

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Law Division

BETWEEN

2019/COM/lab/00034

PETER OUTTEN

(Trustee, The Bahamas Public Service Union)

TERRANCE DORSETT

(Trustee, The Bahamas Public Service Union)

THEOPHILUS DEAN

(Trustee, The Bahamas Public Service Union)

TASHA BULLARD HAMILTON

(Northern Region VP, The Bahamas Public Service Union)

CINDIRA BAIN

(Secretary General, The Bahamas Public Service Union)

LEOHA COLEBY

(Assistant Secretary, The Bahamas Public Service Union)

Plaintiffs

AND

KIMSLEY FERGUSON

(President, The Bahamas Public Service Union)

PHILIP GREENSLADE

(Treasurer, The Bahamas Public Service Union)

Defendants

Before Hon. Mr. Justice Ian R. Winder

Appearances: Maria Daxon for the Plaintiffs

Kahlil Parker for the Defendants

15 January 2020

RULING

WINDER, J

On 15 January 2020 I refused the plaintiffs' application for an injunction and promised to put my reasons in writing. Having only now received the transcript, I regret any delay occasioned in fulfilling my promise. I briefly provide those reasons now.

1. The plaintiff applied for injunctive relief, by Ex Parte Summons dated 14 January 2020, which was settled in the following terms:

LET ALL PARTIES CONCERNED attend before [] an Honourable Justice of the the Supreme Court in Chambers on [] the [] day of [] AD 2020 at [] o clock in the [] noon on the hearing of an application by the Plaintiffs for an Order pursuant to Order 29 Rule 1 RSC 1978 and under the inherent jurisdiction of the Court that the Defendants by himself, his agents or servants or otherwise howsoever is hereby restrained from conducting the Special General Meeting which is scheduled to be held on Wednesday 15 January 2020 at the Bahamas Public Service Union Hall located on East Street South at 6:00pm. The Special General Meeting can be scheduled at a later date and time after the Executive Board and Trustees meeting which is scheduled to be held on Friday 17 January 2020.

2. The application is supported by the second supplemental affidavit of Cindira Bain (Bain) dated 14 January 2020 which provides, in part, as follows:
 2. I serve as the Secretary General within the Bahamas Public Service Union
 3. ...
 4. There is grave concern among the Executive Board, Trustees and the Union Membership as there was a discovery of unauthorized financial transactions made by the President Kimsley Ferguson.
 5. On Wednesday 8 January 2020, the Office Manager, Ms Melvern Davis delivered a memorandum to me from the President Ferguson indicating that he is requesting a Special Call meeting to be held on Wednesday 15 January 2020.
 6. That according to the Bahamas Public Service Union Constitution Article 7 paragraph (iv) states "on written application of thirty or of a majority of paid up members of the Union the President or any other officer acting in such capacity shall direct the General Secretary or any other officer acting in such capacity to summon a special call meeting within 7 days. The application for such a meeting must state the object for requesting such a meeting and no other business shall be discussed at such a meeting"

7. That on Monday January 13 2020, I received calls and voice messages from numerous BPSU members seeking clarification on the BPSU advertisement shown in the newspapers earlier that day.
 8. It should be noted that the process for a special call meeting as according to the constitution was not followed. Listed below are the infractions which occurred:
 - a. There was no application attached to the said memorandum stating the object for requesting a meeting;
 - b. There were not thirty signatures or a majority of paid up members attached to the memo;
 - c. Letters were prepared and sent to the various media houses requesting advertisement for the said meeting without the knowledge and approval of the Secretary General;
 - d. The Executive Board and Trustees did not authorize the release of any monies.
 9. ...
 10. I am seeking an injunction on the special call meeting which is scheduled to be held on Wednesday 15 January 2020.
 11. I am seeking the Court's indulgence to grant the abovementioned Order because the Executive team and Trustees of the BPSU cannot continue to allow President Ferguson to mismanage the Union's assets as he has done for the past two (2) years. It is gross disrespect that the Executives are still not being consulted on any Union matters. President Ferguson lacks fiscal accountability and transparency, to continue to oversee the handling of the Union's funds.
 12. Going forward the Office Manager should not be allowed to send out any more Union Correspondence and or Communication unless prior approval is obtained from the Secretary General.
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3. The matter was fixed for urgent hearing on 15 January 2020, the day following the filing of the ex parte summons. The Court required notice of the application to be served on the defendants.
 4. On the morning of the hearing the defendants filed an affidavit in response. The affidavit of Kimsley Ferguson stated, in part, as follows:
 2. I am in receipt of the Ex Parte Summons and second supplemental affidavit of Cindira Bain, filed herein by the plaintiffs on 14 January 2020 seeking to disturb and overturn the democratic will of the membership of the Bahamas Public Service Union who have called for and mandated a special general meeting of the BPSU in accordance with the BPSU's constitution which is scheduled to take place at 6:00 pm on the 15th day of January 2020.

Exhibited hereto and marked KF-1 is a copy of the said members application.

3. Contrary to the assertions made in the said affidavit of Cindira Bain, there was full compliance with Article 7(iv) of the BPSU Constitution. On the written application of seventy-eight members of the BPSU, pursuant to and in accordance with Article 7(iv) of the Constitution, I was requested to call a special general meeting of the union to address the resolutions sought by the said application.
 4. Contrary to the assertions made by Ms Bain there is no requirement that the members' said written application for a special General Meeting be attached to the memorandum directing her to summon the said Special General Meeting, there is equally no requirement for such a memorandum. As the written requisition demonstrates, contrary to Ms Bain's assertion, there were significantly more than the minimum of thirty (30) members required to compel the summoning of a special general meeting. There is no requirement that the general secretary arrange the advertisements with respect to the said meeting and, furthermore, the general secretary has no discretion in the circumstances and ought to have acted in accordance with my directive to arrange the said advertisements. The general secretary is not entitled to circumvent the constitutional will of the members of the BPSU. While the special general meeting enjoys the support of the executive officers and executive board of the Union, there is no power in the executive board or trustees to defer or deny the members' constitutional right to the summoning of a special general meeting within seven (7) days of my receipt of a written application in compliance with the constitution.
5. In determining whether it should grant an interlocutory injunction, the Court will exercise its discretion having regard to the criteria set out in the celebrated case of ***American Cyanamid Co. Ltd v Ethicon Ltd [1976] AC 396***, which is the following:
- (1) Whether there is a serious issue to be tried;
 - (2) Good prospects of success;
 - (3) Whether damages are an adequate remedy; and,
 - (4) Where the balance of convenience lies.

According to the learned authors of ***Gee on Commercial Injunctions*** at paragraph 2.015:

What the case [of American Cyanamid] clearly establishes is that there is "normally" no need on applications for an interim injunction to embark upon a mini trial on witness statements or affidavits to assess the quality of the claimant's case or the defendant's defences, or to assess the rival merits on a disputed, complicated question of law. This would be wasteful of the parties resources and those of the court. It would also be inconsistent with the objective of the court not to pronounce an opinion on the substantive merits of

the case until trial. This objective encourages judges not to decide important applications on assessment of the apparent merits based on evidence, which is incomplete, and without the benefit of cross-examination, full disclosure of documents and detailed argument. These features made it fair and sensible to avoid assessment of the merits in *American Cyanamid*.....However, the principles are "guidelines", and not a "straitjacket", where the function of the court is to hold the position as justly as possible pending final determination of the triable issue at trial.

6. On the question of balance of convenience, the case of *Fellowes & Son v Fisher* [1976] 1 QB 122, 137 provides useful instruction. In that case it was stated that:

It is where there is doubt to the adequacy of the respective remedies in damages... that the question of balance of convenience arises.... The extent to which the disadvantage to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.

7. Article 7(iv) of the Constitution of the Union provides:

On the written application of thirty or of a majority of paid up members of the Union the President or any other officer acting in such capacity shall direct the General Secretary or any other officer acting in such capacity to summon a special call meeting within 7 days. The application for such a meeting must state the object for requesting such a meeting and no other business shall be discussed at such a meeting.

8. The plaintiffs ask the court to restrain the President of the Union, and by extension the 78 members of the Union who have sought to convene the special meeting, from following through with the meeting until the executive board would have had an opportunity to meet on 17 January 2020. Counsel for the plaintiffs eventually conceded that the constitution does not provide for the executive board to meet prior to the special call meeting taking place. Despite what Counsel sought to impress upon me, from the bar table, was a practice, there was no basis for the special call meeting to be contingent on the meeting of the executive board. Further, the affidavit evidence did not condescend to speaking to any such practice. This really should have been the end of the matter.
9. The Ex Parte Summons itself, providing for the meeting to be held following the executive meeting, suggests that the plaintiffs are not concerned as to the propriety

of the application by the members. Inherently, it is a recognition that the meeting must be held, just not prior to the executive board meeting. The plaintiffs, having conceded that there was no such contingency in the Constitution, then sought to argue that, as Bain did not receive the application and the signatures of the 78 members, until the morning of the injunction hearing, this was a basis to have the meeting postponed for an additional 7 days. According to Counsel for the plaintiffs,

“the constitution says all application for these things pertaining to the meeting was produced... Now that we get it from the respondent my client has no issue with their meeting in seven days”.

Respectfully, this position is untenable:

- (1) Bain does not demonstrate any gain to be achieved, by her or the plaintiffs, in postponing for 7 days save for her desire to have the executive board meet prior to the special call meeting.
- (2) Counsel for the plaintiffs conceded that, had they received the information, which was provided on the morning of the hearing, they would not have moved the injunction application.
- (3) Bain does not demonstrate any effort to carry out her obligation, to call the meeting, notwithstanding the time restraints in the Constitution for it to be held within 7 days.
- (4) The application was not made until 14 January 2020, the day before the meeting was scheduled to be held and understandably there was little time for the defendants to have prepared and served the affidavit in response.
- (5) Whilst it may seem prudent that the application presented to the President by the members would have been given to Bain, at the time the President directed her to call the meeting, there is no specific requirement for the President to have done so. As general secretary, Bain would not be charged with matters such as whether the members signing the application was paid up, a treasurer function.

10. A more fundamental difficulty which concerns me with this application is that the injunction sought does not arise on the relief sought in the substantive action. The action, outlined in the Originating Summons, concerns questions as to whether the

defendants violated provisions of the constitution by transferring funds contrary to the constitution during October and December 2019. Bain alludes to this complaint in her affidavit when she says:

There is grave concern among the Executive Board, Trustees and the Union Membership as there was a discovery of unauthorized financial transactions made by the President Kimsley Ferguson.

... the Executive team and Trustees of the BPSU cannot continue to allow President Ferguson to mismanage the Union's assets as he has done for the past two (2) years. ... President Ferguson lacks fiscal accountability and transparency, to continue to oversee the handling of the Union's funds.

There is nothing in the substantive action however, which relates to or concern the holding of a special called meeting, the subject of this injunction application. An interlocutory injunction ought to be connected to, or relate to, the relief sought in the substantive action. I am satisfied that this matter, arising since the commencement of the action is unconnected to the substantive action and could not sustain the grant of interlocutory injunctive relief.

11. On the question of balance of convenience I am satisfied this issue must be resolved in favor of the defendants.

(1) I repeat the matters raised in paragraph 9 above.

(2) The plaintiffs, in my view, have not demonstrated that any real loss or damage will be occasioned to them if the meeting proceeds, having acknowledged that the members were entitled to call a special general meeting.

(3) Either decision the court makes involves a breach of the Union Constitution:

(i) If the injunction is refused - the meeting proceeds but summoned at the instance of the President, as the Secretary General failed to carry out his direction as required by the constitution;

(ii) If the injunction is granted - the meeting does not proceed and is not held in accordance the constitution, within 7 days, frustrating the constitutional rights of the members, with the incidental wasted costs of advertisement.

I find that the will of the members ought to prevail over any perceived inconvenience by some executive members, tipping the balance of convenience in favor of the first course of action.

(4) Delay defeats equity. The plaintiffs admit receiving the directive of the President since 8 January 2020 yet there is no application to restrain the meeting (if they felt so aggrieved) until the day before the application on 14 January 2020.

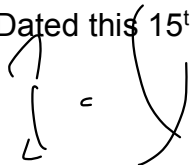
(5) He who comes to equity must come with clean hands.

(i.) The role of the general secretary is merely administrative as Article 7(iv) requires her to act on the direction of the President. She was so directed but did not act, she could not now be heard to say that her failure to act, ought to frustrate the holding of the meeting as provided for in the constitution.

(ii.) It is only when the plaintiffs realize, on 12 January 2020, that the public notices were placed and the meeting would proceed, despite Bain's inaction, do they seek to move the court only hours before the special called general meeting is scheduled to be held. Bain could have requested the application if she thought it was necessary to carry out her function. There is nothing in the evidence to suggest that she did. Counsel for the plaintiffs sought permission to supplement the evidence by calling Bain to the stand. This was refused as such a move would be contrary to the learning set out in the extract from **Gee** above, which reminds us that these interlocutory applications are not the place for mini trials and relative assessment of evidence. The parties were already before the court and such information could easily have passed between counsel if there was a difficulty in obtaining it.

12. In all the circumstances therefore, I refused the application for injunctive relief.

Dated this 15th day of May 2020

A handwritten signature in black ink, appearing to read 'Ian Winder', written over the date line.

Ian Winder

Justice