COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

Common Law and Equity Division
2018/CLE/gen/01480
IN THE MATTER of section 13 and other provisions of the Law of Property and Conveyancing (Condominium) Act, 1965 (as amended).

BETWEEN:

LUCAYAN TOWERS SOUTH CONDOMINIUM ASSOCIATION
(a statutory non-profit body Corporate)

Plaintiff

AND

GRAND BAHAMA UTILITY COMPANY LIMITED

First Defendant

AND

JULIE GLOVER
DAVID GILLIS
TODD KIMBALL
SERGE POITRAS

Second Defendants

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Meryl Glinton for the Plaintiff
	Edward Marshall II for the First Defendant
Hearing dates:	24 February 2022 (Directions), Heard on written submissions lodged 28 February and 4 March 2022

RULING
(Injunction)

Practice and Procedure—Application for extension of time in which to file Statement of Claim—Factors to be considered—Excessive Delay—Explanation for delay—Prejudice—Covid-19 Pandemic

Practice and Procedure—Application for Interlocutory Injunction—Plaintiff a licensee of the Grand Bahama Port Authority (GBPA)—Threat to disconnect water and sewerage supply—Defendant the Grand Bahama Utility Company, responsible for providing water and sewerage services within the 'Port Area'—Hawksbill Creek Agreement—Grand Bahama (Deep Water Harbour and Industrial Area) Acts—American Cyanamid Principles—Serious Issue to be tried—Need for serious issue to relate to legal or equitable right claimed—Declaratory relief—Locus standi—Requirement for affidavit in support of injunction to contain precise factual evidence—Balance of Convenience/Risk of Irreparable Harm—Special factors—Prejudice to third parties—Public interest considerations

INTRODUCTION AND BACKGROUND

Introduction

[1] By this summons, the plaintiff, Lucayan Towers South Condominium Association ("the Association"), seeks orders for extension of time ("EOT") in which to file a statement of

claim in this action commenced by generally indorsed writ on 17 December 2018 and for interlocutory injunctive relief pending trial. The injunction is sought to restrain the first defendant, the Grand Bahama Utility Company Limited ("GB Utility"), from disconnecting water and sewerage services ("the supply") to the condominium property managed by the plaintiff pending trial of the claims for declaratory and other relief.

[2] GB Utility claims to be entitled to disconnect the supply over an outstanding bill of nearly $300,000.00. The arrears have accumulated during a period of prolonged litigation within the Association over the leadership of its body corporate. In a recent ruling connected with that litigation, this Court observed that the dispute had "…*split allegiances among members of the Association, resulted in near paralysis of the body corporate, and crippled the finances of the Association*" (Ruling handed down on 7 March 2022 in conjoined Common Law and Equity Actions Nos. 01354, 01355 and 01357 of 2020, unreported).

[3] The claim for injunctive relief arises in somewhat unusual circumstances. Firstly, it concerns the provision of utilities in the unique constitutional context of the Hawksbill Creek Agreement ("HCA"). As will be further explained, this is a governmental agreement that grants to the Grand Bahama Port Authority ("GBPA"), a private company, what are tantamount to municipal powers to provide public utilities and services (e.g., electricity, water and sewerage, and sanitation) as well as the right to exercise certain administrative functions and control within a demarcated geographical area of Freeport ("the Port Area").

[4] Secondly, this is a renewed application for an injunction by the plaintiff, following the discharge of an earlier injunction that had been granted to restrain GB Utility from disconnecting the supply. Curiously, the first injunction was imposed pending the disposition of outstanding litigation between members of the Association and was not based on any claim then articulated against the first defendant. Subsequently, the Association pleaded discrete claims against the GB Utility (set out in its draft statement of claim annexed to a summons filed 31 October 2021), which are the subject matter of the application for extension of time, and which are said to animate the current application for injunctive relief.

Procedural and Factual Background

[5] The application was made by *ex parte* summons filed 20 October 2021 (which the Court directed would be heard *inter partes*) and which in summary sought the following relief:

(i) an order granting the plaintiff liberty to file and serve a statement of claim in (or substantially in) the terms of the annexed draft, notwithstanding that the time prescribed for doing so has lapsed;

(ii) an order restraining GB Utility whether by its officers or directors or managers or employees or agents or affiliates or subsidiaries or otherwise howsoever, from carrying out its threat to shut off and/or disconnect water and sewerage supply systems to the Plaintiff's property located in Freeport, Grand Bahama, until trial of this action, or "*pending determination of the Plaintiff's summons filed in Supreme Court Action 2013/CLE/gen/No. 2024 consequent upon the Judgment in civil appeal 2015/SCCiv. App. No. 0007, dated 4th September 2017*".

[6] It was supported in the main by the affidavit of Godfrey Bowe filed 20 October 2021 ("the Bowe affidavit") and the further affidavit of Godfrey Bowe filed 23 November 2021 ("the further Bowe affidavit"). The plaintiff also relies on several earlier affidavits of Maurice O. Glinton QC (as he then was) filed 17 December 2018, 25 March 2021 and 29 September 2021. The first defendant's affidavit evidence consists of the affidavit of Karla S. McIntosh filed 30 October 2019 ("the McIntosh affidavit"), the affidavit of Samuel R. Brown filed 22 November 2021 ("the Brown affidavit"), and the supplemental affidavit of Karla S. McIntosh filed 12 January 2022 ("the supplemental McIntosh affidavit"). As mentioned, this is really the second interlocutory injunction sought in these proceedings, and the parties were content to rely on some of the evidence filed in support of the earlier injunction application.

[7] The underlying action was commenced by a generally indorsed writ of summons filed 17 December 2018, initially naming the first defendant only, which was in the following terms:

> "(1) An Order that pending determination of the Summons in Supreme Court Action 2013/CLEG/gen/ No. 2024 consequent upon the Court of Appeal Judgment of 4 September 2017 delivered in civil appeal 2015/SCCiv./No. 0007, allowing the appeal of Lucayan Towers South Condominium Association ("the Body Corporate"), or until further order, the Defendant Grand Bahama Utility Company Limited ("GB Utility") whether by its servants or agents or affiliates or subsidiaries or otherwise howsoever, be restrained from carrying out its threatened shut off and/or disconnection of the water and sewerage supply to Lucayan Towers South Condominium in particular the residential building ("the Property"); or that having disconnected such water and/or sewerage supply to the Property, GB Utility may be ordered to reconnect the same forthwith."

By summons filed that same day, the plaintiff applied for an interlocutory injunction pursuant to the Rules of the Supreme Court 1978 (R.S.C.), Ord. 29, r. 1, in the same terms as the indorsement on the writ.

[8] On 25 March 2019, the plaintiff filed an amended writ (pursuant to R.S.C., Ord. 20, r. 1) to add the second defendants, and to allege claims against them arising out of the litigation referred to in the indorsement ("the 2013 action"). Injunctive relief was also sought against them, mainly to enjoin them from receiving and/or diverting or withholding from the body corporate contributions levied against unit owners, from disposing of or dealing with such assets, or from using them to pay legal fees.

[9] The claims against the second defendants are not relevant for present purposes, but a brief explanation is necessary to understand the relief being sought by the terms of the indorsement. The 2013 action was a dispute over which group of unit owners was entitled to constitute the board of the body corporate of the Association, based on events that took place in March 2013 and March 2014. In summary, owing to differences over the conduct and outcome of board elections, two rival groups (for convenience referred to as the "Glinton Board" and the "Glover Board", after the name of their Presidents) held themselves out as being entitled to carry out the functions of the body corporate.

[10] In a ruling of 21 July 2014, the Supreme Court determined that the Glover Board was not qualified to act between March 2013 and March 2014. However, the Court found that it

was entitled to act as the body corporate after March 2014 and pending the appeal of the Ruling. The Court of Appeal handed down its ruling on 4 September 2017. It found that the Glover Board was not validly elected during the 2014 election and therefore not entitled to act post March 2014, reversing the Supreme Court in this regard, and remitting the 2013 action for trial.

[11] As a result of the disputed elections, there were periods when both Boards were purporting to act, and the 2013 claims (among several other outstanding claims) were intended to recover funds which it was alleged may have been collected by the Glover Board from unit owners for common expenses during these disputed periods and not properly accounted for or applied to the Association's expenses. (A more detailed account of these matters is to be found in the Ruling handed down on 7 March 2022.)

[12] Coming back to the background of the application at hand, an amended *ex parte* summons for injunctive relief was filed 8 April 2019, which was in the same terms as the summons of 17 December 2018. On 9 April 2019, on an *ex parte* hearing, Thompson J. granted the order sought by the plaintiff restraining the first defendant from disconnecting water and sewerage supply. No reasons were provided for this decision.

[13] On 30 October 2019, concerned that the plaintiff's account was falling further into arrears, the first defendant issued a summons for an order discharging the injunction, *inter alia*, on the basis that the plaintiff did not have a reasonable cause of action against the first defendant and that the injunction interfered with the first defendant's contractual rights. However, before that application could be heard, the COVID-19 pandemic and state of public emergency intervened and, in any event, the first defendant suspended disconnection of services to its customers during the pandemic. By Order dated 1 October 2021, the injunction was discharged by this court. The plaintiff did not oppose the discharge, the only issue being as to costs (see, in this regard, the ruling of the Court in *Lucayan Towers South Condominium Association v. Grand Bahama Utility Company Ltd. and Ors. (Costs)* [2018/CLE/gen/01480], dated 21 October 2022).

[14] As noted, the plaintiff issued a fresh summons seeking injunctive relief on 20 October 2021. At the intended hearing of that application on 23 November 2021, the first defendant gave an undertaking not to disconnect services for 40 days (until 7 January 2022), while the parties made a further effort to try to settle the matter. The parties were not however able to come to an agreement and the first defendant, via public notices issued on various dates and most recently on 4 January 2022, which were published on its website, informed customers generally that it would resume the disconnection of utility services to all customers whose accounts were in arrears.

[15] The 7 January 2022 hearing was adjourned due to the illness of the plaintiff's counsel, and at the second fixture (24 February 2022) the parties agreed that the hearing would be completed on written submissions. The first defendant gave undertakings not to disconnect supply pending determination of the summons, which undertaking continues to be in place.

[16] One further procedural detail is deserving of mention. It will become apparent that the second defendants have taken no part in this application. This is because, by notice of

withdrawal dated 28 February 2022, the plaintiff withdrew and discontinued the claims as against the second defendants, a course which Ms. Glinton had foreshadowed at the hearing on 24 February 2022 when the issue of their participation was raised.

Extension of Time

[17] It is only logical that I deal first with the application for extension of time, as the injunction application is predicated on the claims pleaded in the draft SOC. The first defendant did not consent to the EOT application, but neither was any specific objection taken to it and no substantive submissions were directed to the point. In other words, the application would stand or fall on its merits.

Rules and legal principles governing EOT applications

[18] The rules regulating extension of time are to be found at R.S.C. Order 3, r. 4, which provide:

> "(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules, or by any judgment, order or direction, to do any act in any proceedings.
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application is not made until after the extension of that period.
> (3) The period within which a person is required by these Rules or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose."

[19] This is supplemented by R.S.C. Order 31A, r. 18(2), which provides that, except as otherwise provided by the Rules, the Court may:

> "(b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed;" …

[20] Generally, these provisions provide the Court with wide powers to extend time where this can be done without any injustice to the other side and particularly where it can be compensated in costs. As noted in *Halsbury's Laws of England* (4th Ed. Butterworths: London, 1982 at Vol. 37, para. 30):

> "This is an extensive power, designed to give the court a wide discretion with a view to the avoidance of injustice, and ordinarily the court will extend time where any injury caused by delay may be compensated for by the payment of costs."

[21] In *Glen Alexander Colebrooke and Anor. v. National Insurance Board* (2008 SCCivApp No. 127) the Court of Appeal quoted with approval the observations of Luckhoo J.A. in the West Indian appeal case of *Hardial and Anor. v. Sookhia* [1986] 28 WIR 261, where in considering the principles relative to an extension of time in which to appeal, His Lordship affirmed the principle that—

> "…rules laid down or sanctioned as to time are to be observed unless justice clearly indicated that they should be relaxed. It is true that the modern tendency is to give a liberal construction to rules regulating practice and procedure. Courts avoid a too harsh and rigid construction. They realize the rules are designed to serve justice, and, as I observed in an earlier case, they provide the machinery of the law, the channel and means whereby the law is administered and justice is reached. One should seek to strike a fair balance between a too-rigid application of principle and the giving of too much latitude to those who failed to comply. Principles should be adapted to meet the changing circumstances of the times. But, at the same time, one should bear in mind that respect for, and faithful observances of, the rules will always ensure a smooth working of the machinery for the determination of a litigant's rights."

[22] The appeals court in the *Colebrooke* case also referred to the English case of *London Borough of Southwark v. Hejad and Others* [1999] 1 Costs L.R. 62, where it was stated that "*the courts should not adopt a mechanistic approach to questions of extending time*" (pg. 69) and in particular that it should not fetter its discretion to extend time simply because there was no acceptable explanation for any delay.

[23] The latter case was also cited in the earlier Court of Appeal case of *Michael Wilson & Partners Ltd. v Thomas Ian Sinclair* [SCCivApp No. 40 of 2007]. Conteh JA, who was part of a 2-1 majority that allowed an extension of time to file a bill of costs where the delay was at a minimum about 2 years, or in excess of 3 years (depending on what starting point was used to calculate the delay), said:

> "However, on the balancing act which the court must embark upon in order to exercise its discretion under Rule 9 judiciously, whether or not to grant an extension of time, to enable the applicant to proceed to the taxation of costs, I am persuaded that it should not be a mere mechanistic exercise. It must be a careful and judicious exercise, taking all the facts in the case in the round, and informed by the special circumstances of the case. Each case, of course, must depend on its surrounding circumstances."

[24] The Court of Appeal in *Colebrooke* ultimately declined to extend time, based on the factual matrix of that case. But as may be gleaned from its detailed review of the authorities on the principles, the factors which the court will take into consideration in deciding whether to extend time include the length of the delay, whether any good reasons are provided for the delay, and any prejudice that might be caused to the other side.

Discussion and analysis of factors

Length of time

[25] As stated, the writ commencing the proceedings was filed 17 December 2018, and the first defendant entered an appearance on 11 July 2019. There appears to have been a period of two years and about three months intervening between the end of July 2019, when the plaintiff should have filed its SOC (14 days after entry of appearance as prescribed by R.S.C. Ord. 18, r. 1) and 20 October 2021, when the summons was filed with the draft of the claim annexed seeking leave for the EOT.

[26] At first blush, and taken singularly, this period might be considered inordinate delay. For example, in *Colebrooke*, the COA held that 13 months was unreasonable and unacceptable delay in filing an uncomplicated bill of costs, although a differently constituted court in *Michael Wilson & Partners Ltd.* held that 2-3 years did not preclude extension of time, where the majority found there were extenuating circumstances and explanations for the delay. I am therefore not prepared to shut the door on the plaintiff merely on the grounds of delay. In any event, delay cannot be considered in isolation, and must be considered in concert with the other relevant factors.

Reasons for delay

[27] The plaintiff advanced several explanations for the delay. These included primarily the Covid-19 pandemic and the ensuing state of emergency, the effects of Hurricane Dorian in September 2019, and the negotiations and discussions between the parties, which it hoped would have averted the need for litigation. These matters are set out in the further affidavit of Godfrey Bowe, which indicates in part that:

> "9. Despite the difficulties resulting from Hurricane Dorian's passage, and the undrinkable quality of water G.B. Utility continues to provide to consumers in the Port Area, including the condominium by November 2019, the parties were engaged in discussions with the objective of resolving the issues between them, including the discharge of the injunction, and potentially the withdrawal of the action as against G.B. Utility.
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> 10. These negotiations and scheduled court appearances in furtherance of that objective were interrupted owing to the Covid-19 pandemic, which resulted in the Proclamation of a State of Emergency throughout The Bahamas. As a consequence of that Proclamation, various emergency orders were passed which mandated the courts being closed in March 2020. Furthermore, on or about 17th March 2020, Government enacted *Emergency Powers (Covid 19) (Special Provisions) Order 2020*, ("the March 2020 Emergency Order") which provided that:
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> > "The requirement under any enactment— (a)
> > To file a document with;
> > (b) To pay a fee to;
> > (c) To renew a license, visa or permit issued by,
> >
> > any government entity, statutory body, or regulator shall be suspended from the 17 day of March 2020 for the duration of the state of public emergency and thirty days thereafter.
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> 11. Also material to this application, both as to the reasons for delay and as to the application for injunctive relief, during the Covid-19 pandemic the Port Authority assured the public that there would be no water disconnection of water utility customers, presumably also in light of the quality of the water supplied. Indeed, even presently, this assurance remains on the Port Authority's website (www.gbpa.com/covid19/).
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> 14. Ultimately, the delay in filing the Statement of Claim between the filing of the Writ and March 2020 was a result of efforts to avoid litigation and the expenses associated with it. …"

[28] The plaintiff further contends that the statement of claim discloses causes of action "*which are of substantial merit*" and are not time-barred, and the defendant is not otherwise prejudiced thereby in having to meet them.

[29] Looking at the matter in its totality, it cannot be said that the combination of events which are recited in the further affidavit of Godfrey Bowe—Hurricane Dorian in September 2019, the Covid-19 pandemic and ensuing state of public emergency, taken together with some of the other considerations—might not provide an acceptable explanation for some (even if not all) of the delay in this case. For example, in addition to the March 2020 Emergency Order, specific rules were made by the Supreme Court Rules Committee on 1 April 2020 and 2 July 2020 (respectively, *Supreme Court (Covid-19) Rules 2020, Supreme Court (Covid-19) (No. 2) Rules 2020*) extending the time periods prescribed by the R.S.C. for filing any pleadings, etc., that would expire during the emergency period to fourteen days following the cessation of the public emergency. The state of emergency was declared on the 17 March 2020 and ended 13 November 2021.

[30] In its arguments opposing the injunction claim, the first defendant contended that the March 2020 Emergency Order cited by the plaintiff was not intended to apply to private entities, and therefore did not suspend any obligations on behalf of the plaintiff to pay fees to GB Utility, because the defendant did not come within any of the categories enumerated in paragraph 10 of the Order (i.e., government entity, statutory body or regulator). There may be merit in that claim, although I do not have to decide the point for the purposes of this application. It is also to be noted that the time to file the SOC expired well before the imposition of the emergency declaration. But neither observation detracts from the general proposition that the pandemic created extenuating circumstances, and any delay in complying with various statutory and procedural legal requirements must be considered against this backdrop.

Prejudice

[31] As mentioned, the first defendant did not oppose the EOT application, so it did not make out a positive case that it had suffered prejudice from the delay in filing the SOC. To be sure, delay in and of itself might create prejudice for a defendant and the course of justice (see *Culbert v Stephen G. Westwell & Company Ltd. and Anor*. [1993] PIQR P54). But the general principle is that unless the delay is such that it cannot be compensated by costs, it is not reason enough to deny an adjudication of a claim on the merits because of procedural defaults. In this regard, I am happy to endorse the guidance given by the UK Court of Appeal in *Costellow v Somerset County Council* [1993] 1 WLR 256, itself an appeal from a refusal to extend time in which to file a statement of claim, in which Master of the Rolls Sir Thomas Bingham said:

> "Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Order 3, rule 5 should

> ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed."

[32] I therefore do not find that the delay has caused any additional prejudice to the first defendant that would militate against the grant of an extension.

Conclusions on the EOT

[33] In the round, having considered the factors pertinent to an EOT application and the evidence and arguments of the plaintiff in support of its application, I would exercise my discretion to grant the order sought by the plaintiff to extend the time for the filing and service of its SOC. I have also taken into consideration the fact that the first defendant did not specifically oppose the application, although this clearly does not exonerate the plaintiff from making out an objective case for extension, which I have concluded was satisfied in this case.

Application for injunction

Injunctive relief principles

[34] The jurisdiction of the Supreme Court to grant injunctions is codified at s. 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 such relief.

[35] As is made clear by the phrase "*just and convenient*", the grant of an 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 explained by Lord Diplock in *American Cyanamid Co. Ltd. v Ethicon* [1975] AC 369. Those principles are often explicated by way of a 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 the defendant if there is any doubt to as to the adequacy of respective remedies available in damages;
(iv) whether there are any special factors that might affect the court's consideration of the matter.

[36] While the Cy*anamid* principles remain the *locus classicus* on the grant of an interlocutory injunction, there are no fixed rules that can be ticked off in any given case. In fact, subsequent cases remind us that the guidelines are not to be treated as though they were statutory. In *National Commercial Bank of Jamaica Ltd. v Olint Corp. Ltd.* [2009] UKPC 16, the Privy Council deprecated a "*box-ticking approach*", which it said "*does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction*". In delivering the advice of the Board, Lord Hoffman stated:

> "[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 consideration. 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 withholding an injunction is more likely to produce a just result. […]
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> [17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."

[37] It is also to be borne in mind that the wide statutory power to grant an injunction in all cases in which it appears just and convenient to do so is not unlimited. Many cases of high judicial authority have stated that it is subject to the requirement that an injunction will only be granted to protect against the invasion or threatened invasion of a legal or equitable right of the plaintiff, for the enforcement of which the defendant was amenable to the Court (*The Siskina* [1981] AC 909; *South Carolina Insurance Co. v Assurantie N.V.* [1987] AC 24). More recently, in an extensive analysis of the law relating to the grant of injunctions, the Privy Council concluded that the case law as it had developed since cases such as *The Siskina* recognized that the circumstances in which an injunction might be granted were not as circumscribed as stated in those earlier authorities and, for example, a freezing injunction for the enforcement of a money judgment might be granted even where those requirements were not strictly satisfied (*Convoy Collateral Ltd. v Broad Idea International Ltd. and another* [2021] UKPC 24). While this ruling has important implications for the general law relating to the circumstances in which the court may grant an injunction and the "just and convenient" criteria, it does not, in my respectful opinion, remove the requirement for there to be an equitable or legal interest which the court would protect by ordering a defendant to do or refrain from doing something in the vast majority of claims for injunctive relief.

[38] Another general principle I should advert to is this: the fact that a party seeks only declaratory relief is no bar to the grant of an injunction (*Newport Association Football Club Ltd. v Football Association of Wales* [1995] 2 All ER 87). In the case cited, Jacob J. held that an action for a declaration that a contract or arrangement was unlawful and in restraint of trade amounted to a cause of action giving the court jurisdiction to grant an interlocutory injunction. This principle is reflected in R.S.C. Ord. 15, r.17, which provides that:

> "No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and the Court may make a binding declaration of right whether or not any consequential relief is or could be claimed."

Whether a serious issue to be tried

[39] Not surprisingly, both parties have focused to a considerable extent on the first of the gateways to interlocutory relief identified in *Cyanamid*: whether there is a serious issue 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*". This is not a very demanding test. As this court observed in *Satish Daryanani v Leon Griffin et. al.* [2020/CLE/gen/000594] (22 January 2022), at para. 61:

> "Several later cases [after *American Cyanamid*] also make the point that that question of what constitutes a serious issue is not to be investigated to any great extent. For example, *Mothercare Ltd. v Robson Brooks* [1979] F.S.R. 466, at 474, Sir Robert Megarry V.C. said: "*All that has to be seen is whether the plaintiff has prospects of success which, in substance and reality, exist*." Similarly in *Alfred Dunhill Ltd. v. Sunoptics SA* [1979] F.S.R. 373, Megaw L.J. said: "*It is irrelevant whether the court thinks that the plaintiff's chance of success in establishing liability are 90 per cent or 20 percent*."

The plaintiff's claims

[40] In its draft SOC, the plaintiff makes several general allegations of nonfeasance and *ultra vires* conduct by the first defendant arising out of the duties and obligations which the first defendant is said to owe to the plaintiff (and for that matter other consumers in the Port Area) to provide the supply under the provisions of the HCA.

The Hawksbill Creek Agreement

[41] The HCA is constituted by a principal Agreement dated 4 August 1955 between the then colonial Government and the GBPA, which has been amended and augmented by two supplemental Agreements dated, respectively, 11 July 1960 and 1 March 1966. The Agreements are scheduled to a series of Acts, the first styled as the *Hawksbill Creek Grand Bahama (Deep Water and Industrial Area) Act, 1955* and the others being amendments to that Act, which I shall refer to compendiously as "the HCA Acts" for ease of exposition. By these Agreements and Acts, the colonial Government conferred on the GBPA, an incorporated private company, various powers, rights and obligations for the creation and operation of a duty-free zone in the Port Area. This area was to be administered on terms and conditions which are analogous to the powers traditionally bestowed on statutory corporations and municipal authorities to provide and operate essential services to townships or municipalities, including the power to make bye-laws for that purpose.

[42] The gravamen of the complaint is that the GBPA failed to promote bye-laws to authorize the provision of the utilities. This, the plaintiff says, is mandated by the HCA. In consequence, the plaintiff seeks a number of declarations and orders in its draft SOC, the most relevant of which for the purposes of this application are as follows:

> "(2) A Declaration that construction and operation of utilities being the Port Authority's primary obligations within the meaning and intent of Clauses 1(6), 1(70 and 2(21) of the Principal Agreement, GB Utility is providing water and sewage supply as to the Port Authority *alter ego*.

> (3) A Declaration that the Port Authority as the operator of a self-regulated utility (being a primary obligation), it may not, absent a Court Order, lawfully discontinue or cease providing the Plaintiff essential public utilities services as a Licensee operating in the Port Area by virtue of the Principal Agreement preemptively and/or unilaterally even without notice, so as to be punitive in its effect.
>
> (4) An order prohibiting and restraining the Defendants and each of them whether by their subsidiaries or affiliates or Licensees or managers or officers or directors or servants or agents or otherwise howsoever from actually or threatening disconnection of the water and sewage supply to the Property of the Body Corporate."

The plaintiff also claims damages, including aggravated and/or exemplary/vindicatory damages.

[43] In assessing the claims advanced by the plaintiff, I remind myself of the observation in *American Cyanamid* and subsequent cases that in considering a claim for injunctive relief "*the court should not attempt to resolve critical questions of fact or difficult points of law on which the claim of either party may ultimately depend*" (*Sukhoruchkin v. van Bekestein* [2014] EWCA Civ 399, per Sir Terence Etherton).

[44] This caution, however, does not prevent the court from expressing its views on the relative merits of the case. In *Guardian Association Group v Associated Newspapers* (CA, 20 January 2000, unreported), Robert Walker LJ said that in giving effect to the Cyanamid principles the court could give "*proper weight to any clear view which the court can form at the time of the application for interim relief (and without the need for a mini-trial or copious affidavit evidence) as to the likely outcome at trial*". Thus, the fact that the plaintiff may be able to establish an arguable case, does not *ipso facto* justify a right to an injunction (see, for example, *Series 5 Software v Clarke* [1996] 1 All E.R. 853, where the court refused to exercise its discretion on the facts where the case was thought weak). However, I stress that nothing that I say here should be taken as purporting to express any concluded views on the substantive claims.

[45] The plaintiff submits that the draft statement of claim discloses serious issues to be tried, and it is perhaps useful to consider the claims in the form in which they appear in the skeleton submissions:

> "i. Whether G.B. Utility is in its own right lawfully entitled to make charges and/or assess fees and/or penalties in connection with providing water supply to persons in the Port Area without legislatively enabled Bye laws required by Clause 13 of the Agreement entered into between the Government and the Port Authority made on 1st March 1966 ("the Second Supplemental Agreement) which is supplemental to the Agreement entered into between Government and the Port Authority made on 4th August 1955 ("the Principal Agreement");
>
> ii. Whether, by the Principal Agreement or any supplementing amending agreement, G.B. Utility is entitled to disconnect water supply to licensees within the Port Area, including the Plaintiff Body Corporate, without the authority of a Court Order;

iii. Whether in light of the admittedly sub-standard quality of the water supply it is providing, G.B. Utility is legally entitled to make charges and assess fees and/or penalties for non-potable water, and if so, whether and to what extent such charges and/or fees ought to be adjusted, and/or are reasonable in the circumstances;

iv. Whether the First Defendant is legally entitled to increase rates of charges to persons for the supply of water with reference only to the Port Authority;

v. Whether the fees, and the basis of any adjustments thereto, are reasonable in the circumstances;

vi. Whether G.B. Utility is legally entitled to add Value Added Tax upon any charges and fees it may be determined to reasonably assess and levy."

Several of the claims overlap, and for convenience and ease of exposition I have summarized them under the following heads: (i) lack of statutory authority; (ii) nonpotability of the water supply; (iii) unilateral increase in the rates; and (iv) imposition of VAT.

(i) Lack of statutory authority

Plaintiff's position

[46] The main claim is that the supply of water and sewerage services by GB Utility and the imposition of fees and penalties in relation to such supply is unlawful in the absence of any law authorizing the same. This is pleaded at several places in the draft SOC, but the core allegations appear in the following paragraphs:

> "[24] The Plaintiffs say, neither denying nor admitting that GB Utility on the Port Authority's behalf, can exercise rights to make charges in connection with the water supply and distribution, in Freeport, that it is illegal, absent authority of legislatively enabled bye-laws, and it amounts to plunder and an unlawful deprivation of property. The Plaintiffs say furthermore, absent a law prescribing penalties for consumers who fail to pay charges for water supplied to them, and/or the procedure to recover the payment otherwise as a debt, GB Utility (or the Port Authority, as may be) is confined to redress alleged wrongs done to it through the courts, as permitted by law. In the premises, the Plaintiffs say, there is no law authorising and permitting GB Utility (or the Port Authority) to cut off or disconnect water and sewerage supply to the Property as GB Utility threatens.
> […]
>
> [27]. The Plaintiff avers that GB Utility's imposition of fees and charges (as the Port Authority's alter ego) for supplying water and sewage to the Plaintiffs and other owners and occupiers of premises in the "Port Area", absent duly enacted bye-laws, strictly adhering to the fixed procedure in Clause 13 of the 1966 Agreement, is *ultra vires* The Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area (Amendment of Agreement) (No.2) Act, and unlawful.
> […]
>
> [29] By reason of the alleged *ultra vires* acts on the part of the GB Utility, the Plaintiffs, under pain of actual and/or threatened suspension and/or disconnection of water and sewage supply to the Property, have been, are being and will be unlawfully subject to payment demands as will terminate and/or interrupt exercise of their right of quiet enjoyment thereof and other property rights, on account of which the Plaintiffs

> have suffered and will suffer irreparable injury to their status and which if not remedied will lead to diminishment of corporate viability essential to their continuing existence."

[47] Clause 13 of the 1966 Agreement (Second Supplemental Agreement) provides materially as follows:

> "Having regard to the considerable increase in the industrial and other development of the Port and the nature and extent of certain of the responsibilities imposed by the Principal Agreement (as heretofore amended) upon the Port Authority […] and having regard to the need in the public interest to ensure the Port Authority have the powers to enable them to discharge effectively such and other responsibilities more particularly described in the Principal Agreement and the Supplemental Agreement and this Agreement, the Government hereby undertakes to consider sympathetically any application by the Port Authority for the promotion of legislation to permit the Port Authority to make bye-laws subject to the approval of the appropriate Minister for the purpose of enabling the Port Authority to discharge the said responsibilities and to authorize the Port Authority or any duly authorized Licensee to collect or recover from owners or occupiers of premises reasonable fees or charges for services provided or rendered by the Port Authority or such Licensee in the discharge of the said responsibilities." [Emphasis supplied by Plaintiff.]

[48] Ms. Glinton for the plaintiff advanced several points in support of the claim as to lack of statutory authority. Firstly, it is said that the various HCA Acts were only enabling, and therefore did not have the effect of providing statutory authority for the GBPA (or its designate GB Utility) to provide the said utilities. In this regard, comparison is made with the *Water and Sewerage Corporation Act, 1976*, which, at sections 69(1)(h) and 23, respectively, specifically empowers the Corporation to prescribe and collect rates, service charges and deposits for supply of water, and to disconnect such supply in the event of default of payment.

[49] Next, the court's attention was drawn to the provisions of the *Out Islands Utilities Act* ("OIUA") which provides at ss. 3 and 4 for application to be made to the appropriate Minister for the approval of a utility project for public use in any of the "Out Islands" (now euphemistically called "Family Islands") and for entering into an agreement with the Minister if approved. It is said further that there is no evidence of an application being made or any approval being obtained by the GBPA pursuant to those provisions. The plaintiff accepts that s. 14 of the OIUA provides that nothing in that Act is intended to derogate from the provisions made under the HCA, *inter alia*, for the operation and maintenance of utilities in the Port Area. But it says that this recognition of the special regime for the Port Area is not tantamount to statutory *imprimatur*.

[50] Finally, reference was made to the provisions of two bye-laws. The first is s. 10 of *The Freeport (Removal of Refuse) Bye-Laws Act*, which is proffered as an example of how powers given to the GBPA under the Agreement have been transformed into a bye-law. That provides, in material part, that:

> "…*the Company* [Grand Bahamas Utility Company Ltd.] *shall be entitled to charge the owners or occupiers as the case may be of premises within the Port Area fees at*

> *such rates as are prescribed in the Schedule hereto in respect of the removal of house and trade refuse*."

[51] The other is cl. 7 of the *Freeport Bye-Laws Act, 1965,* which provides for a magistrate to order the seizure of a person's goods and chattels to meet any default for any "*telephone service or to which water, gas or electricity is supplied by the Port Authority or any licensee thereof*", where the defaulter has failed to pay on demand and is about to quit the premises to which the utilities have been supplied. Perhaps to head off any reliance on this provision as evidence of statutory authority for the supply, the plaintiff is quick to point out that it only provides a means of enforcement against default in payment and does not itself provide authority to operate and charge for the services.

The First Defendant's position

[52] At a general level, the first defendant stoutly rejected the notion that there are any serious issues to be tried. To the contrary, it characterizes the plaintiff's application as an abuse of the court's jurisdiction to grant interlocutory relief, describing the application in its written submissions as:

> "…a transparent attempt to rectify a defect that existed when it first obtained the order for injunction in October 2019; namely, that the plaintiff had not disclosed any cause of action against the first defendant."

[53] As to its statutory authority to provide the supply, the first defendant points to cl. 2 (16) of the 1960 amendment ("the First Supplemental Agreement"). There, the GBPA is given the right to license any other person or company to perform any of the acts that it is obligated to perform under the HCA. This includes, but is not limited to, the right to construct, operate and charge for the provision of water, sewerage and garbage disposal services in the Port Area. Pursuant to this provision, on 19 September 1961, the GBPA issued a licence to GB Utility permitting it to, *inter alia*, construct, maintain, operate and carry on systems for (i) the pumping, storing and distribution of water; (ii) sewage disposal; (iii) garbage collection as well as all business and activities reasonably necessary or incidental to or connected with the same.

[54] Mr. Marshall developed three principal submissions in support of the first defendant's case that it is empowered to provide the utilities and exercise any incidental powers in relation thereto. Firstly, reference was made to cl. 2(21) of the principal Agreement and cl. 3(7) of the 1965 amendment, which provide for the GBPA to have the authority to charge such rates or other charges for water supply in the Port Area as it, in its absolute discretion, deems fit and proper. Those clauses are excerpted below as follows:

> "2 (21) That subject to the provisions of subclause (10) of clause 1 hereof only, the Port Authority shall have the sole right to construct and operate utilities (and without limiting the generality of the foregoing word "utilities", in particular electrical supply, gas supply, water supply, telephone and sewerage disposal system) within the Port Area, and the necessary distribution systems in connection therewith, and that no licence or other permission or authority shall be required by the Port Authority from Government or any department thereof in connection therewith, and that (subject to the provisions of sub-clause (6) of clause 1 hereof) **the Port Authority shall have the**

> **authority to and may charge such rates or other charges for such utilities or any of them as the Port Authority shall in its absolute discretion deem fit and proper**, Provided Always that all electrical supply installations made by the Port Authority or by any Licensee within the Port Area shall comply with the provisions of the Canadian Standards Association Canadian Electrical Code. […]
>
> 3(7) The Port Authority will co-operate with the Government for the purpose of pest and elimination by providing such means of access within the Port Area as are reasonably available and making such provisions in the said Building Code as may from time to time be mutually agreed by the Government and the Port Authority for such purposes **Provided Always (and it is hereby agreed) that** the Port Authority and **any utility company** or corporation **shall be entitled to make charges in connection with the supply and distribution of water and electricity sewage disposal systems and garbage collection** and disposal facilities." [Emphases supplied by First Defendant.]

[55] Secondly, he submitted that the Agreement and amendments thereto are set out in schedules to the several HCA Acts, and therefore, pursuant to s. 11(2) of the *Interpretation and General Clauses Act,* they take effect as part of those Acts. That section provides as follows:

> "(2) Every schedule to or table in any Act and any notes to such schedule or table shall be construed and have effect as part of such Act."

[56] Thirdly, it was contended that the plaintiff, having made numerous admissions as to indebtedness to the first defendant and having been supplied with and paid for the utility services for decades without complaint, is estopped from claiming that the first defendant does not have the right to operate and charge for the services. In this regard, reliance is placed on *Soldier Crab Limited t/a Sandy Toes v Aqua Tour Limited* [2016] 2 BHS J. No. 190, where, following *Taylors Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. and Old Campbell Ltd. v Victoria Friendly Society* [1982] QB 133, Charles J. (as she then was) held that the defendant was estopped from claiming that a contract which it had performed for 6 months prior to the alleged breach was unenforceable for mistake.

Analysis and Discussion

[57] As I understand the gist of the plaintiff's claim, it is that the development scheme contemplated under the HCA requires express statutory authority by duly enacted bye-laws to authorize GBPA/GB Utility to provide and operate the utilities and for conferring incidental powers such as the ability to impose charges and/or penalties. It is further contended that the various HCA Acts by themselves do not provide statutory authority, being enabling only, and therefore disconnection of these utilities and the infliction of other penalties absent such bye-laws and without judicial sanction is unlawful.

[58] The first defendant's position is that the HCA expressly empowers the GBPA/GB Utility to provide and operate the utilities. But it goes further and says that in any event, and to the extent that expressed statutory authority is required, the Agreement itself has statutory force, by virtue of s. 11(2) of the *Interpretation Act.*

[59] The starting point for determining the legal rights between a supplier of utilities and the customer is normally a construction of the applicable legislative framework. If there are issues of interpretation in dispute which cannot be dealt with summarily, these would normally constitute serious issues to be tried. At first blush, the opposing views as to the construction and legal effect of the HCA might suggest that there is a serious issue to be tried between the parties. Not surprisingly, judicial and academic views on this issue is divided. See, for example, *Shangrila (1982) Ltd. v Grand Bahama Port Authority Ltd.* [1984] BHS J. No. 29 and *Commonwealth Brewery v Attorney General and Ors.* (No. 14 of 1997, SC, Equity Side), where the agreement was said to be statutory; and *Hepburn v Comptroller of HM Customs* [1995] FP/No. 249 and the 1971 Report of the Royal Commission appointed to review the Hawksbill Creek Agreement, where views were expressed that the Agreement is not an enactment.

[60] It is not necessary, for the purposes of this application, to express any concluded view as to the legal status and effect of the HCA. That is an issue for the substantive hearing, or perhaps to be pronounced on in another appropriate case. I will venture to observe, for present purposes, that attempts at dichotomizing the HCA as either an Agreement or enactment is an oversimplification of the complex legal structure and status of the development scheme created by the HCA and Acts. It is plain that the bundle of rights, duties, liabilities and exemptions governing the development and operation of the Port Area are contained in a contract between the Government and a private company, as amended. The fact that these contracts are set out in schedules to Acts does not *ipso facto* make them a part of those Acts, unless that intention can be derived or inferred from the terms of the Acts, which only appear to be enabling. However, as noted by the Royal Commission set up to review the HCA in its 1971 Report, the Acts are not "*wholly without relevance*". The HCA was entered into pursuant to statute, gave effect to governmental policy involving the transfer of governmental functions to a private company, and various obligations under the Agreement have been transformed into bye-laws. Thus, the HCA and its associated legislation created a unique legal and constitutional arrangement founded on contract but which clearly has statutory *imprimatur* and dimensions.

[61] What I am concerned to ascertain in the instant case, however, is whether the alleged failure to make bye-laws in respect of water supply amounts to a serious issue to be tried for the purposes of the application for injunctive relief. As explained, this is because the purpose of an interlocutory injunction is to guard against the invasion or threatened invasion of the plaintiff's legal or equitable rights by actions of the defendant pending trial. As put in a leading case from another Commonwealth jurisdiction, "…*a plaintiff seeking an interlocutory injunction must be able to show sufficient colour of right to the final relief, in aid of which interlocutory relief is sought"* (per Gleeson CJ, in *ABC Lenah Game Meats Pty Ltd.* [2001] HCA 63 [11]). Thus, even assuming that the allegations by the plaintiff as to lack of statutory authority are correct, is there an actionable wrong committed by GB Utility in threatening to disconnect for non-payment that the plaintiff has a right to prevent by interlocutory injunction pending trial?

Locus standi?

[62] I will return to that question, but it seems to me that there is an anterior issue worthy of mention, if only in passing: that is the standing (or *locus standi*) of the plaintiff to seek

declarations in respect of an alleged breach of the HCA. Neither party addressed any submissions on the point, but for reasons that will become clear, it is an issue that cannot be passed over in silence.

[63] In private law claims, the general principle is that an applicant for declaratory relief will have standing where it pertains to declaring the existence of legally enforceable rights or liabilities relating to him, including statutory rights. Where public rights are concerned, a private person may only sue if there is also interference with a private right of his, or if the infringement of the public right will inflict special damages on him (*Gouriet v. Union of Post Office Workers* [1978] AC 435, per Lord Wilberforce, at pp. 483-484; Viscount Dilhorne at p. 491, 494; Lord Diplock at pp. 499-500; Lord Edmund Davies at pg. 506, 513; and Lord Fraser of Tullybelton at p. 518).

[64] It is accepted that the rights, obligations and liabilities in issue have a public law dimension because of the governmental nature of the functions exercised by the GBPA, the fact that the HCA is authorized by statute, and because the Government is a party to the Agreement. In this regard, the plaintiff accepts that the Attorney-General would have standing to intervene in this matter because of these factors. But nevertheless, the rights concerned are contained in an Agreement to which the plaintiff is not a party, and ordinarily the doctrine of privity might throw up obstacles to obtaining relief. However, as a licensee of the GBPA, and therefore a beneficiary of the rights, facilities and privileges contained therein (see cl. 3(5)), the conclusion seems irresistible that the plaintiff would have standing to seek declaratory and other relief to secure the benefits of those contractual promises to licensees, who are active and critical participants in the Agreement (see *Shangri La, supra*).

[65] As stated, however, the court will only grant declarations in respect of litigants whose enforceable rights have been infringed or threatened, and only in respect of the parties before the court. In *Gouriet*, it was observed that to grant remedies for alleged unlawful conduct which does not infringe the plaintiff's private rights is to "*move out the field of private law into that of public law*", to which different considerations apply. In such cases, the person entitled to sue is normally the Attorney General, or someone at his relation. This is not a matter being brought in public law.

[66] But even accepting that the plaintiff has standing to sue for the declarations sought in private law (and the first defendant does not take any objection to the standing of the plaintiff), are they: (i) enforceable against the first defendant or the GBPA?; and (2), do they have any practical importance for the resolution of the injunction claim?

[67] In this regard, it is important to point out that cl. 13, on which the plaintiff primarily constructs its claim for a mandatory duty to promulgate bye-laws, is not couched in imperative language. The way the matter is expressed there is as follows: "*the Government hereby undertakes to consider sympathetically any application by the Port Authority for the promotion of legislation to permit the Port Authority to make bye-laws subject to the approval of the appropriate Minister*…". This suggests that while such applications would not be unreasonably refused, they are not inexorably granted, and the language is hardly consistent with a mandatory duty.

[68] Further, the enabling provision of the Freeport Bye-Laws Act ("Bye-Laws Act"), which provides for the making of bye-laws to regulate the provision of various utilities and administrative functions by the GBPA, is also expressed in permissive language. Pursuant to that Act, bye-laws have been made for the following purposes: enforcement of Building and Sanitation Codes (s. 3); preventing the pollution of water, etc. (s. 5); control of harbours and waterways (s. 8); removal of house or trade refuse (s. 10); control of advertisement (s.12); and safety of machinery (s. 13). It does not appear as if any bye-laws have been made under s. 13. By way of example, s. 5(1) provides as follows:

> "5(1) The Port Authority with the approval of the Minister responsible for Public Health and the Minister responsible for Public Works, may make bye-laws for the protection from pollution of ground water, undue consumption, misuse or contamination of water supplied by the Port Authority or a licensee empowered to supply water to the public, or of water obtained from wells or boreholes with the permission of the Port Authority under s. 4 of this Act." [Emphasis by underlining supplied.]

[69] As to the availability of remedies for any potential breaches, it is notable that cl. 3(6) of the Principal Agreement—which seems to be an oft-overlooked provision—provides that any penalty for a breach of the HCA by the Port Authority or any lessee company or licensee shall be in damages only, which are to be fixed by mutual agreement by the Port Authority and the Government and, failing such agreement, to be determined by arbitration. In fact, it is useful to set out this clause in full:

> "(6) That the penalty for any breach of this Agreement by the Port Authority or by any lessee company of the Port Authority or by a Licensee (other than the covenant on the part of the Port Authority contained in sub-clause (1) of clause 1 hereof) shall be in damages only which shall be fixed by mutual agreement by the Port Authority and the Government and in default of agreement shall be determined by arbitration as hereinafter provided, Provided Always that nothing herein contained shall be deemed to relieve an Importer as detailed in subclause (4) of clause 2 hereof from the penalties of any bond entered into pursuant to the provisions of the subclause." [Emphases by underlining supplied.]

Subclause 9 of cl. 3 provides for questions of differences between the parties or their respective representatives concerning the agreement to be referred to arbitration.

[70] The penalty provision is also given effect in the licence agreement between the GBPA and GB Utility, which is exhibited to the supplemental affidavit of Karla McIntosh. For example, subclause 4(6) provides for GB Utility to pay to the GBPA on demand any sums that the GBPA might have to pay the Government in arbitration proceedings under 3(6) of the HCA "*by reason or in respect of any failure or neglect by the Utility Company to comply with any of its covenants or obligations contained in these presents…*", i.e., the licence agreement, which incorporates the relevant obligations in the HCA to provide utilities. Furthermore, in respect of any such proceedings, there is an obligation on the GBPA to notify GB Utility of any such proceedings, keep them informed and consult them, and submit evidence and representations on their behalf as may be requested (cl. 2(7)).

[71] Thus, it does not appear to have been the intention of the parties to the HCA to make breaches of the Agreement that do not concern the individual benefits to which licensees are entitled under the HCA *qua* licensees remediable in private law at the behest of a licensee. Further, breaches of the various bye-laws is an offence, which is punishable by fine and/or imprisonment.

[72] The final point to note—and one of some significance, although neither party referred to it—is that pursuant to the *Freeport (Water Preservation) Bye-laws* (1967), an "*authorized supplier*" is defined to mean the "*Company and any person who is authorized to provide a public water supply within any specified area of the Port Area*"….and "*the Company*" is defined to mean "*the Grand Bahama Utility Company Limited, being a licensee of the Port Authority empowered to supply water to the public in the Port Area*". Thus, it is not strictly correct to assert that there is no authorizing bye-law for the provision of water. True it is, the bye-law does not specifically condescend to prescribing for payment and rights to disconnect. But in this regard, the doctrine of incidental or implied powers (which is given statutory recognition at s. 36 of the *Interpretation and General Clauses Act*) might be applicable. That provides for all incidental powers reasonably necessary to enable the doing of anything in furtherance of a power conferred by written law to also be deemed to be conferred by that written law.

Is the failure to promote bye-laws actionable in private law?

[73] Returning to the central question posed earlier, and having regard to what has been discussed above, is there any equitable right in the plaintiff resulting from the failure to promote bye-laws regulating the services that would entitle it to an injunction to prevent disconnection for arrears? I think not.

[74] As noted, it may be that the *Water Preservation Bye-Law* is a complete answer to the plaintiff's claim in this regard. But apart from that, the fallacy in the plaintiff's argument is that it assumes that the source of potential payment obligations and the right to disconnect can only arise in the context of authorizing statute. It is clear, however, that similar obligations and rights might also arise in the context of contractual or commercial relations.

[75] An example of this is provided in the Privy Council's decision in *Minister of Justice for Canada v Levis* [1919] A.C. 505. The issue there was whether the appellant was entitled to an order of mandamus to have the water supply to Government buildings reconnected, after they had been shut off by the city over unpaid bills. In that case, the city council had made bye-laws for the assessment of a special annual tax on all buildings to meet the sums expended on the construction of waterworks to supply the city, and which bye-laws made the payment of those taxes payable before water could be supplied at the rates imposed by the city. The city disconnected supply to certain Government building after there was a failure to agree the rates between the Government of Canada and the city for the supply of water. The express power given to the city by art. 5661 of the Cities and Towns Act, 1909, was in the following terms: "*If any person…refuses or neglects to pay the rate lawfully imposed for the water supplied to him….the municipality may cut off the water and discontinue the supply as long as the person is in default*."

[76] The Government applied to have the water supply restored on the basis that the respondent was under a legal obligation to supply the Government buildings, without the payment of any taxes in respect thereof or, alternatively, any payment other than may be agreed between the parties, or a fair payment for the quantity of water consumed. The respondents conceded that the Government was free from liability for all taxation, but contended that as the water supplied was in the nature of a merchantable commodity, the Government was not entitled to continue to receive it without payment. Both the first instance court and Superior Court of Quebec rejected the petition for mandamus, and the Government appealed with special leave to the Privy Council. The Privy Council dismissed the appeal and, in a judgment delivered by Lord Parmoor, stated as follows [pg. 514]:

> "The result is that at the time when the petition was presented for an order for mandamus the respondents were not in default, since the Government of Canada at that time was not willing to pay a price for the supply of water which had by a concurrent finding of two courts held not to be excessive. The respondents were therefore no longer bound to supply a commodity for which the appellant as their customer was no longer willing to pay, and equally they were entitled to discontinue the supply, not as an exercise of an express power to cut it off, but as an implied correlative right, arising because the appellant was no longer prepared to perform his reciprocal obligation." [Emphasis supplied.]

[77] This holding is significant for the case at bar, because it illustrates that the power to disconnect was not dependent on the express statutory power to do so for non-payment, but on the parties' commercial relationship. In fact, there are numerous cases from other common law jurisdictions, normally arising in the exercise of powers by municipal corporations, which hold that the lack of bye-laws does not prevent giving effect to a contract entered into by the municipal council or corporation. An instance is *Dilworth et. al. v Town of Bala et. al.* [1953] CanLiII 144 (ON CA). There, ratepayers suing on behalf of themselves and all other ratepayers sought unsuccessfully to prevent the Town paying the construction company and repaying the bank which provided the loan in connection with the installation of a proposed sewage-disposal system, construction of which was welladvanced when the action was brought. The ratepayers had argued that the acts of the Town in paying the costs of the construction and the loan were *ultra vires* because, *inter alia*, no bye-laws had been passed authorizing the incurring of the obligations.

Estoppel

[78] The first defendant, as a possible line of defence to the claims, asserts that the plaintiff is estopped from denying its indebtedness to the first defendant or denying its right to supply the services on the conditions on which they have been supplied, having accepted and paid for services from the first defendant "without objection" for many years (i.e., estoppel by conduct). As a point of pleading, the plaintiff neither denies nor admits the debt that "*GB Utility alleges it is owed* "; it simply avers that a court order is required before disconnection can be made for that debt. I am quite satisfied, however, that on the evidence the plaintiff has acknowledged the debt. No doubt estoppel, if the elements are made out, might be a complete answer to any denial of liability for the debt in a contractual claim brought by the first defendant or, alternatively, a *quantum meruit* claim for services supplied. I do not think, however, that the estoppel doctrine debars the plaintiff in principle from seeking declaratory relief. To the extent that such relief is available, it would involve the

construction of the relevant instruments to determine the respective rights of the parties and does not depend on the parties' commercial dealings.

Conclusion on lack of statutory authority

[79] This has obviously not been an easy point to decide. While I accept that *ex hypothesi* there is an issue as to the construction of the HCA, I do not find that this creates a serious issue to be tried for the purposes of the plaintiff's claim to interlocutory injunctive relief. The action which the plaintiff wishes to restrain is the disconnection of the water and sewerage services. As has been shown, the first defendant's right to do so is not dependent on statutory authority. In other words, the outcome of this case could never be that the first defendant could be enjoined from disconnecting supply because of the want of bye-laws. A serious issue to be tried must mean an issue to be determined between the parties which goes to the right which the plaintiff seeks to have protected by interlocutory relief and vindicated by a permanent injunction or other final relief. If the law were otherwise, a plaintiff would be at liberty to conjure up any number of straw man or hypothetical arguments to justify a claim to an interlocutory junction.

(ii) Non-potability of water

[80] The plaintiff's second claim has to do with the alleged quality of the water supplied by GB Utility, which it says is sub-standard and non-potable due mainly (but not exclusively) to contamination from hurricane damage. This, like several of the other claims, is not pleaded in very precise terms:

> "12. The Plaintiff (a non-profit body corporate constituted of owners of Units) say that prior to the Hurricanes experienced in Freeport in recent years, as a result of which, it is believed, water supply and sewage disposal systems were severely compromised to the point of normally drinkable water when distribution was restored in the supply system being declared unfit for public consumption (save, perhaps washing) the Port Authority, owning the exclusive self-regulated monopoly, without authority of enabling bye-laws, unilaterally made and continues to make charges in connection with the supply and distribution of water in Freeport."

[81] To some extent, this head seems to be an elaboration of the earlier allegation that the charges have been imposed without authorizing bye-laws and no specific claim is made for any relief in this regard. For example, the plaintiff does not aver that the first defendant has either breached its contractual obligations, the HCA, or bye-laws to provide water of a certain quality. However, there is a general claim for damages, and therefore it cannot be ruled out that this encompasses the possibility of damages for the supply of sub-standard water.

[82] In this regard, s. 12 of the *Water Preservation Bye-laws* provides for an "*authorized supplier*" of water to exercise all reasonable skill and care to ensure that any water supplied for domestic purposes "*is wholesome according to the relevant provisions of the International Standards for Drinking Water for the time being prescribed by the World Health Organization*". As noted, authorised supplier means the GB Utility, and includes any other person authorized to provide water within a specified area of the Port.

[83] The first defendant did not address any arguments as to whether the issue of water quality raised a serious issue to be tried between the parties. Significantly, it did not deny that the water was non-potable for certain periods, although it contends that quality had been restored before the date of the first hearing of the injunction application (23 November 2021). In fact, the plaintiff exhibits to the Further Affidavit of Godfrey Bowe several releases and news reports where the GBPA/GB Utility itself confirms the sub-standard water quality. For example, the affidavit exhibits copies of a news report published in the Tribune on 1 September 2020, where Ms. Philcher Grant, director of operation of GB Utility is quoted as saying:

> "Today, 70 percent of our customer base has potable water supply. That means safe drinking water that has had regulatory approval and has met all requirements, including monitoring, WHO guidelines and testing that has been validated by independent labs. We appreciate our customers' patience, and we'll continue to keep residents apprised as we progress towards island-wide potability in the coming months."

[84] Thus, although the allegations in the pleadings are not specific, it is possible to perceive a cause of action in the draft SOC sounding either in breach of contract or breach of statutory duty, or otherwise at common law, for failure to provide wholesome water of the quality indicated at s. 12. Moreover, the plaintiff has indicated that it intends to argue whether GB Utility is entitled to charge for non-potable water, and/or whether such charges and fees ought to be adjusted and/or are reasonable in such circumstances. As indicated, the claim does contemplate potential damages payable for inferior water supply. I am, therefore, prepared to resolve this issue in favour of the plaintiff and conclude that there is a serious issue to be tried here. If the plaintiff is right—and the court has no impressions of the merits of the claim at this point—it could affect the amount of the arrears owed based on any possible adjustments and, as indicated, might possibly ground a claim for damages. This state of affairs conceivably creates an equitable right to prevent disconnection pending the determination of those issues.

(iii) Unilateral increase in rates

[85] The third claim is somewhat collateral to the first issue, as it questions whether GB Utility is legally entitled to increase the rates of charges with reference to the GBPA only, and whether the basis of such fees or any adjustments are reasonable. However, there is nothing in the draft SOC alleging any increase in the rates and/or indicating what would be the cause of action in this regard, neither is there any affidavit evidence in support of this claim. It appears that this ground is only deployed in the plaintiff's skeleton submissions and is not pleaded in its draft SOC.

[86] I therefore do not find that the plaintiff has satisfied me by way of anything in the draft statement or supporting affidavits that this ground meets the *Cyanamid* threshold. In this regard, I bear in mind the observations of Slade J., who said in *Re Lord Cable deceased* [1976] 3 All ER 417, one of cases decided in the wake of *American Cyanamid* [at pg. 431]:

> "*American Cyanamid Co. v Ethicon* may have led prospective plaintiffs to the belief, partially justified, that it is no 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 the trial. If the facts adduced by him in support of his motion do not by themselves suffice to satisfy the court as to 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."

(iv) Imposition of VAT

[87] The plaintiff also raises the issue of whether value added tax ("VAT") is assessable by GB Utility or GBPA upon any charges and fees. The defendant counters this by pointing out that neither the GBPA nor the Department of Inland Revenue (whom it alleges is responsible for the imposition or assessment of VAT) is a party to the action, and neither is there any claim, even in the draft SOC, relating to this issue. In fact, the plaintiff only foreshadows that it intends to raise this claim in the further affidavit of Godfrey Bowe, and by dint of skeleton submissions.

[88] Even if this is a potentially arguable point, the first defendant is right to point out that it is not raised in the claim, and neither is there anything in the supporting affidavit (other than announcing it as a possible claim) to indicate how it arises and how the plaintiff would seek to advance it. In the absence of any specific pleading of the VAT claim, and any claim for relief in relation thereto, I do not consider that this qualifies as a serious issue (or indeed an issue) to be tried. It must therefore fall on the same sword as the claim at head (iii).

[89] Having satisfied myself that the plaintiff can get through the *American Cyanamid* gateway on at least one of its claims (or perhaps more, in the case I am wrong in rejecting any of the others) I turn to consider the adequacy of damages as a remedy.

Adequacy of damages

[90] The plaintiff does not directly offer an undertaking in damages, but it does contend that damages would be an adequate remedy for the first defendant and attempts to set out the basis on which it might be able to pay if it is unsuccessful at trial. The plaintiff avers, *inter alia,* that: (i) the value of the condominium property far exceeds any costs which may be awarded to the first defendant; (ii) the body corporate controls the fee simple title in 2.78 acres of land surrounding it; and (iii) that it has the benefit of costs Orders made in the Supreme Court and the Court of Appeal against the first-named of the Second Defendants, Julie Glover.

[91] In reply, GB Utility contends firstly that the plaintiff failed to adduce any evidence showing that the condominium is in fact free and clear from all encumbrances allowing the plaintiff (or the first defendant) to realize its value on a sale, or indeed what the value is, which would allow it to properly submit that its value is sufficient to compensate the first defendant in damages. Further, they also say that the plaintiff had not provided any evidence showing that it is the fee simple owner of title in 2.78 acres of land surrounding the condominium (although the plaintiff provided a copy of the conveyance of the property

subsequent to lodging written submissions). The plaintiff also discounts the costs orders in respect of Ms. Glover as being uncertain of recovery.

[92] Further, they argue that "…*any undertaking that may be feigned at this time would be seriously questionable in light of the Plaintiff's own evidence regarding its financial position*"—whom they point out is admittedly impecunious—while indicating that the first defendant is a company with considerable means.

[93] The defendant is right to put little stock on the ability of the plaintiff to pay any damages that might be suffered by the first defendant (which in any event is only likely to be the costs of providing the services, plus any interest and legal costs). Although the plaintiff has pointed out the value of the condominium property and adjoining real estate as possible security, in my view these are not assets that the plaintiff is able to pledge or convert without the necessary action of the Association. However, the fact that the plaintiff has not provided a specific undertaking in damages, which is usually the price of an injunction, does not preclude the grant of the relief sought (see, for example *Allen v. Jambo Holdings Ltd.* [1980] 1 WLR 1252).

[94] On the other hand, the defendant has also not provided a cross-undertaking in damages in the event the injunction is refused and the plaintiff suffers damages in the interim. As indicated, the damages suffered by the plaintiff could be catastrophic, as it could conceptually result in the condemnation of the entire building and disruption of the lives of the residents, which is non-compensable.

[95] These matters, considered together, do not satisfy me that damages would be an adequate for the plaintiff, or that the plaintiff would be in a position to pay any damages sustained by the first defendant. In light of these doubts, I move on to consider the balance of convenience.

Balance of convenience

[96] As was made clear in *Cyanamid*, the balance of convenience is a protean phrase and the list of matters the court may take into consideration is not closed. Later cases have opined on whether that phrase accurately describes the exercise that the court is involved in. For example, the plaintiff cites the case of *Cayne v Global Natural Resource plc* [1984] 1 All ER 225, where May LJ said (at 237):

> "…the balance that one is seeking to make is more fundamental, more weighty, than mere 'convenience'. I think it is quite clear…that, although the phrase may well be substantially less elegant, the 'balance of risk of doing an injustice' better describes the process involved."

In *National Bank of Jamaica Ltd. v. Olint* (*supra*), the Privy Council simply described it as the court having to engage in determining which course "*seems likely to cause the least irremediable prejudice to one party or the other*".

[97] Not surprisingly, each party claims that the balance of convenience is in its favour. The plaintiff contends that failure to grant relief may constitute an existential threat to the body

corporate and may have the effect of destroying it as a going concern and/or of condemning the property. As put in the 17 December 2018 Glinton affidavit:

> "Recognizing the monopoly which GB Utility enjoys in the City of Freeport, in virtue of the provisions of the Hawksbill Creek Agreements, uniquely positions it to pursue and enforce claims for money that the Body Corporate owes it, through the courts by other lawful means, the Board and I believe our statutory duty to act in its best interest in the circumstances, justify having Court intervention to maintain and protect its viability as a going concern and habitability of the Property against interruption of essential services and utilities to any residence that might endanger the health and physical safety of persons residing in or accessing the Property (having no less effect that an Order winding up the Body Corporate), and to protect the mortgagee interests of financial institutions over apartment Units in the property as security, less they be avoidably condemned at a loss to them."

[98] Arguing that the balance of convenience should tilt in its favour, the first defendant reiterates the lack of financial capacity of the plaintiff and its failure to give an undertaking. They also contend that it would be unfair to allow the plaintiff to receive water supply without paying for the same, and that such an order would set a precedent for other customers to avoid disconnection of utility service by simply asserting a claim against the utility service provider.

[99] In considering the balance, I have had to give careful consideration to the plaintiff's contention that the impact of the failure to grant relief may have catastrophic effects on the property. But this is only one factor to be balanced in this exercise and is not dispositive of the issue. As was said by May LJ in *Roger Bullivant Ltd and Others v Ellis and Others* [1987] ICR 464 (at 482), dealing with a claim to restrain breach of confidentiality:

> "That an injunction restraining a company from making unlawful use of confidential information may or will drive it into liquidation is of itself *nihil ad rem*, provided that the *American Cyanamid* test can be satisfied…".

[100] But I bear in mind also that this is not simply an issue of the potential demise of a managing corporate body. Nor is it a simple supplier-customer relationship. The body acts on behalf of all the residents of the units, some of whom might not have any culpability for the body corporate's financial woes, as they may have made the contributions levied on them to meet expenses.

[101] On the other hand, there is undeniable force in the first defendant's contention that it should not have to continue to supply water without receiving payment. As the case law illustrates, quite apart from any express statutory right to provide and/or discontinue the services, as a matter of contract or business dealings the first defendant should not be expected to continue to supply a commodity for which the customer is no longer willing (or able) to pay. But I think the factors are stacked differently here. For one, I am not of the opinion that the grant of an injunction preventing shutting off supply would deprive the first defendant of the ability to exercise its contractual or commercial rights to seek payment, through the courts, for services which it has supplied and continue to supply. At the end of the day, there will still be a debt it can enforce (with any interest) as against the plaintiff body.

Prejudice to third parties

[102] The court may also consider as part of the balance any prejudice to the rights of third parties who are not joined in the proceedings, or whether an injunction might benefit third parties or the public (see, for example, *Solar Thompson Engineering Co. Ltd. and Anor. v. Barton* [1977] R.P.C. 537, at 549) Although this factor does not loom large in these proceedings, it has been pointed out by the plaintiff that the failure to grant the injunction might directly destroy the habitability of the premises and result in them being condemned, which would negatively impact the mortgagee interests of third-party financial institutions holding any individual units as security.

Public interest/special factors

[103] The public interest may also be a factor to be taken into consideration in assessing the balance of convenience, or as one of the special factors adverted to by Lord Diplock in *American Cyanamid*. As mentioned, although this case was brought in the context of private litigation, it has an undeniable public interest component. This is because the utilities which are the subject of this action are provided pursuant to exclusive license and a monopoly granted to the GBPA under the HCA by the Government, and is done for the benefit of the public, or a significant part of the public. The reference to any breach of the Agreement being remediable by damages between the GBPA and the Government also suggests that it was left to the Government to hold the GBPA's feet to the fire, as it were, with respect to the undertakings and covenants in the agreement, including the provision of these essential services.

[104] Protecting the health and safety of the occupants of the condominium is also plainly in the public interest and having access to water is clearly necessary to promote this interest. As the Privy Council pointed out, albeit in a different context, in *Minister of Justice for Canada v Levis* (*supra*) [513]:

> "It must be recognized, however, that water is a matter of prime necessity, and that, where waterworks have been established to give a supply of water within a given area for domestic and sanitary purposes, it would be highly inconvenient to exclude from the advantages of such supply Government buildings on the ground that these buildings are not liable to taxation. The respondents are dealers in water on whom there has been conferred by statute a position of great and special advantage, and they may well be held in consequence to come under an obligation towards parties, who are none the less members of the public and counted among their contemplated customers, though they do not fall within that class who are liable to taxation, and who being in the immense majority are expressly legislated for and made subject to taxation."

[105] Their Lordships were providing a rationale as to why the Government buildings, even though excluded from the taxes levied for the waterworks, would still need water supply. But the passage is cited for the recognition of the importance of access to water supply, especially where (as here), there is a monopoly of supply vested in the first defendant, which would prevent any owner or occupier from providing or sourcing an independent supply of water. Having regard to the fact, also, that the country is just emerging from the Covid-19 pandemic, where basic hygiene and sanitation protocols were (and still are)

mandated to mitigate the spread of the virus, it cannot be gainsaid that shutting off water to a significant community of persons would have public health implications. Considerations of public safety are therefore also in favour of the plaintiff.

Conclusion on balance of convenience

[106] Called upon to decide, as I am, which party is likely to suffer the most irremediable damage from the grant or refusal of an injunction, it seems rather clear to me that the plaintiff stands to suffer far greater harm if the injunction is refused. As I have found that the balance of convenience, or of doing justice, is in favour of the plaintiff, it does not become necessary to address the issue of maintaining the *status quo*, although the parties addressed arguments on this point.

CONCLUSION AND DISPOSITION

[107] The claim for interlocutory injunctive relief in the case at bar has raised novel and difficult points. The court has given careful scrutiny to the first defendant's contention that the plaintiff's draft statement of claim is an attempt to retrospectively fashion a cause of action simply for the purpose of seeking injunctive relief and buying time. But this does not negate the fact that the plaintiff has asserted at least one claim (and potentially others) which legitimately satisfies the *American Cyanamid* criteria of a serious issue to be tried and where, indisputably, it is the party most at risk of suffering irremediable prejudice if an injunction is refused.

[108] In the circumstances, I grant the injunction sought by the plaintiff pursuant to the summons of 20 October 2021 pending trial of this action (and would have refused it on the alternative basis on which it was sought—pending determination of any litigation between the plaintiff and second defendants), but I do so subject to the following terms and conditions:

(i) Firstly, the plaintiff is to progress this matter expeditiously to a final hearing and, therefore, I only grant the injunction for a period of six months (subject to further order of the Court), during which time the plaintiff is to take the necessary steps to bring the matter on for trial.

(ii) Secondly, the grant of interlocutory injunctive relief is without prejudice to the right of the first defendant to pursue other lawful remedies to obtain payment for the supply provided.

Costs

[109] As I have determined that the plaintiff has made out a case for the interlocutory injunctive relief claimed, I also award it the costs of the injunction application. The first defendant is entitled to its costs of the application for extension of time.

Klein, J.

21 October 2022