

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2021/CLE/gen/01400

BETWEEN

ZANE LIGHTBOURNE
QUINTIN LARODA
EULA GAITOR
JOAN KNOWLES TURNQUEST
JOHN MUSGROVE
TEREZ CONLIFFE
PAULA KNOWLES
SHARON RAHMING
(as Trustees of the Bahamas Union of Teachers Pension Plan Trust)
Plaintiffs

AND

THE BAHAMAS UNION OF TEACHERS
BELINDA WILSON
TIFFANY BURRELL ROBERTS
KETRESS WELLS
TIFFANY DELANCY-LAING
CEDRICA ROLLE
LORRAINE KNOWLES
JACQUELINE McKENZIE
JUDD WILLIAMS
VERNINCHA SIMMONS
CYRIL MORRIS
WAYNE THOMPSON
QUINTIN LARODA
VERNON RODGERS
ELDECIA THOMPSON
ANN STRACHAN
(as the Executive Committee of The Bahamas Union of Teachers)
Defendants

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Obie Ferguson Jr. KC for the Plaintiffs
Kahlil Parker KC with Roberta Quant for the Defendants

26 May 2022

DECISION

WINDER, CJ

The Plaintiffs, in their capacity as Trustees of the Bahamas Union of Teachers (BUT) Pension Plan Trust (the Trust), seek mandatory interlocutory injunctive relief against the BUT and its Executive Committee over financial contributions they say are intended for the Trust. The Defendants have applied to have the action struck out.

1. The Plaintiffs asserts that on 1 April 2016 by an Agreement and Declaration of Trust made between the First named Defendant (BUT) and its Trustees, the BUT Pension Plan Trust was created.

2. According to the Plaintiffs:

(a) Article 2.1 and 2.2 of the Trust Agreement provides:

“2.1 ESTABLISHMENT OF FUND. The Bahamas Union of Teachers deposited funds into the custody and control of the Bahamas Union of Teachers Pension Plan Trust and its Board of Trustees for the purposes set out herein and such funds are to be administered and operated in accordance with the terms hereof the delivery and receipt of which is hereby acknowledged. Continuing contributions to the fund shall be made by way of a designated portion of dues payable by members of The Bahamas Union of Teachers to the Union by way of salary deduction in addition to voluntary supplemental or discretionary payments as may be made from time to time by participants in the Pension Plan Trust.

2.2 GENERAL PURPOSE. The Pension Plan Trust shall be a Trust Fund and shall be used for the purpose of providing Pension Benefits, as determined herein and by the Trustees, and shall further provide the means for financing the expenses of the Trustees and the operation and administration of the Trust Fund, in accordance with this Agreement and Declaration of Trust.

3. According to the Plaintiffs, pursuant to the Articles of the Trust, participants make voluntary contributions from the date of their membership by either: i) regular contributions; ii) one off amounts; or iii) transfer value amount. In accordance with Article 6.3 (b) the BUT is to make a contribution to the Trust on behalf of members each month. The BUT reserves the right in the Trust instrument to alter the contribution amount from time to time. The individual participants may also alter their contribution amount.

4. The Plaintiffs say that article 6.4 of the Agreement provides that all Contributions shall be forwarded to the Trustees by BUT on or before the 7th of the month following the

month for which the contributions applies. The Trustees shall maintain a separate account or accounts for each participant. The Plaintiffs claim that the Defendants have not lived up to their obligations under the Agreement to forward member contributions to the Pension Plan.

5. The Plaintiffs claim that this action was therefore brought in pursuit of an injunction to mandate that member contributions are transferred to the Trust and to restrain the Executive Committee from disposing of member contributions other than to the Pension Plan.

6. This action was commenced by Writ of Summons on 19 November 2021. The Statement of Claim, indorsed thereon sought relief as follows:

- (1) An Order that the Defendants do within 30 days provide the Plaintiffs with a full account of all money paid to the Defendants to the provisions of the Agreement for the period April 1, 2016 to-date.
- (2) An Order that the Defendants do pay to the Trustees of the Pension Plan Trust forthwith all member contributions found to be due and collected by the Defendant.
- (3) An Order that henceforth the Defendants comply with Article VI of the Agreement.
- (4) Damages together with interest thereon pursuant to the Civil Procedure Award of Interest Act.
- (5) A Declaration that the Trustees of the Union are bound to carry out the resolutions passed at the union's Annual General Meetings.
- (6) An injunction restraining the Defendants from disposing of participating members contributions otherwise than as stated in the Plan Trust.

7. The Plaintiffs' application for interlocutory injunctive relief seeks the following relief:

- (1) An Injunction restraining the Defendants whether by themselves or by their agents or otherwise howsoever from disposing of participant contributions of the Bahamas Union of Teachers Plan Trust, otherwise than as stated in the Trust Agreement and for an Order that the Defendants do forthwith comply with the resolution of the 72nd Annual General meeting of the Union held on the 25th day of June 2019 whereby it was resolved that the signatories on the Union's account establish a standing order with the Credit Union and that \$27,000.00 be transferred monthly to the Pension Trust.
- (2) And the Plaintiffs herein undertake to abide by any order that this Honourable Court may make as to damages in case the Court shall hereafter be of the opinion that any of the parties have sustained any damages by reason of this Summons.

AND for such other relief as the Court may seem just.

AND THAT the cost of and associated with this application be taxed if not agreed and paid by the Defendants to the Plaintiffs.

8. The Plaintiffs' application is supported by the affidavit of John Musgrove and Eleanor Rolle. Musgrove avers that during the BUTs 72nd Annual General Meeting, held on 25 June 2019, a resolution was passed that directed the signatories of the BUTs account (the Treasurer, President, Secretary General, Trustees and Vice President) to establish a standing order to transfer \$27,000.00 per month to the Trust and to transfer another \$18,000.00 to the Union's savings account monthly. Musgrove avers that notwithstanding the passing of the resolution the BUT did not comply with it.

9. At paragraph 15 of Musgrove's affidavit he states:

"The Trustees of the Pension Plan Trust fear that unless the Defendants transfer members contribution to the plan as mandated therein, the general purpose of the plan which is to provide pension benefits to members (Article II 2.2) will be defeated thereby adversely affecting approximately 3,000 members who continue to contribute to the Bahamas Union of Teachers."

The Plaintiffs say that the Union's failure and refusal to execute the resolution passed at the 72nd AGM of the BUT threatens to put the Pension Plan in jeopardy.

10. The Defendants filed a Summons seeking to have the action struck out in accordance with Order 18 rule 19 of the Rules of the Supreme Court. The Defendants also challenge the admission into evidence of the Trust Agreement, which has not been stamped in accordance with the provisions of the Trustee Agreement.

11. The Defendants oppose the action and says that the Plaintiffs' commission as Trustees of the Pension Plan has expired and they hold no lawful authority to bring this action. Further, the BUT has a professionally administered pension fund overseen by Providence Advisors. The Defendants say that the Plaintiffs have also failed to have the trust instruments duly stamped and cancelled according to the Trustee Act.

12. The Defendants' application is supported by the affidavit of Belinda Wilson. Wilson states that the Trust instrument relied on in the Musgrove affidavit was not duly stamped. She highlights section 92 (4) and (6) Trustee Act which states:

(4) A trust instrument **not stamped and cancelled** in accordance with the provisions of subsection (3) **shall not be admissible in civil proceedings**, provided that a trust instrument may in the discretion of the Court be admissible in such proceedings on proof of the payment of the trust duty together with a penalty in the sum of one hundred dollars for each calendar year from the execution of the trust instrument:

(5) Any trust instrument that is liable to trust duty need not be produced to the Treasury, Post Office or any other public body for purposes of payment of trust duty.

(6) **No trust instrument of which the proper law is the law of The Bahamas shall, except in criminal proceedings, be pleaded or given in evidence** or admitted to be good, useful or available in law or in equity, unless it is duly stamped with trust duty in accordance with the law in force at the time when it was first executed.

[Emphasis added]

13. The Defendants say that having not acted in accordance with the provisions of the Trustee Act, by ensuring that the Agreement and Declaration of Trust was stamped and cancelled, the injunction action should be considered an abuse of the Court's process says the Defendants. They also say that the Plaintiffs have failed to disclose any reasonable cause of action against the Defendants.

14. The Plaintiffs case is that the Court has the jurisdiction to grant an injunction in the circumstances under section 21 of the Supreme Court Act if the Court deems it to be just and convenient to do so. They rely on the principles outlined in the House of Lords case of *American Cyanamid Co. v Ethicon Ltd (1975) AC 396*. The Plaintiffs submit, in reliance on the American Cyanamid principles, that the Court's consideration in this matter should be:

- (a) Serious issues to be tried.
- (b) Good possibility of the applicant's success.
- (c) The balance of convenience.

15. The Plaintiffs submitted that:

- (a) There are serious issues to be tried as the Agreement is valid and binding on the parties and the Defendants are not complying with the terms and conditions of the Agreement, in particular as they relate to the continuing contributions to the fund. They have breached the provisions of the Agreement by failing and refusing to

make contributions to the Fund as mandated causing the Fund to suffer loss and damage as a result.

- (b) The documents laid before the Court, including the Agreement and Declaration of Trust, The Industrial Agreement between the BUT and the Government, the Minutes of the June 2019 AGM, and the Employee Deduction Register from the Public Treasury, all show that the Plaintiffs have a good possibility of success in the action.
- (c) The balance of convenience lies with the plaintiffs in that the potential harm to them outweighs any rights which the Defendants may possess. They rely on ***West Bay Management Limited (trading as "Sandals Royal Bahamian Resort and Spa") and Bahamas Hotel Maintenance and Allied Workers Union et al 2014/CLE/gen/00107***. The Agreement, they say, does not provide the Defendants with the discretion to withhold the contributions from the Trust, as such they are bound by the terms of set out therein. The actions of the Defendants in this regard will result in irreparable harm to the Trust.

16. In response to the allegation as to the unstamped documents, the Plaintiffs proceeded to stamp the Trust Deed and the Agreement on 31 March 2022. It was exhibited to the 2nd affidavit of John Musgrove.

17. The Defendants say that the injunction application is unsustainable on the facts and evidence before the Court. They say that the Plaintiffs have not addressed the issue of damages and why it would not be an adequate remedy in the circumstances. They argue that damages would be an adequate remedy in the circumstances and that the balance of convenience favours the dismissal of the Plaintiffs' application. They also say that the BUT has engaged a professional pension administrator – Providence Advisors Ltd. Neither the Plaintiffs nor the unstamped Trust instrument upon which they rely are recognised by the BUT. The Plaintiffs are not qualified to administer the Trust and it is not in the interests of the BUT to place funds in the Plaintiffs hands, says Wilson.

18. The Defendants also complain that the naming of the Defendants as members of the Executive Committee in their personal capacity in this action is improper and contrary to section 27 of the Industrial Relations Act. Section 27 of the Industrial Relations Act provides:

27. (1) The trustees of any trade union which is registered under this Act, or any other officer thereof duly authorised in that behalf, may in all cases touching or concerning the real or personal property, or the right or claim to any real or

personal property, of the union, sue and be sued in any court in their proper names without other description than the title of their office.

(2) No legal proceeding shall be discontinued or shall abate by reason of the death or removal from office of any trustee or other officer of any trade union which is registered under this Act, but all such proceedings may be continued by or against the holder for the time being of such office in all respects as if such proceedings had been commenced by or against him.

(3) Any damages, costs or other sums whatsoever ordered to be paid by any court in any such legal proceedings shall be ordered to be paid out of or into, as the case may be, the funds of the trade union by or against the trustees or officers of which such legal proceedings are brought.

(4) Any writ, summons or notice in any legal proceedings brought against any trustees or officers of a registered trade union in their respective capacities as such trustees or officers, may be served on such trustees or officers by leaving the same at the registered office of the union of which they are trustees or officers.

The Defendants say that they are strangers to the matters in the action.

19. Having considered section 27 of the Industrial Relations Act, in particular section 27(4) I am not satisfied that the Defendants, as the executive committee of the union, (its officers) would be precluded from being sued for actions taken by them in the course of their duties as such officers. I am not satisfied that they are strangers to the dispute as they allege.

20. The Defendants complain that the Plaintiffs have no standing to bring this action as they are not lawful custodians of any property of the BUT. The application of the Plaintiffs disclose no reasonable cause of action and/ or is an abuse of the Court's process, says the Defendants. Pursuant to the trust instrument upon which they rely the Defendants term has 'long expired', leaving them with no standing to bring this action says the Defendants in their strike out Summons filed 25 March 2022. Surprisingly they sought to rely on the very Trust Instrument which they challenged, to support these allegations. In my view this is an issue for trial, and in any event the Plaintiffs would be entitled to pursue relief up to the time of the conclusion of their term since their liability as trustee would continue to that point, including with respect to any moneys already in their possession.

21. I accept that the issue of the grant of injunctive relief calls for a consideration of *American Cyanamid* principles.

22. I am satisfied, on the limited evidence before me that the Plaintiffs' case may be arguable with respect to the prayers in the Statement of Claim. I am not satisfied however that the Plaintiffs have demonstrated that damages would not be an adequate remedy or that the Defendants would be unable to satisfy a judgment for damages in the event they are successful. Having installed a professional trustee to manage the pension fund it would be difficult to find that the balance of convenience would not favor the Defendants whilst the action proceeds.

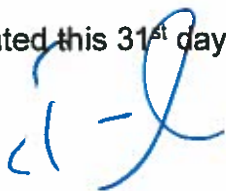
23. The Defendants complain that the Plaintiffs have commenced this action without paying the costs in the amount of \$2,500 which were ordered by the Court to be paid in Supreme Court action CLE/gen/00264 of 2021 on 21 July 2021. I accept that whilst this is a matter which ought to stay the further prosecution of this action it does not rise to a level to cause it to be struck out at this stage.

24. In all the circumstances the application for injunctive relief is refused. I am also not minded to accede to the striking out application at this early stage of the proceedings. I will nonetheless stay the proceedings pending the payment of the outstanding costs in the earlier action.

25. As to costs, the Plaintiffs were unsuccessful on their application for injunctive relief and the Defendants were only minimally successful on its application for a striking out. In the circumstance I will award the Defendants costs in the amount of \$6,000.

26. The sum shall be paid within 45 days and the action stayed until both cost orders are settled. Once the Cost Orders are paid the Defendants have permission to file its Defence within 14 days thereafter.

Dated this 31st day of March 2023



Sir Ian R. Winder

Chief Justice