

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

Claim No. CLE/GEN/00495 of 2023

B E T W E E N

ROMONA A. FARQUHARSON

Claimant

AND

THE BAHAMAS BAR ASSOCIATION

Defendant

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: Calvin Seymour, Samuel Taylor, Quintin Percentie for the Claimant
Sean Moree KC, Erin Hill for the Defendant

Date of Hearing: 29th June, 2023

DECISION

1. The Claimant is a Counsel & Attorney-at-Law, having been admitted to the Bahamas Bar on 21st December 2001, and evinces a desire to seek election to the office of President of The Bahamas Bar Association. Elections for vacant posts on the executive of the Association are scheduled to be held on 30th June, 2023. The Claimant has filed an Originating Application on 27th June 2023, supported by the affidavit of Romona A. Farquharson filed the same date, and seeks the following relief:
 - i. A declaration that the decision of the Bahamas Bar Association not to provide the list of financial members before the voting of the Annual General Meeting scheduled for Friday the 30th of day of June AD 2023 is unreasonable and an

abuse of their discretion

- ii. An order compelling the defendant to provide the list of members eligible to vote in a reasonable time before an election is held to select a new board
 - iii. An order in the form of an interim injunction staying the Bahamas Bar Association's election scheduled for Friday the 30th January AD 2023 until the list of financial members is provided and a reasonable time given to utilize the same
 - iv. Any other order and or relief the court deems just and appropriate
 - v. An order making provisions for the costs occasioned by this action
2. In the affidavit in support the claimant states that she is determined to vie for the position of president in the upcoming elections scheduled for Friday the 30th of June 2023, and that in preparation for the upcoming elections she wishes to campaign and elicit support amongst the eligible voters and thus requested of the Association a copy of the list of financial members who are eligible to vote. She further indicates that she has made four or five verbal requests to the administrator of the Bar Association spanning more than a month, as well as a formal request of the honorable Secretary Mrs. Tara Rolle-Knowles by via email.
3. The Claimant further states that she further inquired of the Administrator of the Bar Association, who advised that she did not have a financial listing, and thus could not send one, and that when the Claimant inquired again a few days later she was told that the association was still not in a position to provide a financial list as they were awaiting the accountant who had yet to visit the bar office and sort out receipts so a list could be prepared.
4. The claimant states that she did not receive a response from the Honorable Secretary, and that she is severely handicapped by not having a list, and verily believes that there are more than 1500 members admitted to the bar, and as such the task of knowing them all is great, and knowing who are financial would be nearly impossible.
5. An Affidavit in opposition to the application of the Claimant was filed by Tara Rolle Knowles, the Honorary Secretary of the Bahamas Bar Association, in which it was averred that the Defendant has not provided anyone with a list of financial members as sought by the Claimant, and that all members of The Bahamas Bar Association are entitled to vote provided they become financial in advance of the Annual General Meeting, and that as members pay

their dues and become financial from day to day, there is no fixed list of financial members.

6. Ms. Knowles further states that it is the policy of Bar Council not to release the private financial data of members, as there have been complaints in the past by members concerning the release of financial data to third parties, and that Bar Council issues Certificates of Good Standing to members to enable them to demonstrate that they are current with their dues and that no relevant adverse findings have been made against them, which can then be produced by the member if they choose to verify their status to anyone inquiring. Mrs. Knowles notes that the Defendant's membership listing is widely available and is published and maintained on the Bar Association's website.
7. Mrs. Knowles further notes that she has contested a seat on Bar Council on three previous occasions since 2017, and at no point was provided a list of financial members by The Bahamas Bar Association, neither was she aware of any candidate being provided with such a list.
8. It is further stated that the Claimant has not been duly nominated for any of the vacant positions on Bar Council at the upcoming AGM, nominations now being closed, save from the floor at the AGM, and that the candidacy of the Claimant is hypothetical at this stage.
9. With respect to the balance of convenience, the Honorary Secretary states that third-party vendors have been engaged and notices published to the members of the Bar Association, who have planned their work and travel schedules around the standard date for elections, and that the Vice President for the Americas of the Commonwealth Lawyers Association has requested and is scheduled to attend and speak to members at the AGM, arriving in The Bahamas on the 29th day of June A.D. 2023 for the AGM on the 30th day of June A.D. 2023. A delay of the election would therefore cause serious prejudice.
10. Finally, the Honorary Secretary suggests that the Claimant has been able to campaign and approach any member of the Bar Association she wishes, and has in fact caused to be published a few articles in a local daily newspaper with respect to her campaign. The suggestion that the Claimant has been handicapped by not having such a list is therefore rejected.

CLAIMANT'S SUBMISSIONS

11. The plaintiffs submits that the general principle is that one of the main purposes of an injunction is to protect the plaintiff against any violation of their rights, and rely on the case of *American Cyanamid Company v Ethicon Ltd.* (1975) AC 396 where Lord Diplock stated the following: "An attempt has been made to reconcile these apparently differing approaches as to the exercise of the discretion by holding that the need to show a probability or a strong prima facie case applied only to the establishment by the plaintiff of his right, and that the lesser burden of showing an arguable case to be tried applied to the alleged violation of that right by the defendant."
12. The plaintiff further accepts that a party seeking an injunction has the onerous duty of proving that their right is being or is likely to be infringed upon and relies on the case of *Pride of Derby and Derbyshire Angling Association Limited vs British Celanese Limited* (1953) Ch 149 where Evershed MR stated that "It is I think well established that if A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is prima facie entitled to his injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstance that damages are an inadequate remedy for the wrong that he has suffered."
13. The Claimant also relies on the authority of *Dyphany Mortier v Darnette Weir* (President of the Lawn Tennis Association) 2020/CLE/gen/00611, in which the learned Klein J stated as follows: "As mentioned, the threshold consideration in the American Cyanamid test is the requirement for there to be a serious issue or issues to be tried. In his now famous speech in that case, Lord Diplock equated a serious issue to be tried with the court being satisfied that "the claim is not frivolous or vexatious". In other words, all that is required is that there be some triable claim, and this is a lower standard than the prima facie case rule that pertained in the pre-Cyanamid cases."
14. The Claimant therefore submits that there is a serious issue to be tried, and that she is prejudiced as without the requested list, she would not know to whom to address her campaign efforts. It is further submitted that the balance of convenience lies in favor of the grant of an injunction to protect her rights to a fair election.

15. The Claimant has also made submissions with respect to the issue of legitimate expectation, and submits that there is a common practice of providing members of the Bar Association with the list of financial members, usually in the Gazette or by emailing the same upon request by an attorney. They rely upon the cases of *McHari Institute v The Department of Public Service* 2019/PUB/jrv/00033 and *Sawmillers Co-operative Society Ltd. v The Director of Forestry* TT 2006 CA 34, and have buttressed this claim with a supplemental affidavit to which is exhibited a list of financial members published on 17th June 2013.

DEFENDANT'S CASE

16. The Defendant submits that the three issues to be determined by the court are the question of standing; the right to the list; and whether an injunction is warranted. In addressing those issues, the Defendant contends that the claim cannot be brought as the Claimant has not in fact been nominated, and that there is no vested right at this point. They note that members can be financial even on the day before the election, and as such any purported list could not be accurate, as financial membership is static. They further submit that the balance of convenience lies in favor of the defence, as there has been no undertaking in damages, and the Claimant could simply have campaigned to all members, encouraging any who were found not be financial to become financial to ensure eligibility to vote. The Defendant also notes that no evidence has been provided to substantiate the claim of a legitimate expectation.

DISCUSSION

17. The criterion for the grant of an injunction are well known, and can be discerned from the case of *American Cyanimid*, as follows:

- Whether the claimant has a strong or merely an arguable case.
- The adequacy of damages as a remedy.
- The balance of convenience.
- Whether the status quo should be maintained

18. In considering the instant case, I note that the procedures governing the elections of the Bahamas Bar Association are set out in sections 4 through 7 The Legal Profession (General) Regulations, which reads as follows:

4. (1) Every member of the Association shall have the right to attend annual general meetings of the Association but no member shall be entitled to stand for election to Council as a candidate or vote at any meeting unless all money due from that member to the Association has been paid.

(2) Every member of the Association entitled to vote shall have one vote, except where a member has been appointed as a proxy he shall have one vote in respect of each proxy held.

(3) In the case of an equality of votes, the Chairman shall have a second or casting vote.

5. (1) The Secretary shall not less than twenty-one days before an annual general meeting, give notice of the meeting to members.

(2) The notice referred to in paragraph (1) shall be in the form specified in the Second Schedule.

6. The President of the Association shall be the Chairman at any meeting of the Association and in the absence of the President, the Vice President, or such other person as the members may elect, shall act as Chairman.

7. (1) Any financial member may deliver to the Secretary at least fourteen days before the day of the annual general meeting the nomination in writing of any person eligible for election as officers of the Association and Council and such nominations shall be signed by two financial members of the Association.

(2) Nominations may also be made from the floor of the annual general meeting.

(3) The result of the election shall be ascertained by counting the votes given to each member nominated and the member receiving the greatest number of votes shall be declared to be elected.

19. Pursuant to those Regulations, nominations may be delivered to the Secretary at least fourteen days before the day of the annual general meeting, and the Claimant in her affidavit states that she made a request of the Administrator of the Bar Association on or about 25th May 2023, which would have been well in advance of the closure of nominations, yet the Claimant has not formally nominated, but merely evinces an intention to nominate. While this is curious, it is not in my view dispositive of the issue of standing, as the Regulations do permit a nomination from the floor, and it is still possible for the Claimant to be nominated for election. The Defendant submits that the Claimant has no standing, as any rights being relied upon are contingent, as she has not yet nominated. I am concerned that the Claimant is not at the time of this application formally a candidate for election. She indicates that she intends to stand for election, but that intention depends on someone else nominating the Claimant,

although the regulations are less than clear on the question of whether the possibility of self-nomination exists. However, in my view, it is less a question of standing, and more a question of whether any such “right” to the requested list exists. As was noted in the *Pride of Derby* case cited by the Claimant, an applicant may be entitled to an injunction where he shows that his “proprietary rights” are being interfered with. I accept that the bar is not very high, in that there need only be a triable claim, but it is in my view still necessary at least to show the existence of the right which the Claimant complains is being adversely impacted.

20. In considering the existence or otherwise of a right to the list, I note that this is not a situation analogous to a general election, where procedures surrounding the promulgation and closing of a voter’s list are carefully set out. There are no such strictures in the Regulations governing this election. Nor has any statutory or common law basis for the existence of such a right been provided. No suggestion has been made that the court should or could interpret the Regulations in such a way as to infer the existence of such a right, and no challenge has been launched to the Regulations themselves. I do not accept that such a list is necessary to assist with campaigning, particularly when the entire membership list is easily ascertainable, and those members are all potential voters who could conceivably become financial in time to vote. It is entirely possible that a certain flexibility was deemed necessary to ensure the widest possible participation by professionals who generally operate under severe time constraints. I am therefore not satisfied in all the circumstances of this case that any such “right” to a list exists, as to say that the existence of such a list is desirable or preferable is not the same as saying that one must be provided.
21. The Claimant has also raised the issue of legitimate expectation, and has provided evidence that a list was published on at least one occasion in 2013. She has also stated in a supplemental affidavit that such lists were published by at least four past Presidents. In contrast, the evidence of the Defendant is that there is no awareness of such a practice, and that the Honorary Secretary has contested the last three elections and has not been provided with any such list.
22. The issue of legitimate expectation has been considered by the Court of Appeal in *Phillipa Finlayson et al v The Bahamas Pharmacy Council* SCCivApp & CAIS No. 104 of 2019, an appeal of a decision of the learned Charles J. in which, in addition to finding that there was

no evidence of any promise sufficient to ground a legitimate expectation, Charles had said at paragraph 187 that :

[187] So, in addition to being entitled to changing its policy, the Council may frustrate any legitimate expectation that the Applicant may be seized of if there is an overriding public interest.”

23. On appeal to the Court of Appeal the following was said:

“33. However, the appellants cannot invoke legitimate expectation as the respondent is a statutory council performing a statutory duty. This is supported by Lord Woolf MR in *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850 at paragraph 64 where he makes the point that a decision-making body’s ability to change its policy should not be fettered: “64. ...But since it cannot abdicate its general remit, not only must it remain free to change ‘policy; its undertakings are correspondingly open to modification or abandonment...”

24. In my view, the production of a list published ten years ago is not a sufficient basis to ground a legitimate expectation that such a list would be provided to an electoral candidate, which is what is being claimed by the Claimant. Furthermore, even if a policy of providing such a list existed, the present board would be entitled to change the policy, as long as there were good reasons for so doing. Such a change might be subject to judicial review, but that is not what is being pursued in the present action.

25. I am also constrained to say that I am not satisfied that any such information has been provided to other candidates. No doubt the current executive might be aware of the financial status of members because of their involvement in the day to day affairs of the organization, but that does not mean that it can be imputed that they were provided with any such information. I am also not satisfied that a denial of such a list is a handicap to an election campaign. While there may be more than 1500 members of the Bar, that is not so large a number as to impose any real difficulty on a serious candidate for President, and, as has been suggested by the Defendant, part of the campaign efforts should be to encourage those who might wish to support a particular candidate to ensure that they are financial so as to be able to vote.

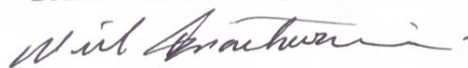
26. In applying the principles set out in *American Cyanamid*, the first question for the court is whether there is a serious issue to be tried. Having concluded that there is not in my view any right to a list, I am unable to conclude that any triable issue exists. In *American Cyanid* the court went on at page 406 to say the following:

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies.”

27. In the instant case, if the injunction is granted, the Defendant would suffer loss, as there are financial costs attached to the holding of a General Meeting and Election. On the other hand, if the injunction is refused, the Claimant would still be able to contest the election should she be nominated from the floor. I note also that the Claimant has given no undertaking in damages, either in the initial affidavit of the Claimant or in the supplemental affidavit, which was filed after the initial hearing, during which this issue was mentioned. There is therefore no basis upon which the court could say that damages would be an adequate remedy to compensate the Defendant should it be found that an injunction was wrongly granted, or the claim ultimately fails. In these circumstances, I am of the view that the balance of convenience lies with the Defendant.

28. In all the circumstances of this case, the application for an injunction is refused, with costs to the Defendant to be assessed by the court upon receipt of submissions by counsel.

DATED this 29th June, A.D., 2023



Neil Brathwaite

Justice