

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Law Division

BETWEEN

2019/COM/lab/00034

PETER OUTTEN

(Trustee, The Bahamas Public Service Union)

TERRANCE DORSETT

(Trustee, The Bahamas Public Service Union)

THEOPHILUS DEAN

(Trustee, The Bahamas Public Service Union)

TASHA BULLARD HAMILTON

(Northern Region VP, The Bahamas Public Service Union)

CINDIRA BAIN

(Secretary General, The Bahamas Public Service Union)

LEOTHA COLEBY

(Assistant Secretary, The Bahamas Public Service Union)

Plaintiffs

AND

KIMSLEY FERGUSON

(President, The Bahamas Public Service Union)

PHILIP GREENSLADE

(Treasurer, The Bahamas Public Service Union)

Defendants

Before Hon. Mr. Justice Ian R. Winder

Appearances: Maria Daxon for the Plaintiffs

Kahlil Parker for the Defendants

13 July and 23 July 2020

RULING

WINDER, J

This is a further application by the plaintiff's for injunctive relief as against the defendants.

1. On 15 January 2020 I refused the plaintiffs' application for an injunction to restrain the Defendants from conducting a special general meeting which was scheduled for 15 January 2020. The new application for injunctive relief, made by Summons filed on 29 June 2020, seeks an Order:

Restraining the defendants from withdrawing, transferring, encumbering, concealing, assigning, removing or in any way disposing of any BPSU property (including any assets relating to it, any real estate, personal property, cash accounts, stocks, mutual funds, bank accounts or vehicles) except with the executive board or the trustees approval for the usual course of business, for the Bahamas Public Services Union and usual expenses until further order.

Additionally the plaintiffs seek that the defendants be restrained:

- (1) from completing the work on the Bahamas Public Services Union Building in Freeport that was commenced during the month of June 2020 until the Trustees have an opportunity to review and inspect the work and receive accurate quote for the completion of the work;
 - (2) from charging, causing to be charged or assisting others in charging any Bahamas Public Services Union's credit card or debiting, causing to be debited or assisting others in debiting and Bahamas Public Services Union bank account without the consumers' express informed consent for such charge or debit; and
 - (3) from misrepresenting or assisting others in misrepresenting, expressly or by implication, that a Bahamas Public Services Union is obliged to pay any charge or debit that has not been expressly authorized by the board or trustees of the Bahamas Public Services Union.
 - (4) from transferring any funds or other assets subject to this Order for attorneys fees or living expenses, except from accounts or other assets identified by prior written agreement with the Bahamas Public Service Union's executive board or trustee...
2. The action, outlined in the Originating Summons, concerns questions as to whether the defendants violated provisions of the constitution by transferring

funds, with respect to dues of the Union to the National Congress of Trade Unions, contrary to the constitution, during October and December 2019.

3. The application is supported by the affidavit of Peter Outten (Outten) dated 23 July 2020 and Leatha Coleby (Coleby) dated 23 July 2020. According to Outten, at paragraphs 6-10 and 19-21 of his affidavit:

...

6. That the Board of Trustees is in charge of authorizing any funds that are spent by the BPSU. None of the trustees were aware or given notice that construction would be conducted on the BPSU building in Freeport.
7. Additionally, the Trustees were excluded from the zoom meeting that was held on 24th June, 2020 by the First Defendant, President Kimsley Ferguson.
8. On 27th June, 2020, I had a conversation with the First Defendant while he was at the BPSU hall in Freeport, Grand Bahama. I had asked him the following questions "When will the trustees be informed about the construction work that is currently taking place on the BPSU building in Freeport?", "How much monies were collected from the insurance company in regards to the damages cost by Hurricane Dorian?" and "Where is the key for the building?". He only replied to the last question stating that he do not have a copy of the key for the BPSU building located in Freeport.
9. Lastly, I asked "Why were the trustees excluded from the Executive zoom meeting that took place on the 24th June, 2020?" His response was that he does not have the time to entertain me and he is reading his Bible.
10. Since we commenced this action against Mr. Ferguson, President and the Treasurer Mr. Philip Greenslade, there have been no executive meetings nor were the Trustees given the opportunity to address the real priorities of the BPSU, namely, how the BPSU membership monies are been spent and allocated. Presently, Mr. Ferguson has full control of the Union's bank accounts. This matter needs to be immediately addressed as the President has no authority nor has he received any approval to control the Union's funds and the real and personal properties of the Union.

...

19. That the other Trustees and I wanted to close the Bahamas Public Services Union building because of the lack of accountability and

transparency. We have yet to receive the financial statements from the Defendant that was requested from over a year and we are not aware of operations that are going on within the Union. We have been told by Mr. Kimsley Ferguson that the Trustees are not a part of the board and should not receive any information pertaining to the BPSU. However, based on the Industrial Relation Act Articles 25 and 27 it clearly states that the Trustees are responsible for the real and personal property of the Union.

20. That the other Trustee, Theophilus Dean and I went before the Honourable Court while serving during this term for actions taken by the Defendant with regards to shutting down Compass Point. We are not taking any more chances with the President and Vice President of the BPSU.
21. On, Wednesday the 8th July, 2020 the other Trustee, Theophilus Dean and I tried to shut down the BPSU building and were restrained from carrying out our duties. The President and Officers of the Royal Bahamas Police Force prevented us from performing our duties under the Industrial Relation Act Article 25 and 27 and the BPSU Constitution Article 4 section 12.

4. According to Coleby at paragraphs 6-8 and 10-15 of her affidavit:

- ...
6. We have attempted to table our concerns about the manner in which the President, Kimsley Ferguson continues to make isolated decisions as it relates to the expenditure of Union funds without the Board's authorization, approval and many times without their knowledge of such expenditures until after the act. Trustee, Outten's concerns were embraced and supported by Trustees Terrance Dorsette, Theophilus Dean, Secretary General, Cindira Bain, Assistant Secretary General, Leotha Coleby and the undersigned, Vice President Northern Region, Tasha Bullard-Hamilton.
 7. I believe this action was unethical, considering the Treasurer and the signatory Trustee were not involved in the transaction. The President did not utilize the normal manner in which payments are made.
 8. That this serves as another violation that the President refused to uphold the laws and procedures that governs the union. Additionally, this act of the President shows poor leadership and self-serving and should be openly condemned.

...

10. The misappropriation of funds was for his personal gain and NOT to benefit the members of the Bahamas Public Service Union (BPSU). Hence, as a result of this situation President Kimsley Ferguson should not be allowed to remove the BPSU funds unilaterally to the NCTU without the approval of the Executive committee and the trustees due to his bad taste in judgment.
11. On 18th June, 2020, I received a call from Peter Outten who informed me that he was in Freeport and while driving passed the BPSU Hall, he saw Mr. Kimsley Ferguson and his crew of persons working on the Union building. He then asked me whether I was aware of whether Kimsley Ferguson had received approval from the Executive committee. I told Peter that I was not aware of the works at the Union building in Freeport and that I was very surprised as this is a common practice with Kimsley Ferguson to make decisions without the Executive Board's approval.
12. I, in turn, asked Peter Outten whether he or the other Trustees were aware of whether Kimsley Ferguson had received approval for the building works at the Union Hall in Freeport. To this present day, and as a part of the Executive team, I am not aware of how the building contractor is being paid. However, I do know for certain that the Union building is insured, and that the Union should have been compensated by the insurance company for any damages caused by any "act of God".
13. On 22 June 2020 I received a text from Mr. Kimsley Ferguson inviting me to a zoom meeting, for the 24th June 2020. During the course of the zoom meeting on the 24th June, I noticed that no Trustees were in attendance at the meeting. During the course of the meeting, Mr. Ferguson discussed the renovations of the BPSU building in Freeport, and at that time, he produced copies of quotes for the renovations which were already ongoing in Freeport. This is not the way the BPSU conducted their business, thereafter I exited the zoom meeting. My issue with Mr. Ferguson's actions is that every time Mr. Ferguson wants to spend the BPSU's money without the Board's approval, he will usually enter into contractual agreements. When Mr. Ferguson becomes aware that some of the Executive Board members and the Trustees are aware of his actions, he will call a meeting to ratify his illegal actions. I wish to categorically state that Mr. Kimsley Ferguson has not held any Executive Board meetings since January, 2020 and the only time that he has held a meeting is to correct his illegal actions.

...

15. Presently, Mr. Ferguson has full control of the Union's bank accounts. This matter needs to be immediately addressed as the President has no authority nor has he received any approval to control the Union's funds and the real and personal properties of the Union.

5. The defendants' evidential response is found in the affidavit of Kingsley Ferguson (Ferguson) dated 9 July 2020. Whilst it is Ferguson's affidavit it is also executed by Ernest Burrows, Vice President, Philip Greenslade, Treasurer and O'Neil Thurston Executive Vice President. This, the defendants say, reflects that Ferguson's statements are supported by a majority of the Executive Board. According to Ferguson:

2. ... Insofar as the said Summons suggests that the affairs of the BPSU are being conducted without Executive Board approval I wholly reject the same. With respect to the Trustees of the BPSU, I maintain, as has been established by Resolution of the BPSU's members in Special General Meeting, the said Trustees are not members of the BPSU's Executive Board. I resist and reject the premise of, the Plaintiff's said application as it seeks to impose unconstitutional restrictions on myself as President of the BPSU charged with superintending its affairs and the Executive Board in its overall operation and management of the BPSU.

...

4. Contrary to the plaintiffs' assertions ... the Trustees are not in charge of authorizing any funds that are spent by the BPSU. That would make a nonsense of the Executive Board, and indeed my role as President and Chairman of the Board. It is this issue which is at the heart of the plaintiffs' allegation and desire to embroil the members of the BPSU's Executive Board in seemingly endless litigation. The officers of the BPSU are set out in Article 9 of the BPSU Constitution...
5. The business of the Union has been conducted throughout in accordance with the determination of the Executive Board and myself, as President. The repair and remedial works being carried out on the BPSU property in Grand Bahama are being carried out pursuant to decisions made by the Executive Board at our most recent Executive meeting on Thursday 24th June 2020 conducted via Zoom remote meeting platform with full complement of the Executive Board including three of the plaintiffs in attendance. While I cannot speak to what Mr Outten knew or didn't know, I can confirm that those plaintiffs herein

who are also members of the BPSU's Executive Board, were present at the said Executive meeting when decisions with respect to the said construction work were made. It is disingenuous therefore for the plaintiffs to be presenting this application on the basis that they did not know what was going on.

...

9. ...By the said Resolutions the members of the BPSU have in general special meeting addressed the substantive issues raised by the plaintiffs in this action as presented before the Court herein to date. ..
 10. As for the BPSU building in Freeport, the Executive Board does not require the Trustees approval and as noted above the plaintiffs cannot credibly assert that they were not informed of the Executive Board's decision regarding the building, having themselves submitted quotes for the Board's consideration. As we are in another hurricane season the building needed to be closed up and secured, and the Executive Board took the requisite decision to have the remedial works completed. Exhibited hereto and marked KF-1 are photographs showing the state of the building prior to the work commencing and some of the completed works, as has been approved by the Executive Board.
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6. At the hearing, Counsel for the plaintiffs sought to amend the Outten's affidavit by indicating that paragraphs 11-18 ought to be excluded and that the date in paragraph 8 ought to have been 18th June rather than 24th June. The defendants, understandably, objected to this on the basis that the evidence was given by Outten and ought only be changed by him either by supplemental affidavit or otherwise.
 7. In determining whether it should grant an interlocutory injunction, the Court will exercise its discretion having regard to the criteria set out in the celebrated case of ***American Cyanamid Co. Ltd v Ethicon Ltd [1976] AC 396***, which is the following:
 - (1) Whether there is a serious issue to be tried;
 - (2) Good prospects of success;
 - (3) Whether damages are an adequate remedy; and,
 - (4) Where the balance of convenience lies.

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

What the case [of American Cyanamid] clearly establishes is that there is "normally" no need on applications for an interim injunction to embark upon a mini trial on witness statements or affidavits to assess the quality of the claimant's case or the defendant's defences, or to assess the rival merits on a disputed, complicated question of law. This would be wasteful of the parties resources and those of the court. It would also be inconsistent with the objective of the court not to pronounce an opinion on the substantive merits of the case until trial. This objective encourages judges not to decide important applications on assessment of the apparent merits based on evidence, which is incomplete, and without the benefit of cross-examination, full disclosure of documents and detailed argument. These features made it fair and sensible to avoid assessment of the merits in American Cyanamid.....However, the principles are "guidelines", and not a "straitjacket", where the function of the court is to hold the position as justly as possible pending final determination of the triable issue at trial.

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

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

9. In January I dismissed the plaintiffs' application for injunction on the basis that the restraint sought then, restraining the holding of a general special meeting of the members, had nothing to do with the substantive complaint of improperly paying moneys to the NCTU. Regrettably, it appears that the same situation is occurring here. Whilst there is the hint of concern about the defendants acting unilaterally, there is nothing in the substantive action however, which relates to or concern the decision to repair the Grand Bahama property of the Union. As I had indicated in the January application, "*an interlocutory injunction ought to be connected to, or relate to, the relief sought in the substantive action. I am satisfied that this matter, arising since the commencement of the action is unconnected to the substantive action and could not sustain the grant of interlocutory injunctive relief.*" Litigation

cannot evolve as disagreements evolve between the parties. If there are new disputes then new proceedings must be pursued.

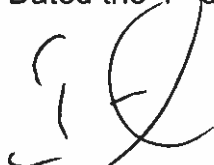
10. The plaintiffs say that the decisions are taken without the approval of the executive boards whilst the defendants say that the board has given the requisite approval. The plaintiff says that there are no meetings, although Coleby admits to being called to a Zoom meeting which she left. I cannot be expected to reconcile these evidential differences in an interlocutory application such as this.
11. It is also of note that nothing has been done to advance the substantive action. Mr Parker for the defendants, advances a very convincing submission, to which the plaintiffs have not responded. Since the commencement of this action the members of the Union, in a special general meeting, has confirmed and ratified the decisions of the defendants which the plaintiff's complain of in relation to the payments to the NCTU. Is there really anything left to adjudicate upon? And if so are the questions now purely academic.
12. Additionally one of the main planks of the plaintiffs claim is the involvement of the Trustees in the Executive Board's decision making. The plaintiffs say that they are to be included whilst the defendants says no. The constitution does not directly speak to this, but by implication it could appear that they are bare trustees acting only on the direction of the Executive Board. This seems to accord with the statutory functions of Trustees in the Industrial Relations Act. The members of the Union however, according to the evidence, have determined at the special called meeting that the Trustees ought not to be involved. It begs the question that if the members, who hold the ultimate power in the Union, has made a determination, whether there is really a serious issue to be tried.
13. The issue of damages in this application, should the defendants not be restrained, would be repaying any improper expenditure by the Union in repairing its Grand Bahama property. Whist this is not a loss to the plaintiffs themselves, it is clearly a

question of money. In this regard, I have not been persuaded, as I ought, that damages would not be an adequate remedy in this case.

14. On the question of balance of convenience, the restraining of the defendants will result in the Unions' building not being secured for a period, and during the hurricane season. The evidence, both through the defendants words and the pictures, which they say represents the view of the majority of the executive, demonstrates the need to secure the property for impending storms. After the recent experience of Hurricane Isaias passage through The Bahamas, including Grand Bahama, it is clear that the balance must lay in completing the securing of the Union's property.

15. In all the circumstances therefore, I will refuse the application for injunctive relief with costs to the defendants.

Dated the 4th day of August 2020.

A handwritten signature in black ink, appearing to be 'I Winder', written in a cursive style.

Ian Winder

Justice