



[2022] JMCC Comm 41

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00489

IN THE MATTER of Section 14 of the
Arbitration Act

AND

IN THE MATTER of an Application for the
Court to appoint an Arbitrator

BETWEEN	CECILE KENNEDY	CLAIMANT
AND	LIGUANEA PREPARATORY SCHOOL TRUST LIMITED	DEFENDANT

Injunction – Agreement to construct and operate nursery school- Termination of agreement- Whether compensation payable- Whether Defendant entitled to possession- Whether agreement provides for Arbitration- Whether real prospect of success in claim to have arbitrator appointed- Whether damages an adequate remedy- Balance of convenience.

Obika Gordon instructed by Frater, Ennis & Gordon, attorneys at law, for the Claimant.

Joerio Scott instructed by Messrs. Samuda and Johnson, attorneys at law, for the Defendant.

Heard: 13th December 2022.

In Chambers

COR: BATTS, J.

[1] On the 13th day of December 2022 having considered affidavit evidence, written and, oral submissions I granted an injunction until trial or until an earlier agreement. (in accordance with section 1(4) and/or, sections (3) and/or (4) under the heading “Termination”, of the agreement entered into between the parties). I then refused leave to appeal. I promised also to put my reasons in writing. This judgment fulfils that promise.

[2] The above stated order extended an injunctive order made on the 13th November 2023. On that date the Defendant, although represented, had not yet filed affidavits in answer. At the inter partes hearing, however, I also had the Defendant’s evidential response. The facts, as revealed from the affidavits, are as follows:

- I. The parties signed an agreement on the 31st July 2013 which was dated 22nd July 2013. It is entitled “*Liguanea Preparatory Nursery Department Agreement*” and will in this judgment be referred to as The Agreement.
- II. Pursuant to The Agreement the Claimant erected a building and structures and thereafter opened and operated a nursery school.
- III. A valuation report done in November 2022 indicates a value of \$42 million for the structures so erected, see exhibit CK 3 to Cecile Kennedy’s affidavit of 14th November 2022 in support of the application.
- IV. The school year has 3 terms: 1st week in September to 2nd week in December; 1st week in January to 2nd week in April and; 3rd week in April to last week in June.
- V. In or about September 2022,(the date is disputed as the Defendant alleges it was served on the 2nd September 2022, see paragraph 22 of the affidavit of Paulette Francis-McGregor dated 13th December 2022, whereas the Claimant has proffered two dates, one being the 5th September 2022,see paragraph 16 of Claimant’s affidavit in Support of Notice of Application dated 14th November 2022 and, the other being the 29th August 2022, see

exhibit CK5 to the same affidavit), the Claimant was served with a “Notice” which stated:

“NOTICE IS HEREBY GIVEN that, pursuant to the Liguanea Nursery Agreement, particularly section 1 clause 5 thereof, the Management and Board of Directors of the Liguanea Preparatory School Trust Limited terminate the same effective December 16, 2022.

FURTHER TAKE NOTICE that, without prejudice to the right to terminate under the aforementioned section and clause, the Management and Board of Directors rely on the grounds for Termination as indicated in the attached document.

BY ORDER of the Board of Directors and Management.”

- VI. A document entitled “Ground for Termination”, accompanied the notice and, contained seven alleged breaches which I will consider in due course.
- VII. The Defendant, by an affidavit of Paulette Francis-McGregor dated 13th December 2022, asserts several breaches by the Claimant of the Agreement and that:

“23. That the Claimant in many respects has been the author of her alleged risks and that to my certain knowledge the School has received complaints that the Nursery is not being operated professionally and that the education of the children is consequently being placed at risk”

- VIII. By letter dated the 21st September 2022 the Claimant’s attorneys wrote to the Chairman of the Board of the Defendant referring to the “Notice to Terminate” and denied the breaches alleged but also “without prejudice” offered to vacate on or about the end of July 2023. The letter referenced

Section 1 Clause 4 of the Agreement and raised the matter of compensation. This letter having been exhibited to the Claimant's affidavit constituted a waiver of any protections offered by the "without prejudice" nature of the communication from her attorneys.

- IX. The Defendant's reply, to that letter, came by letter dated 14th October 2022 from its attorneys. That letter flatly refused to entertain discussion of compensation because the Claimant "*had failed to give any account and has engineered the unprofitability of the operations of the Kindergarten School contrary to her obligation under the section 2 clause 2 and 8 as well as section 3 clause 6 of the agreement.*"
- X. In answer, the Claimant's attorneys, wrote a letter of 31st October 2022 requesting the referral of the matter to arbitration pursuant to "*Termination paragraph 3*", [which is to be found on page 5 of the Agreement]. Proposed arbitrators were put forward.
- XI. By letter dated 2nd November 2022 the Defendant's attorneys responded as follows:

"Please be advised that we do not have instructions to refer the matter to Arbitration. We reiterate our advice that our client has every intention of ensuring that your client vacates in accordance with the notice which was served on her and look forward to the premises being vacated on or before December 16 2022".

- [3]** The Fixed Date Claim, filed on the 14th day of November 2022, seeks the following relief:

"1) Pursuant to section 14 of the Arbitration Act, an Order appointing a Sole Arbitrator to determine the matters in dispute between the parties concerning the compensation

that the Defendant is to pay to the Claimant arising under a Contract between the parties entered into on or about the 31st July 2013 for the Claimant to construct and operate Liguanea Preparatory Nursery on premises occupied by the Defendant.

2) An injunction restraining the Defendant whether by themselves and/or their servants and/or agents from evicting, assaulting, molesting, annoying or otherwise interfering with the Claimant's occupation of the said property prior to the completion of Arbitration proceedings.

3) An injunction restraining the Defendants, whether by themselves and/or their servants and/or agents from dealing with the said property in any way prejudicial to the interest of the Claimant prior to the completion of Arbitration proceedings

4) Liberty to Apply

5) Cost to the Claimant

6) Such further or other relief as this Court deems just"

[4] Each Counsel filed written submissions and authorities and were permitted to make oral submissions. In the middle of their submissions the Defendant's counsel requested an adjournment. I refused the application as the Defendant had had ample time to address the matters raised, in the Notice of Application and the affidavits filed, by the Claimant. I will not repeat the parties' respective submissions so the reasons for my decision can be shortly stated.

[5] At this interlocutory stage I am not required to make any factual findings and, save for one important area, I will make no observations one way or the other on the evidence. I adopt the three stage test for interlocutory injunctive relief which is now

well established, see *In Re Mystic Mountain Limited: Karibukai Limited v Sky-High Holdings Limited et al [2022] JMCC Comm 38 (unreported judgment delivered 11th November 2022) at paragraphs 29 and 30.*

[6] It is manifest that the Claimant has demonstrated that there is a serious issue to be tried. The arguable questions are, whether the Claimant has a right to have the matter of compensation arbitrated and, whether until then she has a right to operate the school. In this regard the relevant terms of the Agreement are as follows:

“1. The Liguanea Preparatory School Nursery Department will be fully incorporated into the operations of the school with regards to its administration, and operate as a department of the School.

2. The Owner/Operator will construct a temporary structure with the agreed dimensions as stated in Appendix 1 and shall build same according to the relevant rules and regulations associated with the Lease Agreement between the School and the Commissioner of Lands currently held with the School. The building will be constricted and furnished according to the standards of the Early Childhood Commission and it shall receive the approval of the relevant approval body/agency. It will be fully furnished with appropriate and safe furniture in agreement with the School.

3. The building structure, fitting, fixtures, equipment (including playground equipment and toys), belong to the Operator.

4. In the event that the need to terminate this Agreement arises, such termination shall be done with due notice given

by the terminating party, prior to the anticipated termination date. In the event of termination, the Operator will receive compensation (for the building and fixtures) based on an agreed depreciation value. The School shall be given the option to purchase the toys, equipment and other movable items. In the event that this is not desirable, the Operator may dispose of these items. In the event that the School opts to continue the Operations of the Nursery after termination of this Agreement, there should be a negotiated amount for compensation to the Owner/Operator for passing on the title to the business as a going concern to the School.

5. No less than one terms' notice should be given by either side to terminate this Agreement.

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8. The Agreement shall be in effect for a term of 15 years, with the option to renew for an additional term, upon the mutual agreement of the parties in writing

9-13....

14. The operations of the Nursery should always be to add value to the offerings of the School. At all times a high standard of delivery of child care and educational development shall be provided by the Nursery Department.

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Section 2 Financial

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2. *The Nursery should not be a liability to the School, all expenses appurtenant and relevant to the operations of the Nursery shall only be paid from the income of the Nursery*

3. *Tuition Fees for the Nursery should be paid directly to School and collected monthly in advance. Such Fees shall be determined by the Owner/Operator based on market rate, Operational cost and viability. These transactions shall be accounted for in separate accounting records.*

4-9.....

10. *On an annual basis (end of June each year) after all expenses excluding Capital expenses and any expenses not in the agreed budget of the Nursery Department have been cleared, such remaining surplus shall be shared between the Owner and the School on 50%:50% basis.*

Section 3: Operations

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Termination

1. *Should the decision to terminate the Agreement be on the part of the School, and the School wishes to maintain the operation and staff of the Nursery, the following shall apply:*
2. *The School shall pay the Owner/Operator for the depreciated value regarding the construction of the Nursery and furniture and equipment in instalments, not exceeding 36 months. Annual interest to be negotiated*

on the amount provided that all the funds are paid from the Nursery project.

3. *In the event that the parties cannot agree on the above, the matter will be referred to an independent Arbitrator as agreed between the parties. During the period the Nursery shall continue to operate until mutual agreement is reached.*
4. *In the event that no amicable arrangement regarding the options above can be reached, upon termination, it should be understood that the structure shall remain standing and intact and in full Operation, notwithstanding the termination of the terms of this Agreement, with the option for operations of the Nursery to be passed to a duly designated party, upon mutual agreement in writing between the parties to this Agreement.”*

[7] At the trial of this matter a final decision, as to whether the parties intended arbitration to apply to the circumstances of this case, will have to be made. At this interlocutory stage, it certainly is apparent that, there is an arguable case that the parties so intended. The agreement, as detailed as it is, makes no express provision for termination, or immediate delivery up of possession, for cause. The Agreement also distinguishes between termination of the agreement, on one hand and, the operation of the nursery on the other. It therefore provides, in certain circumstances, for the operation of the nursery by an agreed third party until the matter of compensation is resolved. I hold, on reading the agreement in its entirety, that there is a real prospect of the Claimant succeeding with its case that the issue of compensation is to be resolved by arbitration and that the nursery is to remain operational until then. In this regard it is noteworthy that whereas, the Defendant has not stated an intent to close the nursery after the Claimant delivers up possession, neither has it stated an intent to continue operating the nursery as is.

- [8] The Claimant will not be entitled to an injunction if damages are an adequate remedy. In this regard the Claimant asserts that if forced to vacate “severe” hardship will be caused to herself, her staff, the children and, parents of the nursery. It will cause “*a significant amount of disruption, uncertainty and instability at the nursery*”, and that parents will be forced to find another nursery in the middle of the school year. There is a further reason why damages cannot adequately compensate her. The Agreement, on the Claimant’s interpretation, contemplates and/or provides for the continued operation of the nursery until adequate arrangements for compensation have been arrived at. Therefore if correct, but she is forced to leave and the nursery is closed, that term will have been breached. If the injunction is refused but the Claimant succeeds at trial she will have lost the benefit of an operational transfer, a smooth transition and, the nursery being valued as a going concern while being operated as such. It is difficult to see how damages can compensate for that lost opportunity.
- [9] Relevant to the question, whether an award of damages is an adequate remedy, is the Defendant’s ability to pay such damages. The Defendant’s affidavit put forward no such indication. I turn to the matter of the Claimant’s undertaking as to damages and her ability to support it. The Claimant has proffered a valuation report which indicates the building she constructed has a value of approximately \$42.5 million. The Agreement makes it clear this belongs to her. It therefore suffices to support her undertaking as to damages. This is particularly so as the Defendant has not demonstrated their loss. The nursery has been operated for 9 years. It is alleged that the Claimant breached The Agreement in many respects and failed, in particular, to transition students from the nursery to the preparatory school. They allege also that the nursery has, in breach of The Agreement, become a liability to the school. These are matters, it seems to me, which can be assessed and computed. I pause to observe however that, given the clear terms as to separation of accounts, payment of nursery fees to the school and, expenses being paid from earnings of the nursery, it is difficult to discern how the nursery became a liability to the school.

- [10] If however, contrary to my finding, the Defendant's potential losses are incalculable and therefore the Claimant's undertaking as to damages is inadequate to protect, for example, the loss of reputation of the Defendant it means I must go on to consider the overall justice of the case. This is because the question, of damages as an adequate remedy, would be equally weighted both for and against injunctive relief.
- [11] The balance of convenience, that is the overall justice of the case supports the grant of injunctive relief. In the first place it is consistent with the parties' apparent intent as stated in The Agreement that, pending the determination of compensation for the Claimant's investment, the nursery remain operational either by the Claimant or by an agreed third party. Secondly, when one considers the interest of the children, and the desirability of as little disruption as possible, maintenance of the status quo is to be preferred. The dispossession of the Claimant, with no indication as to the identity of her replacement and/or whether or how the nursery will continue to operate, would most likely result in some disruption. In this regard at paragraph 28 of her affidavit, dated 13th December 2022, Mrs Paulette Francis-McGregor states that by failing to "*cease operations*" the Claimant is preventing the school from "*exploring options to engage another operator*". This is an indication, that continuous operation of the nursery is not contemplated, because it is only after the Claimant vacates that her replacement will be sought. Therefore, it is reasonable to assume, until someone is found to operate the nursery there will be an interruption of service. This cannot be in the best interest of the children or, at any rate, it does not appear so at this interlocutory stage.
- [12] I consider also the several breaches of The Agreement alleged. The Claimant is alleged to have: failed or neglected to reimburse the school with a proportion of operational expenses; operated as a law unto herself; wilfully induced the nursery into unprofitability; operated the nursery without adding value to the school; failed to transition students to the preparatory school; under reported the number of children in the nursery; failed to make purchases in the name of the school; failed to honour obligations re water, sewage, security, maintenance, disposal of refuse

and, marketing; failed to maintain proper inventory and; failed to operate the nursery professionally. It is also alleged that, the structure of the building is termite infested and requires refurbishing and that the school suffers from severe reputational damage by her continued occupation. These assertions are mostly denied by the Claimant. They may, I suppose, form the basis of set off or counter claim in any arbitration or litigation to follow.

- [13]** The overarching question for me is however whether there is any danger to the children. The valuation report, which is the only objective evidence at this interlocutory stage, states that:

“5.6 The building is approximately 9 years old, well maintained and in good state of repair. We have not conducted a structural survey of the building and are therefore not in a position to comment on latent defects, if any. However at the time of inspection the building was in need of minor repairs including decorative painting of eaves at the rear.

For valuation purposes the building has a remaining life of 60 years assuming good maintenance given throughout the period.”

This suggests that the children are in no physical danger from the structure. There is no evidence that the nursery is in breach of any academic, educational, health or, other standard established by law. Nor is there evidence of any such report or investigation launched. There is no particularity given to the alleged complaints by parents, see paragraph 23 of the Paulette Francis-McGregor affidavit. There is therefore no basis to say that the childrens’ education is at risk by the Claimant’s continued operation of the nursery.

- [14]** The Defendant’s complaints largely revolve around financial matters, an apparent tendency of the Claimant to operate independently and, her not transitioning

students to the Defendant's preparatory school. These questions, at this interlocutory stage, do not override the apparent intent, gleaned from the words of The Agreement, that upon termination the Claimant or an agreed person would operate the nursery until either, the matter of compensation was resolved or, appropriate arrangements in that regard were arrived at.

- [15]** The overall justice of this case supports, overwhelmingly, a maintenance of the status quo until the questions in the Fixed Date Claim are determined. The questions being whether the matter should be arbitrated and, if so, whether an injunction until completion of the arbitration is to be ordered.
- [16]** For all the reasons stated above I granted injunctive relief. Leave to appeal was refused as I see no real prospect of the Defendant persuading an appellate court to do otherwise.

David Batts
Puisne Judge