[2013] JMSC Civil 185

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2013 HCV 06428

BETWEEN	AURTHUR WILLIAMS	CLAIMANT
A N D	ANDREW HOLNESS	DEFENDANT

IN CHAMBERS

Mr. Wentworth Charles and Ms. Georgia Buckley instructed by Wentworth Charles and Company for the Claimant.

Mrs. Georgia Gibson Henlin and Ms. Taniesha Rowe instructed by Henlin Gibson Henlin for the Defendant.

Heard: November 21 and 25, 2013

Injunction – Interlocutory Application – Restraining Defendant from making any nomination for appointment of a new member of the Senate.

P.A. Williams, J.

[1] The claimant seeks the following order:-

An injunction restraining the Defendant from making any nomination for the appointment of a new member of the Senate of Jamaica which would purport to fill alleged vacancies created by his use of undated resignation letters of two Senators including the Applicant, pending a final determination of this matter by the court or agreement between the parties.

After the matter commenced, Mrs. Gibson-Henlin raised concerns about the inclusion of words "agreement between the parties" and Mr. Charles agreed they were inappropriate.

[2] It is well recognized that the right to get an interlocutory injunction is premised on the applicant having a substantive cause of action. In this case the claimant is seeking declarations surrounding the usage of undated letters which were used to facilitate the resignation of two (2) Senators thus rendering their seats in the Senate vacant.

[3] Although in the Fixed Date Claim Form containing the orders requested, there is the inclusion of the order for an injunction, it is in the identical terms of the order sought at this interlocutory stage. It includes the request for the injunction until trial i.e. pending a final determination of this matter. This suggests that there is no permanent injunction or final remedy of this nature being sought. It can but be assumed that the inclusion of this order was erroneously done. It is, of course, to be noted that, in any event, our rules provide for a circumstance such as this.

CPR 17.1 (4) states:

> "The court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind."

[4] The case of **Newport Association Football Club Ltd. and Ors. v. Football Association of Wales** [1995] 2 All ER 87 provides a useful background to the matter before the court. In that case the plaintiffs were football clubs who applied for an interlocutory injunction enabling them to play 'at home' games at grounds in Wales during a football season pending trial of an action in which they sought –

(i) declarations to the effect that any decision of the defendants to exclude the plaintiff football clubs from playing at home in Wales was void as being in unreasonable restraint of trade and

(ii) injunctions to prevent the defendants continuing to act in unreasonable restraint of trade.

[5] Jacob J at page 93 of the judgment had this to say:-

> "In a number of cases the courts have referred to the possibility of the grant of an injunction at trial when the only 'cause of action' was for a declaration that an arrangement is void. Thus Lord Upjohn said in **Pharmaceutical Society of GB v. Dickson** [1968] 2 All ER 686 at 701
>
> "A person whose freedom of action is challenged can always come to the court to have his right and position clarified subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case, in the judicial exercise of the discretion the court may declare the right of the parties and by way of ancillary relief grant injunctions, and so on."

[6] Further at pages 94 to 95 he said:-

> "Once one recognizes that a claim for a declaration is a cause of action then I see no reason to say that the injunction can only be granted once the court had determined the claim. Where there is a cause of action for invasion of a right the court does not need to wait until trial – to find out whether the claim is good – before it has power to grant an injunction. In can do so before trial simply on the basis that the claim may be good so, also on my judgment, where the claim is for a declaration of rights. The injunction, whether at trial or interlocutory, is in support of a cause of action on its widest sense".

[7] This instant request for an injunction is viewed as being ancillary to the claim for declaration in so far as the claimant is seeking to prevent the defendant from, in effect, filling a seat in the Senate which was made vacant by the claimant's resignation being submitted by the defendant to the Governor General. The claimant to my mind cannot be claiming any rights to that seat, whether legal or equitable. He is however, maintaining that given his stated position that he would not resign as requested he had revoked the said letter of resignation. Thus the question would become whether he has in fact resigned such that the seat is indeed to be regarded as vacant.

[8] It is now accepted that in giving judgments in interim injunction cases the usual starting point is **American Cyanamid Co. v. Ethicon Ltd.** [1975] 1 All ER 504 where

Lord Diplock laid down guidelines on how the court should exercise its discretion. The principles gleaned from this case require primarily a consideration of the following:-

a) Is there a serious issue to be tried?

b) Would damages be adequate remedy?

c) Where does the "balance of convenience" lie?

Is there a serious issue to be tried?

[9] As already noted, the claim now before the court arises from the usage of an undated letter of resignation. The usage however, to my mind cannot be divorced from the circumstances of its creation. However in considering this matter, I am of course obliged to bear in mind the words of Lord Diplock at page 510 of the **American Cyanamid** case [supra]; and indeed both counsel in their submissions made reference to this:-

> The use of such expressions as "a probability", "a prima facie case" or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. "

[10] The genesis of the letter therefore is from the desire of the defendant as the Leader of the party in opposition to carry out his constitutional duties – one of which is to nominate members for appointment to the Senate. The Constitution at section 35 states:-

(1) The Senate shall consist of twenty-one (21) persons, who being qualified for appointment as Senators in accordance with this Constitution, have been so appointed in accordance with the provisions of this section.

(2) Thirteen (13) Senators shall be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister, by instrument under the Broad Seal.

(2) The remaining eight (8) shall be appointed by the Governor-General, acting in accordance with the advice of the Leader of the Opposition, by instrument under the Broad Seal.

[11] From the wording of the section it is not difficult to see why some might be lead to say that it is the Prime Minister or the Leader of the Opposition who effectively appoints Senators because once these persons advise the Governor-General as to their choice for the position, the Governor-General will have to act in accordance with that advice and appoint accordingly. Further, the Constitution sets out the requirement for membership of the Senate so far as it relates to citizenship and residency. It provides no guidance as to what other criteria should be used in governing the decision of those entrusted with the responsibility to give the advice as to who should be appointed.

[12] The defendant in his affidavit explains that upon assuming office as Leader of the Opposition, concerns were expressed to him about the unity and stability of the Opposition Senators having regard to its history while in opposition. The claimant was entrusted with the important position of Chief of Staff in the office of the Leader of the Opposition and the defendant says he agreed to appoint him Leader of Opposition Business in the Senate. The concerns about unity and stability were shared with the claimant. The fact that some concerns were indeed shared with him was not denied by the claimant. However he asserts that the concerns related to one issue – that of the Caribbean Court of Justice and who would therefore, as Senator, be likely to vote other than in accordance with the official position of the Jamaica Labour Party on that issue.

[13] The claimant asserts further that after discussions it was agreed that he would prepare letters to be signed by persons who were to be recommended for appointment. The defendant describes it that the claimant "in his capacity as an attorney-at-law and leader of government business in the Senate, he devised a scheme which he advised would preserve the stability and unity in the Opposition Senate, which he further advised was constitutional and which he would present to the Opposition Senators." It must be acknowledged that neither party purports to give credit to the contents of the letters subsequently prepared by the claimant to anyone other than the claimant himself. There is no suggestion that the defendant dictated or indeed had any imput in what was contained therein. The defendant on the contrary would seem to be suggesting that he relied on the claimant in his capacity within the party, the Senate to be comprised; and his profession as an attorney-at-law.

[14] The claimant said the letter was to be used by the defendant in the event of any member appearing to take a view or position on the issue of the Caribbean Court of Justice other than in accordance with the position of the Jamaica Labour Party. In the final preparation it was three (3) letters that he prepared. The letters were exhibited by both parties and it is clear that they do not specify any single issue as alleged by the claimant but gives the defendant very wide and exclusive authority to use the letter of resignation as he saw fit.

[15] The Letters were as follows:-

(i) To the Governor-General

"I hereby tender my resignation as a Member of the Senate of Jamaica with immediate effect."

The letter was signed by me and delivered to the Leader of the Opposition at the time of my appointment to the Senate, on the clear understanding that he is authorized to date this letter and deliver to your Excellency at any time he deems necessary."

(ii) To the Governor-General

> "I hereby tender my resignation as a Member of the Senate of Jamaica with immediate effect."

(iii) To the Leader of the Opposition

> "Upon you advising the Governor-General of Jamaica to appoint me as Senator, I have signed and delivered to you an undated letter of resignation as a Senator. You are hereby authorized at your sole discretion to date and deliver to the Governor-General at any time you deem necessary."

[16] The claimant then acknowledges that it was he who had the other relevant persons sign. There is an affidavit from Christopher Tufton who confirms the fact that concerns existed. The concerns were explained to him by the claimant in the terms the claimant has expressed them to be and it was the claimant who told him that the Leader of the Opposition required each person who was to be recommended for appointment as a Senator to sign them. Mr. Tufton further explains that having enquired of the claimant and having been advised by him that all other persons to be recommended had already signed; he too signed "but after expressing great reservations". The defendant supports this fact that he was not directly involved in securing the signatures to these letters. As he puts it "consequent the scheme devised and executed by the claimant, I received the letters........which were created and drafted by the claimant."

[17] It is against this backdrop that the orders being sought must be considered to see if there are indeed serious issues to be tried.

[18] Firstly, there is a request for a declaration that an undated letter of resignation and a letter authorizing the defendant to date and use the same which had been signed by the claimant were used by the defendant other than for the purpose for which they had been given and therefore were unlawfully used and accordingly are void and of no effect.

Given the fact that the letter composed by the claimant does not speak to any purpose for it usage, this matter would involve an assessment of the credibility of the parties. The admitted hurdle the claimant would have to overcome is answering this

question:- since the concern as he understood it to be was limited to just one issue, why did he in drafting the letters not limit the usage to that issue?

[19] The next relief sought is a declaration that based upon the claimant's stated position that he would not resign as requested he had effectively revoked the said letters.

Importantly this matter again touches and involves issues of credibility. However, the wording of the letter seems to envisage a situation where the signatory of the letter may not have wished to resign, but gave the defendant authority to do as he saw fit. Also, considerations may have to be given for the fact that the letters were executed as an agreement between the parties that in exchange for the appointment offered and accepted by the signatory he would give the defendant the authority to use it "at any time he deem fit" "and at his sole discretion" to secure the resignation of that Senator. Having completed his part of the agreement, the defendant is now faced with the situation of the claimant seeking to resile from it in the circumstance where it must be considered if it would be just to do so.

[20] The third relief being sought is a declaration that the very fact of requesting these undated letters of resignation from all persons to be appointed as Senators under nomination of the Leader of Opposition is contrary to Jamaica's constitutional scheme and is inconsistent with the Constitution. It is convenient to consider the fourth relief sought at this time also. It is for a declaration that the undated letters of resignation and the manner of their use are void as being inconsistent with the Constitution by seeking to give to the defendant the right or power to effect the resignation of the claimant at the defendant's volition and timing.

In his submissions on behalf of the claimant, Mr. Charles notes that the Constitution does not contain any provision which authorises the defendant as Leader of the Opposition to terminate the appointment or procure the applicant's seat, as a Senator, be rendered vacant. Further he submits that the action which has been taken by the defendant and which the defendant threatens to take is in consistent with the Constitution because in effect it is granting to the Leader of the Opposition a power to

terminate the membership in the Senate of persons who have no decision to resign and on grounds not specified in the Constitution.

[21] At section 41 of the Constitution is found the only section that speaks to the tenure of office of Senators and Members of House of Representative. It addresses the circumstances under which the seat of a member of either House shall become vacant. It is nowhere in the Constitution expressly stated that an appointment once made to the Senate can be revoked. It is therefore clearly in believing this that the letters were prepared, signed and given to the Leader of the Opposition. He saw them as being done to address his need to ensure unity and stability in the Senate. The creator of the letter, the claimant, saw it as a need to ensure unity in views, position and ultimately a vote as regards one issue only. In any event, it was giving the defendant the authority to control who remained sitting, on his advice, in the Senate and the circumstances under which they are permitted to remain.

[22] Notably the submissions made by Mrs. Gibson-Henlin now on behalf of the defendant, is contrary to the belief that he would be unable to revoke appointments. Indeed she urged that the power to appoint included the power to revoke. Authority for this proposition she insists is to be found in Section 1 (12) of the Constitution when read together with section 35 of the Interpretation Act.

Sec. 1 (12) of the Constitution reads:-

> "The Interpretation Act, 1889 as in force on the appointed day shall apply with the necessary adaptations for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting, and in relation to Acts of Parliament of the United Kingdom."

Sec. 35 of the Interpretation Act reads:-

> "Whereby, or under any Act a power to make any appointment is conferred, then unless the contrary intention appears, the authority having power to make the appointment shall also have power to remove, suspend, reappoint or reinstate any person appointed in exercise of the power."

[23] Questions as to whether the section of the Interpretation Act is indeed relevant will not now be addressed. The point is noted however, since it is the assertion of the defendant through the submission, that since the power of appointment in the Constitution includes the power of removal even if the court were to grant the injunction sought, it would be an exercise in futility.

[24] The claimant, as creator of the letter, on whom the user of the letter undisputedly relied, is now saying it is inconsistent with the terms and intendment of the Constitution for seeking to improperly permit the latter to seek to interfere with the tenure of the Senator. While the Constitution does not speak to this, it certainly has become the expectation that members of the Senate must be able to engage in debate freely and fairly and must be without concerns as to whether the Opposition Leader would deem it necessary to use their undated letter of resignation to seek to secure the vacating of their seat in the Senate. There is in effect no constitutional requirement that the Senate be independent in its thinking or that there be unity in their approach to all matters along party lines. The question therefore of what is the spirit of the Constitution as it relates to the operation of the Senate would have to be addressed.

[25] Thus it seems there would be an inescapable outcome of any consideration of the manner of the use of the letters, a consideration as to the position of anyone who voluntarily signed and thereby agreed to be bound by the implications of the letters. Indeed the Constitution does provide for determination of questions as to membership in Parliament.

Sec. 44 (1) of the Constitution states inter alia:-

Any question whether ...

(a) any person has been validly elected or appointed as a member of either House or

(b) any member has vacated his seat therein or is required under the provisions of subsection (3) or subsection (4) of section 41 of this Constitution to cease to exercise any of his functions as a member,

shall be determined by the Supreme Court, or on appeal by the Court of Appeal whose decision shall be final, in accordance with the provisions of any law for the time being in force in Jamaica..............

[26] In other words it would seem to me that the addressing of the unconstitutionality of the letter would necessitate a consideration of the status of the persons who relied on the letter to secure their appointment in the Senate. As Mr. Charles so convincingly argued, the termination of the office of a member of one of the Houses of Parliament on the basis of an undated letter which would make the tenure unsure and subject to termination other than as contemplated by the Constitution may well be contrary to the public interest and inconsistent with the scheme of the Constitution. The correlated matter must be whether any person sitting in the office of a member of one of the Houses of the Parliament on the basis of this undated letter of resignation is contrary to public interest and inconsistent with the scheme of the Constitution.

[27] The next relief sought is for a declaration that by using the undated letters of resignation for the reason that the claimant did not support the defendant in the election for the leadership of Jamaica Labour Party is inconsistent with the Constitution of the Jamaica Labour Party and the Constitution of Jamaica.

In his submission Mr. Charles notes that under the constitution of the Jamaica Labour Party there is a right of members to contest leadership and to support, oppose or remain neutral in such contest. Certainly therefore, it would be the claimant's right as a member of that party to act in a manner he deemed appropriate without now seemingly being removed from the Senate for any failure to act as the leader would have expected. However, this is one area where the inconsistency with the Constitution of Jamaica is not immediately clear.

[28] The final declaration sought is that the use of the undated letters of resignation on the basis that the claimant did not support the defendant in the election for leadership of the Jamaica Labour Party contravenes the claimant's constitutional rights

to the freedom of conscience, association and expression protected by section 13 (3) (b) (c) and (e) of the Charter of Rights.

The Charter of Fundamental Rights and Freedom – Chapter III of the Constitution as amended in April of 2011 does now provide that a provision of this chapter binds natural or juristic persons if, and to the extent that it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right. See Sec. 13 (1) (5). Hence, to pursue such a claim against the defendant in person is now possible. The claimant thus would bring himself within the provisions of section 19 of the Constitution i.e have the necessary standing to bring such a claim.

Section 19 (1) states:-

> "If any person alleges that any of the provisions of this Chapter has been ....or is likely to be contravened in relation to him then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

[29] It is the opinion of Mrs. Gibson-Henlin that the claim is frivolous and vexatious and the claimant's "claim" amounts to a claim to a proprietary right to a Senate seat or breach of an oral contract not to remove him in these circumstances. The former she calls ludicrous and the latter, she says is not supported by any evidence. She opines further that what triggered this claim is an internal party squabble following on an internal party election and not a constitutional crisis.

[30] Whilst it is true that this matter may well have been triggered by the internal party election, what follows therefrom has given exposure to matters that are neither "frivolous" nor "vexatious". From my analysis of the claimant's statement of case and affidavit in conjunction with the supporting affidavit of Christopher Tufton, I find that the threshold has been met – there are serious questions to be tried.

<u>The question as to the adequacy of damages to the applicant</u>

[31] Mr. Charles submits that this is not a situation in which damages can be an adequate remedy. Indeed, in these circumstances it would be fair to say that the

claimant's undertaking in damages also would not be adequate protection. This is a matter where the wrong, if it exists, would be irreparable and difficult to assess.

[32] In the **American Cyanamid** case [supra] Lord Diplock addressed how the court may proceed in circumstances such as these.

At page 511 he said:-

> "Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. 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, and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application.

The balance of convenience

[33] The opinion of the Privy Council delivered by Lord Hoffman in the **National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.** at [2009] 1 WLR 1405 is the most useful place to start (in this aspect).

At page 1409 paragraph 16 he said this:-

> "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 freedom of action will have consequences for him and for others, which a court has to take into account. 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 product a just result."

And at paragraph 17

> "In practice, however it is often hard to tell whether 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 have been granted or withheld as the case may be. The basic principle is that the court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other."

[34] Considering firstly the prejudice claimant may suffer if no injunction is granted, one has to recognize that this is not a matter that will directly affect his livelihood or employment. He does not indicate the possibility of or the existence of any prejudice. This was also not addressed by Mr. Charles in his submissions. However, in his affidavit the claimant speak to the possibility of damaging the reputation of the Senate. In his affidavit of urgency in support of the without notice application Mr. Charles speaks to irreparable damage to the image of Senate. Both of these were raised in urging the need for no notice of the application being given and the application being heard urgently. Those concerns were rendered redundant and in the circumstances I doubt it would have been appropriate for this matter to have been dealt with exparte.

[35] The wording of the injunctive relief sought seemingly concedes that there now exists a vacancy in the Senate – even if "alleged" is the manner they describe it. There is no certainty that after the determination of the matter the claimant will retake his position in the Senate even if the declarations are made as he has requested. Certainly the defendant, in seeking to exercise the authority willingly giving to him to facilitate the claimant's resignation from the Senate, has demonstrated his willingness to have the claimant remain in the Senate as one of his eight (8) nominated representatives of the party he was elected to lead.

[36] In considering the prejudice the defendant may suffer if the injunction is granted, it is to be also recognized that while his employment or livelihood is not likely to be affected, what is to be restrained would be his constitutional duties. In his affidavit he notes that until the claimant is replaced or reappointed, the Opposition only has seven (7) Senators to the Government's thirteen (13) and this weakens the minority caucus and makes it more difficult for the Jamaica Labour Party to carry out its mandate in the public interest in the Senate. Further, he urges that if he is prevented from making one of the eight (8) appointments contemplated by the Constitution, then the constitutional provisions as to the Senate make-up will have been thwarted and greater prejudice will be caused to him in his capacity as Opposition Leader; to the Jamaica Labour Party and the hundreds and thousands of unnamed third parties who voted for the Jamaica Labour Party in the general election with the legitimate expectation that the Opposition Leader would be able to appoint eight (8) Senators at the sole discretion of the Opposition Leader.

[37] I find this to be a compelling argument. It is however not limited to the expectations of the Jamaica Labour Party but to the entire nation. It is therefore appropriate that the defendant goes on to consider the expectations of the nation when he states that the nation could suffer weakening of its democratic traditions and constitutional institutions should this order be granted. Indeed, he concluded that any order that prevents him from exercising his Constitutional authority in his capacity as Opposition Leader is likely to constitute a fetter on the exercise on his power of appointment under the Constitution and would threaten all other powers thereunto enabling and for the proper functioning of the democratic institutions thereunder.

[38] In the case of **Smith v. Inner London Educational Authority** [1978] 1 All ER 411 the court considered how to approach claims against public authorities and held that they should not be restrained from exercising their statutory powers and duties unless the claimant had extremely strong case on the merits.

[39] Extending that principle to the instant matter is to my mind justified. The restraining of a public official from carrying out a Constitutional duty must be exercised with caution especially where it impacts on the proper functioning of the Parliament. Although the present situation is being brought about by the actions of the defendant, the role of the claimant cannot be ignored. It could be said that the effort was on both their parts to create a situation to circumvent the right for a Senator to resign only when he truly sees fit. However, this does not detract from the fact that there would be great prejudice to be suffered by seeking now to fetter the Leader of the Opposition in carrying out his duty to ensure that the composition of the Senate is in keeping with the Constitution. This prejudice to my mind does in fact outweigh any prejudice the claimant would suffer.

[40] I conclude therefore that the injunction requested ought not to be granted. The Notice of Application dated November 19, 2013 is hereby dismissed.
No order as to cost.