

BARBADOS

CV.0663/2015

SUPREME COURT OF BARBADOS

HIGH COURT OF JUSTICE

BETWEEN:

**DR. LATOYA JORDAN
DR. SHEMICA MAYERS
DR. JAMAILA PRESCOD
DR. JANELLE WELCH**

APPLICANTS/CLAIMANTS

AND

**QUEEN ELIZABETH HOSPITAL BOARD
MINISTER OF EDUCATION, SCIENCE,
TECHNOLOGY AND INNOVATION
UNIVERSITY OF THE WEST INDIES
BARBADOS MEDICAL COUNCIL
MINISTER OF HEALTH**

FIRST RESPONDENT/DEFENDANT

SECOND RESPONDENT/DEFENDANT

THIRD RESPONDENT/DEFENDANT

FOURTH RESPONDENT/DEFENDANT

FIFTH RESPONDENT/DEFENDANT

Before the Honourable Justice Randall I. Worrell, Judge of the High Court

2015: 09, 12 June

17 Date of Hearing

Mr. Ralph A. Thorne QC. for the Claimants

Mr. Ivan Walters for the First Defendant

Ms. Deidre Gay-Mckenna with Mr. Jared Richards for the Fifth Defendant,

JUDGMENT

[1] The Claimants in this matter have made an application to the court for interlocutory injunctive relief pending the outcome of their Application for

Judicial Review of the First Defendant's decision not to admit them into the Internship Programme at the Queen Elizabeth Hospital. In fact the Applicants have come seeking Injunctive Relief as follows:

(1) An injunction to cause the First and/or Fifth Respondents/Defendants to postpone any consideration of applicants other than the Applicants/Claimants into the Internship Programme due to commence on or about July 1st 2015 at the Queen Elizabeth Hospital during the course of these proceedings or until further order.

(2) Further and/or alternatively an injunction to cause the first and/or fifth Respondents/Defendants to admit or first admit the Applicants/Claimants into the Internship Programme due to commence on or about July 1st 2015 at the Queen Elizabeth Hospital during the course of these proceedings or until further order.

Background

[2] The Applicants completed their course of studies in the Medical Faculty of the University of the West Indies and were awarded the MBBS degree in 2014. The Applicants claim that having completed this course of study they expected that upon graduation from the faculty of Medical Sciences in June 2014 that they would be fully qualified and expected:

(a) That their internship would begin in July 2014.

(b) that at the end of their expected internship they would have received a pre-registration certificated sign by the various heads of department and sent to the Director of Medical Services at the Queen Elizabeth Hospital.

- (c) That the Director of Medical Services would have given a “certificate of internship completion” to be taken to the Registration Department to be licensed as a medical practitioner.
- (d) That their expectations have been defeated and approximately one year later they have been offered no hope that they can become fully qualified having been successful in their MBBS finals in June 2014.
- (e) The Applicants therefore fear that as each of them stipulates “my career will be terminated at this stage where I will probably never be able to become a fully qualified medical doctor.”

[3] Basically the claim of the Applicants, based on their affidavits is that they had a legitimate expectation for acceptance into the Internship Programme at the Queen Elizabeth Hospital. They also claim that the Respondents in this matter, in performing their duties, have acted in breach of the principles of natural justice and have exercised discretion unreasonably, irregularly, arbitrarily improperly and in bad faith as a result of which “I am now led to believe that I am at risk of being permanently excluded from the Internship Programme at the Queen Elizabeth Hospital”.

[4] The Applicants together state that they have exhausted all other options of applying for enrolment into all other internship programmes in the countries in which they are eligible. They have stated that they were unsuccessful because all of the places were taken by others including the nationals of those countries who were given first choice.

[5] It is in the above mentioned context that the Applicant/Claimants have come before this court to seek injunctive relief. The Claimants' affidavits have been met in response by the affidavit of Dr. Clyde Cave for the First Respondent.

[6] Although this matter is at the interlocutory stage this court in my opinion, while not carrying out a detailed inquiry into the merits or otherwise of the Applicants and First Respondents case, is entitled to have regard to the evidence placed before it, noting all the while as per Lord Diplock in **American Cyanamid Co. v. Ethicon Ltd** – 1975 AC 396 at page 406 –

“In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the Plaintiff's ultimate success in the action at fifty percent or less but permitting its exercise if the court evaluated his chances of more than fifty percent”.

[7] After reviewing the authorities Lord Diplock stated further: -

“...Nevertheless this authority was treated by Graham J. and the Court of Appeal in the instant appeal as leaving intact the supposed rule that the court is not entitled to take any amount of

the balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence than is before the court at the hearing of the application the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction”.

[8] Lord Diplock continued

“Your Lordships should in my view take this opportunity of declaring that there is no such rule. 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 otherwise that there is a serious question to be tried”.

[9] In further dealing with this Lord Diplock continued:-

“It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to the 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”.

The Approach of the Court

[10] Section 44 (b) of the Supreme Court of Judicature Act Cap.17A confers a discretionary power on the High Court to grant a mandatory or other injunction per Burgess, JA in **Toojays Limited v. Westhaven Limited** Civil

Appeal No.14 of 2008. It is clear therefore that the High Court has a discretionary power in relation to the grant of the type of relief hereby sought by the Claimants/Applicants in this matter.

[11] The approach of the courts in this jurisdiction from as long ago as 1981 in the case of **Williams v. Canadian Bank of Commerce Trust Co (Caribbean) Ltd** 1981-BARB-LR11 accepted the principles handed down by Lord Diplock in the English House of Lords decision in **American Cyanamid Co, v. Ethicon** 1975 AC 396, as establishing the guidelines to be applied in determining whether or not to grant or to discharge an interlocutory injunction.

[12] Recently the decision of **Toojays**, supra, Burgess, JA confirmed that the approach is indeed one which has two stages, that is the trial judge before whom the application is made has to consider the first question, namely; whether there was a serious issue to be tried. In the words of Lord Diplock –

“The Court must be satisfied that the claim is not frivolous or vexatious”.

In other words that there is a serious question to be tried. I must hold that based on the affidavits before me, and that is all that I can base this finding on, there appears to me to be a serious question to be tried. On the pleadings the Claimants have shown that they have an arguable case, one which I cannot agree is frivolous or vexatious.

- [13] The next step as contemplated by Burgess JA in the **Toojays** case is the second stage of inquiry, that in the inquiry into the balance of justice. Where does the balance of the justice lie in determining whether or not the court should grant an injunction?
- [14] One of the factors which a court has to consider is whether or not the Plaintiff can be compensated in damages. In other words in order to determine the balance of justice in favour of granting or not granting an injunction it is necessary for the court to perform the task of determining whether damages would be adequate. As Burgess JA states in **Toojays** “The principle that adequacy of damages is to be considered “a significant factor in assessing where the balance of convenience lies” means that the question as to whether or not damages will be an adequate remedy must be assessed in the context of the overall function of the court in the granting or refusal of an interlocutory injunction ,which is to hold the balance as justly as possible between the parties until trial.
- [15] In other words what do I have to consider? I have to consider whether if the Claimants were to succeed at the trial in establishing “his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendants’ continuing to do what was sought to be enjoined between the time of the

application and the time of the trial. If damages would be an adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiffs' claim appeared to be at that stage". Per Diplock LJ. In **American Cyanamid**

[16] "If on the other hand, damages would not provide an adequate remedy for the Plaintiff in the event of his succeeding at trial, the court should then consider whether on the contrary by hypothesis that the Defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined he would be adequately compensated under the Plaintiffs' undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of application and the time of trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the Plaintiff would be in a financial position to pay them there would be no reason on this ground to refuse an interlocutory injunction". The words of Diplock LJ. in **American Cyanamid**.

[17] How then do I do justice between the parties regardless of whichever way the decision goes at the substantive hearing? The words of Buckley LJ, in

the Court of Appeal of England in the case of **Polaroid Corporation v Eastman Kodak Co. Ltd** 1977 RPC 379 at 395 are instructive –

“If the Plaintiff can be compensated in damages for anything he may wrongfully suffer between the date of the application and the trial, the Defendant **should not** (emphasis mine) be restrained save in exceptional circumstances”.

- [18] Is this general approach of Buckley LJ applicable to the present case or to put it another way is there anything in this case to render it as having exceptional circumstances which would move the court to exercise its discretion in favour of the Claimants?
- [19] The Claimants have completed their MBBS degree and are seeking to enter the Internship Programme of the Queen Elizabeth Hospital. Can they be compensated in damages if they are not successful in entering the July 2015 programme? What is there so seemingly unquantifiable as far as damages are concerned in their case? Are damages not recoverable by them should they triumph at the trial? Are these damages quantifiable? Surely the internship programme can be quantifiable in damages both in terms of the financial loss of wages and the loss of opportunity should they be successful at trial. The salary of interns must be in the knowledge of the First Defendant and can therefore be supplied to the Court which would be the arbiter of the substantive matter. The courts can use all methods of

quantification available to them to reach a figure for any loss of opportunity which may result to the Claimants and therefore damages for their loss if any, at their stage of their careers, in my opinion can be adequate compensation.

[20] In these circumstances I do not consider this to be one with any exceptional circumstances which would lead this court to the conclusion that the interest of justice can be served by the grant of the injunctive relief sought by the Claimants. I am of the opinion that damages are both quantifiable and adequate and would be legally recoverable by the Claimants should they suffer as a result of the refusal of the interlocutory relief, and accordingly the balance of justice would best be served by the denial of the Claimants' application and so I accordingly rule.

[21] But in this particular action before me what other factors are there which can be considered? I am of the opinion that the court must consider whether the grant of the interim relief may have the result of the disruption of the smooth functioning of the Queen Elizabeth Hospital. If the selection process is abandoned, postponed or halted whilst the trial of the substantive matter proceeds, what effect may that have of the First Defendant which clearly is charged with the management of the hospital? Can it be said that to grant the injunctive relief would be doing justice between the parties. I think that

this factor too must be considered by the court and I am emboldened by this approach by the words of Diplock LJ at page 407 in the decision of **American Cyanamid** where he states, and I quote:

“Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the Defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of him succeeding at trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial”.

[22] In light of the above, can it be said, based on the submissions of counsel and the affidavits filed herein that the grant of the injunction “would interrupt the First Defendant in the conduct of an established enterprise and therefore would cause greater inconvenience (injustice) to the First Defendant in the proper running and management of the Queen Elizabeth Hospital”. Surely one can argue that the selection process is an established practice which would have to be postponed in the event of the grant of interlocutory relief and would definitely have to be done at a later date if the First Defendant is successful at trial.

[23] I must therefore conclude that for all of the reasons stated herein, particularly at paragraphs 19 and 20 above that the balance of justice between the parties lies in not granting the injunctive relief sought by the Claimants. At this stage of this action I am not here to pronounce on whether the Claimants would be successful in arguing the principle of legitimate expectation or their reliance on natural justice. Neither is the Court at this stage concerned with whether the selection process is a good one and free from fault or error. These are all matters which will have to be dealt with at the substantive trial.

[24] In the circumstances this court denies the application of the Claimants and accordingly orders costs to the First and Fifth Defendants on this application, to be agreed or assessed in default of agreement.

Randall I. Worrell
Judge of the High Court