THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2012/0 770

BETWEEN:

VANETTA RODGERS

Claimant

AND

AIRPORT SERVICES ANTIGUA LTD

Defendant

Appearances:

Mr. Hugh Marshall for the Claimant
Ms. E. Ann Henry Q.C. for the Defendant

2013: January 21
March 14

RULING

[1] Remy J.: By Claim Form and Statement of Claim filed on 28th November 2012, the Claimant Vanetta Rodgers (Mrs. Rodgers) claimed against the Defendant Airport Services Antigua Ltd. (the Defendant Company) the following relief:-

1. A declaration that the termination of the Claimant's employment by letter dated the 21st day of November 2012 on the stated grounds of redundancy is unlawful and a breach of the employment contract and that the Claimant remains general manager and executive director of the Defendant.
2. An injunction to restrain the defendant, its servants and or agents for acting upon the Board decision to terminate the employment of the Claimant dated the 21st of

November 2012 or in any way from interfering with the employment contract of the claimant until further order of this Court.

3. Damages for breach of contract.
4. Costs.

[2] By Notice of Application filed on the 28th November 2012, Mrs. Rodgers applied to the Court for an interim injunction, seeking an Order, namely that:-

1. An injunction be granted ordering the Defendant, its members, servants and agents from acting upon the decision of the Board of Directors purported to be made on the 22nd November 2012 whereby the Claimant is terminated from the position of General Manager of the Company effective the 30th November 2012 on grounds of redundancy or from otherwise interfering with the Claimant in the due performance of her functions as the General Manager of the Company until further order of the Court.
2. Costs.

[3] The grounds of the application were stated as follows:-

a) The Claimant is the General Manager of the Defendant Company since 2007 and has performed the functions without incident.
b) The Claimant is being maliciously removed by fellow beneficial shareholders and the Executor of her late husband's Estate on the stated grounds of redundancy.
c) The removal of the Claimant is likely to prejudice her employment and beneficial interest in the Company and the Estate of her late husband of which the Defendant company forms a substantial part.
d) There is no redundancy.
e) Just and equitable.

[4] The Notice of Application was supported by an Affidavit of Mrs. Rodgers filed on the 28th November 2012 (the First Affidavit).

[5] When the matter came up for hearing on the 30th November 2012, an Order was made in the following terms:-

> "AND UPON THE DEFENDANT by its Counsel giving an undertaking that the Defendant will not terminate the employment of the Claimant or otherwise interfere with her employment until the hearing of the application;
>
> THE COURT DOTH ORDER THAT:-
>
> 1) Defendant do file and serve an Affidavit in Reply on or before the 11th December 2012.
> 2) The Claimant be at liberty to file and serve an Affidavit in Response on 14th December 2012.
> 3) The hearing of the application is adjourned until the 18th December 2012 at 9. a.m in the forenoon."

[6] A Second Affidavit of Mrs. Rodgers was filed on the 4th day of January 2013 (the second Affidavit.) Several Exhibits were attached to the said Affidavit.

[7] The hearing of the application for injunctive relief took place on the 21st January 2013, after being adjourned on application by Counsel for the Claimant. At that hearing, Counsel for both parties made oral submissions to the Court.

[8] Before dealing with the Submissions of Counsel, I find it prudent to set out some of the facts with respect to the application before the Court as are found in the above – mentioned Affidavits:-

(a) Mrs. Rodgers is a shareholder of the Defendant company. In her First Affidavit, she deposes that, by the Will of her late husband Calvin Rodgers, the latter left his entire share holding (comprising 100%) to four persons, namely his daughter Mrs. Pigott in the amount of 48%; his Accountant (Mr. Avondale Thomas) in the amount

of 2%; his long time employee and close friend, (Noel Walling) in the amount of 2%. The balance of the shares, being 48%, was left to Mrs. Rodgers.

(b) In her First Affidavit, Mrs. Rodgers alleges that the relief which she seeks is an interim relief namely, "to restrain the Defendant from acting upon or otherwise giving effect to its decision dated 15th November whereby her position as general manager and executive director of the Defendant is terminated with effect from the 30th November 2012 on grounds of redundancy. The termination letter is hereby reproduced:-

> "21 November 2012
>
> Dear Dr. Rodgers
>
> For the record, I acknowledge receipt of your memo of November 15, 2012 and confirm that the contents were considered at the Board Meeting of the same date.
>
> ……..
>
> You will note that the other Directors expressed that they have the same concerns as were expressed in my proposal and, as such, the decision to re-organize by removing the position of Executive Director and creating the position of General Manager was approved by the majority of the Board.
>
> ……..
>
> ……..
>
> As the Board has approved the creation of the position of the General Manager, I will be working on the detailed job description so that the position may be advertised by year. I look forward to your contribution to the discussions on this issue.
>
> Since the position of Executive Director is removed by reorganization as of the 30th November 2012, you are entitled to severance and notice for your years of service.
>
> Yours truly,

Yorie O. Pigott
Chairman
Airport Services (Antigua) Ltd."

(c) The above letter was copied to "Mr. Avondale Thomas – Director" and "Mr. Noel Walling- Director." (both of whom, like Mrs. Pigott, are beneficial shareholders – see (a) above.)

(d) In paragraph 5 of her First Affidavit, Mrs. Rodgers states that "from 2007 I was employed to perform the functions of the General Manager and was given the title Executive Director."

(e) In paragraph 12 of her First Affidavit, Mrs. Rodgers states that at the time of her employment with the Defendant, she was not given a written statement of her employment conditions as all employers are obliged to do by reason of the Antigua and Barbuda Labour Code. Following the death of her husband "and the subsequent divisions of ownership of the Defendant", she sought to have the said statement issued; she sent a letter, written by her Attorney, requesting a statement of her employment conditions.

(f) She remained in office performing her "functions as the General Manager of the Company."

(g) In his Affidavit in Reply, Mr. Walling states that "….I deny that the Claimant was the General Manager of the Defendant Company as asserted by the Claimant in paragraph 5 of her Affidavit. To my certain knowledge, the Claimant was designated as the Executive Director of the Defendant company and as far as I am aware it is in the application filed in these proceedings that, for the first time, the Claimant has asserted that she is the General Manager of the Defendant company."

(h) In paragraph 11 of his Affidavit, Mr. Walling states that, to the best of his knowledge, "no terms of employment were ever agreed between the Claimant and

the Defendant company." In paragraph 30 of the said Affidavit, Mr. Walling adds that the Claimant provided him with the Memorandum at page 9 of her Exhibit "VR1", in which she set out a job description for herself as Executive Director.

[9] In her Statement of Claim, Mrs. Rodgers pleads that:-

(a) On the 22nd May 2012, following the death of her husband, the Executor of her husband's estate installed a new Board of Directors consisting of Mrs. Yorie Pigott, the Claimant's stepdaughter; Mr. Walling, the Executor, Mr. Avondale Thomas, who is also the Auditor of the Defendant company.

(b) She contends that the Board is unlawful for the following reasons:-

i) The appointment by the Executor of the Estate of the members of the Board was done at a time when he was not registered as the shareholder of the company.

ii) The presence of Avondale Thomas as a director whilst being the auditor is contrary to Article 49 of the Articles of incorporation of the Defendant company.

(c) Upon the appointment of the Board of Directors they unlawfully sought to redefine the Claimant's employment position and set about to purport to unlawfully remove the Claimant from her employment position.

(d) The Board of Directors without lawful authority have sought to terminate the employment position of the Claimant by way of letter dated 21st November 2012 effective 30th November 2012.

(e) The stated reason for termination is redundancy; there is to the knowledge of the Defendant no redundancy of the Claimant's employment position within the Defendant company.

SUBMISSIONS OF COUNSEL FOR THE CLAIMANT

[10] Learned Counsel for the Claimant, Mr. Hugh Marshall Jr. submitted that the legal issues are as follows:-

1) The legality of the Constitution of the Board of the Defendant Company; he contends that this can be broken down into two parts, namely: - (a) Whether persons appointing the Board of Directors are entitled to do so in that they are not the registered shareholders, and (b) Whether Avondale Thomas in his persona as the Auditor of the Company can rightfully be a member of the Board of Directors of the Company.

2) The second issue is: - Whether the termination of the Claimant is lawful; Counsel contends that this can be broken down into: - (a) There is no redundancy or suggestion of redundancy, and (b) There is no loss of confidence in the employee in the discharge of her functions.

3) The third issue is that the purported termination by the Defendant is being carried out in contravention of the obligations of Avondale Thomas in his position as the Executor of the Estate given that the shares are beneficially in the Estate or legally in the Estate.

[11] Learned Counsel Mr. Marshall contended that the above are the issues raised on the pleadings. He stated that the Court's obligation is to make a determination at this stage following the principles of American Cyanamide v Ethicon[1], namely: - (a) there is a serious question to be tried? (b) would damages would be an inadequate remedy? and (c) if there is any doubt as to the adequacy of damages, where does the balance of convenience lie? Learned Counsel submits that, if there is any doubt as to the adequacy of damages, in the circumstances, the balance of convenience lies in the granting of the injunction and the maintenance of the status quo. Counsel further submits that at this juncture, it is not for the Court to determine whether or not the Claimant has a prima facie case, or that the Claimant is likely to succeed, but rather, whether, on the pleadings before the Court and on the Affidavit evidence, there is a serious legal issue.

[1] [1979] R.P.C. 215

[12] In advancing his submissions on the first issue (referred to in paragraph 10 above), namely, that of the legality of the Constitution of the Board, Learned Counsel relies on the authority of National Westminster Bank PLC[2]. Counsel contends that this case states that persons may have a beneficial interest in shares and be entitled to be registered as a shareholder; but the rights and privileges of a shareholder can only be exercised by a registered shareholder. Learned Counsel submits that, under the authority of the National Westminster case, Mr. Thomas who is the Executor of the Estate, although entitled to be registered as a shareholder, at the material time, has not been so registered. Counsel also refers to Section 69(3) of the Companies Act of Antigua and Barbuda as authority for the proposition that only a registered shareholder can appoint directors.

[13] It is the submission of Learned Counsel that, on this issue alone, the Board of Directors of the Defendant company is unlawfully constituted and cannot act in the manner that it has. Counsel further submits that, in these circumstances, not only does the Claimant raise a serious issue to be tried, but that she has a good arguable case.

[14] With respect to the issue of the legality of the termination of the Claimant (issue # 2 in paragraph 10 above), Mr. Marshall submits that, in so far as that issue is concerned, there is a serious issue to be tried and that the Claimant has a good arguable case

[15] With respect to the third issue raised (in paragraph 10 above), Mr. Marshall contends that this issue is raised in the Statement of Claim at paragraph 5 (b). The issue here is that Mr. Thomas is also the Auditor and purports to be a Director of the Company. Counsel submits that on this issue, the Claimant has a good arguable case which remains unchallenged by the Defendant.

[16] Learned Counsel refers to the Claimant's 1st Affidavit at paragraph 23 in which she deposes that if the Defendant company is not restrained from unlawfully dismissing her, she would suffer untold losses and hardship. She states that she is a single mother and is the sole support of her 17 year old son who is studying abroad and that she would

[2] [1994] STC

be “hard pressed” to find alternative employment in these difficult economic times. Further, as a 48% stake holder in the Company, her removal therefrom would place her at a severe disadvantage on the conduct of her affairs as they relate to her interest in the company. Counsel contends that the Claimant alleges that damages will not be an adequate remedy as a result; he adds that this position which she has taken has not been challenged by the Defendant company. Counsel adds that, even if the Court were to consider whether damages would be an adequate remedy, the balance of convenience lies in favour of the Claimant who is a single mother, is dependent upon this as her only source of income, as opposed to the Company which is currently under her management and has an annual turnover of over 5 million dollars.

[17] Learned Counsel addressed what he states has been a “suggestion” by the Defendant through the Affidavit of Mr. Walling that, in employment relationships, injunctions are not granted. Counsel contends that this would be a mistake in law; that the Court has jurisdiction to grant an injunction in an employment case, dependent upon the circumstances, particularly where there is no loss of confidence. Counsel refers to the case of Hill v Parsons & Co. Ltd[3], It is the contention of Learned Counsel that in the Affidavit of Mr. Walling and the Exhibits attached, there is not a single allegation against the Claimant that the Company does not have confidence in her to carry out her task. He states that, in the Affidavit of Mr. Walling as well as the Exhibits before the Court, there is not a single allegation against the Claimant that the Company does not have confidence in her to carry out her task. Counsel refers to paragraph 13 of the Second Affidavit of the Claimant; he contends that this is a clear demonstration that there is not a lack of confidence and that the Claimant is carrying out the functions.

[18] It is the further submission of Mr. Marshall that this is a complex issue, which involves the administration of an estate in which the Company is an asset of the Estate and the purpose of an administration is not to effect changes in the asset of the Estate but to give effect to the Will, which is to transfer the shares in this case; not to use the position of

[3] C.A. [1972] CH 305

shareholder to re-organise the Company, when such re- organisation is not necessitated to give effect to the testator's wishes.

[19] Learned Counsel concludes his submissions by stating that, in all the circumstances, the Claimant has a good arguable case, that damages would not be adequate, that the balance of convenience remains with the Claimant in maintaining the status quo of her position and there are extenuating factors that justice and good conscience dictate that the injunction be granted. He adds that he relies upon the entire contents of the Affidavits.

SUBMISSIONS OF COUNSEL FOR THE DEFENDANT

[20] Learned Queen's Counsel, Ms. Ann Henry submitted that the claim before the Court is for three (3) grounds of relief, namely:-

i) A Declaration that the termination of the Claimant by letter dated 21st November 2012 is unlawful and is a breach of employment contract.

ii) An Injunction to restrain the Defendant from acting on the Board's decision to terminate the employment of the Claimant dated the 21st November 2012 or in any way from interfering with the employment contract of the claimant until further order of the Court.

iii) Damages for breach of contract - which is plainly the breach of the alleged employment contract.

[21] Learned Queen's Counsel stated that the Board of the Defendant company to which the Claimant refers is that chaired by Ms. Piggott of which Mr. Walling, Mr. Thomas and the Claimant are members. It is the decision of that Board in respect of which the Claimant complains. Learned Queen's Counsel submits that the issue before the Court is whether or not in seeking to terminate the employee, the Board has acted unlawfully with the consequential breach of her contract etc.

[22] Learned Queen's Counsel concedes that "there is a serious issue, within the context and meaning of that phrase in the American Cyanamide case". In that case, stated Learned Queen's Counsel, the Court ruled that the court should decide that the case before it should not be frivolous or vexatious. Learned Queen's Counsel states that, following the American Cyanamide case, the Court must consider whether damages should be an adequate remedy; if damages are an adequate remedy, the Court will not grant an injunction, because the grant of an injunction is an "extraordinary act on the Court", disturbing what would be the rights of a party, and the rights and wrongs are determined at the end of the case. She states that it should be noted that the Claimant has in fact claimed for damages for breach of contract.

[23] It is the further submission of Learned Queen's Counsel Ms. Henry, that the Court should consider that the claim for damages "may go some way in undercutting Counsel's argument in relation to paragraph 23 of the First Affidavit of the Claimant and the assertions made by Counsel." Counsel adds that it is a "stretch" for Learned Counsel Mr. Marshall to advance the case of Hill v Parsons (supra) in support of what she believes is his proposition that Courts grant injunctions in employment matters. Learned Queen's Counsel invites the Court to look at the same entire case. In the Hill case, Data was not a party to the suit; the two parties to the dispute wanted the contract to continue. She states that what is being sought in the instant case is an order for specific performance of a contract of employment which normally is not granted. She referred the Court to the case of Lumley v Wagener (1843 – 1860 ALL ER, page 368) and also to the case of Records & Another v Bolton & Others (1967 3 ALL ER, 822). According to Learned Queen's Counsel, these cases are submitted as authority for the proposition that a Court of law does not ordinarily make an order for specific performance of an employment contract, which is a contract for personal services. Exceptionally, she adds, in Antigua and Barbuda, the Industrial Court may make an order for the re-instatement of an employee who has been unfairly dismissed; but this is under the Statute.

[24] Ms. Henry contends that, underpinning the American Cyanmide case, is that the Court will not make an order for an injunction where at the end of the proceedings it would not be

able to make a final order. She submits that the final order would be to enforce a contract of personal services, and that the Court does not normally make that order. Ms. Henry contends that, in considering the balance of convenience, the Court is invited to consider that, if at the end of the day, the Court would not make an order to specifically enforce the contract of employment, then it would not be proper for it to make an order for an injunction at this stage. Ms. Henry submits that this is how the Court considers the issue of the balance of convenience.

[25] In his Reply, Learned Counsel Mr. Marshall states that Learned Queen's Counsel has not addressed the issue of the legality of the Board in its constitution to make the decision, so it cannot make the decision. He contends that this takes it out of the situation of an ordinary employment situation. With respect to the suggestion of Learned Queen's Counsel that the Claimant's claim for damages has "undercut" the claim for an injunction, Mr. Marshall submits that the claims are not in the alternative; that there is nothing wrong in seeking a declaration, seeking an injunction, and in seeking damages, where the Court finds them justifiable. He adds that the case of Hill v Parsons has been provided as authority for the proposition that this Court has the authority to grant an injunction where common sense dictates, and that common sense derives from all the circumstances.

[26] Mr. Marshall states that, with respect to the cases referred to by Learned Queen's Counsel, in both of these cases, the injunction being sought was by the employer to compel the employee to perform personal services. He states that there are exceptions to the general rule that the Court will not ordinarily make an order for specific performance of an employment contract. There are circumstances where the Court has granted injunctions in employment situations; the Court has authority to do it. Certainly, adds Learned Counsel, the Claimant would be entitled to a permanent injunction at the end of the case where the Board was unlawfully constituted in making a decision of that nature.

[27] Ms. Henry sought and obtained leave of the Court to reply to Mr. Marshall's submissions. She commented on the submission of Mr. Marshall that she did not deal with the issue of

the legality of the constitution of the Board. She stated that she was not obliged to deal with matters of evidence which she would leave until the matter goes to trial.

LAW

[28] "An injunction is an order of a court requiring a party either to do a specific act or acts (a mandatory or positive injunction) or to refrain from doing a specific act or acts (a prohibitory or negative injunction). A prohibitory injunction restrains the commission of an act. Injunctions can be further classified according to the period of time for which the order is to remain in force. A perpetual injunction is a final judgment….an interim injunction, is a provisional measure taken at an earlier stage in the proceedings, before the court has had an opportunity to hear and weigh fully the evidence on both sides." - Bean on Injunctions, 9th edition, page 3, paragraph 1.01.

[29] An injunction is an equitable remedy and the Court can refuse the remedy on discretionary grounds. Provided that the applicant has a substantive cause of action, the court's discretion to grant or refuse an injunction is almost unlimited – Bean (supra) page 11, paragraph 1.20.

[30] The Civil Procedure Rules 2000 (CPR), Part 17.1 provides the authority for the Court to grant interim remedies including, in Part 17.1 (1) (b), an "interim injunction"

[31] The hearing of an application for an interim injunction is not a trial on the merits. The guidelines for the grant of an interim injunction are laid down by Lord Diplock in the House of Lords decision in American Cyanamid Co. v Ethicon Ltd.[4] These guidelines are as follows:-

(a) Is there a serious issue to be tried?
(b) Are damages an adequate remedy?
(c) Does the balance of convenience lie in granting such relief?

[4] [1975] AC 396; [1975] 2 WLR 316

[32] The Court must, however, bear in mind that the above are merely guidelines, and as stated by Kerr L.J. in Cambridge Nutrition Ltd. v BBC[5]:-

> "It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in any case. It must never be used as a rule of thumb, let alone as a straitjacket…….The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial. ……."

ANALYSIS

[33] The Court is of the view that the issue before it is as submitted by Learned Queen's Counsel, namely, whether or not in seeking to terminate the employment of Mrs. Rodgers, the Board has acted unlawfully with the consequential breach of her contract. Accordingly, the Court will not deal with the other issues raised by Learned Counsel Mr. Marshall in his oral submissions, namely that of the legality of the Constitution of the Board, as well as the issues of company law. The Court is of the view that these are issues to be dealt with at the trial of the substantive claim.

[34] The Court will now deal with the guidelines laid down in the American Cyanamide case. Firstly:-

(a) IS THERE A SERIOUS ISSUE TO BE TRIED?

[35] The Court must be satisfied, at the outset, that there is a serious issue to be tried. "The Court only needs to be satisfied that there is a serious question to be tried on the merits. A cause of action that can be described as hopeless will not satisfy this test (National

[5] [1990] 3 All E.R. 523 at 534

Commercial Bank Jamaica Ltd. v Olint Corporation[6]). The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality." - see Blackstone at page 536, paragraph 37.21.

[36] The Court is of the view that the above threshold has been met. Significantly, Learned Queen's Counsel for the Defendant conceded at the very beginning of her oral submissions before the Court, that there is a serious issue to be tried. The Court will therefore move on to consider the question of the adequacy of damages. The test with respect to the issue of the adequacy of damages was expressed in the American Cyanamid case, (at 408 B-C), thus:-

> "The court should go on to consider whether…..if the claimant 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 defendant's 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 interim injunction should normally be granted, however strong the claimant's claim appeared to be at that stage."

(b) ARE DAMAGES AN ADEQUATE REMEDY IN THE INSTANT CASE?

[37] According to Blackstone (supra), page 538, paragraph 37.23, "….damages will often be an adequate remedy for the claimant in claims for breach of contract, including contracts of employment…..but the position regarding claims in respect of contracts of employment is not completely free from doubt, see Powell v Brent London Borough Council[7]. …….As where the claimant fails to show a serious question to be tried, if damages would be an adequate remedy, that is the end of the matter and the injunction must be refused."

[6] [2009] UKPC 16
[7] [1988] 1 CR 176

[38] As a general rule, "an injunction will be refused if its effect is to enforce an agreement for personal services" – see Warren v Mandy[8]. Accordingly, the Court will not usually restrain an employer from terminating an employee's contract, but will leave the employee to his remedy in damages (Chappell v Times Newspapers Ltd.[9]). The learned writers of Gee on Commercial Injunctions state:-

> "The law sets its face against forcing people who do not desire to maintain a close personal relationship, which involves mutual trust and confidence, to do so. The court will not grant an injunction which would in effect put the defendant in a position where he would in practice be compelled to continue with such a contract. Contracts of employment fall within this category. The decision of the Court of Appeal in Hill v C.A. Parsons & C. must be regarded as a case decided on highly exceptional facts, where both employer and employee were happy for the relationship to continue and damages would have been a wholly inadequate remedy."

[39] In similar vein, Snell (page 477, paragraph 17-012) states:-

> "Traditionally the courts would not compel performance of a contract for personal service, a concept which encompasses contracts of employment and other agreements to do acts involving personal skill, knowledge or inclination. Moreover, the courts are similarly reluctant to grant an injunction for breach of a negative stipulation in a contract, if this would have the indirect effect of compelling the defendant to perform personal services. Though still an important general principle, the personal services rule is not inflexible and in recent years a number of exceptions have been recognized."

And at page 478, paragraph 17-013:-

> "……..recently the courts have recognized that the employment relationship is not necessarily as personal as it once was and have shown more flexibility in granting injunctive relief against employers in exceptional circumstances, even where this might amount to indirect specific performance."

[40] It is the submission of Learned Queen's Counsel Ms. Henry that damages are an adequate remedy in the instant case. As stated above, Ms. Henry states that what is being sought in the instant case is an order for specific performance of a contract of

[8] [1989] 1 WLR 853
[9] [1975] 1 WLR 482

employment which normally is not granted, as such a contract is a contract for personal services. Ms. Henry cited the case of Lumley v Wagner as well as Page One Records and Another v Button and others, where the Court held that if it were to grant the injunction, it would be enforcing a contract for personal services in which personal services are to be performed by the claimant.

[41] The rival submission of Learned Counsel Mr. Marshall is that damages would not be an adequate remedy in the instant case. Counsel cited the case of Hill v Parsons Ltd. (the Hill v Parsons case) where the Court held that where the relationship of mutual trust and confidence between the parties has survived, an injunction may be granted to maintain the employment situation. According to Mr. Marshall, the instant case is one which the Court should consider as a "special case" such as to come within the exception as stated in the Hill v Parsons case. Counsel referred to paragraph 23 of the First Affidavit of Mrs. Rodgers filed on the 28th November 2012. In that Affidavit, Mrs. Rodgers appears to set out the basis for her assertion that damages would not be an adequate remedy in the instant case. She deposes as follows:-

> "I am convinced that unless restrained by this Court the Defendant will in fact unlawfully dismiss me occasioning me untold losses and hardship. I am a single mother and the sole support of my 17 year old son who is studying abroad. My current income from the Defendant is a basic wage of $18,000.00 monthly. I will be hard pressed to find alternative employment in these difficult economic times. Though money would to some extend (sic) compensate me for losses it would not alleviate all my hardship experiences following an unlawful dismissal. Additionally I am a 48% stake holder in this company I have over the last 5 years helped to build up. My removal from the company would place me at a severe disadvantage on the conduct of my affairs as they relate to my interest in this company."

[42] Additionally, in paragraph 13 of her Second Affidavit filed on the 4th January 2013, Dr. Rodgers deposes as follows:-

> "I consider that the issue before the Court is more than a mere employee dismissal. This involves a situation where there is no loss of confidence in the employee by the employer; namely the Company but where fellow beneficial shareholders wish to remove another beneficial shareholder so as to conduct the affairs of the Company wholly to my exclusion. Indeed not only has no evidence been advanced of any reasoned loss of confidence with

> respect to any specific task undertaken by myself, no evidence is advanced by anyone properly authorized on behalf of the Company……."

[43] With the greatest of respect, I do not agree with the submission of Learned Counsel Mr. Marshall that the instant case falls within the exception stated in the Hill v Parsons case. Firstly, it cannot be said that the Claimant and the parties who represent the Defendant are "happy for the relationship to continue," as were the parties in the Hill v Parsons case. Learned Counsel has submitted that there is no loss of confidence in the employee (Mrs. Rodgers) in the discharge of her functions. However, from what can be gleaned on a perusal of the Affidavits as well as the Exhibits before the Court, it does not appear that the parties share a "mutual trust and confidence." No doubt, the successful performance of a contract of personal service depends on mutual co-operation or mutual confidence. On the facts of the case at bar, it cannot be said that either factor exists.

[44] Importantly, the Court notes that by letter dated the 31st December, 2012, (attached to the Second Affidavit of the Claimant as VR2), Counsel for the Claimant wrote to Counsel for the Defendant expressing his "deep regret" that he was "forced to pen …correspondence to highlight what he considered to be breaches of the undertaking given by her (Learned Counsel)". Mr. Marshall stated that the Defendant "removed the Claimant's website privileges previously held as an incidence of her employment position." Counsel also complained that the Defendant "usurped the Claimant's functions as the General Manager and without any consultation or notification, removed her from negotiations with LIAT (1974) Ltd. on a hanger facility." The letter ends with Counsel requesting the Defendant to "reconsider their position within 48 hours failing which ….appropriate legal proceedings would be commenced against the appropriate individuals."

[45] In the view of the Court, the above letter is evidence, not only of the fact that mutual co-operation between the parties is, and seems, highly unlikely, but, secondly, that a grant of the interim injunction in the instant case would very likely necessitate the constant intervention of the Court in resolving issues between the parties. The authorities show that among the relevant matters which the courts consider in deciding whether or not to

grant an order for specific performance is whether the performance requires excessive supervision – see Ryan v Mutual Tontine Westminster Chambers Association[10]. Similarly, "a contract to do continuous successive acts (which would include a contract for personal services) would not be enforced specifically, as it would involve constant and possibly ineffective supervision by the court" (Snell page 479, paragraph 17-015), and will be refused.

[46] In the more recent case of Vertex Data Science Limited v Powergen Retail Limited[11], the court declined to grant an interim injunction compelling companies to work together under a contract requiring continual co-operation at an operational level on a daily basis where the relationship has broken down and where there was lack of certainty on what had to be done if there was to be performance in accordance with the contract.

[47] The Court is of the view that, based on the above, the instant case does not fall within the exception stated in the Hill v Parsons case. The Court finds that, in the instant case, damages would not be a "wholly inadequate remedy", as was held in the Hill v Parsons case.

[48] No doubt, in light of the Claimant's assertions referred to in paragraph 16 above, the Claimant's preferred remedy would be that her employment not be terminated. In all the circumstances of the case, however, I am not persuaded, based on the legal principles, that damages are not an adequate remedy in this case. I am of the view that an award of damages would adequately compensate the Claimant if the Court finds that she was unlawfully terminated. Further, as stated by Robert Walker J, the test is whether damages would be an ADEQUATE remedy, not whether they would be a PERFECT remedy (my emphasis).

[49] In the event that I am wrong in concluding that damages are an adequate remedy, I now go on to consider the balance of convenience.

[10] [1893] 1 Ch. 116
[11] [2006] EWHC 1340 (Comm)

[50] Every case turns on his own particular facts. As stated by Lord Hoffman in the Privy Council decision of National Commercial Bank Jamaica Ltd. v Olint Corp. Ltd, (in paragraph 19 of the judgment) supra :-

> "….What is required in each case it to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be."

Or, as stated in Halsbury, - page 331, paragraph 386:-

> "The Claimant must also be able to show that an injunction until the hearing is necessary to protect him against irreparable injury – mere inconvenience is not enough."

[51] I must bear in mind that "the fundamental objective of the Court, when weighing up all the factors, is to take the course which involves the least risk of injustice at the end of the day, if the Court's decision to grant or refuse an injunction should turn out to have been "wrong' by reference to the final result at trial." Gee – page 44, paragraph 2.014. I must consider (1) the risk of injustice to the defendant if it were to grant an injunction to the claimant who at trial is, or if there was a trial would be, unable to establish his right to an injunction; and (2) the risk of injustice to the claimant if it were to refuse to grant an injunction against the defendant when at trial the claimant is able to establish his entitlement to an injunction, or if there was a trial would be able to establish such an entitlement.

[52] In considering the balance of convenience, I must also bear in mind that "the critical feature is always the justice of the situation." As stated by Lord Hoffman in the National Commercial Bank case, at paragraph 16:-

> "….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. ….As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd., that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and

> the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."

[53] At paragraph 17:- "… The basic principle is that the Court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."

[54] The Claimant's substantive claim is for a declaration that the termination of her employment by the Defendant on the stated grounds of redundancy is unlawful and a breach of her employment contract and that she remains general manager and executive director of the Defendant. She claims an injunction to restrain the Defendant its servants or agents from acting on the Board's decision or in any way from interfering with her employment contract until further order of the Court. She also claims damages for breach of contract.

[55] I am of the view that the balance of convenience lies in favour of the Defendant. I am also of the view that:-

a) If the Claimant succeeded on her claim at the trial, an award of damages would be an adequate remedy. She would be entitled to damages for breach of contract as a result of her unlawful dismissal. Further, the evidence of the Claimant, namely her First Affidavit is that the Defendant "has an annual turnover of over 5 million dollars. "The Defendant would therefore be in a financial position to pay damages awarded to the Claimant.

b) Even if the Claimant were to succeed in her claim for breach of her contract of employment, at the end of the day, it is unlikely, based on the legal principles, that the Court would make a final order to specifically enforce the Claimant's contract of employment.

CONCLUSION

[56] As stated above, an interim injunction is an equitable remedy. Further, it is a remedy "that must be kept flexible and discretionary" - Hubbard v Vosper[12]. In exercising my discretion whether to grant the Claimant's application for an interim injunction, I have taken into account the Affidavits and Exhibits before the Court as well as the oral submissions of Counsel for the parties in so far as they are relevant to the application. I have taken into account the overriding objective of the rules (CPR 2000). I have taken into account the relevant legal principles as well as the guidelines set out in American Cyanamid, while bearing in mind the words of Buckley LJ in Polaroid Corporation v Eastman Kodak Co.[13], namely, that :-

> "The underlying purpose of the guidelines is to enable the Court to make an order that will do justice between the parties, whichever way the decision goes at trial, while interfering with the parties' freedom of action to the minimum extent necessary."

[57] In all the circumstances of the instant case, I am of the view that the interim injunction which the Claimant seeks must be refused, and I so order.

MY ORDER IS AS FOLLOWS:-

1) The application of the Claimant for an interim injunction is dismissed.

2) Costs relative to this application will be considered on the hearing of the substantive matter.

JENNIFER A. REMY
Resident High Court Judge
Antigua & Barbuda

[12] [1972] 2 Q.B. , 84
[13] [1977] RPC 379 at p.395