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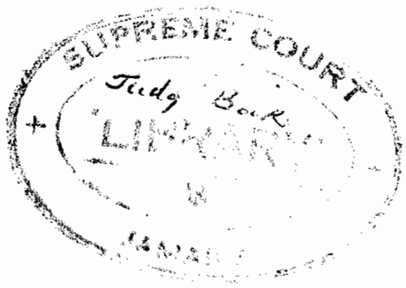

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 19/86

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Ross, J.A.

BETWEEN - W.D. MILLER & W. PARKES - DEFENDANTS/APPELLANTS

AND - O'NEIL CRUICKSHANK - PLAINTIFF/RESPONDENT

R.N.A. Henriques, Q.C., & Allan Wood for appellants

W.K. Chin See, Q.C., & Dennis Morrison for respondent

April 16; & May 5, 1986

ROWE, P.:

O'Neil Cruickshank, the respondent herein enrolled as a student at Kingston College on September 7, 1985. By writ dated March 19, 1986 he sought a declaration and an injunction against the School's Principal and the Cricket Secretary of the Inter-Secondary Schools Sports Association. The declaration which he sought was that he was eligible and entitled to participate on behalf of Kingston College in all inter-Secondary Schools Cricket competitions and he sought an injunction to restrain the Principal and the Cricket Secretary from unlawfully prohibiting or preventing him from participating on behalf of Kingston College, inter alia, in the current Sunlight Cup Cricket competition. Bingham J. heard an exparte application for an interim injunction on March 20, 1986, and granted

the restraining order prayed for, limited to a period of 14 days. The application was renewed before Panton J. (Ag.) on April 7, when these appellants were represented by counsel and Panton J. (Ag.) continued the interim injunction with two variations. There was no limit as to time for the restraint but it specifically provided that this restraint would only apply if the respondent was selected on behalf of Kingston College.

Time had become an important factor. What is known in Jamaica as the Sunlight Cup is the premier cricket competition between secondary schoolboys, and the 1986 competition was approaching the semi-final stage. If the injunction was maintained there would be a possibility that the respondent could be selected and could be permitted to play in the final stages of the competition. Everyone wanted to know whether the injunction was properly granted. As Mr. Chin See said, the Principal of Kingston College should not consider himself a real defendant, neither should anyone regard the respondent as one not prepared to abide by the rules of his school. What was before the court was the question of the true interpretation of Rule 1 of the Rules of the Cricket Competition - Revised 1986 made by the Inter-Secondary Schools Sports Association "ISSA" and especially as they affect the respondent.

With the consent of the parties the appeal came on for hearing within 9 days of the order of Panton J. (Ag.). It is hoped that this expedition will become a precedent for litigants who wish to challenge interlocutory or interim injunctions.

The Cricket Rules of 1986, as revised, incorporated the Eligibility Rule, adopted by the General Meeting of "ISSA" of June 1, 1985. That Rule states:

> "Any boy who transfers from one member school to another or 'drops out' from one member school and enrolls in another, is not eligible to participate in any ISSA controlled competition for the new school during the succeeding academic year unless the boy enrolls in the second school before January 1st of the preceding academic year. (Further explanation of rule: A boy leaves school "A" and enrolls in school "B" on 1st January, 1985 (or later) is NOT eligible to participate during the 1985-86 school year. However, had said boy enrolled in school "B" before January 1st, 1985 he would be eligible to participate during the 1985-86 school year). "

There was a single area of dispute, namely, what is the meaning of "any boy who transfers from one member school to another" with the accent upon transfer. In the respondent's case, the agreed facts were that he had attended Excelsior High School, attained the Fifth Form, successfully completed his Cambridge Ordinary Level Examinations and in 1985 had been the captain of the Excelsior High School Sunlight Cup team. Excelsior does not offer advanced level examinations and, desiring to pursue that course, the respondent applied to and was accepted at Kingston College, enrolling on September 7, 1985. Excelsior is a member school of "ISSA".

It is obvious that the argument which succeeded in the court below is that the term "transfer" means a lateral movement and is inapplicable in circumstances where the course of secondary education at one school is completely exhausted and the student must perforce seek admission to another secondary school or to a tertiary institution. One of the sub-paragraphs of Rule 28 of the Education Regulations 1980 was relied upon to underpin the argument that, for a transfer of students, there is the necessity for a present relationship to an educational institution. Regulation 28 (1)(c) provides that:

> "A student may be transferred from one public educational institution to another where there has been consultation between the principal of the institution that he is presently attending and the principal of the institution to which he seeks admission."

These regulations are the guidelines for the transfer of students but in my view they do not dispose of the necessity to interpret the term "transfer" as used in Rule 1 of the "ISSA" Rules. Correspondence available to the court disclosed that the rule was designed to discourage and prevent "the purchasing of players" by member schools, and that "the matter of leaving school with no facilities for 'A' level work was a case cited in the hot debates before the passing of the Eligibility Rule. The Association comprises Government aided high schools with different programmes and the assumption has been that any movement from one to the other is a "transfer". The language used in Rule 1 above is significant. There is no reference to "a boy who is transferred" but rather to "a boy who transfers". The explanatory part of that Rule refers to "a boy who leaves School "A" and enrolls in School "B". All this would lead one to think that the more probable interpretation of the term "transfer" in Rule 1 is the broad and general one involving any movement from one member school to another without regard for the underlying reasons for that movement.

Inter-Secondary Schools Sports competitions form an important part of secondary school life and if rules exist by which these competitions are organized, then the proper interpretation of these rules are of such paramountcy, that when there is dispute a declaratory order from the court appears to be an appropriate remedy. This suggests that there is merit in the respondent's contention that he had a justiciable issue on which to approach the court.

Given then that the respondent could seek the declaration contained in the writ of summons, were there sufficient facts on which the court below could grant an injunction. Mr. Chin See conceded that the respondent had no actionable right to be selected a member of the Kingston College team but contended that on the true interpretation of the letter from the Principal which formed part of the record, the only impediment to the respondent's selection was the school's interpretation of the Eligibility

Rule. It seems to me to be a moot question which would require equity to provide a remedy by injunction where there is uncertainty that the basis for the equitable remedy would ever arise. What, however, formed the cogent basis of Mr. Henriques' argument was his contention that on a balance of convenience, the learned trial judge had made a wrong exercise of his undoubted discretion. In the first place the respondent would at the highest lose the opportunity to represent Kingston College in the event that his claims caught the eye of the Kingston College sports-master. He was not being prevented from playing competitive cricket although participation as a representative of the school carries high prestige and could add lustre to the catalogue of his extra-curricular activities. "ISSA" and the Principal of Kingston College had solemnly agreed against the use of ineligible players. Were the respondent to be permitted to represent Kingston College prior to the determination of the issue of his qualification, and should Kingston College emerge winners of the competition, what would be the fate of any trophy awarded, should the court eventually find on the trial of the action that the respondent was barred under the terms of the Eligibility Rule? The harm to Kingston College and to the Sunlight Competition could be irreversible. Further, under the clear provisions of Rule 1 above, if the respondent continued to be a student at Kingston College, he will become eligible to participate on behalf of the school in all competitions in the school year 1986-87. Consequently, if the injunction remains in force the respondent would have gained his total objective. Nothing of practical value would be left in the action and if the respondent elected to go to trial it would be of the merest academic interest to him, he having already reaped all the benefits he could ever obtain from the action.

Mr. Henriques submitted, quite rightly, that the court's discretion ought not to be exercised in that way, and he relied on the decision of the English Court of Appeal in Cayne and Another v. Global Natural Resources plc. [1984] 1 All E.R. 225. The facts in that case are as complicated as those in this case are simple. Of those facts

Eveleigh L.J.said at p. 226 of the Report: "The case is riddled with complexities of one kind or another" but over-simplified they relate to an application by minority shareholders to prevent directors of a company from issuing a large number of shares in the company prior to a general meeting as the minority shareholders apprehended that this was being done to maintain those directors in office. Sir Robert Megarry V-C. held that there was no real prospect of the plaintiffs succeeding in their action for a permanent injunction and he declined to grant the injunction. In so doing he did not even go on to consider the balance of convenience. Eveleigh L.J. interpreted the opinion of Megarry V-C. at p. 232 in these words:

> "The view that the Vice-Chancellor took on the facts was this. If an injunction was granted to the plaintiffs, that would be an end to the substance of the matter and the injunction would not in effect amount to a holding operation: it would be giving the plaintiffs all that they came to the court to seek, namely their injunction, and when the time came for trial there would be no point in a trial because the object of the plaintiffs would have been achieved seeing that the annual general meeting would have been held."

Eveleigh L.J.then added his own views:

> "With that I agree."

The broad principle identified by Eveleigh L.J. on which the court should act was "What can a court do in its best endeavour to avoid injustice?" And he answered the question on p. 233 thus:

> "The question, it seems to me, is: should the court exercise its discretion bearing in mind all the circumstances of the case, when to decide in favour of the plaintiffs would mean giving them judgment in the case against Global without permitting Global the right of trial? As stated that way, it seems to me that would be doing an injustice to the defendants."

Kerr L.J. was of a similar opinion. At p. 235 he said:

> "The practical realities in this regard are that, if the plaintiffs succeed in obtaining an injunction, they will never take this case to trial."

After reviewing the evidence Kerr L.J. concluded:

> "In these circumstances it seems to me that it would be wholly wrong for this court, in effect, to decide the entire contest between the parties summarily in the plaintiffs' favour on the untested material before us. This does not present any over-whelming balance on the merits in the plaintiffs' favour, or any other overriding ground for an immediate injunction without a trial. There is only a triable issue whose outcome is doubtful; and that issue should be tried and not pre-empted."

To indicate how unanimous were the views of the court, I will quote a short passage from the judgment of May L.J. at p. 238:

> "In general, as I say, where a plaintiff brings an action and in it seeks an interlocutory injunction on the basis that the defendant had breached the former's rights, then justice requires that that defendant should be entitled to dispute the plaintiff's claim at a trial, and if the grant of the injunction would preclude this then it should not be granted on an interlocutory basis."

Affidavit evidence from the defendants was not available to demonstrate the detailed make-up of the Inter-Secondary Schools Sports Association with particular reference to the types of educational programmes offered by these schools. Such programmes would be of high probative value if it showed that schools with 'A' level programmes were not at liberty to scramble for players from 'O' level only schools to enrich their squad of players. It seems tolerably clear that the Eligibility Rule was designed to combat this mischief and that in the circumstances of the instant case, the outcome of the trial so far as the plaintiff is concerned is doubtful at best.

In my view it would work an injustice to the defendants to permit the interim injunction to stand and I concurred in the decision to allow the appeal and set aside the order for the injunction.

Mr. Henriques declined to accept an order for costs. Earlier, in the court below, Mr. Chin See had similarly refused to accept costs on his then successful application. The appeal was heard on Kingston College Founder's Day. One of the Judges who heard the application in the court below, one member of this court and both leading counsel in the case are products of Kingston College. Although the matter reached this court, it had all the similarities of a domestic dispute in a Kingston College dormitory.

CAREY, J.A.:

Undoubtedly, it is given to few students the honour of representing Kingston College in the Sunlight Cup cricket competition. It is, therefore, truly a high honour when a student is selected. But is it a right which can be protected by an injunction? Young O'Neil, the plaintiff, wished to represent his new school at cricket in this competition. According to his affidavit in which he deposed as follows:

> "8. That since my enrolment at Kingston College I have made efforts to participate on behalf of the said Kingston College in Inter-Secondary Schools Cricket competitions and in particular, the current Sunlight Cup Cricket competition but that I have been precluded from so doing by the Defendants on the ground that the Rules of the Inter-Secondary Schools Sports Association makes me ineligible .....".
>
> "12. That I am extremely anxious to participate in the current Sunlight Cup competition which has now reached the stage where semi-finals are due to be played within the next two (2) weeks".

That plainly demarcated the scope of his ambition. Panton, J.,(Ag.), in granting an interim injunction in the following terms:-

> "1. That the Defendants W.D. MILLER and W. PARKES, their servants and/or agents be restrained from unlawfully prohibiting or preventing the Plaintiff from participating and playing on behalf of the said Kingston College in any and all Inter-Secondary Schools Cricket competitions including the current Sunlight Cup Competition".

went some way in removing the obstacles inconsiderately placed by the appellants in young O'Neil's path to achieving his goal and glory. It is against that order that the appeal comes before us.

The question which, on the 61st Anniversary of the Alma Mater's Founders Day, occupied three alumni, one each leading for the respective parties, and one member of the Court may be stated in other terms, thus - did the learned judge exercise his discretion on correct principles?

Lord Diplock in American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All E.R. 504 at page 510, dealing with the principles governing the grant of interlocutory injunction, said:

> "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".

As to this, it is not in dispute that there is a serious question to be tried. The plaintiff seeks the following Declaration -

> "A Declaration that he is eligible and entitled to participate on behalf of his school, Kingston College situate at 2A North Street in the parish of Kingston in all Inter-Secondary Schools Cricket competitions".

The determination of the relief for which he prays, necessitates the interpretation of 'transfer' in Rule 1 of the Rules of the Cricket Competition Revised 1986, in respect of the Inter-Secondary Schools Sports Association.

The Court must then go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. In this case the question of compensation in damages, whatever the outcome, does not arise. Neither of the parties has the slightest interest in money; honour is at stake. In these circumstances, in an endeavour to see where the balance of convenience lies, then it is a counsel of prudence "to take such measures as are calculated to preserve the status quo" (per Lord Diplock in American Cyanamid v. Ethicon Ltd. (supra) at page 511). In my opinion, the preservation of the status quo required the plaintiff to continue in his status of not participating in the competition and the Headmaster of the School (and the Secretary of the Association) the present appellants to continue honouring their obligation under the Rules. I think it is right to point out that in this regard, the Court is called upon to weigh the respective risks that injustice may result from its

deciding one way rather than the other, at a stage when the evidence is incomplete. See per Lord Diplock in N.W.L. Ltd. v. Woods [1979] 3 All E.R. 614 at page 625. The grant of the injunction at this stage would mean that 'transfer' meant what the plaintiff was contending for and that would have been decided at a stage when all the evidence was not yet placed before the Court. Indeed as Cayne v. Global Natural Resources plc [1984] 1 All E.R. 225 demonstrates -

> "Where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice, and to balance the risk of doing an injustice to either party. In such a case the court should bear in mind that to grant the injunction sought by the plaintiff would mean giving him judgment in the case against the defendant without permitting the defendant the right of trial. Accordingly, the established guidelines requiring the court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply in such a case, since, whatever the strengths of either side, the defendant should not be precluded by the grant of an interlocutory injunction from disputing the plaintiff's claim at a trial".

To avoid injustice, all the circumstances of the case must be looked at, and that means, having regard to all the practical realities. The practical realities in this situation are that if the injunction were granted, the plaintiff will have qualified for selection and would doubtless play in the semi-final and possibly in the final. He would have been given the high honour of joining the selected few, among whom are names to conjure with, viz., J.K. Holt, Jnr., O'Neil "Collie" Smith, Easton McMorris and others of the elite. What need would there be for any declaration thereafter? It may be, his time will come. It cannot be done in this way. Whether on the footing of the balance of convenience or to avoid injustice, I am of opinion that the learned judge erred in principle, and in granting the injunction, wrongly exercised his

discretion. His order cannot therefore be allowed to stand: it must be set aside.

For these reasons I concurred in the order made at the hearing on such an historic occasion.

ROSS J.A.

I agree.