



[2014] JMSC Civ. 163

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. HCV 04650 OF 2014**

**BETWEEN            JOHN PHILLIP AZAR JR (A MINOR)    1<sup>st</sup> CLAIMANT**  
**(By his Father and next friend, John Azar)**

**AND                    TENNIS JAMAICA LIMITED                    DEFENDANT**

**CONSOLIDATED WITH:**

**CLAIM NO. HCV 04652 OF 2014**

**BETWEEN            EMMA DIBBS (A MINOR)                    2<sup>nd</sup> CLAIMANT**  
**(By her Mother and next friend Rachael Dibbs)**

**AND                    TENNIS JAMAICA LIMITED                    DEFENDANT**

Lord Anthony Gifford QC and Emily Crooks instructed by Gifford, Thompson & Bright for the 1<sup>st</sup> claimant.

Arlene Harrison Henry for the Emma Dibbs instructed by Michelle Ann Cousins for the 2<sup>nd</sup> claimant.

Ransford Braham QC instructed by Braham Legal for the defendant.

**Injunction restraining defendant from implementing the decision of the Board – Whether the Board is obliged to notify competitors of the change pertaining to the selection of players for national duty and whether notice of such change ought to be given in a timely manner.**

**Heard:            16<sup>th</sup> and 17<sup>th</sup> October 2014**

**SINCLAIR-HAYNES J**

[1]    The first named claimant, John Phillip Azar Jr. (“John”), a minor and an associate member of the defendant, Tennis Jamaica Limited, has by his father John Azar sued

the defendant. This claim was subsequently consolidated with claim No. HCV 04652 in which Emma Dibbs (“Emma”), also a minor, has sued the defendant by her mother Rachel Dibbs. The facts are essentially the same. John seeks the following reliefs:

- (1) *An Injunction restraining the defendant, whether by itself its servants or agents, from taking any steps to implement the decision made by the Board of Tennis Jamaica on 11<sup>th</sup> September 2014 pertaining to the selection of players for the Jamaican team for the ITF/GSDF Caribbean 12 and under COTECC Championships to be held in Mexico on 1<sup>st</sup> to 7<sup>th</sup> November 2014;*
- (2) *A Mandatory Injunction ordering the defendants to hold qualifying trials for the purpose of selecting the players who will comprise the Jamaican team for the ITF/GSDF Caribbean 12 and under COTECC Championships to be held in Mexico on 1<sup>st</sup> to 7<sup>th</sup> November 2014; or*
- (3) *A Mandatory Injunction ordering the defendant to select the Jamaican team to the ITF/GSDF Caribbean 12 and under COTECC Champions to be held in Mexico on 1<sup>st</sup> to 7<sup>th</sup> November 2014 on the basis of current National rankings;*

Emma seeks the following reliefs:

- (1) *An Injunction restraining the Defendant, its President and Board of Directors their servants or agents from sending the selected team to represent Jamaica in the Tennis Masters Tournament in Mexico without holding trials for a proper selection of the best qualified team.*
- (2) *An Order that trials for the Tournament to be held in Mexico on or about 1<sup>st</sup> to 7<sup>th</sup> November, 2014 be held within 7 days of the hearing of this matter.*
- (3) *An Order that the defendant, its Directors, President, servants and or agents, or any of them disclose to the Applicant the deadline for entries to the said tournament.*
- (4) *An Order that the defendant, its Directors, President, servants and or agents, or any of them publish on the Tennis Jamaica website for the Ministry of Sport any and all invitations received from international tennis organizations within 3 days of receipt of same.*

...

## **The Background**

### **John's case**

[2] In 2013, John was the All Jamaica Tennis Champion in the Under 12 category. Indeed he has been for the past 3 years and is currently the national champion for the Under 12 category. Jamaica participates in an annual international tennis competition, the International Tennis Federation (ITF)/Grand Slam Development Fund (GSDF) Caribbean 12 and Under Central American and Caribbean Tennis Confederation (COTECC) Team Championships (ITF/GSDF Caribbean 12 and Under COTECC). The qualifying tournament was held in Jamaica for the first time in 2013. The event was described on the defendant's Facebook page. It informed that teams which qualified from the 2013 tournament would participate in the final competition, the Masters Event, which was held in Mexico.

[3] Jamaica, being the host country, was permitted to enter two teams in the 12 and Under boy's category and two teams in the equivalent of the girl's category. Each team comprised four players. John's team qualified having placed in the top three final positions of the tournament. Although the claimant's team qualified, he was informed that that fact did not automatically entitle him to represent Jamaica and he would be required to participate in a qualifying event, the 12 & Under Masters Event Team Trials. At that time, national ranking was the primary method used in the selection of the Under 12 national team.

[4] The claimant's father protested against the requirement to participate in the trials on the ground that as the unbeaten all-island champion for more than a year and a member of the qualifying team he should be exempt. The defendant however insisted that trials were compulsory as each country was required to send its best team. John participated in the trials and was among the two victorious males who were selected.

[5] Mr. Azar, John's father says that having experienced that selection process and other dealings with the defendant, it was his view that the policy for selecting teams to represent Jamaica mandated the participation in trials. He expected that if the policy

changed he would have been informed of the change and provided sufficient time in order to prevent any negative impact consequent on any such change.

[6] Recently however, he was informed that the defendant had already selected the team to represent Jamaica at the 2014 Masters tournament in Mexico and that the teams selected were those which were sent to a qualifying tournament in St Lucia in August 2014. He was also informed that the defendant's Board, the Board of Tennis Jamaica (Board), on the recommendation of the Technical Committee, had taken the decision that there would be no trials. The decision was taken on the 11<sup>th</sup> September 2014.

[7] Mr. Azar avers that he was never informed that the St. Lucian tournament would have been the qualifying tournament. Sometime about the 11<sup>th</sup> July 2014, whilst he was speaking casually to Mrs. Judith Harrison, a member of the Technical Committee (whom he regards as a friend), about holiday plans for their children, she asked whether he was sending John to the tournament in St. Lucia at the end of August 2014. She informed him that she would be taking her daughter. He told her he was not aware of that tournament and had already made other plans for that period which he could not change.

[8] She did not inform him that the team for Mexico would be selected at the said tournament, nor was he informed by the defendant. His son did not receive any invitation from the defendant to represent Jamaica at the said tournament. Mrs. Harrison forwarded him an email on the 12<sup>th</sup> July 2014 which referred to an attached Fact Sheet. No Fact Sheet was however attached to the email he received.

[9] It is his evidence which is not challenged, that shortly before the team departed, Mr. McGregor told him that even if the team which attended the St. Lucian tournament qualified for the tournament in Mexico, trials would be held. Upon the team's return, he (Mr. McGregor) informed him in a brief conversation that he had seen a Fact Sheet in St. Lucia which stated that the team which qualified in St. Lucia should be the team to represent Jamaica in Mexico but that it was within the Board's discretion.

[10] About mid September he discovered that the Board had taken the decision that no trials would be held. He then wrote to the president, Mr. Bailey, and Mr. McGregor about his concerns. On the 18<sup>th</sup> September 2014, Mr. Bailey responded by way of email and informed him that the decision was taken based on the recommendation of the ITF which was that the team which represented Jamaica in St Lucia should represent Jamaica in Mexico.

[11] Mr. Azar then wrote to the ITF and sought clarification. He was informed by the region's representative that such decisions were within the purview of the national association. On the 18<sup>th</sup> September 2014, he again wrote to Mr. Bailey, and informed him of the view expressed by the ITF representative for the region. He also wrote to Mr. McGregor on the matter. He informed him of the views which were expressed by the ITF representative and pointed out that the Fact Sheet issued by the ITF did not mandate the team that participated in the St. Lucian tournament to be the same to represent Jamaica in Mexico at the Masters tournament. Mr. McGregor told him that the Board would review the matter. On the 24<sup>th</sup> September he was informed that the Board had ratified its original decision.

### **Emma's claim**

[12] Emma is one of Jamaica's top 3 Under 12 Girls Tennis players. She is currently the number one ranked player in this category. In 2013, she was selected to represent Jamaica having been successful in the national trials held to select the team. She too complains that she was not informed that the team would be selected from the team sent to the St. Lucian tournament.

[13] Mrs. Dibbs, Emma's mother, avers that sometime in early August 2014, the family was in Florida for the month of August when they received the notification about the tournament. Emma was at that time enrolled in the Smatt Tennis Academy. The late notification by Mrs. Harrison about the tournament made it difficult and expensive to change their family's plans.

[14] Mrs. Dibbs, avers that she is informed by her husband and believes that Mrs. Harrison did not inform Mr. Dibbs that failure to attend the said tournament would cause

her to be ineligible to attend the Mexican tournament. She avers that Mrs. Harrison is the mother of one of the girls selected and Mr. McGregor coaches her child. Mr. John Bailey, the association's president, is the sponsor of the other two children who were selected. She asserts that the defendant's Board ought to exercise its discretion fairly and reasonably.

### **The defendant's evidence**

[15] It is Mr. Bailey's evidence that he is the sponsor of one child. He avers that Mr. Azar was aware that the method of selection was at the discretion of the defendant because of his representations in 2013. He ought to have known that selection might have been based on participation in the qualifying tournament. Mr. Bailey's evidence is that in determining that the team which represented Jamaica in St. Lucia should be the team to represent Jamaica in Mexico, the Board considered the following:

- a) The representation made by Mr. Azar in 2013 and concluded that the COTECC competition was a development competition. It was therefore appropriate that the team that participated in the qualifying tournament should continue to the Masters tournament. This would afford the players the opportunity to further and continue their development which began at the qualifying tournament.
- b) The Board formed the view that the ITF required or preferred the same team to represent Jamaica at the Master's tournament.
- c) The parents of the children would be responsible for the costs and expense to participate in St Lucia.

### **The law**

[16] The statement of Lord Hoffmann in **National Commercial Bank v Olint**, Privy Council Appeal No. 61 of 2008 contains the guiding principle. He said:

*"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 trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for the interference with the defendant's freedom of action by the grant of 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 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.*

*In practice, however it is often hard to tell whether either damages or 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 not have been granted or withheld, as the case maybe. 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. This is an assessment in which as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:*

*“It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.”*

*Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is, the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court’s opinion of the relative strength of the parties’ cases.*

Examination of the relative strength of the parties’ cases is necessary at this juncture.

[16] Article 36 of the ITF confers on the Board the power to change the rules which govern tournaments, competitions and matches. Article 36 states:

*“The functions of the Board shall be to administer all matters in connection with tennis in the Island including the arrangement and control of such competitions, tournaments and matches as the Board deems fit, and the Board shall have committed to it all the governing functions of the company with power to appoint sub-committees to deal with any particular matter .*

*The Board shall also have power from time to time to formulate, adopt and amend rules, regulations and bye-laws governing competitions, tournaments and matches with such variation as to any particular*

*competition, tournament or match as the Board may think expedient or necessary and the decision of the Board on all such matters shall be final.”*

[17] Tennis Jamaica is an affiliate of the International Tennis Federation. It is therefore empowered to amend the rules which govern tournaments and its decisions are indeed final. Notwithstanding the defendant’s power to amend the rules governing competitions, that power ought not to be exercised capriciously, arbitrarily and unfairly. Salmon LJ in **Nagle v Feilden** [1966] Queen’s Bench Division 633 at page 654, said:

*“One of the principal functions of our courts is, whenever possible, to protect the individual from injustice and oppression. It is important, perhaps today more than ever, that we should not abdicate that function.”*

[18] The evidence of Mr. John Bailey, the defendant’s president, is that teams are selected by the Technical Committee. He says:

*“The committee is guided by guide lines which are issued and published by the defendant. In its selection, the guidelines state that the Technical Committee may use trials; rely on rankings or a combination of trials and reliance on ranking. International rankings take precedence over national rankings...whether rankings or trials or a combination of both is used to select a team will depend on the circumstances.”*

These circumstances include:

*“The time frame available for the selection of a team. It may not be practical to organize trials in a limited time frame.*

*Whether the rankings of the players are close*

*Whether there are players available who are internationally ranked.*

*Whether the tournament involved is regarded as a development tournament and if there was an earlier qualifying tournament in which the player was involved.*

*The requirements of the particular tournament.”*



[19] In 2013 the claimant was number one. His selection then was based on a combination of rank and trial. It is Mr. Bailey's evidence that the junior players are not usually selected on the basis of trials but in 2013 trials were held because the rankings were close. On his evidence it can reasonably be concluded that ranking is the usual or preferred determining factor for juniors. John was ranked highest in 2013 and still is. Come 2014, a decision is taken to use the qualifying tournament as the basis for team selection. This, on his evidence, is a departure from 2013 when the selection was determined by trials and also a departure from selection by rank. Such change ought to have been communicated to the claimant timeously.

### **Was the change communicated to the claimants?**

[20] The pertinent question is whether it was communicated to the claimants' that the selection would be made from the St. Lucian tournament. Mr. Bailey says it was. It is trite that the burden of proving that assertion falls on the defendant.

### **The method of communication**

[21] It is Mr. Bailey's evidence that the fact that a child is selected to represent Jamaica is first communicated to the parents by telephone. Upon receipt of the parent's acceptance, an email or letter is sent. In the instant case the responsibility of informing the claimants was delegated to Mrs. Harrison who is a member of the Junior Development Committee. She is also the parent of a competitor who was selected. Scrutiny of his evidence as to her efforts provides the answer. He says she informed him as follows:

*"On the 10<sup>th</sup> July 2014 she contacted John Azar by What's App asking him to contact her to discuss COTECC under 12.*

*Mr. Azar responded by What's App saying he was in a meeting and he would contact her the next day (11<sup>th</sup> July 2014) the latest.*

*John Azar did not contact Mrs. Harrison on the 11<sup>th</sup> July 2014 as promised.*

*Mrs. Harrison contacted Mr. Azar by phone on the 12<sup>th</sup> July 2014 but the call was disconnected before the conversation was concluded.*

*On the 13<sup>th</sup> July 2014 Mrs. Harrison spoke to Mr. Azar by telephone. In the conversation Mrs. Harrison advised that she told Mr. Azar that his son John was selected for COTECC in St. Lucia, he being the number one ranked player*

*She inquired of Mr. Azar if he was interested in sending John to St. Lucia.*

*Mr. Azar's response was that he could not make a commitment and he didn't think so.*

*Mr. Azar did not contact Mrs. Harrison thereafter to advise that he had changed his position in relation to the tournament."*

[22] There is not a shred of evidence that she actually told him that the tournament would decide who would be selected. Considering the difficulty she experienced in reaching and communicating to Mr. Azar the fact that selection would be made from the tournament, it raises the question as to why an email was not sent. Similarly, regarding Emma, his evidence is that Mrs. Harrison told him that whilst at a party at the child's house, she asked Mr. Dibbs whether Emma would be attending the tournament in St. Lucia and he told her no and berated the tournament. There is no evidence that she told him that the tournament was a qualifying one.

### **Will the claimant suffer prejudice if the injunction is refused?**

[23] On Mr. Bailey's evidence, players who participate in international competitions may be awarded ranking points. International ranking takes precedence over national ranking. It is useful to quote him:

*"International ranking takes precedence over national ranking. That is to say that a player may be ranked number one on the national ranking but a player of similar age group with an international ranking may gain selection ahead of the player ranked number one on the national ranking,"*

[24] The claimants are children. John's desire is to become a professional tennis player. To achieve number one status for 3 years he must have poured much effort and time into honing his skills. His father says if the decision stands he would be deprived of the chance to try out to represent Jamaica and furthering his desires of becoming a professional player.

[25] This court agrees. If he is prevented from playing he might well lose an opportunity to receive an international ranking. It is probable that the child selected in his stead may receive an international ranking which would place that child higher in rank than he. He would have been unfairly denied the opportunity not only to compete, but also to possibly achieve glory for himself and his country.

[26] Mr. Braham submits that the Masters tournament is a development competition and it is appropriate that the team that participated in the qualifying tournament continue to the Masters tournament because the players would have the opportunity to further and continue their development which began at the qualifying tournament. This submission is in my view tenuous. The development of the players would have begun before the qualifying tournament. Indeed it is the claimants who would unfairly be denied the opportunity to compete so as to benefit from the development which the tournament offers.

[27] Mr. Bailey avers that the removal of the children selected would be damaging emotionally and psychologically as their selection received widespread exposure to the media. That is indeed unfortunate, but in balancing the scales, I must also consider that they are all children and all will suffer disappointment. Consideration must also be given to John and Emma's emotions. Mr. Azar's evidence is that John feels a strong sense of disappointment.

[28] Mr. Wilson also says that plans are well advanced; Jenna Harrison and John Chin have purchased their tickets. This court is of the view that should the defendant succeed, damages can remedy any financial loss suffered. This court is also of the view that the likelihood that at trial it will turn out that the injunction was wrongly granted is low.

[29] Mr. Braham is concerned about the finality of a mandatory injunction as he says the reliefs are designed to compel the defendant to hold trials or send no team. He argues that if the injunction is granted, the claimants will have achieved their entire remedy and there will be no need to go to trial. He submits that a grant of a mandatory injunction will result in greater irredeemable harm to the defendant.

[30] This court is of the opinion that if the injunction is withheld, the claimants will suffer greater irredeemable harm as they would have been unjustly deprived of an opportunity to compete. Should, however the defendant be compelled to hold trials, all parties will get an equal opportunity to vie for a place on the team. The aim of the ITF will then be achieved as the stronger team will represent Jamaica at the tournament.

[31] Lord Hoffman's statement in **National Commercial Bank v Olint** makes it plain that the underlying principle applicable to mandatory injunctions is the same as that applicable to prohibitory injunction. At pages 6 and 7 of the decision he said:

*"There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in **R v Secretary of State of Transport, ex parte Factortame Ltd (No 2)** [1991] 1 AC 603,682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see **Films Rover International Ltd v Cannon Film Sales Ltd** [1987] 1 WLR 670, 680. But there is no more on than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in **Shepherd Homes Ltd v Sandham** [1971] Ch 340, 351, " a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."*

*For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren."*

[32] In light of the foregoing;

- (1) The Defendant is restrained, whether by itself, its servants or agents from taking any steps to implement the decision made by the Board of Tennis Jamaica on 11<sup>th</sup> September 2014 pertaining to the selection of players for the Jamaican team

for the ITF/GSDF Caribbean 12 and under COTECC Championships to be held in Mexico from 1<sup>st</sup> to 7<sup>th</sup> November 2014.

(2) The Defendant is hereby ordered to hold qualifying trials for the purpose of selecting the players who will comprise the Jamaican team for the ITF/GSDF Caribbean 12 and under COTECC Championships to be held in Mexico from the 1<sup>st</sup> to 7<sup>th</sup> November 2014.

(3) Cost to be costs in the claim.

