

COMMONWEALTH OF THE BAHAMAS

**IN THE SUPREME COURT
COMMON LAW & EQUITY DIVISION
2007/CLE/GEN/00982**

between

**THE BAHAMAS BEVERAGE AND WATER DISTRIBUTORS UNION
Plaintiff**

and

**KLG INVESTMENTS LIMITED
(DBA Aquapure Water Limited)
Defendant**

BEFORE: His Lordship The Honourable
Mr Justice K Neville Adderley

APPEARANCES: Mr Obie Ferguson, Jr for the Plaintiffs
Mr Emerick Knowles for the defendant

23 March, 10 June, 16 October 2009

DECISION

Adderley J

1. The application by way of Originating Summons filed 31 July 2007 seeks the following relief among others:

- “(a) a declaration that the terms and conditions contained in an Industrial Agreement dated 21 May 2003 (“the Agreement”) between the Plaintiff and [Aquapure Water Limited (“Aquapure”)] are legally binding on the Plaintiff and the defendant and the employees of the defendant....”

The effect of this and several ancillary applications is to ask the court to declare that KLG Investments Ltd. (“KLG”) is obliged to collect Agency Shop fees by virtue of its succession to the Agreement. The Agreement was not registered under section 49 of The Industrial Relations Act, Chapter 321 (“the Act”).

2. Section 50 of the Act makes the following provision:

- “50. An Industrial agreement under section 46 shall have effect only if it is registered by the [Industrial] Tribunal in accordance with section 49.”

3. The two crucial issues raised for decision are:

Firstly, if an industrial agreement expressly provides that it is legally binding between the parties is it enforceable despite the fact that it has not been registered under the Act; and

Secondly, is a company which inherits employees upon the acquisition of a business which had as part of their industrial agreement the agency shop provision bound by that provision if it is not a party to the agreement and the agreement has not been registered under the Act?

4. In *The Hotel Corporation of The Bahamas v Bahamas Hotel Managerial Association* Civil Appeal No.12 of 1999 Hall JA, as he then was,

made the following statement in relation to section 50 of the Act at paragraph 35 of his judgment on page 5:

“It will be remembered that section 50 of the Act prescribes registration by the Tribunal as a condition precedent to that agreement taking effect.”

5. I must, however, mention the obiter dictum of Ganpatsingh JA at paragraph 40 on page 7 op cit relied on by Mr Ferguson to support his view that if an industrial agreement expresses that it is legally binding, that term makes it binding for purposes of the Act notwithstanding that it has not been registered.

6. I do not think that what is contended by Mr Ferguson is what the learned judge said. It appears that he sought to give a background for construing section 50 of the Act and did indeed refer to ***Ford Motor Company Ltd v Amalgamated Union of Engineering and Foundry Workers et al [1969] 2 ALL ER 481*** in which the agreement did not have an express term stating that it was legally enforceable. The learned judge stated that the submission of the agreement under section 48 of the Act for registration is an expression of an intention of the employer and employee that they wish to enter an industrial agreement under section 46, and in such case section 50 provides that an agreement shall only have effect if it is registered in accordance with section 49. The learned Judge did not go further to discuss what would happen if the parties did not make the submission for registration under section 49 but nevertheless by a term in the industrial agreement expressed an intention to be legally bound. That is the issue which the plaintiff has quite appropriately raised for decision in this case.

7. The short argument put forward by the plaintiff is that the defendant is the successor to the Agreement and is bound by all the terms and conditions between Aquapure and the employees including the agency shop provision. It is legally bound, submits Mr Ferguson, because of several clauses in the Agreement on which the plaintiff mainly relies, namely:

“25.02 The company recognizes that the union retains all rights and powers vested in it by the industrial relations Act 1970 as the sole bargaining Agent of the Bargaining Unit ...”

“53.13 Agency Shop

The company agrees to deduct Ninety (90) percent of the Union dues from non management members, and the authorized amount from Union members once every month upon being notified by the Minister of Labour that the matter has been dealt with as required by law.

“56.03 If at the expiration date of this contract a new contract is not consummated the terms and conditions of this contract would remain in effect until the new contract is negotiated up to the maximum provided by law.”

“56.04 Where there is change in Ownership of the Company and an Employee continues to be employed after the change in Ownership without interruption, the new Owner shall be the company of that Employee and the Employee’s legally recognized Bargaining Agent (Union) shall continue to be recognized as such. The employment shall be deemed to be continuous notwithstanding the change of Ownership.”

“56.05 This agreement shall be binding on any successor to the Ownership or control of the company for the purposes of which the members of the Bargaining Unit are employed.”

“57.02 The parties to this Agreement agree that the said agreement is to be legally binding on the company, the employees and the Union.”

“56.02 “The provisions of section 51(1) (c) of the Industrial Relations Act shall have effect in relation to change of ownership....”

8. The defendant states that pursuant to an agreement made the 24 May 2006, KLG purchased the business and assets of Aquapure which was placed into liquidation on 14 December 2006. As such, KLG is not a party to the Agreement. Furthermore, the Agreement expired on 28 February 2006 and no new industrial agreement has been negotiated or entered into by Aquapure, and none by KLG.

9. Having regard to the doctrine of privity of contract, since KLG was not a party to the Agreement, at common law it cannot be sued to carry out any obligations under it. Such obligations would have to be voluntarily assumed or imposed by statute. Section 51(1)(c) of the Act modifies the effect of the privity doctrine by the following provision:

“51(1)(c) Every industrial agreement so registered [under section 49 of the Act] shall; during its continuance be binding on -

(c) any person succeeding (whether by virtue of a sale or other disposition or by operation of law) to the ownership or control of the business for the purposes of which the employees in the bargaining agent are employed;”

Although section 51(1)(c) is incorporated in clause 56.02 of the Agreement, the section repeats the requirement of section 50 that in order for it to take effect the agreement must be registered.

10. The same principle applies to the agency shop provision as it relates to the non-union employees. At common law under the privity of contract doctrine parties to an agreement cannot confer rights or impose burdens or obligations on third parties who are not parties to the agreement. The way I understand Mr Knowles’ argument is that an agency shop arrangement imposes an obligation or burden upon non-union members to pay 90% of dues to the union and the non members by definition are not parties to the membership contract between the union and its members. The employer is also given the burden of collecting those dues. As KLG is not a party to the Agreement or the membership contract between the union and its members the obligation is not enforceable at common law. Only the registration of the Agreement can make the agency shop provision legally enforceable against KLG as the successor employer and on the employees. This is by virtue of sections 50 and 51(1)(c) of the Act.

11. There were other issues raised but the court does not consider it necessary to deal with those. Having perused the relevant sections of the

Agreement and the Act, it is the view of the court that without first being registered the Agreement is not legally enforceable against the defendant with respect to the matters which are the subject matter of this application.

RULING

12. For the reasons set forth above, I exercise my discretion to refuse the declarations and the consequential relief sought and dismiss the originating summons. Costs shall follow the event to be taxed if not agreed.

Dated the 16th day of October 2009

K Neville Adderley
Justice