BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

CV 1090 of 2014

BETWEEN

DRAYTON CARTER **CLAIMANT**

AND

CITY OF BRIDGETOWN CO-OPERATIVE CREDIT UNION LIMITED **DEFENDANT**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court

2019: February 26

Mr. Bryan Weekes, Attorney-at-Law for the Claimant.
Dr. H.A. Cummins Q.C., Mr. R. Forde Q.C. and Mr. F. Odle, Attorneys-at-Law of Messrs. Carrington & Sealy for the Defendant.

DECISION

Introduction

[1] This is an application to strike out the Claimant's statement of case, pursuant to Rule 26.3(3)(b) of the Supreme Court (Civil Procedure) Rules, 2008 ("the CPR"). The parties agreed that the Court would give

its decision based on the written submissions from counsel for the parties.

Background

[2] The claim was filed on 09 July 2014 when the Claimant was an officer of the Defendant. On 02 June 2014 he was suspended by the Supervisory Committee ("the Committee") of the Defendant, pursuant to section 215 of the Co-operative Societies Act, Cap.378A ("the Act"). The relief sought is:

1. an injunction preventing the Defendant from holding a special meeting on 19 July 2014;
2. a declaration that the Claimant's suspension was wrongful and of no legal effect;
3. damages for defamation; and
4. costs.

[3] The claim was accompanied by a notice of application and an affidavit requesting that the Defendant "be enjoined from holding a Special General Meeting on the 19th day of July, 2014 or any other special general meeting of its members to consider the suspension of the Claimant from his position as Secretary of the Defendant until further order of the Court". On 16 July 2014, the Defendant gave an

undertaking to postpone the meeting, and to advertise the postponement in a local newspaper.

[4] The Defendant filed an acknowledgment of service on 28 July 2014, indicating that it did not admit the claim. This was followed on 11 August 2014 by an application to strike out the statement of case, and to enter judgment with costs for the Defendant. The grounds of the application are that:

1. the statement of case disclosed no reasonable grounds for bringing the case against the Defendant. Even if the facts alleged were true, they did not disclose any legally recognizable cause of action;
2. the statement of case omitted facts necessary to support the claim for damages. The alleged defamatory words were not mentioned; no breaches of care or statutory duty were identified; no breach of contract was mentioned; and there was no reference to any action or omission by the Defendant; and
3. the statement of case did not comply with Parts 8.5 and 69.3 of the CPR. Neither the precise defamatory words complained of, nor sufficient particulars of the publication to enable identification, were stated.

[5] The Defendant's affidavit in support of the application restates the grounds of appeal along with advice received from its counsel. The affidavit goes further and deposes that, based on the legal advice received, the Defendant was not responsible for the actions of the Committee. The Defendant contended that the Committee was established by Cap.378A; it acted independently of the Defendant's board; and the Defendant was not a party to the Committee's decision to suspend the Claimant.

Issues

[6] A number of issues are raised by the Defendant's application. The first is whether the Claimant's pleadings are so defective that they raise no known cause of action. Secondly, did the statement of claim identify any breach of statutory duty, breach of contract, or action or omission by the Defendant. Thirdly, has the Claimant used the correct process to initiate his action. And fourthly, is the Defendant the wrong party to the action.

The Defamation Action

[7] The Claimant filed an amended statement of claim on 14 August 2014, three days after the filing of the Defendant's application. He was

entitled to file this document without the Court's permission. Rule 20.1(1) of the CPR provides that:

> "A statement of case may be amended at any time prior to a case management conference and the filing of a defence without the court's permission".

When the amended document was filed, no case management conference had taken place, and no defence was filed.

[8] The amended statement of claim inserted two additional paragraphs which addressed the shortcomings in the Claimant's defamation plea. (See paras. 4 and 5 of that document). The alleged defamatory words are now mentioned along with other particulars. By so doing the Claimant satisfied the requirements of Rules 8.5 and 69.3 of the CPR.

Breach of Statutory Duty

[9] Both paragraph 13 of the original statement of claim, and paragraph 15 of the amended statement of claim state that:

> "The [Committee] of the Defendant is under a duty to carry out its functions in a manner which is fair and transparent and has failed to follows the law as set out in [section] 215 of the Act, that is to say, that it has failed to employ the assistance of an independent auditor in the investigation of the claims against the Claimant prior to taking the decision to suspend him".

[10] Section 215(2) of the Act provides that:

> "The [Committee] shall appoint an auditor or some other body to assist it in determining whether any of the funds, securities or other property of the credit union have been misappropriated or misdirected and the remuneration of any auditor or other body so appointed shall be determined by the [Committee] and paid by the credit union".

[11] The Court understands the Claimant to be alleging a breach of statutory duty under section 215(2) of the Act. The relief sought, *inter alia*, is a declaration that the Claimant's suspension was wrongful and of no legal effect. The Claimant was suspended pursuant to section 215(3) of the Act. It appears to the Court that findings of fact based on the evidence advanced at trial will be crucial to the Claimant's case. At this stage the Court is unable to determine whether the Committee appointed "an auditor or some other body". Likewise, the Court is unable to say if reasonable grounds existed for the Committee to suspect misappropriation or misdirection of the Defendant's property by the Claimant.

[12] Additionally, the Claimant's case is that in the circumstances of his suspension, and the failure to appoint an auditor, the Defendant conducted its affairs in a manner prejudicial to the Claimant. Reliance

is placed on sections 177(2)(b) and 177(3) of the Act. (See para.22 of the amended statement of claim). These sections enact as follows:

> "177. (1) A complainant may apply to the court for an order under this section.
>
> (2) Where the court receives an application pursuant to subsection (1) and is satisfied that, with respect to the society,
>
> (a)…….;
>
> (b) the business or affairs of the society are or have been exercised in a manner;….
>
> that is oppressive or unfairly prejudicial or that unfairly disregards the interests of a member or other security holder, creditor, director or officer of the society, the court may make an order to rectify the matters complained of.
>
> (3) For the purpose of subsection (2), the court may make any order that it considers appropriate,….".

[13] Part of the relief sought by the Claimant is "any other remedy that the court deems appropriate in the circumstances". (See para.24c of the amended statement of claim). This is in tandem with section 177(3) of the Act. The Claimant is not relying on any act or omission under section 177(2)(a) of the Act. To do so would require further

amendment to paragraph 22 of his amended statement of claim. The Claimant has not alleged or relied on any breach of contract in this action. Therefore, there was no need to plead such.

Is the Claim Form the Correct Process

[14] The Defendant filed further written submissions on 26 November 2014. At paragraph 6 of that document the Defendant asserted that where relief is sought under section 177 of the Act, a fixed dated claim form must be used. The Court notes that this was not raised in either the Defendant's application or affidavit in support of the application. The Defendant argues that the claim should be struck out because the wrong claim form was used.

[15] Section 181 of the Act provides that:

> "(1) Where this Part provides for an application, the application may be made in a summary manner by originating notice of motion or in any other manner that the rules of court may provide".

The Claimant is seeking relief under section 177 which is in Part XV of the Act, the same Part referred to in section 181(1).

[16] Counsel for the Claimant responded that the language of section 181(1) is permissive and not mandatory. This interpretation accords with section 37 of the Interpretation Act, Cap.1. Counsel also relied on the

Canadian case of **Sparling v. Royal Trustco Ltd, 24 BLR 145,** in which the Ontario Appeal Court confirmed that a litigant could commence an action under the Canada Business Corporations Act by way of writ of summons. The litigant was not bound to commence proceedings by notice of motion or by originating motion. Section 241 of the Canadian legislation was drafted similarly to section 181 (1) of the Act.

[17] Courts are hesitant to strike out claims because the wrong process was used to initiate proceedings. Our Chief Justice has opined that:

> "In an era when access to justice is an un-questionable desideratum, particularly in light of the overriding objective stated in Rule 1.1[of the CPR] "to enable the court to deal with cases justly", we must, in construing the CPR, always prefer substance to form in regulating access to the courts". (See **Auto-Guadeloupe Investissement S.A. v. Columbus Acquisitions Inc. et al, CA B'dos No.11 of 2011, decision dated 19 October 2012**, at para. [37] of judgment).

[18] Consideration should also be given to the fact that in addition to the relief sought under section 177 of the Act, the Claimant is also seeking damages for defamation, a declaration, and injunctive relief. The defamation action would normally begin with a claim form. The CPR permits a claimant " to include in a single claim form all, or any other

claims which may be conveniently disposed of in the same proceeding". (Rule 8.3). The Claimant has opted to address all his claims in the same claim form.

[19] This Court is unable to say that by using a claim form the Claimant committed such an egregious procedural error that he should be driven from the seat of justice. Neither is the Court persuaded that the Claimant used the wrong claim form. Noticeably the Defendant has not indicated any future procedural challenges, or any prejudice to itself, or any compromise of the Court's powers, if the matter is allowed to proceed by way of the claim form.

Was the Wrong Defendant Sued

[20] The Defendant's final argument is that the Claimant sued the wrong party. The Defendant contends that the Committee is a separate entity, and that the Defendant is not responsible for the acts or omissions of the Committee. Part XV11 of the Act establishes a Credit Committee (ss.205-210), and a Supervisory Committee (ss.211-217). The Committee being considered here is part of the governance machinery of the Defendant.

[21] The Committee is elected by the members of the Defendant at the annual general meeting (s.211(1)). Neither board directors, nor credit

committee members, nor officers of the Defendant may be members of the Committee (s.211(4)). The purpose of this Committee is to "examine the books of the credit union, confirm the cash instruments, property and securities of the credit union, and confirm the deposits of the members, and perform such other duties as are prescribed by this Act, the regulations and the by-laws of the credit union". (S.212).

[22] The Committee also has the responsibility for investigating whether credit union property was misappropriated or misdirected, (s.215(2)), and may suspend a board member (s.215(3)). The role of the board, vis-à-vis the Committee, is to summon general meetings of the members to consider the removal of a member (s.215(4)(6)); and to receive reports of Committee meetings (s.216(2)(a)). A Committee member may be removed at a general meeting of the credit union members (s.217).

[23] At paragraph 18 of the amended statement of claim, the Claimant pleaded that the Defendant is vicariously liable for the acts of the Committee. This is an issue to be decided by the Court when the law is applied to its findings of fact after a trial. In **The Catholic Child Welfare Society v. Various Claimants et al [2012] UKSC 56**, Lord Phillips commented that "the law of vicarious liability is on the move".

(See para.[19] of judgment). And in **Cox v. Ministry of Justice [2016] UKSC 10,** it was held that a relationship, other than a relationship of employment, is capable in principle of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of a defendant's business and for its benefit.

Disposal

[24] Rule 26.3(3) of the CPR provides that:

> "The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court
>
> (a)……
>
> (b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim;…."

[25] In considering this part of the CPR, the Court of Appeal offered guidelines for dealing with applications to strike out a statement of case. In **Paradise Beach Limited et al v. Edghill et al, Civ.Ap. No.10 of 2011, decision dated 12 December 2012**, courts are cautioned not to usurp the function of a trial judge by engaging in

"minute and protracted examination of documents and facts of the case, in order to see whether [a party] really has a cause of action." (Para. [21] of judgment quoting Dankwerts L.J. in **Wenlock v Moloney and Others [1965] 2 All ER 871**).

[26] The Court of Appeal also reaffirmed that it was not appropriate to strike out a claim where the central issues are in dispute. (See para. [23] of the **Paradise** judgment). And finally, the Court of Appeal urged a consideration of the overriding objective as follows:

> "…..in order to arrive at a just result it is necessary to bear in mind that the master or judge exercising his discretion to strike out a claim….before trial must pay regard to the overriding objective in Rule 1.1 of the CPR, that is to say, the need to deal with cases justly. Dealing with a case justly includes so far as practicable saving expense; dealing with a case in a way which is proportionate to the amount of money involved; ensuring that it is dealt with expeditiously and fairly; and importantly, allotting to it an appropriate share of the court's resources whilst taking into account the need to allot resources to other cases". (See para. [24] of judgment).

[27] Taking these guidelines into consideration, this Court is of the considered opinion that the Defendants application should be dismissed. The Court will proceed to hear the parties on the matter of costs.

Apology

[28] The Court apologies for the time taken to deliver this judgment. Unfortunately this file was overtaken by a flood of other judgments that included more pressing and urgent decisions. This Court has been severely challenged in maintaining a balance between outstanding decisions in the face of insufficient time for judgment writing.

Sonia L. Richards
High Court Judge