

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCMAP2022/0008

BETWEEN:

SEVENTH DAY ADVENTIST CO-OPERATIVE SOCIETY LIMITED

Appellant

and

FINANCIAL SERVICES REGULATORY AUTHORITY

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Trevor M. Ward
The Hon. Mde. Esco Henry

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Leevie Herelle for the Appellant
Mrs. Sardia Cenac-Prospere and Ms. Cleopatra Mc Donald for the Respondent

2023: November 06;
2024 January 31.

Civil Appeal – Section 45 of the Financial Services Regulatory Authority Act of Saint Lucia – Whether section 45 establishes a right to appeal decisions of the Authority made under section 180 of the Co-operative Societies Act - Whether learned judge erred in her interpretation and application of rules 11.15 and 11.16 of the Civil Procedure Rules 2000 – Failure to include statement in ex parte order as required by rule 11.16(3) of the Civil Procedure Rules 2000 - Rule 13 of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019 - Duty to give full and frank disclosure – Whether the judge failed to give due regard to the failure of the respondent to give full and frank disclosure at the ex parte hearing

The Financial Services Regulatory Authority is a body corporate responsible for the administration of the Financial Services Regulatory Authority Act (“the FSRAA”) and for the general administration of the Co-operative Societies Act (or “the Act”) in Saint Lucia. The Authority functions as a regulatory and supervisory body, tasked with maintaining a general review of the operations of all regulated entities in Saint Lucia. The Seventh Day Adventist Co-operative Society Limited (“the appellant”) is a duly registered credit union

co-operative society under the Act, licensed to carry on the business of deposit-taking and granting loans to its members and is a regulated entity under the FSRAA and the Act.

Over the years, a series of correspondence had been exchanged between the Authority and the appellant in which the Authority advised the appellant of the need to comply with its statutory obligations. By letter dated 9th December 2021, the Authority informed the appellant that it had taken the decision to appoint an examiner to examine the books and records of the appellant pursuant to section 180 of the Act. The appellant then wrote, through counsel, on 24th January 2022, to the Prime Minister in his capacity as Minister of Finance, requesting him to exercise the powers under section 45 of the FSRAA to appoint an Appeals Tribunal as counsel had instructions to pursue an appeal against the decision of the Authority. On 31st January 2022, the Authority wrote to the Minister indicating that the decision was not appealable and that it intended to continue with its course of action. On the said date, the appointed examiner attempted to execute his duties but was prevented from doing so by the President of the appellant who asserted that a 'notice of appeal' had been filed in respect of the decision of the Authority.

On 8th July 2022, the Authority filed an amended (without notice) fixed date claim for the appointment of an inspector to carry out an investigation into the appellant pursuant to section 181 of the Act ("the ex parte application"). On 11th July 2022, the judge *inter alia* granted the order for the investigation of the appellant and for the appointment of an inspector ("the ex parte order"). The ex parte order was served on the appellant on 20th July 2022 while the claim with supporting documents and authorisation code were served on 21st July 2022. The Authority also filed an application for committal which was listed for hearing on 4th August 2022. On the said date, the appellant filed an application to set aside the ex parte order. This application to set aside was heard and dismissed by the judge on 24th November 2022. The judge also ordered the appellant to comply with the terms of the ex parte order.

The appellant being dissatisfied with the decision of the learned judge sought and obtained leave to appeal and filed its notice of appeal on 23rd February 2023 which contained four grounds of appeal namely: 1.) the judge erred in that she did not give due weight to section 45 of the FSRAA, by which a statutory appeal had commenced; 2.) the judge erred in her interpretation and application of rules 11.15 and 11.16 of the Civil Procedure Rules 2000 ("the CPR 2000"); 3.) the judge failed to give due regard to the failure of the respondent to give full and frank disclosure at the ex parte hearing; 4.) the judge failed to apply the relevant legal principles when considering the respondent's ex parte application and the appellant's set aside application.

Held: dismissing the appeal with costs to the respondent, that:

1. Section 45(3) of the FSRAA establishes the right to appeal decisions of the Authority made under the FSRAA itself or an enactment specified in Schedule 1 of that Act unless that enactment provides otherwise. The Co-operative Societies Act is a specified enactment under Schedule 1. As it relates to appeals under this Act, it is concerned only with prescribing a right of appeal in respect of specified decisions taken under that Act, which it makes appealable to the Co-operative Societies Appeals Tribunal under section 188. In the context of this case, a proper interpretation of section 45(3) is that decisions taken by the

Registrar under the Co-operative Societies Act are appealable pursuant to section 45(3) of the FSRAA except decisions taken pursuant to sections 177, 187 and 148(9) of the Act as these are expressly excluded from the ambit of section 45(3) of the FSRAA. Since a decision made by a Registrar taken under section 181 of the Co-operative Societies Act to appoint an examiner is not specifically made subject to appeal under that Act, nor is it stated in that Act that no appeal lies from such a decision, it is caught by section 45(3) of the FSRAA and is appealable to the Appeals Tribunal established thereunder. Moreover, there can be no appeal to the Appeals Tribunal under section 45(3) in the absence of a duly constituted Tribunal pursuant to section 45(2). The learned judge was therefore right to characterise the appellant's written overtures to the Minister as a "purported appeal," in the sense that while the act of writing to the Minister is stated by the appellant to be an appeal, it is in fact and law not an appeal and, therefore there was no pending appeal at the time the respondent engaged the court with the *ex parte* application to appoint an investigator.

Section 45 of the **Financial Services Regulatory Authority Act** Cap.12:23 of the Revised Edition of the Laws of Saint Lucia applied; Sections 177, 148(9), 180, 181, 182, 188 of the **Co-operative Societies Act** Cap 12:06 of the Revised Edition of the Laws of Saint Lucia considered.

2. Read together, rule 11.15 of CPR 2000 and E-Litigation Rule 13(3)(b) have as their primary objective the requirement that a respondent to an *ex parte* order or claim commenced on the E-Litigation Portal must be served with the application, supporting documents and evidence, and at the same time must be served with the authorisation code. Service of the originating documents without the authorisation code means that proper service has not been effected and this defect cannot be cured by serving the code separately at a later date but may be remedied by re-serving the court documents with the authorisation code. In this case, the defective service of the documents did not render the *ex parte* order invalid and liable to be set aside. Moreover, in circumstances where the evidence is that the other documents were served personally on the appellant on 21st July 2022, and the authorisation code, though served separately, was served about 2 hours later, and considering that the appellant was able to access the portal documents and lodge his application to set aside the *ex parte* order and otherwise participate in the process, there is no basis for finding that any prejudice was caused to the appellant by not receiving the authorisation code at the same moment that it was served with the other documents. Further, the underlying purpose served by CPR 11.16(3) is to ensure that the respondent to an *ex parte* application is given notice of their right to apply to have the order set aside and to apprise them of the deadline by which they must do so. Despite the fact that the *ex parte* order did not contain a statement as required by the rule, the appellant in fact lodged an application to set it aside within the time prescribed by the rules. In all the circumstances, the reasons given by the learned judge for exercising her discretion not to set aside the *ex parte* order for breach of rule 11.16(3), cannot be said to exceed the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Rules 11.15 and 11.16 of the **Civil Procedure Rules 2000** applied; Rule 13 of the **Eastern Caribbean Supreme Court (Electronic Litigation Filing and**

Service Procedure) Rules, 2019 applied; **Flavio Maluf v Durant International Corp et al** BVIHCMAP2021/0025 (delivered 13th January 2022, unreported) considered.

3. A person applying for relief upon an application made *ex parte* must make full and frank disclosure of all material matters relevant to the decision whether or not to grant the application. The test of materiality is whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application. In this case, the respondent could not be said to have failed to make full and frank disclosure at the *ex parte* hearing in relation to the appellant's contention in relation to its purported appeal. The learned judge examined the evidence before her and related it to the allegations made and the order that was being sought on the *ex parte* application. Having considered the evidence, the learned judge found that even if the Credit Union Sector Reports had been disclosed, they would not have caused her to refuse the order because they did not demonstrate that the appellant was compliant with the relevant provisions of the law. The learned judge also carefully assessed the evidence before her on the set aside application and provided cogent reasons for her decision not to set aside the *ex parte* order on the basis of material non-disclosure. As such, there is no warrant for interference by this Court and ground 3 of the appeal is dismissed.

Commercial Bank - Cameroun v Nixon Financial Group Limited BVIHCVAP2011/0005 (delivered 6th June 2011, unreported) applied.

4. The test of materiality is context specific and what is considered relevant or material depends in every case on the nature of the application and the orders sought. In this case, the nub of the allegations grounding the *ex parte* application was the appellant's serial non-compliance with the statutory requirements of the Co-operative Societies Act. Therefore, matters pertinent to whether or not the appellant had been compliant were highly relevant at both the *ex parte* and set aside applications. The judge was cognisant of this as can clearly be gleaned from paragraph 28 of the dismissal order. Additionally, a judge should give his or her reasons in sufficient detail to show the principles on which he or she has acted and the reasons that have led him to the decision. They need not be elaborate. The judge gave a very detailed order and set out her reasoning on each issue at different paragraphs throughout the order. The matters that informed her decision were readily apparent to this Court. There is no merit to this complaint.

English v Emery Reimbold & Strick Ltd and other appeals [2002] EWCA Civ 605 applied; **Thornton Tomasetti Inc v Anguilla Development Corporation Ltd** AXAHCVAP2014/0008 (delivered 15th September 2015, unreported) applied.

JUDGMENT

- [1] **WARD, JA:** This is an appeal against the order of Justice Cadie St Rose Albertini dated 22nd November 2022 ("the dismissal order") dismissing the

appellant's application to set aside an order made *ex parte* on 11th July 2022 appointing an investigator into the affairs of the appellant and awarding costs against the appellant. The appeal raises important issues relating to the procedure for a cooperative society to appeal a decision of the Registrar of the Financial Services Regulatory Authority ("the Authority" or "the respondent") under section 45 of the **Financial Services Regulatory Authority Act**¹ ("the FSRAA"), which establishes a Tribunal for the purpose of hearing such appeals, and the relationship between this section and sections of the **Co-operative Societies Act**² (or "the Act") which make provision for certain decisions of the Authority taken thereunder to be appealed to the Co-operative Societies Appeals Tribunal, established under section 188 of the Act. At the heart of this appeal is whether a decision to appoint an examiner pursuant to section 180 of the Co-operative Societies Act is appealable pursuant to section 45 (3) of the FSRAA. To place the dispute in context, a concise summary of the background facts giving rise to this appeal follows.

- [2] The Financial Services Regulatory Authority is the body corporate responsible for the administration of the FSRAA in Saint Lucia. It is also the authority responsible for the general administration of the **Co-operative Societies Act**. The Authority functions as a regulatory and supervisory body, tasked with maintaining a general review of the operations of all regulated entities in Saint Lucia; keeping under examination the affairs or business of a regulated entity for the purpose of satisfying itself that the provisions of the FSRAA and the Act are being complied with; and ensuring that a regulated entity is in a sound financial position and is managing its business in a prudent manner.
- [3] The Seventh Day Adventist Co-operative Society Limited ("the appellant" or "the Credit Union") is a duly registered credit union co-operative society under the Act, licensed to carry on the business of deposit-taking and granting loans to its members. It therefore qualifies as a regulated entity under the FSRAA and the Act.

¹ Cap. 12:23 of the Revised Edition of the Laws of Saint Lucia.

² Cap. 12:06 of the Revised Edition of the Laws of Saint Lucia.

- [4] Over the years, a series of correspondence had been exchanged between the Authority and the appellant in which the Authority advised the appellant of the need to comply with its statutory obligations, to submit financial reports and quarterly returns, convene annual general meetings and to take other compliance measures. By letter dated 21st September 2021, the Authority invited the appellant to participate in training for its new Board, which had been elected following its recently held AGM, to allow it to conduct an onsite inspection and to participate in meetings with the Authority. However, the appellant provided reasons why it was unable to facilitate the requests at the time. By letter dated 9th December 2021, the Authority informed the appellant that it had taken the decision to appoint an examiner to examine the books and records of the Credit Union pursuant to section 180 of the Co-operatives Societies Act.
- [5] Seemingly unhappy with this development, by letter dated 24th January 2022, the appellant through counsel, wrote to the Prime Minister, in his capacity as the Minister of Finance (or “the Minister”), requesting him to exercise the powers granted to the Minister under section 45 of the FSRAA to appoint an Appeals Tribunal because counsel had instructions to “pursue an appeal of a decision of the Registrar of Cooperative Societies, which is extremely prejudicial to our client’s interest” and, as the appellant understood it, the appointment of the Tribunal was outstanding.
- [6] On 31st January 2022, the Authority, which had been copied on the letter to the Prime Minister, wrote to the Prime Minister seeking to “clarify” its decision to appoint an examiner and to further advise that the matter involving the Credit Union was not appealable under section 188 of the Act. The letter indicated that the Authority intended to continue with its course of action as provided under the provisions of the Act.
- [7] On the said date, the appointed examiner, Mr. Gordon Alcindor of Nathaniel & Associates, attempted to execute his duties and attended the Credit Union. The examiner was however met by the Credit Union’s President, Mr. Brian Samuel, who informed him that he would not be assisted by the Credit Union because

it had filed a 'Notice of Appeal' in respect of the decision of the Authority to appoint an examiner to examine the books and records of the Credit Union.

- [8] On 8th July 2022, the Authority filed an amended (without notice) fixed date claim pursuant to section 181 of the Act for the appointment of an inspector to carry out an investigation into the Credit Union ("the *ex parte* application"). The core of the allegations against the appellant was that the appellant had for several years committed various breaches of the Act and had resisted the supervisory and regulatory authority of the respondent. The fixed date claim was treated as an *ex parte* application³ and was heard on 11th July 2022. The judge, *inter alia*, granted the order for the investigation of the Credit Union and for the appointment of an inspector and awarded costs of the application to the Authority to be paid by the appellant ("the *ex parte* order").
- [9] The *ex parte* order was served on the appellant on 20th July 2022. The claim with supporting documents and the authorisation code were served on the appellant on 21st July 2022.
- [10] On 27th July 2022, the respondent filed an application for committal of the appellant's President and General Manager for failure to comply with the investigation order. That application came on for hearing on 4th August 2022. On that day also, the appellant filed an application to set aside the *ex parte* order. The judge gave directions for the hearing of both applications. On 22nd November 2022, the learned judge heard and dismissed the appellant's set aside application and ordered the appellant to comply with the terms of the *ex parte* order. The judge referred to what the appellant contended was its appeal as the 'purported appeal' and 'purported pending appeal'. On 28th July, the judge also dismissed the application for committal but ordered the respondent to re-serve the *ex parte* order on the appellant.

³ No point was taken on this in the court below or before this Court.

Appeal

[11] The appellant, being dissatisfied with the decision, sought and obtained leave to appeal and filed its notice of appeal on 23rd February 2023. At the hearing of the appeal, counsel for the appellant, Mr. Leevie Hewell, was invited by the Court to clarify what the grounds of appeal were. Counsel identified four grounds of appeal, namely:

Ground 1- The judge erred in that she did not give due weight to section 45 of the FSRAA, by which a statutory appeal had commenced;

Ground 2 – The judge erred in her interpretation and application of rules 11.15 and 11.16 of the Civil Procedure Rules 2000 (“the CPR 2000”);

Ground 3 - The judge failed to give due regard to the failure of the respondent to give full and frank disclosure at the *ex parte* hearing;

Ground 4 – The judge failed to apply the relevant legal principles when considering the respondent’s *ex parte* application and the appellant’s set aside application.

[12] The issues arising from these grounds of appeal are (i) whether the judge erred in failing to hold that a statutory appeal had been commenced pursuant to section 45 of the FSRAA; (ii) whether the judge erred in failing to set aside the *ex parte* order on account of the non-compliance with rules 11.5 and 11.6 of the CPR 2000; (iii) whether the judge erred in failing to find that the respondent had not made full and frank disclosure at the *ex parte* hearing; and (iv) whether the judge erred in her application of the relevant principles governing the grant and setting aside of an *ex parte* order.

[13] I propose to deal with each ground of appeal, and the respective arguments in relation to each, in turn.

Ground 1: The judge erred in that she did not give due weight to section 45 of the FSRAA, by which a statutory appeal had commenced

- [14] This ground of appeal gives rise to two main issues. First, whether the Authority's decision to appoint an examiner pursuant to section 180 of the Act is subject to appeal pursuant to section 45(3) of the FSRAA. Secondly, if so, whether the appellant had initiated an appeal against the decision of the Authority under section 45(3) of the FSRAA by its letter to the Prime Minister.

The appellant's submissions

- [15] In its written submissions, the appellant characterises the nub of its appeal as the contention that the *ex parte* order enabled the respondent to sidestep a pre-existing statutory appeal, which the appellant had commenced against the decision taken by the respondent to appoint an examiner pursuant to section 180 of the Act. The appellant contends that when it comes to supervisory and regulatory concerns, the Co-operative Societies Act does not provide a route to appeal. Therefore, the statutory path for challenging decisions of the Authority was to be found in section 45 of the FSRAA. The appellant submits that the granting of the *ex parte* order pursuant to section 181 of the Act, effectively circumvented the statutory processes already commenced under section 45 of the FSRAA. In amplifying the appellant's written submissions, Mr. Herelle submitted that an appeal had commenced under section 45 of the FSRAA because all that was required of the appellant to commence an appeal, or for an appeal to exist under section 45 of the FSRAA, was for the appellant to write a letter to the Minister indicating that it wished to appeal. He submitted that the legislation required no further initiatory steps to be taken by the appellant to commence the appeal. From the standpoint of the appellant, it had done all that it needed to do to institute the appeal under the FSRAA i.e. write to the Minister, and there was nothing more it could do at that stage. The court ought not to have disregarded the fact that an appeal process had commenced. According to counsel, having initiated the appeal by writing the letter to the Minister, the second step in the process required the Minister to appoint three persons to the Appeals Tribunal in consultation with the injured sector (in this case, the appellant) to hear the appeal, and the third step involved the Appeals Tribunal regulating its own procedures for proceeding with the appeal.

- [16] The appellant therefore takes issue with the learned judge's use of the word "purported" in the dismissal order to describe what it maintains is its appeal. Mr. Herelle submitted that the use of the word 'purported' carried the negative connotation that an appeal did not exist. Further, Mr. Herelle submitted that the judge erred in that she failed to give weight to the fact that as an appeal had already commenced, the court should not have proceeded to take a course of action that conflicted with the process that was already in train, i.e. appointing an Investigator when the decision to appoint an Examiner was being challenged. Essentially, the appellant contends that the respondent was pursuing the very same objectives, by way of an *ex parte* application under section 181 of the Act, after its initial decision to examine the affairs of the Credit Union pursuant to section 180 of the Act had been impugned by the appellant's appeal. This, it was submitted, constituted an abuse of process and a violation of the doctrine of the separation of powers.

The respondent's submissions

- [17] The respondent's contention in relation to ground 1 is two-fold. First, it submitted that there is no right of appeal against the Authority's decision to appoint an examiner pursuant to section 180 of the Act, either under section 188 of that Act or section 45 of the FSRAA. Secondly, it contends that an appeal under section 45 of the FSRAA was never initiated.
- [18] In relation to the first contention, counsel for the respondent, Mrs. Sardia Cenac-Prospere, argued that neither the FSRAA nor the Act provides for an aggrieved party to appeal a decision of the Authority to appoint an examiner pursuant to section 180 of the Act. She submitted that when the Act intended to give a right to appeal, it specifically said so in its provisions. Mrs. Cenac-Prospere cited, by way of example, section 188 which provides for the jurisdiction of the Tribunal to hear appeals against a decision of the Registrar or an arbitrator. In oral submissions, Mrs. Cenac-Prospere argued further that when section 45 speaks of conferring a right of appeal against decisions of the Registrar taken under the Act, this must be interpreted as meaning decisions in respect of which that Act confers a right of appeal, and not any decision at large made under that Act. For this reason, it was submitted that there was no

right of appeal against the decision of the Registrar made pursuant to section 180 and the appropriate recourse was for the appellant to file a claim for judicial review.

- [19] In relation to the respondent's second contention, Mrs. Cenac-Prospere submitted that the appellant's letter to the Minister served to indicate a mere intention by the appellant to pursue an appeal and cannot be treated as constituting a statutory appeal. For there to be an appeal, there must be a constituting act beyond a mere letter which sets out the grounds so that the other side (in this case the Authority) knows the case it has to answer. Furthermore, no material step was taken by the appellant to advance and prosecute an appeal. The respondent contends that in any event, even if it could be said that the letter constituted an appeal, it failed to set out the grounds on which it challenged the decision and therefore it cannot properly be treated as a notice of appeal. Yet further, the respondent submitted that even if there was a properly constituted appeal, nothing in the Act prohibits the Authority from carrying out its duties pursuant to section 181 to make an application for investigation.

The judge's ruling

- [20] In relation to these submissions, the judge expressed her conclusions on them at paragraphs 15 to 20 of the dismissal order. So far as material, the judge stated:

"15. ...The defendant wrote to the respective Minister on 24th January 2022 requesting the appointment of an appeal tribunal pursuant to section 45 of the FSRAA, for the purpose of appealing a decision by the claimant to appoint an examiner under section 180 of [the Act]. The claimant subsequently wrote to the Minister on 31st January 2022, expressing its position that there was no provision under [the Act] or section 45 of the FSRAA, to appeal the decision of the claimant to appoint an examiner. Further, that section 188 of [the Act] made provision for the appointment of a Cooperative Societies Appeals Tribunal, and that in previous correspondence the claimant had advised the Minister of the need to establish such tribunal. The defendant takes issue with the fact that it was not copied on this letter to the Minister.

16. There is no evidence from the defendant on the status of the appointment of the tribunal or the status of an appeal. The Court

however notes that the Minister is required to consult with the defendant in appointing such tribunal, and when appointed the tribunal regulates its own procedure.

17. Sections 180 and 181 are contained in Part 12 of [the Act], under the rubric “Investigations”. They are independent of each other. Section 180 concerns the appointment of an examiner by the claimant on its own motion. Section 181 on the other hand is a judicial process and concerns an application to the court for the appointment of an Inspector who reports to the Court and the claimant. From a plain reading of [the Act], the sections bear no relationship or connection to each other, and section 180 is not a prerequisite or precursor to section 181.

18. The procedure under section 181 is a special one afforded to the claimant to aid in dispensing its supervisory and regulatory function, where the circumstances so warrant, by making an application directly to the court. The application can be made at any time, and it is the responsibility of the claimant to meet the evidential threshold for satisfying the court that an Inspector ought to be appointed. The application may be made ex parte and the hearing may be held in camera. Although this Court is of the view that section 45 of the FSRAA makes provision for appealing certain decisions taken by the claimant under [the Act], this does not preclude the claimant from exercising the right afforded under section 181 in pursuance of its regulatory mandate, in appropriate circumstances.

19. In the absence of any evidence that a tribunal has been appointed, or that a formal appeal process has commenced, these matters have no bearing on an application under section 181, where the claimant believes that the appointment of an Inspection (sic) is critical, because it is being stymied by excuses and protracted delay in conducting the important task of ensuring that the defendant complies with the regulatory standards which governs its operations. The role of the Inspector is to conduct a review of the defendant’s records, file a report of his findings with the Court, and provide same to the claimant. The report may be filed under seal, and the court has the discretion to determine the extent of publication. There is no benefit to be derived from prohibiting such oversight, which ultimately redounds to the greater good of the public, by ensuring that the funds of the members of the defendant are being managed in the manner prescribed by law, and as expected by the claimant. The claimant is charged with monitoring financial institutions for regulatory compliance. Accordingly, promoting public confidence in the affairs of the defendant and protecting its members would not be achieved, if the claimant is precluded from investigating the full extent of the defendant’s financial affairs, while it is unclear whether an appeal has even formally commenced.

20. The purported pending appeal is not a reason for setting aside the order, and this Court would not have taken a different view on the

necessity of granting the order had the defendant appeared to oppose the application on that basis, considering that the assessment required at the ex parte hearing was whether on the evidence, it appeared to the Court that the defendant was not carrying on business in accordance with [the Act].” (emphasis added)

- [21] In summary, the judge concluded that there was no evidence before her that the appeals tribunal had been appointed or that “a formal appeal process has commenced” and that in those circumstances the section 181 application was not impacted. Secondly, she found that section 180 and 181 are independent of each other and bore no relationship or connection with each other, neither was section 180 “a prerequisite or precursor to section 181.” Thirdly, the judge concluded that while section 45 conferred a right of appeal in relation to “certain” decisions of the Registrar, this did not preclude the respondent from exercising the right afforded under section 181 in pursuance of its regulatory mandate. The judge seems to be saying here that even if there was a right to appeal the Authority's decision to appoint an examiner under section 180, this was not a bar to the Authority seeking to appoint an investigator pursuant to section 181 of the [Cooperative Societies] Act because the sections were independent of each other.

Discussion - Ground 1

The legal framework

- [22] The resolution of ground 1 necessitates setting out the relevant statutory provisions engaged in this appeal. I will first examine the statutory provisions under which the Authority purported to act and under which the judge acted to grant the orders sought by the Authority. This will be followed by an examination of the provisions of the FSRAA in relation to appeals from decisions of the Authority, followed by an examination of the interplay between these provisions.
- [23] The Authority's initial decision to appoint an examiner was made pursuant to section 180 of the Act, which provides, inter alia that the Registrar may on his or her own motion or on the application of the lesser of 25 members and 10% of the members appoint a person as examiner who shall make an examination

of the books of the society and examine the affairs of the society and shall make available his or her report to the Registrar.

- [24] When the appellant allegedly failed to cooperate with the examiner, the Authority sought the appointment of an Inspector pursuant to section 181 (1) of the Act. This section provides:

181. INVESTIGATIONS

(1) A member, the Registrar or any interested person may apply ex parte, or on any notice that the Court may require, to the Court for an order directing an investigation to be made of the society and any of its member societies or corporations.

(2) On an application under subsection (1), the Court may order an investigation of a society or of any of its affiliates where it appears to the Court that—

(a) the society is not fulfilling the purpose stated in its by-laws;
(b) the society is not carrying on business in accordance with this Act or the regulations or the by-laws;
(c) the society is not organised or being operated on co-operative principles;

(d) the business of the society or any of its member societies is or has been carried out with intent to defraud any person;

(e) the business or affairs of the society or any of its member societies are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is oppressive or unfairly prejudicial to or has unfairly disregarded the interest of a member or security holder;

(f) the society or any of its member societies was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose; or

(g) persons concerned with the formation, business or affairs of the society or any of its member societies have acted fraudulently or dishonestly, in connection with the society.

(3) An applicant for an order under this section is not required to give security for costs.

(4) An ex parte application under this section shall be heard in camera.

(5) A person shall not publish anything relating to ex parte proceedings conducted under [to] this section other than with the authorisation of the Court or the written consent of the society being investigated.

182. COURT ORDER

In connection with an investigation under section 181, the Court may make any order it considers appropriate, including an order—

(a) to investigate;

(b) appointing an inspector, who may be the Registrar, fixing the remuneration of an inspector and replacing an inspector;

I determining the notice to be given to any interested person or dispensing with notice to that person;

(d) authorising an inspector to enter any premises in which the Court is satisfied there might be relevant information, and to examine anything and make copies of any document or record found on the premises;

I requiring any person to produce documents or records to the inspector;

(f) authorising an inspector to conduct a hearing, administer oaths and examine any person on oath, and prescribing rules for the conduct of the hearing;

(g) requiring any person to attend a hearing conducted by an inspector and to give evidence on oath;

(h) giving directives to an inspector or any interested person on any matter arising in the investigation;

(i) requiring an inspector to make an interim or final report to the Court and to the Registrar;

(j) determine whether a report of an inspector made under paragraph (i) should be published and, where published, ordering the Registrar to publish the report in whole or in part or to send copies to any person the Court designates;

(k) requiring an inspector to discontinue an investigation;

(l) requiring the society or a person who applied under section 162 for an order to pay the costs of the investigation. (emphasis added).

[25] In short, section 181 authorised the Authority to make an *ex parte* application to a judge of the High Court for an order directing an investigation to be made of the society. The judge had a discretion whether to require notice of the application to be given. Subsection (2) stipulates the matters in respect of which the judge must be satisfied before making an order for an investigation of a society. Section 182 sets out the orders which the judge is entitled to make on granting such an application.

[26] Upon the appellant being notified by the Authority of its decision to appoint an examiner, it wrote to the Prime Minister, who held the portfolio of Minister of Finance, by letter dated 24th January 2022 requesting the appointment of the Appeals Tribunal pursuant to section 45 of the FSRAA. That section provides:

“45. Appeals

(1) There is hereby established an Appeals Tribunal for the purpose of hearing appeals pursuant to this section.

(2) The Appeals Tribunal established pursuant to subsection (1) shall comprise three persons appointed by the Minister in consultation with the injured sector.

(3) An appeal against the decision of the Authority pursuant to this Act or an enactment specified in Schedule 1 lies to the Appeals Tribunal appointed pursuant to subsection (1) except where an enactment specified in Schedule 1 provides otherwise.

(4) The Appeals Tribunal appointed under subsection (1) shall regulate its own procedure.

(5) A person aggrieved by a decision of the Tribunal may appeal to a Judge of the High Court.”

[27] As can be seen, section 45 (1) establishes an Appeals Tribunal for the purpose of hearing appeals. Subsection (2) speaks to the complement of the Tribunal and the manner of its appointment. The relevant Minister (the Minister of Finance) is the person who appoints the members of the Tribunal but must do so in consultation with the “injured sector.” This curious nomenclature is without definition in the FSRAA. However, given that the appeal contemplated is against decisions of the Authority, the injured sector can be taken to be a party aggrieved by such a decision, which would normally be a co-operative society. Therefore, the Tribunal is appointed by the Minister, in consultation with a representative or representatives of the co-operative society sector. It was common ground between the parties that the section contemplates the appointment of a standing Appeals Tribunal and not an ad-hoc one as the occasion for appeal arises. Subsection (3) is the subsection that establishes the right of appeal to the Tribunal. It permits appeals against decisions of the Authority made under the FSRAA itself or an enactment specified in Schedule 1 of that Act unless that enactment provides otherwise.

[28] The Co-operative Societies Act (with respect to credit unions only) is a scheduled enactment under Schedule 1, and, prima facie, decisions taken by the authority pursuant to this Act are amenable to appeal under section 45(3) of the FSRAA. However, consistent with section 45(3), one must look to the Co-operative Societies Act itself to see whether it provides otherwise.

- [29] The Co-operative Societies Act does make provisions for appeals of certain decisions to the Registrar. It does so at section 31 (termination of person's membership pursuant to section 28 or 29). It also provides in section 178 for appeals against decisions of the Registrar in relation to the Registrar's power to surcharge pursuant to section 177; and at section 187(5), which permits an appeal against the Registrar's decision in relation to settlement of a dispute among members of a society or between societies.
- [30] Section 188 establishes the Cooperative Societies Appeals Tribunal, which is the Tribunal to which appeals against the decisions of the Registrar taken under [this Act] are filed. Detailed provisions relating to the procedure for making appeals to the Registrar are contained in the Co-operative Societies Regulations. Similarly, detailed provisions relating to the procedure for appealing decisions of the Registrar to the Cooperative Societies Appeals Tribunal are contained in the Co-operative Societies (Appeals Tribunals) Regulations. For example, Part 3 of the latter regulations provides at Regulation 5 that an appellant may appeal by notice in writing to the Tribunal within 14 days of the decision of the Registrar or Arbitrator. The notice of appeal shall be signed by the appellant and 6 copies submitted to the Secretary. Regulation 5(3) prescribes the contents of a notice of appeal, while regulation 5(4) mandates that it be in the prescribed form as set out in Schedule 1. Part 4 of the Regulations governs the Hearing of the Appeal itself.
- [31] Two matters seem plain, based on the foregoing provisions. First, the decisions of the Registrar which are appealable to the Cooperative Societies Appeals Tribunal established by section 188 of the Act appear to be clearly defined and are confined to decisions taken pursuant to sections 177 and section 187. This seems to be borne out by the fact that although a person whose membership has been terminated may appeal to the Registrar under section 31 of the Act, there is no provision which says that the Registrar's decision in relation to that issue is appealable to the Cooperative Societies Appeals Tribunal. Also, where the Act prohibits an appeal from a decision of the Registrar, it states so specifically. For example, by virtue of section 148(10) the decision of the

Registrar made pursuant to 148(9)⁴ shall be final and not subject to any appeal. The second observation is that where provision is made for appeal, such appeal lies to the Tribunal established under section 188 of the Act, namely, the Cooperative Societies Appeals Tribunals.

[32] It seems to me, therefore, that the Co-operative Societies Act clearly identifies those decisions of the Registrar that are subject to appeal under that Act and provides its own procedure for appeals against those decisions of the Registrar. It also stipulates those decisions of the Registrar which may not be appealed.

[33] The respondent contends that since the Co-operative Societies Act identifies the decisions of the Registrar which are appealable, then any appeal pursuant to section 45(3) of the FSRAA must be in relation to those decisions. With respect, this cannot be right for a number of reasons. In the first place, the right of appeal conferred by the Co-operative Societies Act is to the Cooperative Societies Appeals Tribunal established under section 188 of the Act; this has nothing to do with appeals to the Appeals Tribunal established under section 45 of the FSRAA. It is the FSRAA itself that regulates which decisions of the Registrar are appealable to the Appeals Tribunal established under section 45. Secondly, if the respondent's interpretation is correct, it would render the provisions of section 45(3) that include the Act as an enactment under Schedule 1 in respect of which decisions of the Registrar are appealable to the Appeals Tribunal useless and absurd. This would be so for two reasons. In the first place, there could never be an appeal pursuant to section 45(3) of a decision taken under the Act because, on the respondent's argument, only decisions which are specifically stated to be appealable thereunder can be

⁴ Section 148 deals with the division of a society into 2 or more societies by preliminary resolution passed by three quarter of the members present and voting at a special general meeting called for the purpose. Another special general meeting of the society is required to be called at the expiration of 3 months from the preliminary resolution and after due compliance with the requirement for giving of notices to various interested parties. Subsection (9) provides that if at that special general meeting the preliminary resolution is confirmed by a special resolution either without changes or with such changes as in the opinion of the Registrar are not material, the Registrar may, subject to subsection (11) and section 13, register the new societies; and upon registration, the original society shall be deemed to be dissolved and its registration cancelled. Subsection (10) provides that the decision of the Registrar as to whether any changes made in the preliminary resolution are material shall be final and not subject to any appeal.

appealed under section 45(3). This argument encounters the hurdle that appeals from decisions taken under sections 177 and 187(5) of the Act are specifically made appealable to the Cooperative Societies Appeals Tribunal. On the respondent's argument such decisions would also be appealable under section 45(3) because it is specified as an appealable decision under the Act. It does not seem to me that the legislature intended that the same decision be appealable to two different tribunals established under two different enactments. Where the words of a statute are plain, it must be given its ordinary and natural meaning and an interpretation that avoids absurdity.

[34] In my view, the Co-operative Societies Act is concerned only with prescribing a right of appeal in respect of specified decisions taken under that Act, which it makes appealable to the Cooperative Societies Appeals Tribunal established under section 188. By contrast, section 45 of the FSRAA is intentionally wider in its reach in relation to decisions of the Registrar taken under several enactments, which it renders subject to appeal under the FSRAA, subject to any provisions in the relevant enactments to the contrary.

[35] Thus, in the context of this case, a proper interpretation of section 45(3) means that decisions taken by the Registrar under the Act are appealable pursuant to section 45(3) of the FSRAA except decisions taken pursuant to sections 177, 187 and 148(9). Decisions taken pursuant to sections 177 and 187 are excluded from the reach of section 45(3) because the Act itself provides that such decisions are to be appealed to the Cooperative Societies Appeals Tribunal established under section 188 of the Act. The decision of the Registrar taken pursuant to section 148(9) is excluded from the ambit of section 45(3) because section 148(10) expressly provides that such a decision is not subject to any appeal. In other words, and in the language of the FSRAA, section 45(3) of the FSRAA does not apply to decisions of the Registrar taken under these sections because the Act otherwise provides.

[36] Since a decision by the Registrar taken under section 180 of the Act to appoint an examiner is not specifically made subject to appeal under that Act, nor is it stated in that Act that no appeal lies from such a decision, it is caught by section

45(3) of the FSRAA and is appealable to the Appeals Tribunal established thereunder.

[37] For these reasons, I agree with the appellant's submissions in so far as it contends that it has a right of appeal in respect of the Authority's decision to appoint an examiner pursuant to section 180 of the Act.

[38] This is not the end of the matter, however. The central issue is whether the appellant had filed an appeal under section 45(3) of the FSRAA. This appears to be the issue to which the judge's decision was directed, and not whether the Registrar's decision to appoint an examiner pursuant to section 180 of the Act was appealable under section 45(3) of the FSRAA, although the latter argument was deployed before her on both the *ex parte* and set aside applications.

[39] As plainly recognised by the appellant in its letter to the Minister, the Appeals Tribunal established by section 45(1) had not been constituted. This is common ground between the parties. This letter reads in material part:

"As we understand it, the appointment of the Tribunal is currently outstanding, however we have been instructed to pursue an appeal of a decision of the Registrar of Cooperative Societies, which is extremely prejudicial to our client's interest. According to our client, a decision of the Registrar to appoint an Examiner into it was made in bad faith and is oppressive, unjust and contrary to the intent of the legislative powers afforded to the Registrar under the Cooperative Societies Act.

It is our client's desire that by pursuing an appeal before the Tribunal, the resolution of the dispute would be less caustic than formal court proceeds (sic) however they are committed to the preservation of the interest of their members and the integrity of the credit union movement."⁵

[40] Mr. Herelle submitted that the act of writing this letter served to and had the effect of initiating the appeal. However, the appellant rightly acknowledged that the Tribunal established by section 45(1) of the FSRAA has to date not been constituted. Mr. Herelle further conceded during the course of oral submissions

⁵ Record of Appeal Vol. 2 at page 1797.

that section 45(3) contemplates that an appeal would lie to the Appeals Tribunal, and not to the Minister. Furthermore, there are no provisions in force regulating the procedure for appealing under section 45(3), and, when asked, Mr. Herelle could point the Court to no provision that said that a letter to the Minister requesting the appointment of a Tribunal constitutes an appeal under section 45(3). The letter does not even feign to articulate anything resembling grounds of appeal. Considering all of this, it is difficult to see how it could be maintained that a letter addressed to the Minister which merely requests the appointment of the members of the Appeals Tribunal serves to initiate an appeal under section 45(3) of the FSRAA.

[41] In my opinion, there can simply be no appeal to the Appeals Tribunal under section 45(3) in the absence of a duly constituted Tribunal pursuant to section 45(2), and I would so hold. The learned judge was therefore right to characterise the appellant's written overtures to the Minister as a "purported appeal," in the sense that while the act of writing to the Minister is stated by the appellant to be an appeal, it is in fact and law not an appeal and, therefore there was no pending appeal at the time the respondent engaged the court with the *ex parte* application to appoint an investigator. I would therefore dismiss ground 1. This disposition would render moot the appellant's submissions regarding the alleged breach of the doctrine of separation of powers, and submissions in relation to the principle of *res judicata* and abuse of process, about which I need say no more.

[42] Having determined that there was no pending appeal which would prevent the judge proceeding to entertain an application made pursuant to section 181 of the FSRAA, I turn now to examine the grounds of appeal which take issue with the judge's handling of that application. Before doing so, however, it is worth observing that a common feature of the remaining grounds of appeal is that they seek to challenge the judge's findings of fact and/or her exercise of discretion. This Court must therefore be ever mindful of the principles that guide an appellate court when invited to interfere with a judge's findings of fact or exercise of discretion.

- [43] In short, an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong: **Dufour and Others v Helenair Corporation Ltd and Others**. The reference to assessing the weight given by the judge to any relevant factor is to be read in light of the guidance given by the Privy Council in **Ming Siu Hung v JF Ming Inc**⁶, where it was held that 'A view that a judge should have given more weight to a relevant matter is not within the scope of appellate review. Matters of weight when exercising a discretion are for the judge, provided that his assessment of weight is not irrational...'
- [44] An appellate court is therefore required to exercise some restraint and must not interfere with the judge's order simply because it disagrees with the weighting which the judge has ascribed to any particular factor or because it would have exercised its discretion differently.
- [45] This approach applies equally in relation to a judge's findings of fact. In **Kwok Kin Kwok v Yao Juan**⁷ the Board restated the guiding principles that should inform the approach of an appellate court in reviewing a trial judge's findings of fact. In summary, an appellate court should not interfere with a judge's findings of primary fact unless they are "plainly wrong", in the sense that either there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence, or the finding was one that no reasonable judge could have reached. This restraint extends to the judge's evaluation of the facts and any inferences to be drawn from them.

⁶ [2021] UKPC 1.

⁷ [2022] UKPC 52.

[46] With the foregoing principles in mind, I turn to the consideration of ground 2.

Ground 2: The judge erred in her interpretation of CPR 11.15 and 11.16.

The appellant's submissions

[47] The appellant's complaints under this ground are first, that the *ex parte* order granted by the judge is defective because it did not contain the mandatory statement required by rule 11.16(3) informing the appellant of its right to apply to set aside the *ex parte* order not more than 14 days after the date on which the order was served on it. It was submitted that the learned judge erred when she ruled that the omission to include a statement informing the appellant of the right to apply to have the *ex parte* order set aside within 14 days of the service of the order, was a procedural irregularity which the court could put right under the discretionary case management powers contained in CPR 26.9, and further erred in holding that the non-inclusion of such a statement caused no prejudice to the appellant given that it had exercised its right to apply to set aside the order within the timeframe for doing so.

[48] Secondly, it is said that the respondent sought to both serve and execute the *ex parte* order on 20th July 2023 in disregard of rule 11.15, which provides that after the disposition of an application made without notice, the applicant must serve a copy of the application and any evidence in support on all other parties, and also paragraph 12 of the *ex parte* order which stipulated that "The claimant will serve the fixed date claim, affidavits in support, exhibits, authorisation code, and this Order on the defendant." However, contrary to CPR 11.15 and the express terms of the order, the respondent elected to serve only the *ex parte* order and at the same time, sought to commence its investigation within the period when the appellant was entitled to apply to set aside the order. The appellant says that the learned judge misdirected herself in holding that the act of serving the order separately from the attendant documents and authorisation code did not invalidate the order and was not a reason for setting it aside. In so holding, the judge failed to appreciate that proper service was integral to ensuring justice on an *ex parte* order, and that the *ex parte* order was

“ineffective and unenforceable.”⁸ It is further said that the judge adopted inconsistent positions in relation to the breaches of rules 11.5 and 11.6 on the one hand, and her position in relation to the improper service of the committal application on the other. In the latter case, the judge dismissed the committal application for defective service but ordered that the *ex parte* order be reserved.

The respondent’s submissions

[49] For the respondent, it was submitted that there is no procedural sanction at CPR 11.16 for failing to include the notice to the appellant on the *ex parte* order. The judge’s decision not to set aside the *ex parte* order in the circumstances was a proper exercise of her discretion under CPR 26.9 as contemplated in the case of **Guy Eardley Joseph v McDowall Broadcasting Corporation (MBC) Limited**⁹; **Charles Osenton & Company v Johnston**¹⁰; and **Ratnam v Kumarasamy and Another**¹¹. It was further submitted that the absence of a notice compliant with CPR 11.16(3) was not fatal to the validity of the *ex parte* order and was not a ground upon which the court could properly set aside the order. In relation to the service of the order, the respondent submitted that the judge was correct to find that the appellant was not prejudiced. Any prejudice which may have occurred in not being served with the supporting documentation and the authorisation code at the same time as the *ex parte* order on 20th July 2022, was cured by service on the following day, 21st July 2022. Relying on the **Guy Joseph** case, the respondent submits that everything that could have been afforded to the appellant with good service was achieved.

The judge’s reasons

[50] In relation to the breach of rule 11.16(3) the judge held:

“21. The order should have contained the statement as mandated by CPR 11.16(3), informing the defendant of the right to make an application within 14 days of service of the order. There is no sanction for non-compliance with the rule. If the application was filed outside the

⁸ Appellant’s skeleton arguments at paragraph 117.

⁹SLUHCVP2022/0008 (delivered 22nd May 2023, unreported).

¹⁰ [1941] 2 All ER 245 at 257.

¹¹ [1964] 3 All ER 933.

time prescribed by the rule on account of this omission, that would have been a procedural irregularity which a court could put right by extend (sic) the time, to regularize the late filing, under the discretionary case management powers contained in CPR 26.9. In this case, the defendant exercised its right to apply to set aside the order within the timeframe for doing so and could not have suffered any prejudice by the absence of the statement in the order...

23. In the circumstances, the absence of the statement is not fatal to the validity of the order and is not at all a reason to set it aside."

[51] In short, the judge was of the view that this was a procedural irregularity which could be put right by the court under its case management powers pursuant to rule 26.9, and that the irregularity did not cause any prejudice to the appellant, since it lodged its application to set aside the *ex parte* order within the time prescribed by the rules.

[52] In relation to the complaint that service of the *ex parte* order was defective, the judge held as follows:

"24. The claimant has not advanced any reason for serving the order first in time and separately on 20th July 2022. The requirement of paragraph 12 of the order is pellucid, and it incorporates CPR 11.15. It stated that the defendant should be served with the fixed date claim, attendant documents, the authorization code, and the order. The intention was to serve all the documents together, as the 14-day window for making the application under CPR 11.16(2) commenced from the date of service of the order. Ideally the defendant ought to be seized of the matters which led to the order, from that time. To have serve (sic) the order without the authorization code and attempt to commence the inspection on the same day was not in compliance with paragraph 12 of the order, or CPR 11.15(2), or rule 13(4) of the E-Litigation Portal Rules dealing with service of documents, where proceedings are commenced on the e-litigation portal.

25. Service would only be complete when all the documents and the authorization code were duly served and that appears to have happened on 21st July 2022. Once service of all documents was completed the Inspector would then be entitled to enter the defendant's premises to commence the inspection.

26. Nonetheless, it is trite that the act of separate service of the order does not invalidate the order, and is not a reason for setting it aside."

- [53] The judge, in effect, recognised that the purported service of the order on 20th July 2022 was defective but held that it did not invalidate the order and was not a reason for setting it aside.

Discussion – Ground 2

- [54] The relevant rules engaged on this ground of appeal are CPR 11.15, 11.16(3) and rule 13.3(b) and 13(4) of the E-Litigation Portal Rules¹².

- [55] Rule 11.15 provides that after the court has disposed of an application made without notice, the applicant must serve a copy of the application and any evidence in support on all other parties. Rule 11.16(3) states that an order made on an application of which notice was not given must contain a statement informing the respondent of the right to make an application under this rule. That right is conferred by rule 11.16(1) which provides that a respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again. By rule 11.16(2), the respondent must make such an application not more than 14 days after the date on which the order was served on them.

- [56] E-Litigation Portal Rule 13 (3) provides:
“...(3) Where proceedings have been commenced –
(a) service must be effected in accordance with the applicable rules of court; and
(b) the filing party must at the same time serve the authorization code generated by the Electronic Litigation Portal in Form 1 in Schedule 2 to these rules.”

- [57] Rule 13(4) provides that service shall be deemed not to have been effected where the authorisation code is not served in accordance with Rule 13(3).

- [58] Read together, rule 11.15 of the CPR 2000 and E-Litigation Rule 13(3)(b) have as their primary objective the requirement that a respondent to an *ex parte*

¹² The Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2019.

order or claim commenced on the portal must be served with the application, supporting documents and evidence, and at the same time must be served with the authorisation code. The service of these documents and the authorisation code fulfils an important purpose, as it is the means by which the respondent is put on notice of the proceedings instituted against him and at the same time gains access to the portal to initiate his response to the proceedings.

[59] Paragraph 12 of the judge's order dated 11th July 2022 expressly mandated service of the fixed date claim, affidavits in support, exhibits, authorisation code, and the *ex parte* order on the respondent. It is not disputed that the respondent served the *ex parte* order only on 20th July. In accordance with E-litigation Rule 13(4), service was therefore not effected on 20th July 2022. See **Flavio Maluf v Durant International Corp et al**¹³, where the court held that service of the originating documents without the authorisation code means that proper service has not been effected, and that "[t]he defect is not cured by serving the code separately at a later date. That would still run afoul of Rule 13(4) of the E-Litigation Rules rendering service still being deemed ineffective." The court went on to hold, however, that this failure is merely a procedural misstep and is not fatal and that one remedy to cure such defective service is for the party attempting to effect service to re-serve the court documents accompanied by the authorisation code.

[60] In reviewing the evidence that was before the judge, it is noted that on 21st July 2022, at 10:07 a.m., the respondent served the appellant with the amended claim form and the affidavits and exhibits that had been relied on at the *ex parte* hearing¹⁴. The authorisation code was served at 12:21 p.m. that same day according to the affidavit of Irwin Ferdinand. This runs afoul of the decision in **Maluf** which interpreted rule 13(3) as requiring the authorisation code to be served at the same time as the originating documents. The question is whether it follows from this that the *ex parte* order was invalid, such that the judge should have set it aside, which is the position advanced by the appellant.

¹³ BVIHCMAP2021/0025 (delivered 13th January 2022, unreported).

¹⁴ Affidavit of service, Record of Appeal, Vol. 2 at p. 1972.

[61] Mr. Herelle points to the judge's decision to dismiss the committal application on the basis that the failure of the respondent to serve all of the documents at the same time when serving the *ex parte* order constituted a defect in service and submitted that this demonstrates an inconsistent approach to this issue of service. However, one must note that this application was determined on 28th November 2022. It is also readily apparent on the face of that order that on that occasion the judge had before her the Court of Appeal's decision in **Maluf** by which she was bound. The judge was therefore obliged to find, and did find, that service of the committal application was defective. Furthermore, the judge was mindful that in considering a committal application, the liberty of the individuals named in the application was at stake, and she noted that the authorities on committal proceedings confirmed that proof of service of the order on a respondent is paramount and strict, whereas the failure to serve the inspection order in compliance with rules 11.15 and 11.16 was a procedural irregularity which caused no prejudice to the appellant and could be rectified under the discretionary case management powers contained in CPR 26.9. Having regard to the nature of each of the proceedings, different considerations therefore applied even though both involved defective service.

[62] While service of the documents was defective, that did not render the *ex parte* order invalid and liable to be set aside. The order, which is regular in every respect, was not made invalid because the appellant did not comply with the terms of paragraph 12 and CPR 11.5 and E-Litigation Rule 13(3). Moreover, in circumstances where the evidence is that the other documents were served personally on the appellant on 21st July 2022, and the authorisation code, though served separately, was served about 2 hours later, and considering that the appellant was able to access the portal documents and lodge his application to set aside the *ex parte* order and otherwise participate in the process, I can see no basis for thinking that any prejudice was caused to the appellant by not receiving the authorisation code at the same moment that it was served with the other documents. Although on the authority of **Maluf**, the judge was wrong to conclude that the subsequent separate service of the

authorisation code cured the defect, the defective service of the documents did not invalidate the order itself, and I can discern no basis for saying that the judge erred in exercising her discretion not to set aside the *ex parte* order, having regard to all the circumstances.

[63] In relation to the omission of the statement required by rule 11.16(3) from the *ex parte* order, the underlying purpose served by CPR 11.16(3) is to ensure that the respondent to an *ex parte* application is given notice of their right to apply to have the order set aside and to apprise them of the deadline by which they must do so. This is essential to avoid prejudice to the respondent. It is for this reason that the rule speaks in mandatory terms.

[64] In this case, the mischief which the rules seek to avert did not materialise because despite the fact that the *ex parte* order did not contain such a statement, the appellant in fact lodged an application to set it aside within the time prescribed by the rules. If the pursuit of the overriding objective dealing with cases justly stated in CPR 1.1 is to mean anything, then where no sanction is provided for the breach of any particular rule¹⁵, and where such a breach causes no prejudice to a party, the court should not elevate an error of form to a place of primacy when determining the consequences that flow from a breach of the rules. In my view, the reasons given by the learned judge for exercising her discretion not to set aside the *ex parte* order for breach of rule 11.16(3) cannot be said to exceed the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

[65] For all of the foregoing reasons, I would dismiss ground 2 of the appellant's appeal.

¹⁵ See *The Attorney General v Kerron Matthews* [2011] UKPC 38.

Ground 3 – The judge failed to give due regard to the failure of the respondent to give full and frank disclosure at the *ex parte* hearing

The appellant's submissions

- [66] Under this ground, Mr. Herelle submitted that the Authority was guilty of material non-disclosure at the *ex parte* hearing. It was submitted that the Authority failed to disclose a number of facts or documents which were material.
- [67] The first item of non-disclosure referenced is a letter from the Authority to the Minister dated 31st January 2022 in which the Authority asserted that there was no right of appeal from a decision taken pursuant to section 180 of the Cooperative Societies Act. It is said that disclosure of this letter would have alerted the judge to the fact that an appeal pursuant to section 45 of the FSRAA was subsisting at the time of the examination and would have enabled her to discern that to proceed with the appointment of the investigator would render the appeal moot. When it was pointed out to Mr. Herelle that the respondent's letter to the Minister was in fact before the Court on the *ex parte* hearing as it was exhibited to the affidavit of Ms. Sancha Victor, counsel responded by saying that even so, it was the responsibility of counsel for the respondent to specifically refer the court to the exhibit and have the court appreciate the significance of the exhibit. This failure was also said to be in breach of the respondent's obligation to inform the court of issues likely to arise on the claim.
- [68] Secondly, the appellant complains that the Credit Union Sector Reports for the years 2019 to 2021, which were generated by the respondent, and which the appellant submitted would have shown it to be among the best performing credit unions in terms of its capital adequacy and liquidity ratios were not disclosed. It was submitted that the existence of these reports would have flatly contradicted the impression conveyed that the respondent was not in possession of such data for the appellant; instead the judge focused on the delay in preparing the 2022 reports.

[69] Thirdly, the appellant accuses the respondent of material non-disclosures in relation to the appellant's holding of AGMs by failing to disclose that it did so in 2014, 2017 and 2021. In relation to audited financial statements, the respondent failed to disclose that the appellant had presented audited financial statements for the period 2015 to 2017 and had presented these at its 2021 AGM, and that the respondent was aware that an independent auditor had been engaged and had committed to a timeline for the completion of the outstanding audited financial statements. In relation to the existence of the appellant's Supervisory Committee, the respondent failed to disclose to the judge that a supervisory committee had been elected at the respondent's June 2021 AGM. Further, the appellant argued that the respondent misled the court by presenting a fabricated narrative to the court of the appellant's alleged breaches of its financial reporting obligations and its alleged refusal to permit onsite inspection, while failing, for example, to concede that some of the delay complained of was occasioned by the independent auditor.

[70] The appellant also takes issue with the judge's approach at the set aside application hearing to the question of material non-disclosure. It was submitted that the judge misdirected herself in law, in that she failed to apply the relevant legal principles on the issue of material non-disclosure. It was also contended that the judge framed the issue of material non-disclosure in terms of non-compliance or compliance issues as far as the appellant was concerned, and not in terms of the need for the respondent to convince the court of the necessity of its *ex parte* application. Further, the learned judge failed to address her mind properly or at all to the failure of the respondent's submissions to anticipate and present the key submissions that the appellant would have deployed had it been present, or the potential weaknesses of the case and the remedies or sanctions under the Act which the respondent had already imposed upon the appellant, and which the appellant had satisfied. The appellant submitted that the judge did not address the respondent's arguments on these points, which it had made at the hearing of the set aside application.

[71] In summary, the appellant argued that important information was suppressed by the respondent and the judge therefore erred in finding that none of the

matters raised by the appellant at the set aside hearing attained the threshold of materiality which would have caused the court to arrive at a different outcome had they been presented.

The respondent's submissions

[72] In its written submissions, the respondent asserted that it would be unjust to deprive the respondent of the relief granted on the *ex parte* application in the absence of evidence at the set aside application that there was either a false and dishonest case or that the respondent did not disclose material facts. **Dar Al Arkan Real Estate Development Co v Al Refai and others**¹⁶ is cited in support of this proposition. Furthermore, the respondent cites **Brink's Mat Ltd v Elcombe and others**¹⁷ for the proposition that the extent of the inquiries required to be made by an applicant for an *ex parte* order depends upon (i) the nature of the case; (ii) the order for which the application is made and the probable effect of the order on those against whom it is made, and (iii) the legitimate urgency and the time available for inquiries. Relying on the case of **Eco Quest PLC v GFI Consultants Ltd**¹⁸, the respondent contended that what was required was for the respondent to give a full and fair presentation of the facts and not an exhaustive one, including all facts relating to the engagement between the appellant and the respondent prior to filing the claim. Applying these principles, the respondent addressed the specific disclosure failings identified by the appellant by submitting:

- (a) In relation to the respondent's letter to the Minister, that the appellant's letter to the Minister requesting the appointment of the Appeal Tribunal was disclosed as exhibit "SV22" on the claim and the respondent's letter as "SV23"¹⁹. Thus, the allegation of non-disclosure was demonstrated to be false at the set aside application as reflected at paragraph 15 of the dismissal order.²⁰ The burden was on the appellant at the set aside

¹⁶ [2012] EWHC 3539 (Comm).

¹⁷ [1988] 3 All ER 188.

¹⁸ [2014] EWHC 4329(QB).

¹⁹ Record of Appeal, Vol. 2 at pp 1797 and 1799.

²⁰ Record of Appeal, Vol. 1 at p. 41.

application to adduce evidence of the status of its appeal, and it failed to do so.

- (b) In relation to the credit union sector reports, that the allegation was that the appellant had breached several sections of the Act and the 2019 to 2021 reports do not disprove the allegation that the appellant had failed to submit management accounts and returns within the required timelines or at all. Moreover, the appellant admitted at the set aside application that it had not provided the returns as required. Accordingly, there was no material non-disclosure;
- (c) In relation to complaints about the judge's approach on the set aside application, that in the circumstances, the learned judge properly weighed all the material evidence on the *ex parte* application and set aside application. Such matters to which the appellant alluded did not amount to material non-disclosure and would have had no bearing on the judge's ultimate finding that the appellant was non-compliant and had failed to cooperate with the Authority.

Discussion- Ground 3

[73] Where an order is sought without notice to a party, there is an uncompromising obligation on the applicant to make full and frank disclosure to the judge hearing the application. While grateful and acknowledging the industry of counsel, I find it sufficient to refer to the relevant principles governing the duty of full and frank disclosure on a without notice application and the circumstances under which an *ex parte* order would be set aside for material nondisclosure as discussed by this Court in **Commercial Bank - Cameroun v Nixon Financial Group Limited**.²¹ There, the Court summarised the relevant principles in the following way:

“The principles underlying the duty to make full and frank disclosure in applications made without notice may be summarized as follows –

(1) A person applying for relief upon an application made *ex-parte* must make full and frank disclosure of all material matters relevant to the decision whether or not to grant the application.

²¹ BVIHCVAP2011/0005 (delivered 6th June 2011, unreported).

(2) The test of materiality is “...whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application...”

(3) Materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers.

(4) The duty of candour is a heavy one. The duty of disclosure extends not only to material facts known to the applicant, but to additional facts that he would have known had he made proper inquiries. Moreover, the applicant is under a duty to present fairly the facts so disclosed. The rationale for the duty is that the court is being asked to grant relief in the absence of the Defendant and is wholly reliant on the information provided by the Claimant. Other parties do not have the opportunity to collect or supplement the evidence which has been put before the Court. Observance of the duty is essential to secure the integrity of the Court process and to protect the interest of those potentially affected by whatever order the Court is invited to make.”

[74] The judge was obviously aware of these principles as they found expression at paragraph 27 of the dismissal order in which the judge correctly directed herself on the applicable principles. The appellant’s contention that the judge misdirected herself on the applicable principles relating to material non-disclosure is therefore baseless.

[75] In assessing the merits of this ground of appeal, I keep in mind that the judge, when asked to set aside the *ex parte* order, was engaged in both a fact finding function and the exercise of discretion, in that she had to determine whether there had been material non-disclosure, and if so, what consequences should flow on account of that.

[76] That said, I turn to the facts of this case. I say straight away that there is no substance at all to the complaint that the respondent failed to disclose the Authority’s letter to the Minister. That letter, as well as the appellant’s letter to the Minister requesting the appointment of the Appeals Tribunal pursuant to section 45 of the FSRAA, was before the judge on the *ex parte* hearing. Both were exhibited in the affidavit of Ms. Sancha Victor filed on 20th June 2022. In exhibiting both letters, Ms. Victor averred as follows:

“55. By letter dated 24th January, 2022, a true copy of which is now shown to me exhibited hereto and marked “SV22”, the defendant notified the Claimant of the Defendant’s letter dated 24th January, 2022

addressed to the Honourable Minister of Finance, wherein the Defendant purported to invoke a right of appeal of the Claimant's decision to appoint an Examiner. The Defendant's legal counsel expressed anticipation that the intervention of the Examiner would be stayed until the Honourable Minister of Finance provided a formal response.

56. By letter dated 31st January, 2022, a true copy of which is now shown to me exhibited hereto and marked "SV23", addressed to the Honourable Minister of Finance, the Claimant indicated that its decision to appoint an Examiner was grounded on the protracted non-compliance of the Defendant with respect to its statutory obligations. Further to this, the Claimant Indicated that the matter involving the Defendant is not appealable under section 188 of the Act, or the FSRA Act."

[77] In light of this, it is beyond doubt that the appellant's letter, which it regarded as initiating an appeal, was before the judge, who was told by the respondent that it "purported to invoke a right of appeal." Also before the judge was the letter from the appellant's counsel. Secondly, the judge had before her the Authority's letter to the Minister, which asserted that the decision to appoint an examiner was not appealable. The judge could not have failed to appreciate that it would be the appellant's position that it was claiming to have initiated an appeal pursuant to section 45 of the FSRAA, and that the Authority was contending that the appellant had no such right of appeal. The respondent's position in relation to the purported appeal is also reflected at paragraph 2.7 of the amended fixed date claim which was also before the judge on the *ex parte* application. Moreover, on the set aside application, the appellant's written submissions made specific reference at paragraph 2.8 and 2.81²² to these very exhibits, and practically quoted from the affidavit of Ms. Victor, which means that the appellant clearly knew that these exhibits were disclosed to the judge on the *ex parte* application.

[78] I am therefore satisfied that the respondent made full and frank disclosure at the *ex parte* hearing in relation to the appellant's contention in relation to its purported appeal. There is no reason to think, as the appellant seems to contend, that the letters written by the appellant and the respondent to the Minister were not brought to the judge's attention. The second recital of the *ex*

²² Record of Appeal, Vol. 2 at p. 2840.

parte order undermines any such suggestion as the judge stated: “AND UPON READING the fixed date claim form, affidavits in supports (sic) and exhibits of the claimant...”. This is a clear indication from the judge that she considered the relevant letters. The fact that the judge was alive to the appellant’s position is also confirmed in her dismissal order. At paragraph 15, when addressing the allegation of non-disclosure of the letter, the judge states:

“15. The Pending Appeal under Section 45 of FSRAA: All the relevant documentation concerning the purported appeal by the defendant, were placed before the Court on the *ex parte* application.” (original emphasis)

[79] In these circumstances, the appellant’s contention of material non-disclosure in relation to the purported appeal must fail, and the judge was plainly right to dismiss it.

[80] As it relates to the assertion that there was material non-disclosure in relation to the Credit Union Sector Reports, the judge held at paragraph 33 of the dismissal order:

“33. Much was said of the Credit Union Sector Reports, to which claimant explained that the information used in relation to the defendant’s performance was premised on the 2017 audited financial statements which it received on 26th July 2022, These reports were issued subsequently on 21st and 28th October 2022, respectively after the 2017 audited statements were received. In any event, disclosure of these reports would not have been sufficient to cause the Court to refuse the order, as the reports do not demonstrate that there has been compliance with the relevant provisions which the claimant says has been breached.”

[81] The judge’s approach was to examine the evidence which was before her, and to relate it to the allegations made and the order that was being sought on the *ex parte* application. She found in summary that “the *ex parte* application concerned whether the defendant failed to carry on business in accordance with the regulatory requirements of the Act, the regulations and its byelaws, as stipulated in section 181(2)(b) of the Act, to warrant the appointment of an Inspector.” Having considered the evidence, the judge determined that even if the Credit Union Sector Reports had been disclosed, they would not have caused her to refuse the order because they did not demonstrate that the appellant was compliant with the relevant provisions of the law. This was a

finding that was open to the judge based on the evidence before her, and I see no reason to disturb her conclusion on this issue.

[82] The judge considered the appellant's submissions in relation to the other asserted instances of material non-disclosure relating to scheduling of AGMs from 2015 onward, the non-submission of returns and audited financial statements and the establishment of the supervisory committee at paragraphs 31 to 34 of the dismissal order. This clearly refutes the appellant's submission that the judge did not address the respondent's arguments which it had made at the hearing of the set aside application. The judge concluded that they had all been addressed in one way or another in the affidavit of Ms. Victor and that none of these matters attained the threshold of materiality, which would have led to a different outcome. She found as a fact that to date the audited statements for 2018 to 2021 remained outstanding, and concluded that if the appellant was having difficulty presenting audited statements "the proper course is to facilitate on-site inspection of its books and documents to enable the [respondent] to confirm that all is well, while it awaits presentation of the audited statements."

[83] The judge's assessment was that cumulatively, the matters put forward by the appellant on the set aside application amounted to no more than steps towards compliance but did not constitute compliance and did not warrant setting aside the *ex parte* order.

[84] The judge considered the evidence adduced by the appellant to rebut the allegation of non-compliance but concluded:

"29. The Court accepts that the several facts and matters which the [appellant] says were not disclosed, were either disclosed, and where they were not, they were not material or relevant. These were not matter[s] or documents which conveyed proof of compliance, but for the most part were letters and exchanges between the parties in an effort to ensure that the [appellant] complied with the regulatory requirements. Most of the letters further substantiated non-compliance over the years, and would only have served to strengthen the case for appointing an inspector. These were not non-disclosures intended to mislead the Court, considering that the issue which the Court was required to evaluate and assess on the *ex parte* application, was whether the

defendant failed to comply with specific regulatory requirements and that such failures had continued.”

31. It is clear that most of the matters complained of were addressed in one way or another in the affidavit of Sancha Victor...”

[85] It seems to me that the appellant’s real grievance is that the judge’s findings of fact and the manner in which she ultimately exercised her discretion did not accord with the outcome desired by the appellant. Laid bare, this Court is being invited to substitute its own views for that of the judge. Such a course is impermissible unless the judge’s findings of primary fact are plainly wrong, in the sense that either there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence, or the finding was one that no reasonable judge could have reached; or in exercising her discretion, the judge failed to take into account relevant factors or had regard to irrelevant ones such that the judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

[86] In my view, the judge carefully assessed the evidence before her on the set aside application and provided cogent reasons for her decision not to set aside the *ex parte* order on the basis of material non-disclosure. In this regard, neither the judge’s findings of fact nor the exercise of her discretion can attract reasonable rebuke. As such, there is no warrant for interference by this Court. I would accordingly dismiss ground 3.

Ground 4: The judge failed to apply the relevant legal principles when considering the respondent’s *ex parte* application and the appellant’s set aside application.

[87] Under this ground the appellant makes a number of complaints about the judge’s application of relevant legal principles on both the *ex parte* and set aside applications. There is an obvious overlap between the complaints made under this ground with some of the complaints made under grounds 2 and 3. Accordingly, I will deal only with those complaints that I have not previously addressed above when dealing with grounds 2 and 3.

- [88] The appellant asserts that the learned judge framed the issue of material non-disclosure on the set aside application in terms of non-compliance or compliance issues, and not on the terms that the respondent should be seeking to convince the court of the necessity of its *ex parte* application.
- [89] In the first place, it is not accurate to say that the judge framed the issue of material non-disclosure in terms of non-compliance or compliance issues. As I have pointed out at paragraphs 74 to 75 above, the judge correctly directed herself on the relevant principles relating to material non-disclosure.
- [90] Moreover, it is settled that an applicant for an *ex parte* order must make full and frank disclosure of all material matters relevant to the decision whether or not to grant the application. The test of materiality is whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application. This is context specific, and what is considered relevant or material depends in every case on the nature of the application and the orders sought. In the present context, the judge was faced with an *ex parte* application for the appointment of an Inspector pursuant to section 181 of the Act, where the allegation was that the appellant was not carrying on business in accordance with the Act or the regulations or the by-laws. The nub of the allegations grounding this application was the appellant's alleged serial non-compliance with the statutory requirements of the Act. Therefore, matters pertinent to whether or not the appellant had been compliant were highly relevant at both the *ex parte* and set aside applications. The judge was cognisant of this as can clearly be gleaned from paragraph 28 of the dismissal order where she stated that the respondent was required to "disclose all material facts which evidenced such non-compliance, or compliance where such had been attained, or was imminent."
- [91] Central to the judge's decision whether to grant or set aside the *ex parte* order was whether there was sufficient evidence before her on the issue of compliance or non-compliance. For the reasons previously identified, the judge was satisfied that the appellant had been non-compliant. The judge therefore

did not err in making this issue an important part of her focus on both applications.

[92] Finally, there was a general complaint that the judge failed to state the legal provision and/or the basis upon which she was exercising her discretion. In **English v Emery Reimbold & Strick Ltd and other appeals**²³ the English Court of Appeal stated:

“...if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process... It does require the Judge to identify and record those matters which were critical to his decision.”

[93] In **Thornton Tomasetti Inc v Anguilla Development Corporation Ltd**²⁴, a decision of this Court, it was held that a judge should give his or her reasons in sufficient detail to show the principles on which he or she has acted and the reasons that have led him to the decision. They need not be elaborate.”

[94] In my judgment, the learned judge did not offend those principles. As the preceding paragraphs which examined criticisms of the judge's reasons demonstrate, the judge gave a very detailed order and set out her reasoning on each issue at different paragraphs throughout the order. The matters that informed her decision were readily apparent to this Court. There is no merit to this complaint.

[95] Based on the foregoing, I am of the considered view that this ground of appeal has not been made out and accordingly would dismiss this ground of appeal.

Disposition

[96] I would dismiss the appeal with costs to the respondent.

²³ [2002] EWCA Civ 605.

²⁴ AXAHCVP2014/0008 (delivered 15th September 2015, unreported).

[97] This Court expresses the fervent hope that the authorities will move with dispatch to address the establishment of the Tribunal contemplated under section 45 of the FSRAA, without which the right of appeal conferred thereunder will be rendered nugatory.

I concur.
Mario Michel
Justice of Appeal

I concur.
Esco Henry
Justice of Appeal [Ag.]

By the Court

Chief Registrar