

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2022/0027

BETWEEN:

ANTIGUA AND BARBUDA FISHERMEN CO-OPERATIVE SOCIETY

Appellant

and

[1] PHILLIP ATHANAZE
[2] GARRY GORE
[3] COLIN FRANCIS
[4] JOHN BROWNE
[5] JOHN TOMLINSON

Respondents

Before:

The Hon. Mde. Vicki-Ann Ellis
The Hon. Mr. Trevor Ward
The Hon. Mr. Paul Webster

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

Appearances:

Dr. David Dorsett for the Appellant.
Mr. Justin L. Simon KC for the Respondents.

2023: June 9;
October 26.

Interlocutory appeal – Locus standi – Standing of the Board of Directors of the Antigua and Barbuda Fishermen Co-operative Society – Section 72 of the Antigua and Barbuda Co-operative Societies Act (“the Act”) – Election of Directors – Whether the judge erred in her interpretation of section 72(2) of the Act - Whether the judge erred in her finding that the 2014 Board lacked standing to bring the claim since the term of office of the directors elected in 2014 had expired

On 20th July 2014, Leonard Mussington, Lyndon Greene, Icilma Joseph, Cedric Dunnah and Vaun Phillip (the “2014 Board”) were elected as the Board of Directors for the Antigua and Barbuda Fishermen Co-operative Society (“the Society”). On 23rd April 2015, a resolution was passed purporting to expel Leonard Mussington (“Mussington”) and Lyndon Greene (“Greene”) from the Society on the basis that their membership on the Board of Antigua Fisheries Limited was a conflict of interest which placed them in breach of the Society’s By-Laws. On 12th November 2017, at a Special General Meeting, a second group of persons, namely, Sir Anderson E.M. Roberts, Garry Gore, Colin Francis, Orel J. Benjamin, Victor Richardson, Dale Henry and Natrechia Mussington (“the 2017 Board”) claims that they were elected as the new Board of Directors of the Society.

The election of the 2017 Board prompted the 2014 Board to initiate proceedings in the name of the Society against the respondents (otherwise called, “the defendants”); who are purportedly past and present members of the Supervisory and Compliance Committee established under the Antigua and Barbuda Co-operative Societies Act (“the Act”). The 2014 Board sought among others, an injunction to restrain the 2017 Board from acting on the Society’s behalf, however they were unsuccessful as the court struck out their injunction applications on 23rd April 2018. Consequently, they appealed and on 30th November 2018, the Court of Appeal decided to stay the applications until it could be determined which of the two Board of Directors was entitled to represent the Society.

On 29th January 2021, the defendants amended their defence, contending that the 2014 Board was unlawfully claiming to operate as the Board of Directors of the Society given the expulsion of Mussington and Greene and the election of the 2017 Board, and lacked the authorisation from that Board to bring any claim on the Society’s behalf. Then on 17th February 2021, the 2014 Board sought summary judgment and a declaration that the decisions and actions of the 2017 Board were all null, void and of no legal effect, however the judge refused to grant summary judgment. They sought leave to appeal but subsequently withdrew the application. On 21st February 2022, the Court of Appeal ordered that the issue of the standing of the Board of Directors be determined as a preliminary issue.

On 12th December 2022, pursuant to that remit by the Court of Appeal, the judge held that the 2014 Board lacked standing to bring the claim. Her reasoning was that their term of office as directors had expired and they were not eligible for re-election until after the expiration of one year, additionally they did not, in accordance with the Act, seek the permission of the Supervisor of Cooperative Societies (“the Supervisor”) for an extension of time for the holding of an Annual General Meeting so as to elect a new Board. In relation to Mussington specifically, the judge found that he was expelled as a member of the Society and did not seek to apply for judicial review or appeal that decision and therefore he could not be authorised to act on behalf of the 2014 Board.

The appellant appealed to this Court and the primary issue for the Court's determination is whether the judge erred in finding that the 2014 Board lacked standing to bring the claim since the term of office of the directors elected in 2014 had expired.

Held: allowing the appeal, setting aside the orders and declarations made by the judge below and remitting the matter with directions to the Registrar that the matter is to be listed for an expedited hearing before another judge of the High Court, and awarding costs to the appellant that:

1. The ordinary and natural interpretation of section 72(2) of the Act means that if an election of directors of the society is not held within three months of the end of the financial year or as extended by the Supervisor, the Board then in office continues to hold over until their successors are elected. This is an interpretation that would allow the day-to-day business of the Society to continue even as remedial steps are taken to address any concerns about the standing of the directors, which is the very issue to be resolved: whether the 2017 Board was lawfully elected as directors at the Special General Meeting on 12th November 2017, thereby terminating the tenure of the 2014 Board. The interpretation employed by the learned judge cannot stand as it is one which narrows the meaning of section 72(2) to exclude its applicability in circumstances where the incumbent directors' term had expired, or where they had served two consecutive terms. Giving effect to the section's ordinary and natural meaning accords with the underlying policy and purpose of the Act which seeks to ensure, that at all times, the Society's business is run by a duly elected Board of Directors as provided for in the Act and the Society's By-Laws.

Sections 42, 72 and 73 of the **Antigua and Barbuda Co-operative Societies Act, Act No. 9 of 2010 Revised Laws of Antigua and Barbuda, 2010** applied; **The Labour Tribunal v The St. Lucia Electricity Services Limited** SLUHCVP2019/0003 (delivered 8th April 2020, unreported) applied; **Smith v Selby** [2017] CCJ 13 (AJ) applied.

2. There can be no rational fear that the directors would hold over in perpetuity. The Act as well as the By-Laws provide for various mechanisms to combat any such scenario, for example, removal of directors from office by special resolution of members, convening of meetings by the Supervisor and convening of meetings by members.

Sections 43, 44 and 90 of the **Antigua and Barbuda Co-operative Societies Act, Act No. 9 of 2010 Revised Laws of Antigua and Barbuda, 2010** applied; Section 54 of the **Antigua and Barbuda Fishermen Co-operative Society Limited By-Laws, St. John's Antigua 2006** applied.

3. Additionally, in relation to whether Mr. Mussington was authorised to act on behalf of the 2014 Board, one of the declarations sought by the claimants was that all decisions flowing from the Special General Meeting held on 12th November 2017 are null and void and of no effect. These included the decision to expel Mussington.

The 2014 Board's challenge on this claim goes to the very root of the defendants' standing to expel him. Therefore, the judge was wrong to conclude that Mr. Mussington did not challenge his expulsion and that by virtue of that, he lacked standing.

JUDGMENT

- [1] **WARD JA:** This interlocutory appeal stems from an internal dispute within the Antigua and Barbuda Fishermen Co-operative Society ("the Society") regarding the standing of its Board of Directors. The Society is a body corporate incorporated under the laws of Antigua and Barbuda. The management of the Society is entrusted to a Board of Directors elected at its Annual General Meeting. Two opposing groups of individuals currently claim to be the legitimately elected Board. The first group, which I shall refer to in this judgment as the "the 2014" Board or "the claimant" was elected on 20th July 2014 for a term of three years. This group comprised Leonard Mussington, President ("Mussington"), Lyndon Greene ("Greene"), Icilma Joseph, Cedric Dunnah and Vaun Phillip. On 23rd April 2015, a resolution was passed at a Special General Meeting purporting to expel Mussington and Greene from the Society on the basis that their membership on the Board of Antigua Fisheries Limited was a conflict of interest which placed them in breach of the Society's By-Laws ("the By-Laws").¹ At the time, Mussington's position, as communicated to the Secretary of the Board by his attorney, was that his expulsion was unlawful, null and void and of no effect as it was not carried out in accordance with the By-Laws.
- [2] The second group ("the 2017 Board") claims to have been elected at a Special General Meeting of the Society held on 12th November 2017. This group comprises Sir Anderson E.M. Roberts, President, Garry Gore as Secretary, Colin Francis, Orel J. Benjamin, Victor Richardson, Dale Devon Henry and Natrecia Mussington.
- [3] Within days of this development, the 2014 Board filed a claim on 24th November 2017 as amended on 1st December 2020, in the name of the Society against the

¹ Antigua and Barbuda Fishermen Co-operative Society Limited By-Laws, St. John's Antigua 2006.

respondents (otherwise referred to as, “the defendants”) who are purportedly past and present members of the Supervisory and Compliance Committee (the “Committee”) established pursuant to section 65(8) of the Antigua and Barbuda Co-operative Societies Act² (“the Act”). The 2014 Board sought among others, declarations that the seven directors elected at the Annual General Meeting of the Society on 20th July 2014 were the lawful members of the Board of Directors and continued to hold office pursuant to clause 32(i) of the By-Laws and section 72(2) of the, and a further declaration that all decisions flowing from the Special General Meeting held on 12th November 2017 were null and void and of no effect. They further sought injunctions restraining the 2017 Board from acting on the Society’s behalf.

- [4] On 23rd April 2018, Wilkinson J struck out the injunction applications on the grounds that section 194 of the Act provides an alternative remedy. The claimant appealed. On 30th November 2018, the Court of Appeal stayed the applications, reserving the substantive issue as to who was entitled to represent the Society for the hearing and determination of the claim.
- [5] On 6th February 2019, the defendants filed an application to strike out the statement of case on the grounds, inter alia, that Mussington lacked authority to institute the claim having been expelled from the Society’s membership. This application was granted by Wilkinson J on the basis that Mussington had failed to rebut or deny the defendants’ affidavit evidence of his conflict of interest or deny his resulting expulsion from the Society. The claimant appealed. On 26th February 2020 the Court of Appeal allowed the appeal, holding that the learned judge had erred in resolving the issue of the authority to represent the Society on a strike out application and that the Court of Appeal had, on 30th November 2018, reserved that issue for the trial.

² Act No. 9 of 2010 of the Revised Laws of Antigua and Barbuda, 2010.

- [6] By their amended defence filed on 29th January 2021, the defendants contended that the 2014 Board was unlawfully claiming to operate as the Board given the expulsion of Mussington and Greene on 23rd April 2015. They said that a new Board was duly elected at the Special General Meeting held on 12th November 2017. As such, the claim brought by them was not authorised by the newly elected Board, whose election was confirmed by the Financial Services Regulatory Commission.
- [7] On 17th February 2021, the claimant filed notice of application seeking summary judgment and a declaration that all decisions and actions of the Special General Meeting and the election of the 2017 Board was null, void and of no legal effect. On 7th June 2021, Drysdale J refused to grant summary judgment. The claimant sought leave to appeal.
- [8] On 21st February 2022, before the Court of Appeal, the claimant withdrew their application for leave to appeal. The Court of Appeal ordered that the issue of the authority and/or the standing of the Board of Directors be determined as a preliminary issue.

The evidence before the judge

- [9] Pursuant to the Court of Appeal's directive, the judge interrogated the preliminary issue of whether the 2014 Board had locus standi to bring the claim. The evidence before the judge was in the form of affidavits filed by Mussington, Cedric Dunnah, Icilma Joseph and Vaun Phillip on behalf of the claimant and an affidavit of Colin Francis on behalf of the defendants. From these affidavits, the following narrative emerges as common ground.
- [10] The persons comprising the 2014 Board were last elected to the Board of Directors at the Society's Annual General Meeting on 20th July 2014. In the case of Mussington and Icilma Joseph, that would have marked the commencement of their second consecutive term in office. The 1st and 2nd defendants were also elected as members of the Supervisory and Compliance Committee at that Annual General Meeting.

- [11] On 14th September 2017 the 1st and 2nd defendants purported to convene a meeting pursuant to section 65(8) of the Act and clause 44(ii) of the Society's By-Laws and to appoint the 3rd defendant as a member of the Supervisory and Compliance Committee. By letter dated 23rd October 2017 the 1st – 3rd defendants called for a Special General Meeting of the Society to be held on 12th November 2017 to consider "violations by the Board of the governing laws and any practice of the Society which, in the opinion of the Committee is unsafe or unauthorised." On 12th November 2017, the defendants convened a Special General Meeting which purported to remove the 2014 Board and to elect a new Board.
- [12] In sum, no Annual General Meeting has been convened since July 2014 and the only Board elections since 2014 was purportedly held at the Special General Meeting on 12th November 2017.

The judgment below

- [13] In a brief ruling delivered on 12th December 2022, the judge held that the 2014 Board lacked standing to bring the claim. Her stated reasons for coming to this conclusion are as follows:
- (a) The tenure of the directors appointed in July 2014 expired before the commencement of the instant proceedings as those directors were precluded by section 73 of the Act and clause 33(1) of the By-Laws from holding office as a director for more than six consecutive years.
 - (b) Sections 73(2) of the Act and clause 32 of the By-Laws, which make provision for directors to hold over where an election does not take place "in the proper time", contemplate "that the proper time be the time within which the annual general meeting is due to be called, which is not later than three months after the end of the Society's financial year pursuant to section 42(1) of the Act. In the event more time is required, a written request must

be made to the Supervisor of Co-operative Societies (“the Supervisor”) who may authorise the holding of the Annual General Meeting no later than 6 months from the end of the financial year.” The judge therefore held that “the ability to remain in office until new directors are appointed is not to be interpreted as a carte blanche provision allowing directors to hold over in perpetuity or until such time that they desire or determine that they should demit office.”

- (c) Mussington had not appealed or sought judicial review of his purported expulsion from membership of the Society, and as such, that decision is valid until set aside by a “superior authority”.

[14] In summary, the judge concluded that the 2014 Board lacked standing to bring the claim because their term of office as directors had expired and having already served two consecutive terms, they were ineligible for re-election until after the expiration of one year. Further, the 2014 Board had not sought the Supervisor’s approval to extend the time for the holding of an Annual General Meeting for the purpose of electing a new Board. Section 72 of the Act did not avail them in these circumstances. In the case of Mussington, an additional basis for the judge holding that he lacked standing as a director was that he was expelled as a member from the Society at its Special General Meeting in April 2015. Since he had not appealed or sought judicial review of his purported expulsion from membership of the Society, the decision stood. For that reason, he lacked standing to authorise the bringing of the claim.

Ground of appeal

[15] The sole ground of appeal contained in the notice of appeal is stated as follows:

“The learned judge erred in holding that the Appellant’s Board elected on 29th July 2014 had no locus to bring the proceedings ANUHCV2017/0585 – *Antigua and Barbuda Fishermen Co-Operative Society v Phillips Athanze [sic] et al*, and accordingly striking out the Appellant’s statement of claim, when it was the case that the said Board was the only board of the Appellant

and hence the sole entity entitled to bring proceedings on behalf of the Appellant.”³

The appellant’s submissions

- [16] On behalf of the appellant, Dr. David Dorsett submitted that the 2014 Board that initiated the proceedings was the only extant Board of the Society and hence the sole entity entitled and empowered to authorise the commencement of the proceedings initiated on 24th November 2017. He submitted that the 2017 directors could not lawfully be elected at the Special General Meeting of 12th November 2017 since section 72 of the Act and clause 32 of the By-Laws specifically provide that the directors must be elected at the Annual General Meeting.
- [17] In relation to the judge’s interpretation of section 72(2), Dr. Dorsett submitted that the provisions of section 72 provide no sanction where a Board holding over does not apply to the Supervisor under section 42 for an extension of time to hold an Annual General Meeting. Drawing on **Attorney General v Mathews**,⁴ Dr. Dorsett submitted that there can be no implied sanction that the Board is by operation of law removed from office. Such a construction results in an absurdity and does not serve the needs of a co-operative where there is an ongoing dispute as to which persons constitute the board of the co-operative.
- [18] Dr. Dorsett contended that the Act does not make it mandatory for a Board holding over to apply for an extension of time to hold an Annual General Meeting, and even if an application is made for an extension of time under section 42 of the Act, the Act does not compel the Supervisor to grant an extension of time.
- [19] Dr. Dorsett further submitted that the Society must have a Board, without which it cannot function. The thought that a co-operative loses its Board without an elected successor is illogical since clause 32(i) of the By-Laws mandates that the business

³ Page 4 of the e-hearing bundle.

⁴ [2011] UKPC 38.

of the Society shall be conducted by a Board of Directors which shall be elected at the Annual General Meeting of the Society.

The respondents' submissions

- [20] On behalf of the respondents, Mr. Justin L. Simon KC submitted that: (a) sections 73(1) and (2) of the Act specifically limit the maximum tenure of the directors to two consecutive terms; (b) section 42(1) of the Act stipulates the maximum time frame granted for holding an Annual General Meeting; (c) section 42(2) of the Act stipulates a period of 6 months as the maximum discretionary time extension for the holding of the Annual General Meeting which the Supervisor can grant upon a written request from the Board; and (d) section 72(a) and (b) have been made subject to the maximum time frame stipulated by sections 42 and 73, and must therefore be interpreted accordingly. Approaching matters this way, Mr. Simon KC submitted that the tenure of the 2014 Board had come to an end by the time the claim was filed on 24th November 2017.

Issue

- [21] The issue that arises on this appeal is whether the learned judge erred in her interpretation of section 72(2) of the Act and consequently in her finding that the 2014 Board lacked standing to bring the claim since the term of office of the directors elected in 2014 had expired.

The legal framework

- [22] Given the basis on which the judge arrived at her decision, it is necessary to examine the relevant provisions of the Act and the Society's By-Laws.
- [23] The management of the Society is entrusted to a Board of Directors comprising not more than thirteen persons but not less than five persons elected at the Society's

Annual General Meeting for an initial term of three years. The holding of that Annual General Meeting is governed by section 42 of the Act which provides:

“Section 42 – Annual general meetings

42. Annual general meetings

(1) A co-operative society shall hold an annual meeting in each year not later than three months after the end of the financial year of the co-operative society.

(2) Notwithstanding subsection (1), where the Supervisor receives a written request from the Board of a co-operative society prior to the expiration of the period of three months referred to in subsection (1), the Supervisor may authorise the co-operative society to hold the annual general meeting at any date not later than six months after the end of the financial year of the co-operative society that it considers appropriate.

(3) The By-Laws may provide for holding semi-annual or other periodic meetings.”

- [24] In summary, the Annual General Meeting must be held not later than three months after the end of the financial year, but if the Board makes a written request to the Supervisor before the expiration of that period, the Supervisor may authorise the Society to hold the Annual General Meeting on a date not later than six months after the end of the financial year. Clause 60 of the By-Laws stipulates that the financial year of the Society shall begin on 1st January of each year and end on 31st December

Election of directors

- [25] The election of directors is governed by section 72 of the Act.⁵ So far as relevant, section 72 provides:

“72. Election of directors

(1) Subject to section 73 and to the Regulations—

(a) the election of directors shall take place annually at the annual general meeting;

(b) the directors shall hold office until the conclusion of the meeting at which their successors are elected, and shall be eligible for re-election;...

(2) Where an election of directors required by this Act or the By-Laws does not take place at the proper time, **the directors then in office shall continue in office until their successors are elected.**” [emphasis added]

⁵ This section was amended by Act No.12 of 2013 but the provisions cited herein remained unaltered.

[26] Section 72(1) is noteworthy in that it stipulates that the Annual General Meeting is the occasion on which the directors of the Society are to be elected and that once elected they are to hold office until the conclusion of the meeting at which their successors are elected and shall be eligible for re-election. However, section 72(2) provides that where the election of directors does not take place within the “proper time”, **the directors then in office shall continue in office until their successors are elected.**” [emphasis added]. It seems to me that this provision is designed to ensure that there is no vacuum in the leadership of the Society. Notably, section 72 does not speak to or define the term or period for which a director is elected to serve. That is addressed in section 73, which I will address shortly.

[27] The election of the Board of Directors is also addressed in the By-Laws in the following terms at clause 32(i):

“The business of the Society shall be conducted by a Board of Directors which shall be elected at the Annual General Meeting of the Society and shall consist of seven (7) members, all of whom shall be members of the Society. Members shall hold office until their successors are elected and shall be eligible for re-election.”

Tenure of directors

[28] The tenure of the Society’s directors is governed by section 73 of the Act. So far as material, it provides:

“73. Tenure of directors

(1) Subject to subsection (3)⁶ the directors of a co-operative society shall be elected for a term of three years.

(2) A person shall not serve as a director of a co-operative society for more than six consecutive years but thereafter the person will become eligible for re-election after the expiration of one year out of office.”

[29] Section 73 stipulates the term or maximum period that a director may serve upon their election, which in the first instance is a period of three years. The section also

⁶ Not relevant for present purposes.

imposes a term limit of two consecutive terms which a director may serve. Thereafter, they must stand down for a period of one year before being eligible to serve again as a director. These provisions are partly reflected in clause 33(i) of the By-Laws:

“...the term of office for members of the Board of Directors shall be for three (3) years. No member shall serve on the Board of Directors for more than two consecutive terms or six consecutive years.”

- [30] A director’s term of office is therefore fixed by the Act and the By-Laws and does not change. I will examine the relationship between section 72(2) and section 73 later in this judgment.

Calling of Special General Meeting

- [31] Section 43 is of some relevance, relating as it does to the calling of a Special General Meeting, which it was contended was null and void.

“43. Special general meeting

(1) The Board may call a special general meeting of the members of a co-operative society at any time.

(2) Subject to subsection (3), the Board shall call a special general meeting of the members on receipt of a written request, specifying the purpose of the meeting, from such number of members as may be specified in the By-Laws.

(3) The Board shall call the special general meeting mentioned in subsection (2) within twenty days of their receipt of the request and the special meeting shall dispose of the business specified in the request.

(4) The Supervisor may call a special general meeting of the co-operative society—

(a) for the purpose of reporting to the members the results of any audit, examination or other investigation of the co-operative society’s affairs ordered or made by the Supervisor, or

(b) where the co-operative society fails to hold an annual general meeting in accordance with section 42(1) or (2), for the purpose of enabling members to secure any information regarding the affairs of the co-operative society that they are entitled to receive under this Act and to deal with any matters affecting the co-operative society.”

- [32] In summary, a Special General Meeting may be called by either the Board or the Supervisor. In the case of the Board, they may do so at any time on their own

initiative. Alternatively, they must do so on receipt of a written request from such number of members as prescribed by the By-Laws. In such a case, the Board must hold the Special General Meeting within twenty days of receiving the request. The Supervisor however may call a Special General Meeting where the co-operative society fails to hold an Annual General Meeting in accordance with section 42(1) or (2).

- [33] The power of the Board to call a Special General Meeting is also governed by clause 54(i) of the By-Laws which provides:

“A Special General Meeting of members may be called by the Board of Directors upon their own initiative and shall be called by them upon the written petition of not less than 15 per cent of the members or twenty-five (25) members, whichever is less. The purpose of the meeting set forth in the notice and only such business as is described in the notice may be dealt with at such meeting.”

- [34] Further, clause 54(ii) of the By-Laws provides that:

“If the Board of Directors fails to convene a meeting within fourteen (14) days from the receipt of a demand as aforesaid, the members applying for such meeting shall have the right to convene the meeting by the notice which must contain the object of the proposed meeting and a statement to the effect that the meeting is convened on the failure of the Board of directors to convene the meeting demanded.”

Analysis

- [35] The resolution of this appeal turns principally on whether the judge’s interpretation of section 72(2) of the Act is correct. In approaching the task of construing the section, I am mindful of the salient principles of statutory interpretation where a court seeks to discern Parliament’s intention through the words by which it has expressed itself in an Act of Parliament. In **The Labour Tribunal v The St. Lucia Electricity Services Limited**⁷ Blenman JA quoted at paragraph 43 from the summary of the relevant principles as articulated by Sir Dennis Byron, P in **Smith v Selby**,⁸ and which I gratefully adopt:

⁷ SLUHCVP2019/0003 (delivered 8th April 2020, unreported).

⁸ [2017] CCJ 13 (AJ).

[9] The principles which the judges must apply include respect for the language of Parliament, the context of the legislation, the primacy of the obligation to give effect to the intention of Parliament, coupled with the restraint to avoid imposing changes to conform with the judge's view of what is just and expedient. The courts must give effect to the intention of Parliament.

[10] The social and historical context can be decisive in ensuring that the words are interpreted to give effect to the meaning and purpose of the Act. But that does not extend to distorting the language used by Parliament. It must be remembered that the court's responsibility is to give effect to the intention of Parliament not to correct legislation to ensure that it is just and expedient. If the court considers that there is a variance between the language used and its understanding of the special purpose of the Act it should be left to Parliament to amend the legislation. Where the words of the statute are not ambiguous there could be no justification for interpreting them in a manner that would alter their meaning, unless it may be necessary to resolve an inconsistency within the statute itself. So, the conjecture that Parliament may have intended a meaning that is different to the words used is not a sufficient reason for departing from their ordinary and natural meaning."

- [36] In short, where the meaning of the words used in the statute are clear and unambiguous and produce no absurdity or internal inconsistency within the statute, effect should be given to their ordinary and natural meaning.

The judge's approach to interpretation

- [37] The learned judge recognised that, on the face of it, section 72(2) provided a mechanism whereby incumbent directors could hold over where the election of directors was not held within the prescribed time. Nonetheless, the judge qualified or narrowed the interpretation of section 72(2) to exclude its applicability in circumstances where the incumbent directors' term had expired or where they had served two consecutive terms, which would have disqualified them from seeking re-election pursuant to section 73. Further, the judge reasoned that once the time provided for the holding of the election of directors has passed without any written application being made within the time prescribed to the Supervisor for an extension of time to hold elections, section 72(2) has no application so that the directors do not hold over or continue in office.

[38] With respect, it seems to me that this very narrow and restrictive interpretation of the holding over provisions of section 72 would work havoc on the operations of the Society leaving it completely rudderless. There may well be valid reasons why it is not feasible to hold an Annual General Meeting within the time prescribed; or, though it is held within the time prescribed, the elections end in controversy. Suppose a board comprising directors, all of whom are coming to the end of their second consecutive term, holds the election on time, but the results were seriously disputed. On the judge's interpretation, section 72(2) would not avail, and the Society would simply be without a Board. As such, the former or outgoing Board would lack standing to mount a challenge in the name of the Society. Nor could the members petition the Board to hold a Special General Meeting because there would be no Board. In my view, such a paralysing outcome could not have been intended.

[39] It seems to me that the ordinary and natural language of section 72(2) means that when an election is not held at the proper time, meaning within three months of the end of the financial year or as extended by the Supervisor, where applicable, the Board then in office continues to hold over until their successors are elected. This is not to say that their original term of office as stipulated in section 73 has not expired. That term is fixed by the Act and the By-Laws and does not change. However, to avoid a vacuum, section 72(2) provides for the directors to serve past the expiration of their term where their successors have not been elected within the time stipulated. Indeed section 72(2) is only engaged when the term of the directors expires, and no election has been held to elect successors. It bears emphasis that section 72(2) speaks of the directors **then in office** continuing in office. [emphasis added] Contrary to the judge's interpretation, which produces an abrupt and automatic termination of the tenure of the directors on the mere effluxion of their term, section 72(2) expressly treats their tenure as continuing, but only until their successors are elected.

[40] The purpose for allowing the directors to hold over is to facilitate the election of their successors. In such a situation the directors are continuing in office or holding over beyond the end of the term stipulated in section 73 because their successors have not been elected. It has to be understood that in holding over pursuant to section 72(2), the directors are not embarking on or serving a new three-year term in office. Read this way, there is no tension at all between section 72(2) and 73(1) and (2) of the Act.

[41] The learned judge seemed to be of the view that permitting directors to hold over after their term had expired would allow directors to hold over in perpetuity or until such time that they desire or determine that they should demit office. I must respectfully disagree. The learned judge seems to have overlooked the fact that the membership of the Society is not without recourse in circumstances where they feel that the directors are acting contrary to the Act or the By-Laws. I have referred above to the provisions relating to the calling of a Special General Meeting pursuant to section 43 of the Act and clause 54 of the By-Laws. Section 44(1)(b) provides another mechanism to address any such concern, as it empowers the Supervisor to call a General Meeting on their own initiative where they consider the circumstances so warrant.

“44. Meeting called by Supervisor

(1) Where—

(a) in the opinion of the Board it is impracticable—

(i) to call a general meeting of members in the manner in which meetings of members may be called; or

(ii) to conduct a general meeting of members in the manner prescribed in this Act or in the By-Laws; or

(b) **for any reason**, in addition to those described in paragraph (a), the Supervisor considers appropriate, the Supervisor on its own initiative may, if satisfied that such a meeting is warranted in the circumstances, order a general meeting to be called, held and conducted in any manner that the Supervisor may direct. [emphasis added]

(2) Without restricting the generality of subsection (1), the Supervisor may order that the quorum required in this Act or the By-Laws be varied or dispensed with at a general meeting called under this section.

(3) A general meeting called under this section shall be a valid general meeting.”

[42] Additionally, section 90 of the Act provides yet another avenue to resolve any impasse between the membership and directors of the Society. It provides:

“Removal of directors

- (1) Subject to the Regulations and the By-Laws, the members of a co-operative society may, by special resolution, remove any director from office.
- (2) A vacancy created by the removal of a director may be filled at the meeting of the members at which the director is removed or where not so filled, may be filled under section 72(1)(e).”

[43] It does not appear that the judge adverted in any way to the effect that these provisions could have on the interpretation she favoured. I am of the view that the effect of these provisions is that where the Board is holding over but not taking steps to facilitate the election of their successors at an Annual General Meeting or on petition of the membership, the Supervisor or the membership can take steps to rectify the situation pursuant to sections 43, 44 or 90 of the Act or clause 54 of the By-Laws.

[44] These options can avert any perceived tyranny by directors of the Society who are holding over after their term has ended. Accordingly, there can be no rational fear of the directors holding over in perpetuity; less still is there any warrant for construing section 72(2) in such a narrow and restrictive way as could potentially paralyse the Society.

[45] It seems to me that the very purpose of section 72(2) is to cater to such circumstances as developed in 2017 and to eventually facilitate an orderly and lawful transition of directors. An interpretation that would allow the day-to-day business of the Society to continue even as remedial steps are taken by the membership or the Supervisor to address any concerns about the standing of the directors is to be preferred. Giving the section its ordinary and natural meaning accords with the underlying policy and purpose of the Act, which seeks to ensure that at all times the Society’s business is run by a duly elected Board of Directors as provided for in the Act and the Society’s By-Laws.

[46] Accordingly, I am of the view that the judge erred when she held that the 2014 Board lacked standing to bring the claim on behalf of the Society because their term had expired. On a plain reading of section 72(2), they continue in office until their successors are elected. That is the very issue which requires to be resolved: whether the 2017 Board of Directors was lawfully elected as directors at the Special General Meeting on 12th November 2017 thereby terminating the tenure of the 2014 Board. I would hold that the 2014 Board, as the directors then in office, have standing to bring the claim to seek a determination of this issue.

[47] For completeness, I will say only a brief word about the judge's additional finding that Mussington lacked standing and could not be authorised to act on behalf of the Board because he had not challenged his expulsion and it therefore stood until set aside. I entertain doubts that this finding is entirely accurate. The evidence before the judge was that the 2014 Board did not act on the purported suspension of Mussington and he continued to function as President. Furthermore, while the Special General Meeting purported to confirm the expulsion of Mussington and Greene, one of the declarations sought by the claimant was that all decisions flowing from the Special General Meeting held on 12th November 2017 are null and void and of no effect. These included the decision to expel Mussington. As the Court of Appeal observed when this matter was before it on 30th November 2018 and 26th February 2020, the allegation of Mussington's expulsion and his right to act as the President of the Society and his authority to represent the society is "heavily contested".⁹ The claimant's challenge on this claim goes to the very root of the defendants' standing to expel him.

[48] I am therefore of the view that the judge was also wrong to conclude that Mussington did not challenge his expulsion and lacked standing.

⁹ See Court of Appeal Digest dated 26th February 2020.

[49] It must be emphasised, however, that nothing in this judgment should be read as making any determination beyond the limited conclusion that the 2014 Board had standing to bring the claim on behalf of the Society when they did. Which group, if any, can lay claim to being the lawfully constituted Board of Directors can only be determined after a full trial.

Disposition

[50] For the reasons previously discussed, I would allow the appeal, set aside the orders and declarations made by the judge below, and remit the matter with directions to the Registrar that the matter is to be listed for an expedited hearing before another judge of the High Court.

[51] The appellant is awarded costs in the Court below, to be assessed by a Judge or Master, and costs in the appeal limited to two-thirds of the sum awarded below.

I concur.
Vicki-Ann Ellis
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar