EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2022/ 0028

BETWEEN:

DEBORAH RAPHAEL-EDWARD

Claimant

And

1ST NATIONAL BANK ST. LUCIA LIMITED

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini — High Court Judge

Appearances:

Mr. Kenroy Justin for the Claimant
Mrs. Sardia Cenac-Prospere and Ms Nina Roheman for the Defendant

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2023: January 16; 17
February 13
December 28

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** Mrs Deborah Raphael-Edward ("Mrs Edward" or "the claimant") is a holder of 126 shares in the 1st National Bank St Lucia Limited ("the Bank" or "the defendant"). The Board of Directors of the Bank ("the Board") issued a notice to shareholders, advising of the 82nd Annual General Meeting to be held on 4th November 2021 ("the AGM"). Mrs Edward was nominated as a candidate for election as director, at that meeting.

[2] She alleges that two directors from the Board contacted her nominators to discuss the nomination, which led one of the nominators to withdraw his nomination just before commencement of the AGM. The withdrawal was accepted by the Board. She further says that at the AGM, it was declared that she no longer met the requirement for nomination, as required by clause 4.9 of the Bank's Byelaws ("the Byelaws"), and of the three vacant seats to be filled, two were filled by directors standing for re-election, and the third remained vacant. She is challenging the Board's conduct in contacting the nominators, and questions whether her nomination could have been withdrawn at the time that it was, as a result of which she was denied the opportunity to fill the vacant seat.

[3] The Bank asserts that the Board acted properly and took into account all relevant principles and factors and acted within the scope of its powers, in good faith, and in the best interest of the Bank, in relation to the withdrawal of Mrs Edward's nomination and all matters surrounding this event.

The Issues

[4] The questions which arise for determined are:-

1. Whether a controversy has arisen in relation to the election held at the AGM, which gives rise to a cause of action under section 133 of the Companies Act[1] ("the Act)?

2. Alternatively, did Mrs Edward waive her right to have the matter of her candidacy resolved at the AGM, in favour of the Board's consideration of the matter at a later date?

3. Is the claimant barred by laches?

4. Did the Board invite the nominators to withdraw their nomination and/or otherwise influenced the outcome of the election, and if so, did the Bank act properly, or with impropriety?

5. Did the Board act *ultra vires* by accepting withdrawal of the nomination after the time for submitting nominations had closed?

[1] Cap 13.01 of the Revised Edition of the Laws of Saint Lucia

6. If the Court finds that the Bank acted improperly, what relief is Mrs Edward entitled to?

The Claim

[5] Mrs Edward pleaded that pursuant to clause 4.9 of the Byelaws a nomination form was submitted on her behalf, five clear days before the AGM, nominating her as a candidate for directorship. The form was signed by two shareholders on 21st and 22nd October 2021 respectively. However, on the morning of the AGM the Board contacted the shareholders to ask that they withdraw the nomination. On doing so one of the nominators purported to agree. She claims that it was improper for the Board to seek to influence the election in this manner, and that the Board erred in its assessment of the nomination requirements under clause 4.9, as the deadline for submitting nominations had elapsed without any issues being raised in relation to her candidacy.

[6] She states that a nomination could not be withdrawn after the time for submitting same had elapsed, and that the deadline for submitting a nomination form is by implication also the deadline for withdrawal of a nomination. Further, at the AGM during the election process, the Board declared that of the three vacant seats two were filled by directors who stood for re-election, and the third remained vacant for supposed lack of a candidate. She says, but for the interference of the Board in requesting the withdrawal of her nomination, no issues would have arisen. Moreover, having met the nomination requirements, she was in fact transmuted to a valid candidate once the deadline elapsed, and she ought to have been allowed to fill the remaining seat, without contest.

[7] The claimant relies on section 133 of the Companies Act[2] ("the Act"), to initiate this action, stating that the court is entitled upon application by a shareholder, to determine any controversy with respect to an election and make an order declaring the result of the disputed election. She seeks the following orders:-

1. A declaration that she was a valid candidate for election to the Board of the Bank, at the 82nd AGM which took place on 4th November 2021.

[2] Cap 12.01 of the Revised Edition of the Laws of Saint Lucia

2. An order affirming her to the Board of Directors, being one of three candidates vying for three seats on the Board.

3. Loss of income.

4. General Damages.

5. Interest on the sums awarded.

6. Costs.

The Defence

[8] The Bank is licensed under the Banking Act[3] to operate a banking business in this jurisdiction. The Bank denies Mrs Edward's claim that she met the requirements to qualify for election as director, at the AGM. It is averred that although clause 4.9 of the Byelaws requires that notice in writing must be given by two shareholders, for nomination of a candidate, at least five days before the meeting at which the election is to take place, this clause facilitates the review and vetting of nominated candidates, to ensure that they meet the prescribed criteria as outlined in the following documents:

(i) the Banking Act,
(ii) the Eastern Caribbean Central Bank Fit and Proper Standards for Institutions licenced under the Banking Act dated October 2016 ("the Guidelines"), and
(iii) the Bank's Fit and Proper Policy ("the Policy").

[9] The Bank says that the Eastern Caribbean Central Bank (ECCB) is empowered to revoke an appointment if a person is found not to be fit and proper to serve as director, and such revocation may have adverse consequences for the Bank. Thus, the Board has a duty to ensure that any person nominated for election meets the fit and proper standard set by the Guidelines and the Policy.

[10] The Bank asserts that pursuant to the Policy, the Governance Committee of the Board("the Committee") is tasked with the responsibility for gathering and assessing information on

[3] Cap 12.01 of the Revised Edition of the Laws of Saint Lucia

candidates nominated for election, and to make recommendations to the Board for appropriate actions.

[11] On 2nd November 2021 the Committee met to consider the candidates nominated for election at the AGM. The Committee found and reported the following matters to the Board:-

(i) one nominee declined nomination due to conflict of interest;

(ii) another nominee was not a shareholder and was rejected; and

(iii) having regard to certain social media posts, the claimant may not be fit and proper due to conflict of interest and lack of sound judgment.

[12] At a meeting held on 3rd November 2021, the Board considered whether the claimant was a fit and proper candidate, taking into account the Banking Act, the Guidelines, the Policy, and certain social media posts which she published, concerning the resignation of the former managing director of the Bank (Mr Johnathan Johannes) which included the following statements:

(i) ".....How can we make it happen so I can move a motion to bring the MD back"

(ii) "I don't know how this board won't be rushing to Choiseul where he lives to keep him .... This board should equally resign if they don't..."

(iii) The current [Board] is the problem so why ask those who don't want to give up power"

(iv) "I wonder if we go and beat pans outside the Board Meeting on the 4th would the executives lose their seats"

(v) "they prick the wrong devil"

[13] At that meeting the Board determined that the claimant had demonstrated a conflict of interest, and poor judgment in her reaction to the resignation of the former managing director, in the absence of facts to substantiate her comments. Consequently, she could not be considered as a fit and proper candidate. The Board instructed two directors, namely Mr Tedbert Theobalds ("Mr Theobalds") and Mrs Mauricia Thomas-Francis ("Mrs Francis"), who were also members of the Governance Committee, to speak to the nominators to discuss these concerns, and to indicate that based on the due diligence which was carried out the

claimant did not meet the fit and proper standard. In this regard, the Bank relies on the minutes of the Board meeting held on 3rd November 2021.

[14] The Bank denies that any of the directors invited the nominators to withdraw their nomination, and asserts that the two directors contacted the nominators on the morning of the AGM to inform them of the provisions of the Banking Act, the Guidelines, the Policy and the social media posts, and to explain to them that the Board had declined their nomination of the claimant. One of the nominator's conveyed his misgivings since submitting the nomination and subsequently wrote to withdraw same. The other nominator was not convinced that the social media posts warranted such decision, and although he understood the Banks position, thought that there was opportunity for leniency. The Bank admits that it was communicated at the AGM that the claimant no longer met the nomination requirements, and that one seat remained vacant, due to lack of a candidate.

[15] The Bank avers that Mrs Edward has no cause of action under section 133 of the Companies Act as there is no controversy, or substantive legal right in relation to election as a director, which grounds a claim for relief. In the alternative the Bank asserts that if the facts give rise to a claim for relief under section 133, the claimant waived any right to equitable relief when she voluntarily and unequivocally agreed to the Chairman's proposal at the AGM, that the question of her election be left to the Board. At that time she had full knowledge of her rights and the full benefit of legal advice.

[16] It is further asserted that, as was agreed by the Chairman at the AGM, the matter of the Mrs Edward's appointment as a director was tabled for discussions at a Board meeting held on 26th May 2022. The Board fairly and reasonably considered the claimant's candidacy and declined to appoint her to fill the existing vacancy.

[17] Alternatively the Bank says that any relief which Mrs Edwards seeks is barred by laches, and the claim should be dismissed with costs.

The Reply to Defence

[18] In reply, Mrs Edward puts the bank to strict proof that the Policy was approved and in operation in November 2021, when the AGM was held. She denies that the ECCB is empowered to revoke appointments of persons found not to be fit and proper to serve as directors, and agreed that the Banking Act makes provision for automatic disqualification in certain circumstances. She agrees that due care ought to be taken to ensure compliance with the Guidelines, and puts the Bank to strict proof of the matters contained at paragraphs 2(v) to (vii) of the defence. She denies that her actions rendered her unfit to be appointed as director, whether on the basis of conflict of interest or poor judgment, and avers that the Bank has not identified any conflict of interest on her part. Further that the expression of an opinion on a matter does not amount to an interest, nor can this be deemed poor judgment. The words which she expressed in the social media posts were not obscene or malicious, and the labeling of a shareholder's opinion about actions taken by the Board, as poor judgment, was merely an attempt to suppress such opinion, and should be viewed as oppressive.

[19] Mrs Edward states that she intends to provide evidence of lapses in judgment of current directors, which are inconsistent with board decisions, which brings the credibility of the Board into question. She reiterates that the Bank has not identified any breaches of the Guidelines or Policy, or the Banking Act, and the latter provides a very narrow scope for disqualification. Furthermore, the Bank admitting to instructing two directors to contact the nominators is an admission of impropriety and an attempt to usurp the prerogative of shareholders to select directors. She asserts that it was highly unusual for confidential board decisions to be discussed unnecessarily with outside parties, and avers that the only reason the nominators were contacted was to invite or influence them to withdraw their nomination. She denies that the Board had any grounds for rejecting her as a candidate, and says that by doing so, the Board acted ultra vires.

[20] The claimant repeats that a cause of action exists under section 133 of the Act in relation to the serious question of whether the election of directors at the AGM was corrupted by the actions of the Bank, thereby causing a controversy, and that no seat should have remained

vacant at the close of the AGM. She denies waiving the right to equitable relief or that she left the question of her election or appointment to be determined by the Board. The record of the meeting will show that she only agreed to the Board deliberating on the issue of the legality of withdrawal of her nomination, on the day of the election. The Board did not address the issue, nor was she engaged on the matter, for a period of 7 months between the date of the AGM and the filing of this claim. She made representation through her lawyer at the AGM, indicating that the Board was not empowered to make an appointment in these circumstances. The Chairman convened a vote on the matter on three separate occasions, but in bad faith refused to recognize the count once voting had taken place. Thus, the meeting reached an impasse and she agreed to divert the matter strictly for the good order of business at the AGM. She reiterates that the Board was not empowered to make such decision in these circumstances, and that such action was ultra vires or a nullity. She denies that the claim is barred by laches as she took proactive steps to secure a remedy, however the Bank was not forthcoming. She asserts that the Bank interfered in the election process in bad faith, and contravened her right as a shareholder, to be elected to the Board, by erroneously accepting withdrawal of the nomination, after nomination had closed.

Preliminary Matters

[21] The matters outlined below arose for preliminary consideration.

[22] *Objection to Pleadings:* This matter was first raised at trial by way of objection to a line of questions put to Mrs St Marthe in cross examination. This is a matter which ought properly to have been raised at the case management stage, by way of an application to strike out what the Bank now says is a new claim or cause of action which Mrs Edward seeks to raise in her reply to the defence. Both sides addressed the matter in closing submissions.

[23] The Bank submits that Mrs Edward's pleaded case is based on the Board's actions prior to commencement of the AGM. It was pleaded in the statement of claim that the Board requested a withdrawal of her nomination. However in the reply, she sought to allege

impropriety which took place at the AGM and pleaded the following at paragraph 17 of the reply:

> *"Consequently, the Board through its Chairman convened a vote on the matter on three separate occasions but in bad faith refused to recognize a count once voting had taken place"*

[24] Counsel for the Bank further submits that this raises a new cause of action in relation to bad faith by the Board, after the nomination process, and that a reply may not introduce new allegations or claims that were not pleaded in the statement of claim. Further, a reply is confined only to matters arising out of the defence, and its purpose is solely responsive. Thus, paragraph 17 is not responsive to the defence, but seeks to set up a new cause of action. The alleged controversy pleaded in the statement of claim is that of the Board contacting the nominators and accepting withdrawal of nomination by one of them. Consequently, any reference in the reply to the actions of the Board at the AGM in so far as it alludes to the fact that by such actions the Board improperly influenced the outcome of the election, or acted ultra vires, is not permissible.

[25] Counsel relied on the authority of **Martlet Homes Limited v Mulalley & Co. Limited**[4] where it was said that:

> *"20 …any ground of claim must be pleaded in the Particulars of Claim. New claims must be added by amending the Particulars of Claim and cannot simply be pleaded by way of Reply……"*

[26] That court rejected the submission that such view would deprive the Reply of all purpose, and stated that a reply can be particularly useful in order to refute a ground of defence."

[27] Counsel for the claimant countered, stating that the paragraph is merely raising new facts required to refute the defence of waiver of Mrs Edward's right to have the issue of her nomination and election resolved at the meeting, and does not create a new cause of action. Further, these matters relate to the issue to be resolved concerning whether the Bank sought to influenced the outcome of the election and acted with impropriety.

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[4] [2021] EWHC 296 (TCC) at paragraph 20

[28] I have reviewed the authority cited by the Bank and given due consideration to the contending arguments. I accept that the statement seeks to address matters which Mrs Edward relies on to support her claim that the Board acted with impropriety by seeking to influence the outcome of the election, first by allegedly causing withdrawal of her nomination and then by stifling a vote on a motion seeking to have her nominated for election, at the AGM. I do not consider the pleading to have strayed from a response to the defence, and conclude that it is founded on facts which are presently in issue between the parties. It is left to be seen whether the claimant will be able to surmount the evidential burden concerning allegations of bad faith.

[29] *Objection to Evidence:* By a Notice of Objection filed on 5th January 2023 the Bank objected to evidence contained in the claimant's witness statement filed on 21st November 2022. The Court heard oral submissions from Counsel, and undertook to provide a ruling in this judgment.

[30] The following are the objections:-

1. At paragraph 6 the words *"in an apparent attempt to influence them"*, should be struck out as inadmissible opinion evidence.

2. At paragraph 7 the words *"the Defendant's agents asked the nominators to withdraw their nomination"*, be struck out as inadmissible hearsay evidence.

3. At paragraph 7 the words *"reluctantly acceded"*, be struck out as inadmissible hearsay and opinion evidence.

4. At paragraph 7 the words *"Mr. Lee advised that the Facebook comments were not good reason to withdraw a nomination", be struck out as* inadmissible hearsay evidence.

5. At paragraph 10 the words *"illegitimately"*, be struck out as inadmissible opinion evidence and scandalous material.

6. At paragraph 10 the words *"It appeared that a clear majority was against the Board's position" be struck out as* inadmissible opinion evidence and scandalous material.

7. At paragraph 11 the word *"coerced"*, be struck out as inadmissible opinion evidence, and oppressive and scandalous material.

8. Paragraph 13 in its entirety be struck out as inadmissible opinion evidence, and scandalous/ argumentative material.

9. Paragraph 14 be struck out in its entirety, as inadmissible opinion evidence, and scandalous/ argumentative material.

10. At paragraph 15 the words *"the antics undertaken"*, be struck out as inadmissible opinion evidence and scandalous material.

The Law

Part 4 of the Evidence Act[5] deals with exclusionary rules to the admission and use of evidence. The **Civil Procedure Rules 2023** also sets out the requirements regarding the content of a witness statement. In this regard CPR 29.5(1) (d) and (e) provide that: *"A witness statement must ...... (d) include a statement by the intended witness that he or she believes the facts in it to be true; (e)* ***not include any matters of information or belief which are not admissible*** *or, where admissible, must state the source of any matters of information or belief.* "The hearsay rule is that evidence of a statement previously made out of court by a person other than the one giving evidence of the statement is not admissible to prove the existence of the fact asserted, that is, the truth of the statement, but may be admissible otherwise than for proving the truth of the statement.[6] Thus "*it is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by the evidence not the truth of the statement but that the statement was made.*"[7]

[31] In civil proceedings there are three exceptions to the hearsay rule. The first is where the maker of the statement is not available to give evidence of the statement he or she made.[8] The maker will be considered unavailable if he or she is dead, not competent to give such evidence, it would not be lawful for the person to give such evidence, giving the evidence is otherwise prohibited by the Act, all reasonable steps have been taken to find the person or secure his or her attendance but without success, or all reasonable steps have been taken to compel the person to give the evidence, amongst others.[9] In such circumstances, the hearsay rule will not apply if oral evidence of the statement is given by a person who saw, heard, or otherwise perceived the making of the statement; or if the statement is contained in a document, or if some other statement is contained in a document to which it is reasonably necessary to refer to understand the representation.[10]

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[5] Cap 4.15 of the Revised Edition of the Laws of Saint Lucia - See sections 2, 6, 48, 49, 50, 51, 54, 64, 65 and 67

[6] Section 48 (1) and (2)

[7] Subramanian v Public Prosecution [1956] 1 WLR 965; Anthony Martin v Attorney General and others Claim NO. DOMHCV2012/0019 paras 28-31; Ganga Charran Singh v Ram Singh and Racoomarie Singh (CCJ Appeal nu. CV 012 0f 2013).

[8] Section 50

[9] Section 6

[10] Section 50 (a) and (b)

[32] The second exception is where the maker of the statement is available to give evidence of the matter asserted by the statement,[11] but it would cause undue expense or delay or would not be reasonably practicable to call the maker.[12] In such circumstances, the hearsay rule would not apply if oral evidence of the statement is given by a person who saw, heard, or otherwise perceived the making of the statement by the maker; or if the statement is contained in a document, or if some other statement is contained in a document to which it is reasonably necessary to refer to understand the representation.[13]

[33] The third exception is that where the maker of the statement is available and is being called to give evidence of the statement,[14] the hearsay rule does not apply to evidence of the statement given by the maker him/herself,[15] or by a person who saw, heard, or otherwise perceived the making of the statement by the maker if at the time the statement was made, the occurrence of the matter asserted by the statement was fresh in the memory of the maker of the statement.[16]

[34] The exceptions above will not apply unless the party who seeks to adduce the hearsay evidence gives 7 days' notice of that intention in writing to the other party.[17] If the party intending to adduce such evidence fails to give the required notice, the court may nonetheless, on the application of that party and subject to conditions, direct that any of the exceptions apply.[18]

[35] The opinion rule is that evidence of an opinion is not admissible to prove as a fact the matter on which the opinion is expressed.[19] Where an opinion is expressed otherwise than as proof of the matter as a fact, it may be admissible.[20] The relevant exception to the opinion rule is in relation to lay opinions, where evidence given by a person based on what he or she saw, heard, or otherwise noticed about a matter or event and such evidence is necessary to obtain

[11] Section 51(1)
[12] Section 51(2)
[13] Section 51(2) (a) and (b)
[14] Section 51(1)
[15] Section 51(3)(a)
[16] Section 51(3)(b)
[17] Section 54(1)
[18] Section 54(2)
[19] Section 64(1)
[20] Section 64(2)

an adequate account of that person's perception of the matter or event is admissible. The exception applies even if the opinion relates to a fact in issue or a matter of common knowledge.

[36] The law regarding striking out of material from witness statements was elucidated in **Joseph W Horsford v Geoffrey Croft**[21], a decision of the Court of Appeal, in which Blenman JA said the following:

> *"36. The witness statement should contain the evidence which that person would be allowed to give orally. A witness statement should not contain inadmissible evidence. Legal arguments or opinion evidence (except from someone who is qualified to provide that evidence), or irrelevant evidence (i.e. evidence which has no bearing on the facts in issue) should not be included in the witness statement. In effect, the purpose of witness statements is to replace oral testimony.9 A witness statement must therefore address all the factual issues in the case upon which the witness is in a position to comment."*

[37] At paragraph 43 the Learned Justice of Appeal stated:

> ***"Scandalous or irrelevant***
> *[43] Allegations or evidence are held to be scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the other party. Moreover, any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party or make any charge of misconduct. However, an allegation which is scandalous, as, for example, by making charges of dishonesty, immorality or outrageous conduct, cannot be struck out if it is necessary or relevant to any issue in the action."*

[38] Applying the legal principles outlined above to each of the impugned paragraphs, I have determined that the following should be struck out of Mrs Edward's witness statement:

1. The matters complained of at paragraph 6, as being inadmissible opinion evidence pursuant to section 64 (1) of the Evidence Act
2. The matters complained of at paragraph 7, as being inadmissible hearsay which does not fall within any of the exceptions in section 51 of the Evidence Act.

[39] The remaining material complained of fell within the category of beliefs held by the claimant, and even if some were capable of being categorized as scandalous; what was said could be

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considered as relevant to the factual matrix, and the issues to be determined in the case. For this reason, the remaining material will not be struck out.

[40] _Inadvertent disclosure of legal advice obtained by the Board, which was inadvertently left unredacted, in exhibits tendered by the Bank:_ This issue arose during the course of trial, by way of objection made by Counsel for the Bank, when Mrs Francis was being cross examined on matters contained in a legal opinion obtained by the Bank. The basis of the objection was that information in a memo to the Board, in relation to a legal opinion obtained by the Bank, was inadvertently left unredacted in Exhibit MFT7 tendered with Mrs Francis witness statement. The Bank submits that this was an inadvertent disclosure of privileged communication and it was an obvious mistake. Thus, the claimant should not be permitted to rely on such material. The Bank says in any event, it is a well-recognized principle that directors have a duty to act independently, and while they may take advice, they are not required to blindly follow it. Further, without context and without any material on the basis for the legal opinion, no ground exists to consider the opinion in view of the Board's decision to decline the claimant's nomination.

[41] Counsel for the claimant submitted that the Bank volunteered the information through the exhibits and effectively waived privilege by disclosing the document and referencing it in witness statements and oral evidence of Mrs Francis. If the reference is made in order to convey a point, then the privilege is waived, even if the party or counsel is not aware that it is being waived. Counsel further says even if the material was inadvertently disclosed, it forms part of the evidence, and trial was not the place to attempt to fix this error. He relied on the authorities of **Re D (a Child)**[22] and **Mac Hotels Ltd v Rider Levett Bucknall**[23] in support of the claim that the Bank by its own actions had waived the privilege.

[42] I note that what was disclosed was not the legal opinion provided to the Bank, but rather a statement which was made in a memo from the Committee to the Board, concerning a position conveyed in a legal opinion. It concerned the social media posts published by Mrs

[22] [2011] 4 All ER 434
[23] [2010] EWHC 767 (TCC)

Edward, in relation to fitness to serve as director. The memo was exhibited by Mrs Francis, for the purpose of conveying the findings of the Governance Committee in relation to the suitability of the claimant for directorship. Some of the Bank's exhibits contained redacted material, and the Bank's position is that due to inadvertence the material was not redacted from this exhibit. This memo was also tendered by Mrs St Marthe as Exhibit SJS6, and the material was not redacted.

[43] The right to withhold disclosure or inspection of documents is addressed in CPR28.14 and 28.15. The time and place for withholding disclosure or inspection of a document is when filing the list of standard disclosure. I note that in the Bank's List of Standard Disclosure filed on 31st October 2022 it is stated at Schedule 2 Part 2 that the Bank claims the right not to disclose correspondence between itself and Counsel for the purpose of giving and receiving legal advice on the basis of legal professional privilege. Rule 28.15 states that *"If a party inadvertently allows a privileged document to be inspected, the party who has inspected it may use it only with the – (a) agreement of the party disclosing the document; or (b) permission of the court.*

[44] Here, the right to withhold disclosure and inspection of the legal communication was properly claimed by the Bank. There was no inadvertent inspection of the legal opinion per se, but rather a statement about what was advised was left unredacted in the respective exhibits, I am of the considered view that the process in CPR28.15 applies equally to such circumstances. As the Bank has claimed legal professional privilege in relation to this material, the claimant could not rely on it, unless agreement was first sought from the Bank as the party which inadvertently disclosed it, or an application made to the Court for permission to use it, and to have the full document disclosed. No such request or application was made.

[45] In **Flowcrete UK Limited et al v Vebro Polymers UK Limited**[24] Cooper J distilled the guiding principles in such circumstances as follows:

[24] [2023] EWHC 22 (Comm)

*"In applying the principles laid down in Al Fayed, the Court must distinguish between two points: **first, whether the document was privileged and, second, whether even if privileged the document has obviously been disclosed by mistake. It is only if the court is satisfied of the latter that it will consider whether to prevent the use of the document in the litigation**; see Rawlinson v. SFO [2014] EWCA Civ 1129 at [15]."*

[46] The cases cited by Counsel for the claimant concerned instances where a party had included such material in a witness statement in support of the respective case. In this context it was held that because the party had willfully disclosed the material as part of the case, the court found that it was necessary to disclose the full extent of the legal communication. This is not what has occurred here. The material was not tendered in support of the Bank's case, and I accept that it was inadvertently left unredacted in both exhibits. Consequently, the claimant may not rely on this material. It will be disregarded, and no weight will be given to it.

The Evidence

Deborah Raphael-Edward (Mrs Edward)

[47] Mrs Edward stated that she has been employed with SOL EC Ltd. for seventeen years in various capacities and is currently the General Manager for the territories of Saint Lucia and Dominica. She holds a law degree with honors from the University of Huddersfield, along with a master's degree in education (with distinction) from the University of the West Indies and a Bachelor of Arts in History & Political Science from the said University. She is currently enrolled as a doctoral student with Brentwood University. Her curriculum vitae[25] was exhibited. She confirmed that she is a shareholder with the Bank, having held 126 fully paid shares since 2005. She states that she currently has no outstanding bad debt with any credit institutions or otherwise, and has never been declared bankrupt. She has never been

[25] See Exhibit DRE1

disqualified as a trustee or a director of a company, and has no knowledge of any information that would disqualify her as a director of a bank or any company.

[48] Mrs Edward states that in October 2021, upon considering her credentials, she opted to stand for election as a director on the Board of the Bank, at the AGM scheduled for 4th November 2021. The Byelaws[26] at clause 4.9 mandates that two nominators who are shareholders, must submit a nomination form in order to be declared a candidate. She had conversations with two shareholders, Mr. Deale Lee (Mr Lee) and Mr. Joseph Maxwell (Mr Maxwell), both of whom agreed to support her candidacy by submitting a nomination form to the Bank. The form was signed by Mr Lee on 21st October 2021 and by Mr Maxwell on 22nd October 2021. It arrived at the Bank five days before the AGM, and before the deadline stipulated in the Byelaws. She says based on the Guidelines, it is the practice of the Bank to vet all nominees and subsequently advise on whether they are not fit and proper to stand for elections. During the five days between the nomination deadline and the AGM, no concerns were brought to her attention, concerning fitness to serve. Then, on 4th November 2021, mere hours before the AGM, she was alerted by the nominators that representatives of the Bank had contacted them, and had discussed the nomination with them. She was informed that the Bank did not agree with some social media comments which she had made, criticizing decisions of the Bank in relation to the former managing director. Mr Joseph subsequently withdrew his nomination but apologized to her profusely when he explained the details of the conversation between himself and the Bank's agents.

[49] The claimant stated that once the election was tabled at the AGM, the Bank announced that three nominees had been put forward initially, however one withdrew, another was found not to be fit and proper to serve, and the third being herself, no longer met the requirement of two nominators under clause 4.9 of the Byelaws. Therefore she was not a valid candidate for election. At that time no concerns were raised regarding her fitness to serve. Thus, the entire ballot comprised of the two retiring directors who were eligible for re-election. She indicated her disagreement and challenged the legality of the Board's actions in person at

[26] See Exhibit DRE2

the AGM, and in writing by a letter dated 4th November 2021[27] which was forwarded to the Board before the AGM convened. The Chairman of the Board Mr Nigel Fulgence (Mr Fulgence) indicated the Bank's intention to utilize the power under clause 4.4 of the Byelaws to fill the position with a person of the Board's choosing, albeit that this was unlawful and contrary to clause 4.5.

[50] Mrs Edward stated that a motion on whether she should be allowed to stand for election was tabled and put to the floor for a vote three times. The Chairman refused to take a count on each occasion, and then withdrew the motion. She says it appeared that a clear majority was against the Board's decision, and the Chairman reverted to deliberation on the matter, notwithstanding that voting had started. Thereafter, she was coerced by the Chairman to allow the matter to be dealt with via a private meeting with the Board at a later date, rather than at the AGM, although election of directors are rightfully the prerogative of the shareholders. She agreed to defer the matter to allow the Board to consider the legalities of its position, which she believed to be incorrect, and the matter was deferred in the interest of good order of the meeting. Having received no response from the Bank, she followed up for an update by way of a letter dated 17th November 2021. Having received no response, she referred the matter to the ECCB, under Part VII of the Banking Act, on 17th December 2021. She was subsequently informed by the ECCB that the matter was outside of its remit.

[51] The claimant further states that the Board inappropriately tampered with the election process, which consequently cheated the entire shareholder base of a valid candidate. Further, if the Board is allowed to remove candidates from vying for election on the cusp of a meeting, in bad faith, this leaves the environment open for corruption and artifice. She was advised that under the Act, an election controversy can be reviewed under section 133, and having met all the requirements to stand for election, she should have been affirmed as a director at the AGM, had the Board not interfered with the process. She states that the antics undertaken to have her removed as a candidate has caused negative public impressions about her character and fitness to serve as a director, and has caused reputational damage. This has dire implications for her position as General Manager of an international company.

[27] See Exhibit DRE3

[52] Having to defend myself against the actions of the Bank at the semi-public meeting which was also broadcast on the Zoom platform, has caused her embarrassment and distress, and it is for these reasons that she seeks a declaration that she was a valid candidate at the AGM, and that having been the only nominated candidate, she ought to have been affirmed on the Board of Directors. Therefore she seeks compensation in damages, arising from the Bank's action.

[53] In cross examination Mrs Edward admitted that at no time was she part of a conversation between the Banks agents and the nominators. She disagreed that a count was taken on a motion to vote on her nomination at the meeting. She clarified that the count referred to in her witness statement was one which the Chair refused to take on a vote from the floor to allow shareholders to vote for her as a candidate. She clarified that the Mangal count refers to the nomination of herself as a candidate, which was voted on. However, once she was nominated and was a candidate on the floor, the Chair refused to take that vote. She agreed that the minutes contained the count about her candidacy but not the refusal of the count to vote for her as director for the vacant seat. She admitted that she did not take any objections to the minutes, but insisted that the count referred to at paragraph 10 of her witness statement is different to the count referenced at paragraph 10.14 of the minutes.

[54] She stated that the Chairman asked her three times to meet outside to discuss the matter. She then agreed to meet with the Chairman on the filling of the vacancy, and he asked her to deal with the matter privately. She confirmed that it was agreed that there would be a meeting on the issue of her candidacy and at paragraph 10.27 of the minutes the Board made a statement indicating that they would meet separately on that issue. At that point the shareholders indicated that there was no need for a separate meeting as there was a legitimate candidate who could be voted on. She agreed that Mr Justin was the one who spoke as she had no experience, and having received the call just hours before the meeting, she contacted him to represent her. He spoke on her behalf at the meeting and there were other shareholders who supported her, which was not recorded in the minutes.

[55] When asked whether she left the matter of her nomination to the Board, she responded that it was when the Board asked to meet, so at that time she left it to the board. She confirmed

that she trusted the Board, having asked for time to meet and trusted that the Board would do the right thing. She, however, disagreed that she left the matter of her candidacy alone. She admitted to having thanked those who supported her and stated that she would be putting herself up again, which she did in 2022. She disagreed that the matter of withdrawal of her nomination was concluded when she agreed to allow the Board to deal with the matter, and agree that at the election held at the 83rd AGM there were a number of candidates and she emerged 3rd by a very slim majority. In re-examination Mrs Edward indicated that the Chairman indicated that a separate meeting would be convened and if she was the successful candidate she would be contacted. She agreed to let the board deliberate and get back to me as I was the only candidate nominated then.

Mrs Simona Carleen Jn. Baptiste-St. Marthe (Mrs St. Marthe)

[56] Mrs St. Marthe stated that she was the Acting Corporate Secretary of the Bank from 1st July 2020. Prior to this she served as Assistant Corporate Secretary from 27th February 2017 to 30th June 2020 and was also the Personal Assistant to the managing director from 1987 to June 2020. In her capacity as Assistant Corporate Secretary and Acting Corporate Secretary, she was tasked with assisting with or taking minutes of meetings of the Board and its various committees and minutes of meetings of shareholders. In both roles she was also responsible for keeping and maintaining all corporate records relating to the Bank's corporate affairs, including but not limited to, the Byelaws, Policies, minutes of meetings and nomination forms for the position of director.

[57] She stated that for reasons of confidentiality, matters not relevant to these proceedings were redacted from the minutes exhibited with her statement. On becoming Assistant Corporate Secretary she was given access to files which she believed formed part of the Bank's records, and continued to have access to these files as Acting Corporate Secretary. They contain documents prepared during the normal corporate processes of the Bank, and she had in her possession the following documents concerning the election and eligibility of persons to serve as directors of the Bank, extracted from these files:

(i) Byelaw No 1[28]
(ii) The Bank's Fit and Proper Policy[29]; and
(iii) The Eastern Caribbean Central Bank Fit and Proper Standards for Institutions licensed under the Banking Act dated October 2016[30].

[58] Mrs St Marthe stated that these three documents guide the Bank's deliberations on the election and eligibility of persons to serve as directors. For as long as she has been employed as Assistant or Acting Corporate Secretary from 2017, the Board and the Governance Committee have relied on these documents, and in particular, on the Bank's Fit and Proper Policy, in deliberations concerning whether a responsible person is fit and proper. In her capacity as Acting Corporate Secretary she was also aware that the Governance Committee was duly constituted as a standing committee of the Board, to fulfil the Board's duties and responsibilities under the Banking Act, and to ensure that persons who are candidates for election, or current directors, are fit and proper, or remain fit and proper during their tenure. The Committee is expressly referred to in section 2.2 of the Policy. She states that at the time of Mrs Edwards nomination, the Committee was already in place. She further states that clause 4.9 of the Byelaws which provides that, no person (other than a retiring director) is eligible to be a director of the Bank unless notice that such person is a candidate for such office is given to the Bank by two other shareholders at least five days before the meeting at which the election is to take place, facilitates the receipt of nominations in advance of a meeting of shareholders, to allow candidates to be vetted by the Committee and the Board.

[59] On 11th October 2021 she issued a Notice[31] of the 82nd AGM scheduled for 4th November 2021, which included the following agenda item:

"10. To elect three Directors.
(i) In accordance with Section 4.6 of the Bank's Byelaw No. 1, the following directors retire by rotation:
M. Robin Schouten who is eligible for re-election.
Mr. Richard Monplaisir who is eligible for re-election.
Ms. Jennifer Remy who will not be seeking re-election."

[28] See Exhibit SJS1
[29] See Exhibit SJS2
[30] See Exhibit SJS3
[31] See Exhibit SJS4

[60] Pursuant to clause 4.9 of the Byelaws she received a nomination form[32] dated and signed on 21st October 2021 and 22nd October 2021 by shareholders Deale Lee and Joseph Maxwell, nominating Mrs Edward for election at the AGM. On 2nd November 2021, she attended a meeting of the Committee at which consideration was given to the three nominations received for the AGM, which included the claimant's nomination. She uploaded a memorandum[33] from the Committee to the Board reporting on the discussions and conclusions from the said Committee meeting to Board Pack, for a board meeting on 3rd November 2021. She explained that Board Pack is a virtual space, accessible to the directors, to which she uploads all board documents which directors are required to access for meetings. On 3rd November 2021, she attended the Board meeting at which the claimant's nomination was discussed, amongst other things. She made contemporaneous notes of the discussions and decisions and prepared minutes of the said meeting[34]. These minutes had not yet been approved at a subsequent meeting, but had been circulated to the Board.

[61] Mrs St Marthe further states that at midday on 4th November 2021 she received an email[35] from Mr Maxwell, indicating that he was withdrawing his nomination of the claimant as a candidate for election at the AGM. She attended that AGM and made contemporaneous notes of the discussions and decisions and prepared minutes of the said meeting, which were approved at the 83rd AGM held on 28th July 2022[36]. Prior to commencement of the AGM on 4th November 2021 Mr Kenroy Justin (Mr Justin) handed an envelope to her, addressed to the Chairman of the Board. The envelope was not opened at the time of receipt as it was received just a few minutes before the meeting was called to order. After the meeting, the Chairman opened the envelope and handed her a copy of a letter from the claimant's lawyers[37] TM Antoine Partners, which alleged that her candidacy had been illegally withdrawn and that corrective action will be pursued.

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[32] See Exhibit SJS5
[33] See Exhibit SJS6
[34] See Exhibit SJS7
[35] See Exhibit SJS8
[36] See Exhibits SJS9
[37] See Exhibit SJS10

[62] Subsequently on 16th November 2021 she received an email from Mr. Justin of TM Antoine Partners, containing a letter dated 17th November 2021[38] which was addressed to her. It required that the Board take corrective action within seven (7) days thereof. The Bank did not respond to these letters, however, at a meeting held on 26th May 2022 to discuss, the appointment of the claimant as a director, amongst other things, she was present and made contemporaneous notes of the discussions and decisions and prepared minutes of the said meeting[39]. These minutes had not yet been approved, and were presented for these proceedings as a redacted draft. Thereafter she cause a Notice of the 83rd AGM[40] to be issued, which included the following agenda item:

"10. To elect four Directors .
i. In accordance with Section 4.6 of the Bank's Byelaw No. 1, the following directors retire by rotation:
Mr Nigel A. Fulgence - who is eligible for re-election.
Mr Tedbert Theobalds - who is eligible for re-election.
Mrs Geraldine Lendor-Gabriel - who is eligible for re-election.
ii. To fill the vacancy occasioned by the retirement of Mrs Jennifer A. Remy."

[63] She then received a nomination form[41] on behalf Mrs Edward as a candidate for election at the 83rd AGM. She attended that AGM as Acting Corporate Secretary, at which elections were held to fill all four vacant seats on the Board. Mrs Edward ran for election at the 83rd AGM but was unsuccessful in her bid. All four seats on the Board were filled at that AGM.

[64] In so far as is relevant, in cross examination Mrs St Marthe agreed that at the meeting it was said that the claimant was not a candidate due to withdrawal by one of the nominators, and that was the only reason given. She agreed that this issue was debated for over an hour during the election process. She agreed that the Board never communicated to the claimant that she was not fit and proper. She also agreed that a person must be properly nominated before a fit and proper test or background check can be carried out. She confirmed the nomination form was received 5 days before the AGM and was accepted by the Bank. She agreedl that there was no byelaw that expressly allowed a nomination to be withdrawn, and did not know if there was written guidance which allowed for this.

[38] See Exhibit SJS11
[39] See Exhibit SJS12
[40] See Exhibit SJS13
[41] See Exhibit SJS13

[65] She agreed that the two retiring directors were returned to the Board by acclamation, and if there was a third candidate that person would have had an opportunity to fill the vacant seat by acclamation. She had never seen a candidate for acclamation rejected by the shareholders. She agreed that there was no need to put directors through by acclamation at the elections which was held at the 83rd AGM. She confirmed that the 84th AGM was due by 24th March 2022, but has not been convened, and is imminent. Three directors will be retiring then, and elections will be held. In re-examination Mrs St Marthe agreed that the Byelaws is silent on the matter of acclamation.

Mrs Mauricia Thomas-Francis (Mrs Francis)

[66] Mrs Francis is a business entrepreneur, retired banker and a director on the Board from 30th May 2019. She was also a member of the Governance Committee from May 2020 to 4th April 2022. She testified that the Committee is charged with vetting nominees for directorship. This is aimed at ensuring that the Guidelines, the Policy and the Banking Act are complied with. In fulfilling this role the Committee gathers and assesses information about nominees. On 2nd November 2021 she attended a meeting of the Committee to review the nominations received for election of directors at the AGM. Of the three nominees received, one declined the nomination due to a conflict of interest. A second nominee declined to accept the nomination as that nominee was not a shareholder of the Bank. In respect of the third nominee Mrs Edward, the due diligence conducted revealed that she had made the following Facebook posts and comments between 20th to 21st October 2021, in response to the resignation of the former managing director of the Bank which occurred on 19th October 2021[42]:

(i) *"This makes no sense that any right thinking Board would accept this resignation";*

(ii) *"I don't know how this board won't be rushing to Choiseul where he lives to keep him .... this board should equally resign if they don't..."*

(iii) *"this board needs to resign periooddddtttt!!!!!";*

(iv) *"there needs to be motion to dissolve the board and reinstate [Jonathan Johaness]"*

[42] See Exhibits MTF3

(v) *"maybe without [Johanthan Johaness] the bank loses relevance"*

(vi) *The current [Board] is the problem so why ask those who don't want to give up power"*

(vii) *"they prick the wrong devil" and*

(viii) *"The region is fighting to keep talent but they accepting a resignation from such great talent."*

[67] Mrs Francis stated that at the time of the Committee meeting, the resignation of the former managing director was still a live issue and the Board had not concluded its assessment of nor decided on its response to the resignation. Thus, the Committee determined that sections 3.3.1 and 3.3.1.1(o) of the Policy were pertinent for assessing Mrs Edward's suitability as a fit and proper person for directorship, in view of her posts and comments. The Committee concluded that the posts brought into question the objectivity and judgment of the claimant, and was concerned that she could impact the Board's ability to determine its response to Mr Johannes's resignation, and decided that the matter should be brought to the attention of the Director of Bank Supervision at the ECCB. The Committee also produced a memorandum dated 2nd November 2021[43] addressed to the Board, on these deliberations. On 3rd November 2021 the Board convened a meeting to discuss nomination of the claimant as a director, in view of the memo, and the upcoming AGM. The Board considered the Banking Act and section 3.3.1 of the Policy and found that the claimant's comments were defamatory of the Board in general, and as an institution, and of each director on the Board. Consequently, the Board found that the claimant had exercised poor judgment, in the absence of facts to substantiate her comments, and was therefore unfit to be a director.

[68] As a result, she and Mr Theobalds were tasked with informing the nominators of the Board's views, that Mrs Edward did not meet the fit and proper standard, based on the due diligence conducted. She stated that the redacted draft minutes[44] contains a record of the discussions held at paragraphs 5.8 to 5.10.

[43] See Exhibit MTF4
[44] See Exhibit MTF5

[69] Mrs Francis stated that in order to closely manage the conversation with nominators for transparency, and to preserve the purpose and intent for contacting them she prepared a script[45] to be followed during the calls with the nominators. On the morning of 4th November 2021 she and Mr Theobalds had a three way call first with Mr Maxwell, and then with Mr Lee, and kept to the script. They were both informed of matters concerning the claimant's suitability to be director, and that the Board had declined their nomination. At no time during these calls were the nominators asked to withdraw their nomination. Mrs Francis stated that by email dated 4th November 2021[46] she informed the Chairman of the nominators positions.

[70] Later that day she became aware that by email dated 4th November 2021 Mr Maxwell withdrew his nomination. At the AGM, one of the agenda items was the election of three directors. Two retiring directors were eligible for re-election and a vacancy was created by the resignation of a third. Mr Theobalds as Chair of the Committee provided a report on the three nominees received, which included the claimant. The meeting was advised by Mrs Brenda Floissac-Flemming that there was no written nomination under byelaw 4.9 before the meeting, and the decision to be made was whether the vacancy created by the resignation of one director should be filled by the Board as a casual vacancy or by the shareholders at a subsequent meeting. A discussion ensued and it was proposed that filling the vacancy be postponed. Mrs Edward agreed with this proposal. Thereafter the retiring directors were re-elected. She says these matters are recorded in the approved minutes[47] of the AGM. Subsequently, at a board meeting held on 26th May 2021 the appointment of Mrs Edward was considered and the board declined to appoint her as director. A true record of the discussions held at that meeting is contained in a redacted copy of the draft minutes.[48]

[71] In cross examination Mrs Francis agree that the assessment of the claimant spoke to a weakness in her judgment in so far as her conduct on Facebook was concerned, and for this she relied on clause 3.3.1.1 of the Policy which makes reference to both her judgment and conflict of interest. She agreed that for a conflict to arise there must be two vested interests

[45] See Exhibit MTF6
[46] See Exhibit MTF7
[47] See Exhibit MTF8
[48] See Exhibit MTF9

that are incompatible, and that as a shareholder the claimant is entitled to have an interest in the Bank's business.

[72] She explained that a person may have an opinion on an managing director but conflict will only arise in terms of the context, and reliance was placed on clause 3.3.1.1 (o) of the Policy to disqualify the claimant as a candidate, and the Board established this in relation to treatment by the claimant in respect of the resignation of the former managing director. In reviewing the myriad of public comments made via Facebook[49] it is evident that there was a relationship between the claimant and the former managing director. The Facebook posts were reviewed against the requirements of the Guidelines and the Policy, and the focus of the Board was in relation to the Facebook posts and nothing else. The particular clause speaks to business or "other" relationship which could materially affect the fitness of the candidate, and it was not only in relation to business.

[73] When asked whether it was unreasonable and tenuous to rely on this clause to show conflict of interest, she responded that some of the posts suggested that the claimant demonstrated that she was conflicted as she strongly decried the Board's acceptance of the managing director's resignation without any evidence of what had transpired and she placed the blame squarely on the Board. These statement were found to lack sound and balanced judgment for the level of objectivity required of a person who is vying to serve on the Board. She agreed that a shareholder would have an interest in who is the manager of a Bank where that shareholder holds accounts and shares but it must be placed in context, in this case where the managing director resigns and this is stated on social media and disparaging comments are made about the Board by the claimant, to the effect that the board was at fault. The Board considered these statements to be irresponsible. As a shareholder and customer one should not make such statements without proper basis and to go as far as saying that a right thinking board would not have accepted that resignation, with no basis for saying the Board should not accept. As someone vying to be a director on the Board the words were to the effect that she is coming to deal with the Board, which has unreasonably caused the removal of the managing director. From the comments posted by the claimant

[49] See Exhibit MTF3

that one had to consider her judgment in the context that she is vying to be a director on the Board.

[74] She confirmed that the Board has nothing against the claimant, and she is academically well qualified but these posts called into question her judgment in dealing matters of decision making on the Board and contributing to the success of the institution. She agreed that the posts were in poor taste for a person vying to be on the board and it was considered that there was an error in judgement. She agreed that public criticism is generally not very pleasing, but disagreed that the Board felt slighted. She remained adamant that the matter focused squarely on the Facebook post in relation to lack of judgment exercised by the claimant in making comments about the resignation of the managing director, and the Board felt strongly that on account of this she should not serve as a director. She agreed that ECCB had to conduct its own due diligence to take a position and that according to its own Guidelines and the Policy plays an important role in these matters in determining whether the matter was handled correctly. She confirmed that ECCB gave no position because they were not required to give an opinion or advice at that stage.

[75] While she agreed that diverse opinions and challenges to a Board are of benefit to a company, she disagree that the Board does not welcome challenge or criticism, and stated that the Board has a responsibility as set out the Banking Act, the Guidelines and the Policy, to ensure robust review on the nomination of candidates and the Guidelines are very clear on this. She accepted that concerning Asher Pearl James she was written to on her non-acceptance, but in relation the claimant the Committee prepared an entire script based on the Board's decision to advise the nominators of its decision. She stated that the script was to direct the focus of the conversation tc avoid ambiguity in the discourse with the two nominators. Preparation of the script was her suggestion and not that of the Committee or the Board, to adopt best practice, as she knew this to be a professional practice to ensure that sensitive conversations leave no room for confusion or ambiguity. She agreed that it was open to the Board to call the claimant directly, however it was felt that the Board owed the respect and courtesy to the nominators to inform them of the outcome of the evaluation which was conducted.

[76] She explained that a different course to Asher Pearl James was taken with good reason, as the circumstances were different. She confirmed that there was never any intention to seek withdrawal of the nomination. They never requested a withdrawal from any of the nominators and simply followed the script as reflected shown as Exhibit MTF6[50] Nowhere in the script is any indication of a request for withdrawal by any of the nominators. She explained that when she reported to the Chairman that Mr Maxwell was cognizant of the option to withdraw the nomination she was simply reporting exactly what he had said as part of my responsibility to the Board. She confirm that his email to withdraw the nomination came after the conversation with him and not before, and remained adamant that every word that was conveyed to the nominators was in the script and there is no difference in what was said to Mr Maxwell during the conversation. She agreed that having made the decision that the claimant was not fit, a withdrawal of the nomination would have been redundant.

[77] When asked whether the Board relied on the withdrawal of the nomination rather that its decision of unfitness, to remove the claimant from the ballot, she responded that the Board's position is as reflected in the minutes of the meeting and at no time during the election process was the claimants fitness mentioned. She disagrees that the decision of the Board to speak to the nominators on the decision taken about unfitness of the claimant was an attempt to influence them, and explained that it was simply as a show of respect fairness and courtesy to the nominators. She confirmed that the matters stated at paragraph 10.54 accurately reflects what transpired at the meeting, and agreed that it was said that consideration would be given to the claimant, then the fit and proper test would have been abandoned.

[78] Mrs Francis disagree that assurances were made to convince the claimant to defer the matter and could not say whether any response was sent to the two letters written on behalf of the claimant. These matter were not within her knowledge. She stated that the claimant was disqualified on the first occasion because the Board received withdrawal of her nomination, but she had failed the fit and proper test conducted by the Board and subsequent to that the nomination was withdrawn, as two nominators are required to qualify

[50] See page 155 -158 of Trial Bundle 3.

for nomination. She could not say whether the fit and proper test was conducted for the claimant for the 83rd AGM, because at that time she was no longer on the Committee and has not seen the minutes of that Committee meeting. Mrs Francis disagreed that the assurances given to the claimant at the AGM were not upheld and stated that it would be incorrect to suggest that the purpose of calling the two nominators was to influence them to withdraw their nomination.

[79] She disagree that the claimant was coerced by the board, at the AGM, to defer the matter of her services to the Board.

[80] In re-examination Mrs Francis clarified that the reason the Board proceeded with the withdrawal of the nomination was that two nominator are required, and although the candidate had failed the fit and proper assessment, as one nominator withdrew his nomination the Board accepted and proceeded on the basis of the withdrawal.

Issue 1 : Has a controversy arisen in relation to the election held at the 82nd AGM, which gives rise to a cause of action under section 133 of the Companies Act?

Issue 2 : Did Mrs Edward waived her right to have the matter of her candidacy resolved at the AGM, in favour of the Board's consideration and determination on the matter?

Issue 3 : Is the claimant barred by laches?

[81] For convenience, issues 1, 2 and 3 will be dealt with together.

<u>The Claimant's Submissions</u>

[82] Counsel for the claimant submits that an election controversy has arisen regarding whether the claimant should have been included on the election ballot, and contends that her name was wrongfully removed from the ballot, having been validly nominated within the time stipulated in the Byelaws. Thus, the controversy concerns conformity with the Byelaws, and whether the Board acted ultra vires by withdrawing the claimant as a candidate for election. Further, at the AGM the claimant challenged the Bank's conduct in contacting the nominators and raised the issue of whether the Board could properly accept withdrawal of a nomination in these circumstances, considering that nominations were already submitted and closed.

Counsel opines that a wholly different election result was imminent, had the claimant been allowed to stand election. She had no opponents and as such would have become a director by acclamation.

[83] Concerning the issue of waiver the claimant says that paragraphs10.16, 10.23 and 10.40 of the minutes of the AGM reveals that motions were put to the meeting to deem the claimant a candidate. Having received votes, the Chairman opted to resume deliberation on each occasion in order to appeal to the meeting not to continue with that step, as noted at paragraph 10.52 of the minutes.

[84] Counsel relied on the case of **Portnoy v. Cryo-Cell Intern**[51] where it was said that a corporate election was tainted, due to several delay tactics undertaken by the Chairperson in order to ensure that she had secured a majority before the vote, and only thus avoided defeat. In these circumstances the result was set aside. After reneging on the vote the Bank made an appeal to the claimant to allow the Board to consider the matter, and made several assurances to the shareholders and the claimant, that her ability to serve as director would not be compromised. Further, that the Board be allowed to seek clarification and based on the findings the claimant would be given the first option to fill the vacancy. The Board also pledged that all concerns that were raised would be addressed.

[85] Counsel says at paragraph 10.58 of the minutes the claimant's concern is stated as being the withdrawal of her nomination. Additionally, those concerns were outlined in two letters to the Board on 4th and 17th November 2021, namely the withdrawal of nominations and the Board's influence on the election of directors. Counsel submits that the assurances given at the AGM were intended to entice the claimant to agree to defer the matter, so that a vote could be avoided, as no answer was given on the issues, for the next 6 months, as promised at paragraph 10.54 of the minutes.

[86] Counsel argued that when matter subsequently came to the Board at a meeting held in May 2022, and the claimant was not disqualified based on fitness to serve. Thus, the matter was deferred, rather than abandoned, and any ambiguity in the process was caused by the Bank

[51] 940 A.2d 43 (Del. Ch. 2008)

and should be interpreted as against the Bank, who used promises to entice the claimant to defer the matter. Having not disqualified the claimant and having given assurances at the AGM, the Board was in position to fulfil those promises but chose not to do so. Thus the Bank cannot rely on the doctrine of waiver, when it has shown bad faith by failing to fulfilling the promises made.

[87] Concerning laches Counsel submits that the claimant has never acquiesced in this matter. Having not received a response from the Bank, she followed up with the letter of 17th November 2021, requesting an update. Again she received no response. On 17th December 2021 she referred the matter to the ECCB under Part VII of the Banking Act. Upon refusal of jurisdiction by the regulators, the claim was filed. The Bank has not outlined any substantive changes which has occurred that would place it in an inequitable position, and litigation has ensued largely because of the Bank's refusal to address the matter.

<u>The Bank's Submissions</u>

[88] Counsel for the Bank contends that the claimant compromised her position at the AGM by waiving her rights to recourse under section 133 of the Act. Consequently, there is no legal dispute capable of being adjudicated by the court. Further, the claimant's only recourse was to requisition a meeting of shareholders pursuant to clause 11.5 of the Byelaws (requisition of meeting by shareholders) or under section 132[52] of the Act (Court-Called Meetings), but she could not seek to revive her rights under section 133 of the said Act.

[89] The Bank submits that waiver is the abandonment of a right, with knowledge of the right, such that a person is precluded from subsequently asserting the right. There must be a clear and unequivocal representation that the person will not insist on their strict rights. At the AGM, the claimant who was fully informed and represented by counsel, waived her rights to bring this claim, when it was proposed that the filling of the vacancy be postponed, and she

[52] The section deals with Court Called Meetings

agreed that this be left to the Board. In this regard Counsel relies on an excerpt from **Halsbury's Laws of England** which states as follows:

> *"251. Waiver.*
> *The primary meaning [of waiver] has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct."*
>
> "252. Knowledge of rights essential for release or waiver.
> *For a release or waiver to be effectual it is essential that the person granting it should be fully informed as to his rights."*

[90] The Bank further says that a representation may be made by conduct or may be implied[53] and the claimant's conduct based on the confirmed minutes of the AGM, coupled with her evidence in cross examination, establishes that she waived her right to challenge the election under section 133 of the Act. Counsel submits that having not disputed the authenticity of any documents, the claimant is deemed to have accepted the truth of the confirmed minutes, which constitutes proof of the matters which transpired at the AGM.

[91] Counsel argued that by her evidence Mrs Edward confirmed that she agreed to defer the matter so that the Bank could consider the legalities of its position, which she expressly believed to be incorrect and agreed that the matter was deferred in the interest of good order of the meeting. In cross examination, she was referred to paragraphs 10.54, 10.56 and 10.59 of the minutes and asked whether she left the matter of her nomination to the Board, to which she responded that when the Board asked for time to reconvene, at that point she left it to the Board. When asked whether she agree to leave matters alone at that AGM, she responded that she trusted the Board, having asked for time to meet, so at that point she left it, but denied that that she agreed to leave it alone. In re-examination when asked to confirm what she agreed with the Board, she indicated that the Chair proposed that a separate meeting be convened on the matter and at that point, if she was a successful candidate she would be contacted. Further, at that point she agreed to let the Board deliberate and get back to her; as she felt that the logical thing would happen knowing that she met the fit and proper test. So she agreed to the Board meeting separately. The Bank

[53] Townsend and another v Persistence Holdings Ltd [2010] ECSCJ No. 241

submits that this evidence from Mrs Edward amounts to confirmation that she had waived any rights accruing to her at the meeting, to question the legality of the decision not to allow her to stand for election at that meeting.

[92] Counsel further submits that the minutes reveal that there was much deliberation on the issue of the legality of withdrawal of the nomination, the legalities of proceeding with the claimant's candidacy at the AGM in the absence of two nominators, and whether the Board had the option to fill the vacancy. Although the claimant clearly expressed her position concerning withdrawal of her nomination as being contrary to the Byelaws, at paragraph 10.59 of the minutes she left the matter of withdrawal alone, and deferred to the Board, thus matter was closed by virtue of the fact that she thanked shareholders and indicated she would be *back* to put herself forward as a director. Therefore, the proposals put forward by shareholders for a resolution on her candidacy was thereby abandoned. No one insisted that a vote be taken, and the claimant did not so request. Further, at the AGM the claimant was represented by counsel and was fully aware of her alleged right to challenge the acceptance of the withdrawal of the nomination, under section133 of the Act, as this was specifically mentioned.

[93] The Bank argues that notwithstanding the claimant's assertion that she was a valid candidate for election, she ultimately agreed to the Board's position as indicated at paragraphs 10.57 and 10.58 of the minutes. She cannot be allowed on one hand to waive her right to challenge the withdrawal by acceding to the Board's proposal, albeit in the hope that the Board would appoint her, and on the other hand, when not appointed, seek to revive her rights under section 133 of the Act.

[94] Counsel relied on the following extract of the minutes in support of these contentions:

"10.14 Mr. Henri-Jacques Mangal approached the microphone and indicated that given the fact that there was a vacancy on the Board and that the nomination had been withdrawn on the day of the meeting, he wished to move a motion that the candidacy of Mrs. Deborah Edward be considered at that time."

"10.26 Mrs Deborah Edward was asked which option she would wish to proceed with, was it to proceed with the motion or that the Board would meet and the option given to her to fill the vacancy. Mrs. Deborah Edward replied that she would be guided by her attorney."

"10.39 ...[The Chairman] had noted that Mrs. Deborah Edward had indicated that she would like to proceed with the motion and invited the Acting Corporate Secretary to read the motion."

"10.45 ...Mr. Mayers noted that there was a motion on the floor, legal challenges had been raised and would recommend that this agenda item be postponed and returned to Shareholders when the process had been reviewed in its entirety. Mr. Mayers moved a counter motion to postpone this agenda item."

"10.47 Mr. Mayers then proceed to move the motion to have agenda Item No. 10 Election of Directors to the Board be postponed to a subsequent meeting of the Shareholders...""

"10.51 ...Mr. Mayers suggested that...a vote could be taken by show of hands to postpone this matter to a subsequent meeting. The Board would then have the opportunity to thoroughly assess the matter and provide a decision which would be in the best interests of everyone."

"10.52. The Chairman...made a further appeal to...Mrs. Deborah Edward to consider the postponement of the item in the best interests of the institution bearing in mind that some legal implications have been brought to the fore."

"10.54 The Chairman indicated that contrary to Mr. Kenroy Justin's statement, based on the provision in the By-Law the Board can appoint a Director to fill a vacancy on the Board. He stated that his recommendation was to allow the Board to deliberate on the matter, seek the necessary clarification and based on the finding, the first option would be given to Mrs. Deborah Edward to fill the vacancy."

"10.57 Mrs. Brenda Floissac-Fleming indicated that the decision to be made was whether the vacancy created by the resignation of Director Remy be filled by the Board as a casual vacancy or filled by Shareholders at a subsequent meeting; that the two retiring directors be elected as there was no opposition to them."

"10.58 The 1st Vice Chair indicated that the Board would ensure that in no way would Mrs. Deborah Edward's ability to serve as a Director on the Board be compromised. The Board would go through the process to ensure that all concerns which were raised were addressed...The 1st Vice Chair appealed to allow the process to run in a manner which was consistent with the Bank's By-Law to ensure that no one was impacted or compromised by the decisions taken."
"10.59 Mrs. Deborah Edward informed the meeting that she trusted the process and did not want to take the Bank into any level of disrepute. She indicated that the proceedings got to this stage because of the withdrawal of her nomination and she would want to leave the matter into the hands of the Chairman and asked that her attorney exercise some patience. Mrs. Deborah Edward thanked the Shareholders who voted for her and those who did not and indicated that she would be back to put herself forward to serve as a director".

[95] The Bank submits that the evidence shows that the Board followed through on its commitment to consider Mrs Edward for appointment or alternatively putting her candidacy to the shareholders at the next AGM. She also made good on her assertion to the shareholders at the AGM, that she would be back to put herself forward for election at the 83rd AGM.

[96] The Bank further submits that the claimant is barred by laches as her silence and inaction constituted acquiescence. Further, in the context of the Bank holding AGMs, which may be imminent, the delay of six months before filing the claim was unreasonable and unconscionable. Counsel highlighted the relevant timelines stating that the AGM was held on 4th November 2021. Thereafter on 17th November 2021 the claimant wrote to the Board and on 17th December 2021, referred the matter to the ECCB. There is no evidence on the steps she took from 18th December 2021 through to 10th June 2022 when she first brought this action, albeit, by the wrong procedure. There is no explanation to justify the claimant's inaction. As the Bank has altered its position and filled all vacancies, the delay was unconscionable, and the claimant by her own inaction and silence, was the author of her misfortune.

Analysis

[97] Section 133 of the Act empowers the court to resolve a controversy with respect to an election or appointment of a director. It states:

> *"133. Court review controversy*
>
> *(1) A company or a shareholder or director thereof may apply to the court to determine* ***any controversy with respect to an election or appointment of a director*** *or auditor* ***of the company****.*
>
> *(2) Upon an application made under this section, the court may make any order it thinks fit including—*
>
> *(a) an order restraining a director or auditor whose election or appointment is challenged from acting, pending determination of the dispute;*
>
> *(b) an order declaring the result of the disputed election or appointment;*
>
> *(c) an order requiring a new election or appointment, and including in the order directions for the management of the business and affairs of the company until a new election is held, or appointment made; and*

> (d) *an order determining the voting rights of shareholders and of persons claiming to own shares."*

[98] In this regard, the court may make several order to put matters right, including declaring the result of a disputed election or appointment.

[99] I have given due consideration to the facts surrounding these issues, and the written and oral submissions of the parties. I accept on the preponderance of the evidence that a controversy arose at the AGM, in relation to the acceptance of withdrawal by one of the claimant's nominators, with the result being that the claimant was not permitted to be on the election ballot, on the premise that she had not attained the requirements of clause 4.9 of the Byelaws and as such could not be put forward as a valid candidate. Elections were held and one seat was left vacant at the end of the meeting.

[100] The parties vehemently dispute the version of events which occurred at the meeting. Mrs Edward says the issue of her appointment as director remained unresolved at the close of the meeting, and she never agreed to the Board making a determination on this matter, as the Board was not empowered to do so, in these circumstances. She says the only matter which was deferred for the Board's consideration was the issue concerning the legality of withdrawal by one of her nominators after nomination had already closed. Some seven months later the issue was still unresolved, hence the reason for filing the claim.

[101] The Bank on the other hand took the view that having accepted the withdrawal by Mr Maxwell, the claimant had no longer met the requirements of clause 4.9 and could not be presented as a candidate for election. The Board felt that the remaining vacant seat could have been filled by virtue of clause 4.4 of the Byelaws and made a proposal to allow time to seek clarity on the legality of the withdrawal and would deliberate on whether Mrs Edward should be appointed by the Board. Further, by her own words and conduct Mrs Edward agreed to the Chairman's proposal to defer the issue of her election at the AGM, in favour of deliberation and consideration of appointment by the Board, at a later date. The question then, is whether the claimant by so doing waived her legal right to pursue a remedy to this controversy by bringing an application under section 133 of the Act.

Waiver

[102] The general rule is that waiver is the demonstration of a party's intent to relinquish a legal right or claim. It may have the effect of extinguishing a cause of action, where one could potentially arise. Thus, the waiving party may no longer pursue legal action, and any real or potential liability to the other party comes to an end. It is also settled law that it is unjust to give a claimant a remedy where, by his express or implied conduct he has done that which might be considered a waiver of the right to pursue such remedy.

[103] Halsburys Laws of England at paragraph 251 further states that :

> *"Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right11, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver12, but mere acts of indulgence will not amount to waiver13; nor may a party benefit from the waiver unless he has altered his position in reliance on it14. The waiver may be terminated by reasonable, but not necessarily formal, notice15 unless the party who benefits by the waiver cannot resume his position16, or termination would cause injustice to him17."*

[104] I have reviewed the authorities cited by the Bank. They establish that the court is required to take into account all relevant matters and their cumulative effect in determining whether waiver has been established. The relevant consideration would be whether, on the facts, Mrs Edwards caused the Bank to believe that she would not invoke section 133 of the Act to resolve the controversy which had arisen concerning acceptance of withdrawal of her nomination after nominations closed, and whether this was done in clear and unequivocal terms. Further, if waiver is established did the letter of 17th November 2021 terminate such waiver, and additionally, did the Bank altered its position in reliance on the waiver, and unable to resume its position, such that termination would cause injustice to the Bank.

[105] The reason given for not allowing the claimant to stand for election at the AGM was the failure to meet the requirements of clause 4.9 of the Byelaws following the withdrawal by Mr Maxwell. The discussion as recorded in the minutes indicate that the Board maintained its position and took the view that Mr Justin's contention on behalf of the claimant, that the withdrawal was unlawful was incorrect, and that time was needed to seek clarification.

[106] Paragraphs 10.1 to 10.60 sheds light on what transpired at the meeting. No objection has been taken in relation to the authenticity of the minutes, and as such they are considered an accurate record of the matters as they occurred at the meeting. From these extracts, I conclude that Mrs Edward did in fact defer to the Board for deliberation and a decision at a subsequent date, on (i) the legality of withdrawal by the nominator and acceptance of such withdrawal by the Board, and (ii) based on the findings a determination would be made on whether the claimant would be appointed to fill the remaining vacant seat on the Board. By her own admission the claimant stated that she trusted the Board to do the right thing, and then asked her lawyer to exercise patience. Thereafter, she thanked the Board and shareholders and informed the meeting that she would be returning to seek election at the next AGM. In her evidence Mrs Edward stated that she adopted this position for the sake of the good order, and to not bring the Bank into disrepute, because the meeting had reached an impasse, and She said that she trusted the Board, and believed that the Board would do the right thing. In my view, these matters taken in the round seem to provide the hallmarks of a definitive conclusion.

[107] The Board subsequently met in May 2022 to deliberate on these matters and having declined to appoint the claimant as director to fill the remaining vacant seat, concluded that she should be invited to submit the appropriate documents and her nomination tabled at the next AGM, when the shareholders would be given the opportunity to select directors.[54] It is doubtful that the Board could in fact have fulfilled its undertaking to appoint the claimant to the vacancy seat, nonetheless, this is what the parties agreed. In the end, the Board proceeded to schedule the next AGM at which elections would be held, and afforded the claimant the opportunity to contest election, notwithstanding that the Committee and the Board had earlier made certain findings, in relation to the suitability of the claimant for directorship.

[108] The issue whether the Board could have accepted the withdrawal will be discussed later in this judgment, but for the present purposes I accept that the controversy which arose in relation to this matter was deferred to the Board for deliberation by the claimant. Based on the evidence, in response to Mrs Edward agreeing to the Chairman's proposal to have the

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[54] See Exhibit SJS12 with attached memorandum dated 25th May 2022

matter addressed internally, the Board stepped back from its strict position and agreed to seek clarification on the matter, and thereafter based on the findings, to consider the appointment or election of the claimant to the Board.

[109] I am of the view that in these circumstances the Board had altered its strict position from inception at the AGM to take a more conducive approach to resolving the issues, and waiver would not have been terminated by the subsequent letter of 17th November 2021. The claimant is well read and academically advanced as can be gleaned from her resume. I do not accept that she was coerced by the Board into accepting this position. She was fully seized of her rights under the Act, she considered the matters, and the ramifications, and had the benefit of counsel when she made the representations to unequivocally accept the Board's proposal.

[110] I therefore conclude that having made the unequivocal representations at the AGM, the claimant clearly conveyed that she deferred the issues which had arisen for the Board's determination, based on the undertakings given by the Board and waived the right to pursue a remedy under section 133 of the Act.

[111] The claimant is therefore precluded from reviving the right to pursue review of the controversy under section 133 of the Act.

Laches

[112] The doctrine of laches is premised on the maxim that a claimant in equity is bound to prosecute his or her claim without undue delay. It is said that a court of equity refuses its aid to stale demands, where a claimant has slept upon his right and acquiesced for a great length of time. Such claimant is then said to be barred by unconscionable delay ('laches')[55]. In determining whether there has been delay which amounts to laches, the court will usually consider whether there was acquiescence on the claimant's part, and any change of position

[55] See Halsburys Laws of England - (Volume 47 (2014) at para 253-255 and 257

which has occurred on the defendant's part, by reason of a claimant's inordinate delay in bringing a claim.

[113] Having determined that the claimant waived her right to pursue legal action in favour of a determination of the issues by the Board, and that by reason of this maintaining a cause of action to review the controversy could not subsist, it would not be necessary to address this issue extensively.

[114] Although acquiescence, is the chief element when assessing the defence of laches, it is not the only consideration. Excessive delay is also paramount. I disagree with the Bank that a time lapse of seven months in these circumstances should be deemed unreasonable or unconscionable. This was clearly a situation where the Board gave certain undertakings and I consider that the six-month period was a time during which the claimant awaited a response from the Board, in relation to the undertakings given at the AGM. Having held the meeting to deliberate on these undertakings in May 2022, it could not be said that the claimant was the one who had caused delay in the context of laches.

[115] In the circumstances I conclude that, the defence of laches would not avail.

[116] In the ordinary course, having concluded that the claimant waived her right to pursue relief under section 133, there could be no cause of action to ground a claim under section133, the claim would have to be dismissed, and that would be the end of the matter.

[117] Notwithstanding the above, for completeness, I will proceed to consider the remaining issues.

Issue 4 : Did the Board invite the nominators to withdraw their nomination to influence the outcome of the election, and if so, did the Bank act properly, or with impropriety?

<u>The Claimant's Submissions</u>

[118] Counsel for the claimant submits that the Bank had no reason to call the nominators, and the only reasonably perceived objective in doing so was to influence them to withdraw their nominations. The evidence is that the candidate Asha Pearl James was dealt with summarily, and informed in writing that she did not qualify as a candidate. It was opened to the Bank to take the same course of action in relation to the claimant. However, the Bank opted not to inform the claimant and nominators in writing, and at no time was she contacted to inform her of the Board's decision. Instead the nominators were contacted via mobile as a direct conversation was the only effective way of achieving their desired influence over the nominators. Were this not the case, the Bank would have taken the simple and tidy route of writing to the claimant. The Bank admitted that Mr. Maxwell was aware of his option to withdraw his nomination, yet at the time of speaking to him, he opted not to withdraw his support and thought that the outcome of the election process would be as desired. From this, it is undeniable that his decision to withdraw the nomination would have occurred sometime after the conversation with the Bank's agents. The reasons for the Board's decision were divulged to the nominators and the Bank has insisted that a conclusive decision had been reached and the claimant was removed as a candidate. If that was the case it would have been obvious to Mr Maxwell that withdrawal of a nomination at this stage was superfluous and pointless. This should have been obvious to the Bank, yet it opted to not treat the withdrawal email as redundant.

[119] Counsel submits that Mr. Maxwell and the Bank, did not act as if the claimant was already disqualified or that his email had been redundant. Instead the Bank welcomed the email and relied solely upon it at the AGM. The claimant's evidence is that Mr. Maxwell called her to explain that he was withdrawing his nomination and was extremely apologetic. This is consistent with the Bank's evidence that he opted not to withdraw previously. Taken together, it is reasonable to assume that Mr. Maxwell's email was prompted by the conversation with the Bank, thereby allowing the Bank to rely on the email. The failure of the fitness test is the only legitimate way to exclude a qualified candidate who has been properly nominated. Counsel says, it appears that the Board doubted its position concerning fitness and instead felt that exerting influence over the nominators would be a stronger

avenue, and this led to the desperate and curious approach of calling the nominators rather than writing the claimant to inform of the Board's decision.

[120] Counsel contends that the Bank's primary aim appeared to be spitefully excluding the claimant from the ballot at all costs, rather than conducting its fiduciary duty on behalf of the shareholders, as displayed by the incoherent manner in with which the Bank approached the assessment of the claimant's fitness for directorship, in Mrs Francis evidence. It was said that conflict of interest and concerns about bad judgment formed the basis of the decision and claimant did not meet the fit and proper standard. The Bank relied on section 3.3.1.1(o) of the Policy, which states that a responsible person must be free from any business or other relationship which could materially pose a conflict of interest or interfere with the exercise of his judgment. Counsel says that in cross examination, Mrs Francis admitted that a shareholder is entitled to take an interest in the Bank, but could not identify a business or other relationship that would conflict with the Claimant's directorship or interest in the bank. She stated that the Facebook material suggested that there must be a relationship between the claimant and former managing director who was the subject of the material. She gave further evidence that the Facebook material suggested bad judgement, however she fail to identify any business or other relationship that would interfere with the exercise of the claimant's judgement as a director, as required by the Policy. Furthermore, she admitted that the Board did not like the social media comments, that public criticism is generally not very pleasing, and that the Board felt strongly that the claimant should not serve as a director. This leads to the conclusion that the Bank seemingly found the claimant undesirable rather than unfit. In cross examination Mrs Francis agreed that the issue of fitness was never raised at the AGM, and this appears to have been abandoned, in favour of the email from Mr Maxwell.

[121] Counsel argued that the claimant's candidacy was put to multiple votes at the AGM and any known issues in relation to fitness to serve should have been raised at that time. Instead, the Board offered the claimant the right of first refusal for the vacant seat on the Board, if she agreed to defer the matter and allow the Board to handle it internally. The Board reconsidered the claimant's candidacy for the 83rd AGM and raised no further issue of fitness to serve on the basis of the social media comments, thereby allowing the Claimant to contest

the election, along with several other opponents. Thus, the Board had no confidence in its decision that the claimant had not met the fit and proper standard, which is what prompted the call to the nominators to provide another avenue to disqualify the claimant. On the balance of probabilities, the Bank directly influenced the nominator's actions and therefore improperly influenced the outcome of the election. Counsel submits that the Bank ought not to inequitably manipulate the corporate machinery to impair the rights of shareholders, as it did in this instance.

[122] Counsel relied on the case of ***Strategic Investment Opportunities LLC v Lee Enterprises, Incorporated et al***[56] to make the point that a Board's inequitable acts towards shareholders do not become permissible even when they are legally possible. The Bank as the body responsible for conducting fair election, owed a fiduciary duty to its shareholders, and ought not to have affect the outcome of the election by influencing the result. On that basis the court can invalidate the Board actions including those that inequitably manipulated the corporate machinery to impair the rights of stockholders[57]. Thus, Bank acted with impropriety and the interference in the election process amounts to such manipulation which ought to be considered inequitable and unfair.

<u>The Bank's Submissions</u>

[123] Counsel for the Bank submits that the burden to proof rests on the claimant to show that on the balance of probabilities the Board requested or asked the nominators to withdraw their nominations. She has attempted to do so by relying on conversations that she had with the nominators, and has failed to call or summon the nominators as witnesses, to put forward this evidence. She agreed that she was never a participant to the Bank's conversation with the nominators. By contrast Mrs Francis evidence is direct first-hand evidence on the contents of the conversations held with the nominators. Her evidence is that she and Mr Theobalds wanted to closely manage the conversations with the nominators for the sake of

[56] C.A. No. 2021-1089-LWW (Chancery of The State Of Delaware)
[57] *Schnell v. Chris-Craft Industries, Inc.* 285 A.2d 437 (Del. 1971)

transparency, and to ensure that the Board's decision was clearly reasoned and communicated to the nominators to avoid a misunderstanding of the purpose and intent of their engagement with them. To achieve this she prepared a script to be follow during the calls with the nominators. She stated that both she and Mr Theobalds kept to the script and after outlining the legal, policy and factual matters touching and concerning whether the Claimant was fit and proper to be a director, she informed the nominators that the Board had declined their nomination of the Claimant. She further stated that at no time during these calls did she or Mr. Theobalds ask either of the nominators to withdraw their nomination.

[124] Counsel says it is evident from the script that there was no request of the nominators to withdraw their nominations and there was no discussion of any option to withdraw. In cross examination, Mrs Francis maintained that the script was followed and that nowhere in it is there any indication of a request for withdrawal from any of the nominators. She maintained that what was conveyed to Mr Maxwell is actually in the script and there is no difference in terms of what was said. When asked specifically about her email to the Chairman of the Board on 4th November 2021, concerning Mr. Maxwell indicating that he was cognizant of the option to withdraw the nomination, she indicated that she was reporting precisely what he said, as was her responsibility to the Board.

[125] Counsel further submits that the Court should place significant weight on Mrs Francis evidence as there was a contemporaneous script for the discussion with the nominators and the evidence is that the script was followed. Moreover, this evidence remained uncontroverted following cross examination. Therefore the claimant has failed to prove her case that the Board invited/asked/requested that the nominators withdraw their nomination.

[126] Concerning the purported refusal of the count as it pertains to the issue of influence of the election, the claimants evidence is that after putting the matter of whether she should be allowed to stand for election to the floor three times to be decided by the shareholders, the Chairman of the Board refused to take a count and on each occasion withdrew the motion. She further says that the Chairman then coerced her to allow the matter to be dealt with via a private meeting with the Board at a later date rather than at the AGM. In cross examination, she was asked to point out where in minutes was this indicated, and she could not do so.

The Bank's evidence refutes this evidence, as it is clear from reading the minutes, that there was a lot of back and forth regarding the issue of the claimant's candidacy and the withdrawal of the nomination. It is also pellucid from the minutes, that shareholders had made interjections to seek clarity at numerous points when a vote on the motion that her candidacy be considered was put to the shareholders.[58] The Bank therefore submits that its evidence should be preferred over that of the claimant which contains unsubstantiated assertions.

[127] As to the propriety of the Board's actions, the Bank submits that the claimant has also failed to prove this aspect of her claim. Her evidence on this issue is merely inadmissible hearsay evidence, as she was not a party to the conversation between the nominators, Mrs Francis and Mr Theobalds, and she is not in a position to proffer this evidence. Mrs Francis has provided direct evidence on the Board's decision, having found that the claimant did not meet the fit and proper standard at the meeting held on 3rd November 2021. Her evidence is that she and she and Mr Theobalds were both tasked with *informing the nominators of the Board's view that the Claimant did not meet the fit and proper standard for directorship, in view of due diligence conducted*. She relied on the draft minutes of the meeting which specifically states that *"Director Theobalds and Thomas-Francis would speak with the nominators Mr. Joseph Maxwell and Mr. Deale Lee to discuss the Board's concerns and to indicate that based on due diligence which was carried, the candidate did not meet the standards of fit and proper."*

[128] *Mrs Francis was asked in* cross examination, whether it was open to the Governance Committee to write to or call the claimant, she answered yes, however, it was felt that in fairness to the persons who submitted the nominations, they owed them the courtesy and respect to let them know what the Board's decision was as it relates to the result of the fit and proper evaluation which was conducted in relation to the claimant. Further, specifically, in cross examination MTF refuted that the decision of the Board to assign the agents to speak to the nominators was an attempt to influence, rather, that the Board's sole intention was to convey the result of the fit and proper assessment out of respect, fairness and

[58] At para. 10.14-10.17, 10.20, 10.23-10.24, 10.40-10.41 of the minutes

courtesy to the nominators. When further probed that a different course was taken with respect to the claimant's nomination than with that of Asha Pearl James, Mrs Francis stated "*yes but with good reason as the circumstances were different*".

[129] Counsel posits that Mrs Francis evidence is consistent with the Policy which the Board relied on in making its assessment, and of particular note, is that section 4.7.3 of the Policy states that: "*If the Board makes a determination that a person is not fit and proper, then the Board may take such action as is appropriate, which may include…(d)…or, if the person is a Director, notifying the respective shareholder(s) that an adverse assessment has been made about the Director representing their interest on 1st National…*" Thus, the Policy gives the Board wide discretion to determine what action should be taken on an adverse assessment of a person. This includes informing shareholder(s) of such adverse assessment where the person is an existing director. By analogy, the same should apply in a case where the person is nominated for directorship. The Bank argued that the Board has the discretion to inform the shareholders, whether it be the entire body of shareholders or only the nominating shareholders.

[130] Concerning the claimant's suggestion of impropriety in the Board's decision to contact the nominators, because notwithstanding the Board's decision that the claimant was not fit and proper, the Board nevertheless accepted the withdrawal and at the AGM no mention was made of her unfitness to serve as director, the Bank says this has not been proven on a balance of probabilities. When questioned on this matter Mrs Francis response was that the claimant was not disqualified from standing for election because she was not fit and proper, but that it was because of the withdrawal of the nomination, which mandates that two nominators are required for onboarding of a candidate. In re-examination, she clarified her responses, when she said that the decision to go with the withdrawal was on the basis that two nominators are required, and while the Board had done the fit and proper assessment and determined that the claimant had failed and declined to accept here as a candidate, the withdrawal came subsequently and the Board decided to proceed on the fact that there was only one nominator.

[131] On the issue of propriety, the Bank submits that the law is that good faith is presumed and he who alleges bad faith must prove it[59], and relies on the case of **Elvis Daniel v Public Service Commission**[60] where the Court of Appeal gave instructive guidance on bad faith, stated that:

> *"The law on bad faith can be briefly stated. An allegation of bad faith is a serious matter and is not to be lightly made. Bad faith must be clearly alleged and proved. Mere error or irrationality does not of itself demonstrate bad faith. Bad faith is not to be found simply because of poor decision making. Errors of fact or law and illogicality will not demonstrate bad faith in the absence of other circumstances which show capriciousness: SBBS v Minister for Immigration & Multicultural & Indigenous Affairs*

[132] The Bank further submits that the claimant has provided no specific pleadings to support the allegation of bad faith, and no particulars or facts having been pleaded in the statement of claim, and there is no evidence has been proffered to support the allegation of bad faith. Even if the Board's action in calling the nominators is considered a poor decision, that is insufficient in and of itself to amount to bad faith, based on the position stated in the **Elvis Daniel** case. Thus the claimant has failed to prove this aspect of her case because at the time of communication with the nominators, the Board had already determined that the claimant was unfit based inter alia on the Policy and clause 4.9 did not factor into the Board's decision. Therefore, to suggest that the only reason the Board called the nominators was to request a withdrawal expressly or impliedly is unfounded.

[133] Additionally, the Bank contends that under the provisions of the **Banking Act** the Bank has a responsibility to ensure that directors are fit and proper, and by virtue of section 100, as a licensed financial institution the Bank is mandated to have a fit and proper policy in accordance with the Act, or the prudential standards issued by the ECCB, and shall *apply* such policy when assessing directors. In view of these matters, the Bank says the claimant has failed to prove that the Bank's agents requested or asked the nominators to withdraw their nomination, and did not act in bad faith or impropriety in contacting the nominators.

[59] Article 2066 Civil Code of Saint Lucia
[60] SVGHCVAP2016/0007

[134] Lastly, the Bank says in so far as the claimant seeks to call into question the decision of the Board that she was not fit and proper, this is not a justiciable issue but a matter for the Board

Analysis

[135] I have given due consideration to the competing arguments, and the evidence.

[136] The Board, through its Governance Committee, proceeded to conducted it due diligence or vetting process in accordance with the dictates of the Policy in relation to the candidates who were nominated for election at the AGM. I accept from Mrs St Marthe's evidence that the Policy had been in effect for some time and at the very least since 2017. It contains the mechanism which the Board has effected to ensure compliance with the regulatory framework under the Guidelines and the Banking Act, for selecting directors

[137] Most of the evidence to refute the allegations of interference and impropriety comes from Mrs Francis. She say after reaching a decision on the claimant's fitness, the Board took a decision to inform the nominators out of respect, courtesy and fairness to them, and instructed two directors to undertake this task. She developed a script for communicating with the nominators and it was followed to the letter. An examination of the script shows that it contained no mention of a request for withdrawal of nominations. She further stated that a decision was taken to addressed this matter differently to the other nominee because of the nature of the matter. When the withdrawal was received, albeit late, the Board elected to proceed on that basis at the AGM, as it meant that there was no reason to engage in the issue of fitness, if the claimant no longer met the nomination requirement.

[138] I found Mrs Francis to be a truthful witness. She was candid and direct in answering questions posed in cross examination and remained unruffled. I had no reason to doubt the credibility of her evidence.

[139] The claimant on the other hand has proffered no evidence of how the nominators were influenced. Mr Maxwell, whom the claimant says apologized to her profusely was not called as a witness and he is the only one who can attest to the reason for his action. In any event

the evidence on this is conflicting as the Bank's evidence is that he expressed that he had misgivings after he had submitted the nomination. Mr Lee was not called to testify about his communications with the Board or the claimant. Thus, the claimant has based these allegations entirely on assumptions and speculation about what transpired in communications between the Bank's agent and the nominators, and the perceptions which were formed from this.

[140] On the preponderance of the evidence. I am unable to make any finding on the reason for Mr Maxwell's withdrawal at the eleventh hour. It was reported by Mrs Francis that at the end of the call he gave no indication that he would be withdrawing his nomination. There is also nothing in the evidence which suggests that the Board requested or asked him to do so. I agree that the Board was well within its mandate to determine how to address this matter, and what steps should be taken in relation to its findings on the fitness of the claimant. This is a discretion that the Board has, and there are no set rules on how these matters ought to unfold. It is trite that the Board's primary duty is to the Bank and in that regard it must make decisions which safeguards the best interest of the Bank.

[141] I accept the submission made by Counsel for the Bank that the decision of the Board in relation to the claimant's fitness for directorship is a matter entirely for the Board to undertake, and the court is not required to make any pronouncement on this.

[142] Much was said about a motion which was put to the floor for a vote for selection of fill the vacant seat at the AGM, and this was voted on three times but the Chairman refused to recognise the vote. In this regard paragraph 10.29 of the minutes sheds some light. There, it was clarified that no written nominations were before the shareholders at the AGM, and to accept a vote on the legitimacy of the claimant would contravene clause 4.9 of the Byelaws, as a vetting process had been established for the purpose of transparency, and Committee had met and reported that the three candidates nominated for election at the AGM did not qualify.

[143] I note that the Byelaws make no provision for candidates for directorship to be received from the floor at an AGM. I note that clauses 4.4, 4.5, and 4.9 are the clauses which state how

directors may be selected or appointed. Additionally the Board through the establishment of the Committee and the Policy has introduced a due diligence or vetting process before a nominee is deemed suitable for directorship. To accept this motion from the floor would have contravened the clear terms of the Byelaws, and governance processes put in place by the Board. for selecting suitable candidates.

[144] I note from the evidence that Mrs Edwards was nominated for election at the 83rd AGM which was held in July 2022 and she contested the elections at that AGM, but was unsuccessful.

[145] The claimant says that the Bank had no confidence in its findings on the fitness standard and never made it an issue for her consideration at the 83rd AGM. In my view decision to allow the claimant for stand for election seemed more in line with the concession which the Board had made, in return for the claimant agreeing to allow the matter to be settled internally. It appears that upon realizing that the Board could not have filled the vacant seat by way of appointment, the alternative course was to convene a shareholders meeting at the earliest opportunity, to allow the claimant the opportunity to contest the election.

[146] On the issue of bad faith I accept the submissions made by Counsel for the Bank, that the claimant has simply not proffered any evidence to establish a finding of bad faith on the part of the Bank.

[147] I have not found that the present case accords with the circumstances in the cases cited by Counsel for the claimant. It was not a case here that there was anything inequitable which was done merely because it was legally permissible. The minutes confirm that there was prolonged exchange between the Board and the claimant and it appears that good sense prevailed and an agreed position was reached on the way forward.

[148] I therefore conclude that there is no evidence to support a finding that the Board sought to influence the outcome of the election, by requesting that the nominators withdraw their nomination. Indeed Mr Lee did not withdraw, and it is anyone's guess why Mr Maxwell did so at the eleventh hour. Additionally there is no evidence on which to make a finding that the Bank acted with bad faith or impropriety.

Issue 5 : **Did the Board act *ultra vires* in accepting withdrawal of nomination by Mr Maxwell?**

The Claimant's Submissions

[149] It is the claimant's contention that Mrs St. Marthe admitted that clause 4.9 regulates the nomination process, and states that *"no one (other than a retiring director) shall be eligible to be a director unless notice in writing that he or she **is a candidate** for such office shall have been given to The Company by two other shareholders of The Company at least five days before the day of holding the meeting at which the election is to take place."*

[150] In keeping with this requirement notice was given on behalf of the claimant by two shareholders before the stipulated deadline which made a candidate for election, and Mrs St Marthe confirmed that the nomination was accepted. Thus the claimant became a candidate, as is her right as a shareholder, unless good reason was found for disqualification based on the guidelines set by the regulators. Mrs St. Marthe further confirmed that the Byelaws contain no provision for withdrawal of nominations (as is seen in other avenues such as national elections where withdrawal procedures are outlined) and there is no reference document that is relied on by the Bank, for this purpose. Thus, the Bank has adopted an unfounded discretion which ought not to exist, and is *ultra vires*, as it impairs the shareholder's right to contest a fair election. This is also inequitable.

[151] In the alternative, the claimant says if such discretion is implied in the Byelaws, it should be exercised equitably, such that a reciprocal deadline to submit **and** withdraw nominations would create equity. Such a discretion ought not to be exercised after the close of nominations due to the wide potential for fraud and manipulation by nominators and the Board. It is clear, as occurred in the claimant's case that allowing withdrawals after the deadline leads to uncertainty, unpredictability and unfairness in the election process. Thus, a shareholder having a nomination withdrawn after the deadline where remedial action cannot be pursued, would have been manipulated into thinking that he or she would be contesting the election, only to remain deserted at the last minute. It is therefore unfair that clear and concise practices regarding nominating and electing directors are not observed.

[152] Counsel submits that such inequitable scenario is of the type envisaged in ***Strategic Investment Opportunities LLC*** and ***Schnell***, and that the ruling in **Shnell** is that "*inequitable action does not become permissible simply because it is legally possible*." There the board of directors had amended the company's byelaws in order to advance the date of the annual meeting and as a result, reduced the amount of time an insurgent group had to wage a proxy battle. The Board's actions were set aside by the Court. Accepting the withdrawal of a nomination on the morning of the election injudiciously impairs the right of the shareholder to stand election, as the deadline and opportunity to find a replacement would have already expired. Thus, the Board's actions ought to be set aside as either *ultra vires* or inequitable and improper

The Bank's Submissions

[153] Counsel for the Bank submits that the nub of the claimant's case is that once the deadline for receipt of nominations had passed, there could be no withdrawal of nominations. However, this is a question of law which turns on the breadth of the directors' powers and interpretation of the Byelaws. She relies on an extract from **Halsburys Laws of England** which states that "*The articles [of a company] should, however, be regarded as a business document and should be construed so as to give them reasonable business efficacy*"

[154] Counsel says it is trite that directors must act in accordance with a company's constitution as dictated by its by-laws. The question is whether or not the Board, by accepting the withdrawal, acted in contravention of clause 4.9. Counsel submits that the clause ought not to be considered in isolation, but rather, regard must be given to the purpose of the clause. Counsel cited that case of **Ngouandi v. Assemblée Communautaire Fransaskoise**[61] where in determining whether advance poll ballots were in time, the Court held that:

> *"In any event, the purpose of a time limit in this regulation would be to ensure that the CEO is able to mail the advance poll balloting kit to the elector 14 days prior to Election Day. This is to ensure timely receipt of the package by the elector and time for the ballot to be returned by the elector to the DRO so that it arrives no later than*

[61] 2018 SKQB 192 at paragraph 72

the fifth day after the election. No one has complained about any delay in obtaining the advance poll balloting kit in this election."

[155] The Bank says in a similar vein, the fact that the Byelaws must be interpreted purposively was stated in **Chartrand v. Aboriginal Council of Winnipeg Inc**[62] where it was stated that "*The by-laws have to be interpreted purposively and in a way that does not achieve an absurd result*." Therefore, clause 4.9 should be construed in the given context of the fit and proper requirements under the Banking Act, the Policy, and the vetting of candidates prior to an AGM. The Bank's evidence is that the "*clause facilitates the receipt of nominations in advance of a Meeting of Shareholders, to allow candidates to be vetted by the Corporate Governance Committee and the Board*" which was alluded to at paragraph 4 of Mrs St Marthe witness statement where she states "*It is the Bank's usual practice for all nominees to be vetted by the Bank...*"

[156] To this end, the Bank submits that the interpretation by the claimant that once she had two nominations by the deadline, she was "transmuted" to a valid candidate once the deadline elapsed, and that the deadline for nominations is also the deadline for withdrawal of nominations, is untenable. The Bank contends that the claimant does not solely by virtue of the nominations become a valid candidate, as the Bank has the power to deem a candidate unfit to be a director. Rather, the sole purpose of this clause is to facilitate the receipt of nominations in advance of the AGM so that the vetting process can take place. Further, if the clause is to be read as being the deadline for withdrawal of nominations, it would preclude a nominating shareholder from exercising the right to withdraw support for a nominee, which would be absurd.

[157] The Bank contends that the next question is whether the acceptance of withdrawal of a nomination is within the directors powers. In this regard section 17(3) of the Companies Act, provides that: ***"It is not necessary for a bye-law to be passed to confer any particular power on a company or its directors."*** Additionally the Byelaws state that ***"The business of THE COMPANY shall be managed by the directors, who...may exercise all such***

62 2006 MBQB 259

powers of THE COMPANY as are not by THE ACT, or by THE BYE-LAWS required to be exercised by THE COMPANY at a meeting of shareholders,..."

[158] The Bank further submits that the point is buttressed in **Northern Mineral Investment Corp. v Mundoro Capital Inc**[63] where it was stated that: *"As a matter of contractual interpretation the directors' powers flow from the Act and articles in which the directors are in fact granted residual powers."* It is submitted that this case is directly applicable to the present, in that both the Companies Act and the Byelaws grant the directors residual power. Therefore, the power to accept a withdrawal need not have been expressly stipulated in the Byelaws. The Bank also relies on the following judicial pronouncements in **Northern Minerals**:

> *"The petitioner has not placed before this Court any evidence that the directors were acting other than in the best interests of the shareholders of the company. There is no evidence to support its allegations that the board was acting to protect their positions as board members, nor is there validity to the assertion that the board was not acting to protect shareholder rights and was targeting the petitioner."*[64]

[159] Hence, by analogy, the claimant has not provided evidence that the directors were acting other than in the best interests of the nominating shareholder, who should be allowed to exercise his free will and right to withdraw support for a candidate. Further, there is no evidence that the Board was targeting the claimant, when in fact prior to the withdrawal, the Board had already determined that she was not fit and proper to be a director given the gravamen of her Facebook posts.

Analysis

[160] The nomination form requires two nominators. If one withdraws then it becomes invalid. The Byelaws is silent on the matter of withdrawal, at any time. Clause 4.9 speaks to the requirements for submission of nominations.

[161] From the evidence the claimant was properly nominated at the time that nominations closed 5 days before the elections.

[63] 2012 BCSC 1090 at paragraph 35
[64] At paragraph 35

[162] I do not agree that once the time for submitting nominations closes, a nominee is automatically transmuted to a valid candidate, as suggested by Counsel for the claimant. It is clear that the Board has instituted a vetting process for determining whether a nominee is suitable for directorship, before he or she can be presented as a valid candidate at an AGM. Once nominations are received the Policy requires that a due diligence process must unfold through Committee for each nominee, and the findings conveyed to the Board for final determination. Until then a candidate is simply a nominee under scrutiny, for determination on whether he or she will meet the requisite qualifying conditions.

[163] Mrs Edwards says but for the late withdrawal, she would have been the sole candidate for election on the ballot and ought to have been installed as director by acclamation. The facts however convincingly show that she could not have made it to the ballot because (i) Mr Maxwell withdrew his support at the eleventh hour and (ii) the Board had already determined that she had not met the fit and proper standard on account of the published Facebook posts (albeit that this reason was placed before the meeting). The Banks evidence is that having received the withdrawal, the Bank accepted it and the Board elected to proceed on that basis. It was within the purview of the Board to make such decision. If the basis of the nomination becomes irregular, then there can be no reason for proceeding to delve into matter of fitness in relation to the candidate.

[164] I disagree that the deadline to submit nominations is reciprocal and must by implication also be the deadline to withdraw nominations. The fact that the Byelaws do not speak to withdrawal of nominations, does not convey the implication that the claimant suggests. To adopt this approach could no doubt lead to undesirable results. For example, if a nominator subsequently became aware of unsavory conduct after having nominated candidate, it would mean there would be no avenue for addressing this issue, unless the same information came to the attention of the Board during its due diligence process.

[165] It is trite that the Board has authority to manage all the affairs of the Bank including review of nominees for directorship, and the conduct of matters at AGM's.

[166] I accept the Banks's submission as an accurate representation of the law on these matters. The Board does have the residuary ability to conduct the affairs of the Bank, including the business of shareholders meetings, in a manner in keeping with good governance and best practices.

[167] I therefore conclude that the Board did not act ultra vires in accepting the withdrawal by Mr Maxwell.

[168] Based on all of the foregoing, the claim must be dismissed, and I make the following orders:

1. The claim is dismissed.
2. Cost is awarded to the defendant to be assessed, if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar