

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

[CIVIL]

SAINT LUCIA

CLAIM NO. SLUHCV2020 /0051

BETWEEN:

BRIAN SAMUEL

Claimant

and

**THE BOARD OF THE ST. LUCIA CO-OPERATIVE CREDIT
UNION LEAGUE LIMITED**

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr. Leevie Herelle for the Claimant

Mr. Andie George and Ms. Sherene Francis for the Defendant

2021: October 19
November 18

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** The claimant, Brian Samuel (“Mr. Samuel”) is the President of the Saint Lucia Seventh-Day Adventist Cooperative Society Limited (“Adventist Cooperative”), which itself is a member of the Saint Lucia Cooperative Credit Union League

Limited ("the League"). Mr. Samuel was elected to the Board of Directors ("the Board") of the League on 17th May 2019, representing the Adventist Cooperative, and serves as Vice President of the League. The defendant is named as the Board of the League.

- [2] Mr. Samuel is aggrieved over the possibility that he may be removed as a director on the Board and has filed a fixed date claim seeking various declarations and injunctive relief against the Board of the League. At the heart of the controversy is a lengthy missive concerning the affairs and management of the League, authored by Mr. Samuel, and disseminated to member delegates. He says this was done to get the Board and members of the League to address the several matters contained in the missive, in keeping with his fiduciary duty as a director.
- [3] The League has strenuously opposed the claim, asserting that by disseminating what is a divisive missive, he has acted in breach of his duties as director and has no legal basis for seeking the relief claimed.

Procedural History

- [4] On 4th February 2020, Mr. Samuel obtained and served on the League, a court order of even date, containing an ex parte interim injunction prohibiting the members of the League from removing him as Director of the Board until resolution of the matter or further order of the Court. On the returnable date of 14th February 2020, at an inter partes hearing, the interim injunction was discharged. The fixed date claim and affidavit in support were deemed properly filed and served, notwithstanding that they were filed outside of the time ordered by the court, and the claim was to take its natural course.
- [5] On 12th March 2020, the League filed an affidavit in answer to the claim. Subsequently, by order dated 5th February 2021, this Court ruled against (i) Mr. Samuel's application to strike out the League's affidavit in answer; and (ii) the League application challenging the court's jurisdiction to try the claim. At a subsequent hearing, Counsel for Mr. Samuel indicated that an appeal had been lodged and the matter was adjourned to pursue the appeal.

- [6] As it turned out, Mr. Samuel failed to properly file and prosecute the appeal and by order dated 28th July 2021, the Court gave further directions in preparation for trial.
- [7] Mr. Samuel filed affidavit evidence and exhibits on his own behalf. Mr. Gilroy Satney and Mr. McOrville Combie, President and Secretary respectively of the League, filed affidavit evidence and exhibits on behalf of the League. Counsels agreed at the hearing that there was no need to cross examine the deponents and the duly filed affidavit evidence was allowed to stand as the evidence in the case.

Mr Samuel's Claim

- [8] Mr. Samuel deposed that the Board called for a Special General Meeting ("SGM") of delegates to be held on 4th February 2020 to remove him from the Board. The reason for removal as contained in a letter dated 21st January 2020 was that by circulating amongst delegates and the Board, a Report entitled "*Crisis of Leadership Continues to Plague the Saint Lucia Cooperative Credit Union League*" ("the Report"), he breached his duty of care to the League, contrary to section 74 of the **Cooperative Societies Act**¹ ("the Act"), and the well-established code of ethics of the League.
- [9] Mr. Samuel states that to the contrary, as a director of the League and the Adventist Cooperative, he owed a fiduciary duty to the Board and delegates to ensure that the League maintained the highest standard of good corporate governance and to alert the Board and delegates when there were matters of serious concern. It was his genuine belief that the integrity of the credit union movement was being undermined by certain practices which fell short of good governance, to which the Board had paid scant regard. He alluded to allegations of bad governance against the former Board and what he perceived as the consequent negative effects, and that he sought to prevent such recurrence.
- [10] Mr. Samuel asserts that there were two attempts by the Board, within two months, to have him removed for the same reason. On the first attempt, at a meeting on 11th December 2019, the Registrar of Cooperatives dismissed the allegations against him following

¹ Cap 12.06 of the Laws of Saint Lucia

representations by his legal counsel. Thus, the second attempt to have him removed for the same reason at the meeting scheduled for 4th February 2020 was oppressive and an abuse of process. Additionally, he says that at a meeting of the Board held on 23rd October 2019, the Board had unanimously agreed to call a SGM of the delegates to consider the Report, but to date that meeting has not taken place. A subsequent Board meeting was held on 30th December 2019 and no resolution or recommendation for his removal was tabled.

[11] Mr. Samuel also claims that the Board's actions were unlawful because according to article 34 of the Bylaws of the League, five or more voting member credit unions are required to request a SGM for the removal of a director. The letter of 21st January 2020 indicates that only four members requested that such resolution be passed at the SGM to remove him. He says section 74 of the Act, which the Board relies on regarding the duty of care of directors, does not apply to the League. He has not been informed of what specifically he has done wrong, or what confidential documents he has disclosed. He states that both the Act and the Bylaws provide for a Supervisory Committee, which the Board has failed to appoint, and this failure prejudices him. As there was no such Committee to report to, he circulated the Report to directors, delegates, and managers of member societies in the reasonable expectation that they would re-examine how the business of the League is conducted.

[12] It is Mr Samuel's belief that he is being victimized for bringing his concerns about governance of the League to the delegates' attention through the Report. He says since then he has been treated with hostility and contempt and been excluded from decision-making. This has caused him discomfort and distress and eroded his good name and standing, and he seeks the following relief:

1. A declaration that the League is the Apex Body established pursuant to section 214 of the Act and is therefore not a "society", "co-operative" or "co-operative society" as defined under the Act.
2. A declaration that section 74 of the Act does not apply to the Board of the League, operating in their capacity as directors of the League.
3. A declaration that the directors of the League owe a fiduciary duty of transparency and accountability to the members of the League which includes the dissemination of all information which affects the integrity and operation of the credit union movement.

4. A declaration that the circulation by him of the Report is not inconsistent with his role as a director of the League and article 3(d) of the Bylaws of the League.
5. A declaration that the issues raised by him in his Report particularly as it relates to (i) investigation into the removal of the preceding Board of directors; (ii) dispute resolution between the League and Ms. Crystal Charles (previous general manager); (iii) consideration and advocacy with respect to the implementation of reporting standard IFRS 9; (iv) implementation of ATM/Debit Card Project; (v) consideration and advocacy with respect to the draft Cooperative Societies Bill; (vi) consideration of the FSRA's Inspection Report; (vii) CCCU 2019 Annual Convention (viii) 2018 Financial Audit Report; (ix) appointment of the Supervisory Committee; and (x) adoption of good corporate governance practices, are consistent with his role as a director of the League and articles 3 (e), (f), (g) and (h) of the Bylaws of the League.
6. An injunction prohibiting the Board from resolving and removing him as a director of the Board of the League on the basis of the Report.
7. An order mandating the Board of the League to convene a Special General Meeting of the members of the League pursuant to its Board Resolution of 23rd October 2019 and within the shortest timeframe provided for under the Bylaws of the League in order to consider the Report.
8. Such further or other orders, accounts, and/or directives as the court may deem necessary.
9. Costs in his favor.

The League's Response

- [13] Mr. Satney, and Mr. Combie deny all the allegations made against the League, or that Mr. Samuel was removed from the Board. They deposed that as contained in the notice dated 21st January 2020 for the SGM to be held on 4th February 2020, that meeting was called to consider and discuss the Report and if thought fit, to vote on, and adopt the resolution contained in the notice, to remove Mr. Samuel as a director. They say the Report was circulated not only between delegates of the League as suggested, but also managers, presidents, and secretaries of member credit unions who are not delegates.

- [14] It is averred that the actions of the Board are transparent, fair, and in accordance with its mandate to manage and oversee the affairs of the League and to promote its objects, as provided in the Bylaws. It is alleged that the contents of the Report are couched in a manner that is divisive and calculated to damage the harmonious relationship which exists among directors and member credit unions and could not have been intended by Mr. Samuel to promote the objects of the League.
- [15] The Board denies Mr. Samuel's allegation that several attempts were made to have him removed and explain that the SGM convened on 11th December 2019 was to consider the Report and vote on resolutions similar to those contained in the notice of 21st January 2020. However, at that meeting the Registrar of Cooperatives, who was chairing the meeting, after hearing submissions from Mr. Samuel's attorney regarding the date on which he was served, accepted that he had been short-served and advised that the meeting be cancelled. The Board heeded the advice of the Registrar and acted in accordance with the Act and Bylaws to schedule another SGM for 4th February 2020. This time the Board ensured that Mr. Samuel was correctly served with notice of the meeting. In the circumstances, the League denies that the SGM of 4th February 2020 was in any way oppressive or abusive. It is admitted that on 23rd October 2019 the Board which includes Mr. Samuel, unanimously agreed to call a SGM of the delegates to table and consider the Report. It is because of this unanimous decision that the meeting of 11th December 2019 was called, and then rescheduled for 4th February 2020.
- [16] The Board further says that it has always been and continues to be guided by and acts in accordance with the Act, the Bylaws and the Governance Policy generated by the World Council of Credit Unions. It is denied that the Board has paid scant regard to good corporate governance and further Mr. Samuel has failed to identify any practice or procedure which fell short. Thus, Mr. Samuel's opinion is grossly misconceived, and he has failed to uphold one of the tenets of good corporate governance, being respect for the democratic principles of the decision-making process of the League. The Board maintains that the very fact that the Report was slated for consideration and discussion, albeit that it brought the entire movement into disrepute, displays the Board's regard for good corporate governance.

- [17] Mr Satney and Mr Combie deposed that the Bylaws permit a SGM to be called at any time, for different reasons and by different entities of the League, and they disagree that the SGM was called in breach of article 34 of the Bylaws. They say, in respect of removal of a director, they were also guided by section 84 of the Act and article 39 of the Bylaws. The Board says it followed due process in accordance with article 39, by serving notice of the SGM on Mr. Samuel and informing of the charges against him, even though this was not mandatory. Further the Board says it is inconceivable that section 74 of the Act would not be applicable to it, and the Act in entirety, applies to the League and its Board.
- [18] The Board claims that it produced two responses to the Report, which were copied to Mr. Samuel, setting out in detail the alleged wrongs and the confidential documents disclosed against the interests of the League. Further the charges against him were contained in the notice of 30th November 2019, which informed him in general terms, of the wrong he is alleged to have committed. Contrary to Mr. Samuel's allegation, the Board says that a Supervisory Committee does exist and was elected at the Annual General Meeting ("AGM") of member delegates held on 19th September 2019, thus there was no prejudice to him. The Board points out that as a director, Mr. Samuel was fully aware of the actions being taken by the Board to elect the Supervisory Committee at the time he wrote the Report. Conveniently, the Report is dated 9th September 2019 and was disseminated on 17th September 2019, when the AGM at which the Supervisory Committee was elected was slated for 19th September 2019.
- [19] The Board says despite the now strained relationship, Mr. Samuel has not been denied the opportunity to fully participate in the democratic process and business of the League. He continues to be invited to activities and Board meetings and has been fully participatory. It is denied that the Board has caused him distress or discomfort or committed any wrong against him. Rather, the Board says he is a vexatious litigant, preferring to bring the credit union movement into disrepute, rather than settle any outstanding issues amicably. The Board is adamant that Mr. Samuel is not entitled to the relief he seeks.

Analysis

1. Declaration that the League is the Apex Body established pursuant to section 214 of the Act and is therefore not a "society", "co-operative" or "co-operative society" as defined under the Act.

[20] The parties agree that League is the apex body established under section 214 of the Act. There is also agreement that it consists of member delegates from all societies which exist in Saint Lucia and performs the functions of the League set out in section 215 of the Act, which includes coordinating, assisting, and promoting registered societies, and performing such other functions as determined by its members.

[21] Mr Samuel contends that the League is not a "co-operative", "co-operative society" or "society" to which the Act applies. These terms are defined in section 2 the Act as follows:

"co-operative" or "co-operative society" means a body corporate registered under this Act which consists of a group of people, small or large, with a commitment to joint action on the basis of democracy and self-help in order to secure a service or economic arrangement that is both socially desirable and beneficial to all taking part;"

"society" means a co-operative society and includes a society registered under this Act."

[22] The interpretation section of the Bylaws defines "co-operative society" to mean a society registered under the Act, which is in conformity with the definition thereof in the Act. There are two defining characteristics of a "cooperative", "cooperative society" or "society" based on the definition in the Act. The first is that it is a body corporate registered under the Act. The Bylaws state that the League is a society duly registered under the Cooperative Societies Act of Saint Lucia. In the interpretation section of the Bylaws, "League" is defined to mean the St. Lucia Co-operative Credit Union League Limited incorporated under the Act by these Bylaws. Consequently, there can be no dispute that the League is a body corporate registered under the Act and satisfies the first characteristic of the definition of a "cooperative", "cooperative society" or "society".

- [23] The second aspect of the definition is that it consists of a group of people committed to joint action based on democracy and self-help to secure a service or economic arrangement that is socially desirable and beneficial to all taking part. The primary function of the League as stated in section 215 of the Act, is to promote registered societies. The Bylaws set out the objects of the League which, to name a few, include fostering growth and welfare of credit unions; encouraging savings by use of credit and prudent management of personal and family resources; securing active participation in the democratic processes of cooperative control at all levels; providing information to credit unions and other cooperative leaders so that the societies they serve will offer the best possible service to members. It is clear from these objectives that the League meets the second requirement of commitment to democracy, self-help and providing a service that is socially desirable and beneficial to all taking part.
- [24] Section 217 of the Act provides that the Registrar shall consult the League with respect to matters relating to the development of registered societies. There is nothing in that section or in any of the other sections highlighted by Counsel for Mr. Samuel, Mr. Leevie Herelle, which elucidates the distinction he seeks to draw between the apex body and a “co-operative”, “co-operative society”, or “society”. The fact that the Registrar may consult the League on matters affecting the development of societies, who are its members, given that the object of the League is to promote societies, does not detract from the League itself being a cooperative society.
- [25] There is seemingly nothing in the Act which precludes the League from being the apex body, as well as a “co-operative”, “co-operative society”, or “society”. In support, I note that the **Co-operative Societies Regulations**,² which is made pursuant to section 238 of the Act states in regulation 2 that “**society**” means a registered primary, secondary or tertiary society. In that vein I agree with counsel for the defendant, Ms. Sherene Francis when she suggests that it is acknowledged in regulation 22(1)(e) and (f) that a society may indeed consist of other societies, as is indeed the case with the League.

² Statutory Instrument No. 90/1999 as amended by Statutory Instrument No. 72/2001

- [26] The inevitable conclusion is that under both the Act and the Bylaws, the League as the apex body is a “cooperative”, “cooperative society” and “society” and a declaration which says otherwise is unfounded.

2. Declaration that section 74 of the Act does not apply to the Board of the League, operating in their capacity as directors of the League.

- [27] Having established that the League is a “cooperative”, “cooperative society” and “society” under the Act, it goes without saying that section 74 of the Act does apply to directors of the League. The section deals with the duty of care of directors of a society and states:

“74. Duty of care of directors and officers

Every director and officer of a society in exercising his or her powers and discharging his or her duties shall—

- (a) act honestly and in good faith with a view to the best interests of the society;*
- and*
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”*

- [28] Section 75, which deals with the ambit of directors’ duty is equally applicable. It states:

“75. Ambit of director’s duty

The provisions of a contract, the by-laws or the circumstances of his or her appointment do not relieve a director from—

- (a) the duty to act in accordance with this Act and the regulations; and*
- (b) liability that by virtue of a rule of law would otherwise attach to him or her with respect to negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the society.”*

- [29] There is nothing in either section that exempts these provisions from applying to the League and it is well within the prerogative of the Board to examine the conduct of a director against the requirements of section 74. There is nothing illegal about this. Accordingly, a declaration which says otherwise is unfounded.

3. Declaration that the directors of the League owe a fiduciary duty of transparency and accountability to the members of the League which includes the dissemination of all information which affects the integrity and operation of the credit union movement.

- [30] In support of this declaration, Mr. Herelle refers to the **Companies Act**³ and the duty of directors contained in section 97 of that Act. It is unnecessary to refer to the Companies Act, given that it has been determined that the League is a society, and the Act prescribes the duties of directors of societies. In any event section 97(1) contains similar wording to sections 74 of the Act and it is to this section that this Court must have regard, when considering this issue.
- [31] While section 74(a) requires a director to act honestly and in good faith with a view to the best interests of the society, this is balanced by the requirement of section 74(b) to also exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. Mr. Herelle's submissions on this issue are mainly grounded in dicta from the case of **Antow Holdings Limited v Best Nation Investments Limited**⁴ where the Court of Appeal held that good faith is ascertained by reference to the actual subjective state of mind of a director. Counsel argued that so long as the director in question believes that he is acting in the best interest of the company, that is sufficient. Although there may be a subjective element in determining whether a director has complied with his duty, section 74(b) imposes an objective element that cannot be ignored. It requires consideration of the care, diligence, and skill that the reasonably prudent person would exercise in similar circumstances, and the **Antow Holdings Ltd** case, which will be discussed further in this judgment, does not repudiate this.
- [32] Whilst it is generally accepted that transparency and accountability are qualities expected of a director in complying with his duties under section 74, it cannot be said, without more, that any action taken in pursuit of this, satisfies the duty of care imposed. The Board accepts that part of the duty of a director is the obligation to be transparent and accountable for his or her

³ Cap 13.01 of the Revised Edition of the Law of Saint Lucia

⁴ BVIHCMAP2017/0010

actions, and that is not a matter in dispute. However, it cannot be said that the obligation to be transparent and accountable necessarily includes the dissemination of all information which affects the integrity and operation of the League, regardless of what information, to whom, and in what manner the information is disseminated. In the circumstances, the declaration sought is unjustified, insofar as it is qualified by the statement: *“which includes the dissemination of all information which affects the integrity and operation of the credit union movement.”*

4. Declaration that the circulation of the Report by Mr Samuel is not inconsistent with his role as a director of the League and article 3(d) of the Bylaws of the League.

AND

5. Declaration that the issues raised in the Report, particularly as it relates to (i) investigation into the removal of the preceding Board of directors; (ii) dispute resolution between the League and Ms. Crystal Charles (previous general manager); (iii) consideration and advocacy with respect to the implementation of reporting standard IFRS 9; (iv) implementation of ATM/Debit Card Project; (v) consideration and advocacy with respect to the draft Cooperative Societies Bill; (vi) consideration of the FSRA’s Inspection Report; (vii) CCCU 2019 Annual Convention (viii) 2018 Financial Audit Report; (ix) appointment of the Supervisory Committee; and (x) adoption of good corporate governance practices, are consistent with his role as a director of the League and articles 3 (e), (f), (g) and (h) of the Bylaws of the League.

[33] Declarations 4 and 5 will be considered together for convenience as they touch and concern the same question of whether Mr. Samuel, by writing and disseminating the Report as he did, acted consistently with his duty as a director.

[34] Mr Herelle submitted that it must be accepted that Mr Samuel complied with his duty as director for the following reasons: (i) he stated in his affidavit that it was his genuine belief that the integrity of the credit union movement was being undermined by certain practices and procedures which fell short of good corporate governance; (ii) that the Board had paid scant regard to these matters; (iii) that he stated in the Report itself that he considered it

important to disclose the matters contained therein in the hope that the necessary corrective actions would be taken and (iv) that he did so in keeping with his fiduciary duties as a Board member and in good faith. Counsel also referred to the general nature of the matters addressed in the Report, as listed in declaration 5, and asserts that bringing these matters to the attention of members by writing and disseminating the Report accords with the objects of the League as contained in articles 3 (c), (d), (e), (f), (g), and (h) of the Bylaws. He relies wholly on the **Antow Holdings** case, which he says espouses a subjective test.

[35] In response Ms. Francis submitted that as a director, Mr Samuel acting on his own advice and initiative, without the authority of the Board, which is the collective decision-making body, was not entitled to disseminate sensitive information to all and sundry. This, she says, does not constitute a proper interpretation of director's duties, particularly as disseminating the Report, appeared to be more bent on creating mischief by bringing the entire Board into disrepute in the public domain, as opposed to attempting to resolve the affairs of the Board in a responsible manner.

[36] Counsel argued that the duty of accountability and transparency must always be juxtaposed against the duty of confidentiality. She contends that section 36 of the Bylaws clearly states that the management of the affairs of the League is vested in the Board, and unless specific duties are delegated to a director, the Board as a group is charged with effective decision making, whether by majority vote, agreement, resolution, or ratification of a prior action of one of more directors. She says Mr. Samuel had no right to disseminate the Report, as there was no vote, agreement, or resolution permitting him to do so. To date there has been no ratification of his actions, whether express or implied. Counsel contends that pursuant to article 57(5) of the Bylaws, the person charged with the duty to disseminate official information of the League to the public is the President of the Board, unless otherwise delegated to the Vice-President due to the President's absence, disability, or refusal to act. Mr. Samuel is not the President of the Board, but the Vice-President, and was not delegated the duty to disseminate the Report.

[37] Counsel further submitted that it is unclear how the issues raised in the Report were consistent with his role of a director of the League, in the sense of being in the interest of

members and the membership of affiliated credit unions. It did not serve to establish and maintain good working relationships with the League and its agencies nor assured maximum freedom of action on the part of credit unions in the fulfilment of their responsibilities and attainment of their goals. She claims that even if the issues raised were considered consistent with the objects of the League, Mr. Samuel, on his own, had no right, permission, or authority to disseminate the Report. Further, these issues are matters which the membership of the League was called upon to discuss at the meeting of 4th February 2020, which Mr. Samuel intercepted and prevented.

- [38] In addressing these issues, it is important to appreciate, firstly, that Mr. Herelle only cited a small part of the dicta in the **Antow Holdings** case, when in fact what was stated was that the section under consideration was “...largely, though by no means entirely, a subjective one.”⁵ There section 120 (1) of the BVI Business Companies Act which is akin to section 74(a) of the Act, came under scrutiny. It states:

“120. (1) Subject to this section, a director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company. “

- [39] After dealing with the subjective test Pereira CJ went on to say:

“[25] Nonetheless, a section 120(1) inquiry has an objective overlay as bona fides cannot be the sole test, “otherwise you might have a lunatic conducting the affairs of the company and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational.” The courts will look for independent, objective evidence to test the director’s claim to be acting bona fide.

[26] Where there has been a failure by a director to consider the separate interests of their company or a challenge by an applicant on the good faith of a director, the test then becomes an objective one...”⁶

- [40] In the present case in response to his claim, the League has challenged Mr. Samuel's assertion that he acted in good faith. The letter of 30th November 2019 addressed to him states that four directors, in their capacity as delegates, requested that a resolution be

⁵ BVIHMAP2017/0010 at para. 23

⁶ BVIHMAP2017/0010 at paras. 25-26

passed by delegates at a SGM that he be removed as director of the Board for breach of his duties as director. Applying the reasoning in the **Antow Holdings** case, this challenge would trigger the application of the objective test, in relation to which, Pereira CJ stated:

“I reiterate that a court will look for objective independent evidence to determine whether there was an honest belief on the part of a director... A court will not accept in an unquestioning way a director’s assertion that he acted bona fide when the facts might appear to suggest otherwise.”⁷

[41] In my opinion, reliance on the **Antow Holdings** case should be applied with caution, as section 120 of the BVI Business Companies Act, does not contain the equivalent of section 74(b) which is repeated in section 122 of the Act under the heading ‘Standard of Care’. The equivalent of section 122 was not being considered in **Antow Holdings** as the contention in that case was that the directors had not exercised their duty care, as opposed to whether they had met the standard of care required. In the present case, this Court could not divorce and disregard section 74(b) in considering whether the duty and standard of care has been met, particularly because sections 74(a) and (b) are conjunctive.

[42] Additionally, in **Antow Holdings**, it was said that it is also part of a director’s fiduciary duty to act within the powers confined on him and this was codified in section 121 of the BVI Business Companies Act. In the present case, although not codified in the Act, it is a common law rule which applies in this jurisdiction and would be applicable to such cases. Without delving too much into the concept, since it was not raised by either of the parties, I will merely state the nature of the rule as explained in **Antow Holdings**, in support of my reasoning on this issue:

*“[48] A director must act in accordance with the company’s constitution and must exercise his powers for the purpose for which they are conferred. As Lord Greene MR stated in **Re Smith & Fawcett Ltd**, directors must exercise their powers for proper purposes and not for any collateral purpose. This duty is important as it is not sufficient for directors to state that they acted in good faith in the best interest of the company, unless they can also establish that their actions were within the powers conferred on them. This view of the proper purpose rule emerged as a separate rule, taking precedence over the bona fide rule in the case of **Hogg v Cramphorn Ltd**...”*

⁷ BVIHMAP2017/0010 at para. 45

[51] ... In the Privy Council case of **Howard Smith Ltd v Ampol Petroleum Ltd** it was stated that when a dispute arises as to whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial, or per contra insubstantial, an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount the assertions of individuals, that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme. Their Lordships quoted an oft cited passage from the case of **Hindle v John Cotton Ltd**:

"Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason."⁸

[43] Applying these general principles here, although **Antow Holdings** speaks to a subjective test by considering the director's actual state of mind at the time of the actions sought to be impugned, it cannot be that simply because Mr. Samuel says he acted in good faith and the best interest of the League, it means that his actions satisfied the duty of care required. It is not only a subjective test. Section 74 of the Act, which is the governing law, imposes in subsection (a) a subjective element, and in subsection (b) the objective element.

[44] Mr. Samuel has not met the objective test stipulated by section 74(b) as he has not shown that he exercised the care, diligence, and skill that a prudent person would, in comparable circumstances. A prudent person acting with care, diligence, and skill, despite the concerns he had, would not write a scathing Report on internal governance matters without first bringing those matters to the Board, and then proceed to disseminate same to delegates of all member societies and non-delegate individuals within members societies.

⁸ BVIHCMAP2017/0010 at paras. 48-52.

[45] The appropriate action of the prudent person exercising care, diligence and skill would have been to adopt the correct procedures in accordance with the Act and Bylaws, which in this case are as follows:-

Bylaw 43: "The Board shall meet together for the dispatch of business at least once in every month... Questions arising at any meeting shall be decided, except as otherwise provided, by the vote of a simple majority..."

Bylaw 47: "The Board may delegate any of its powers to committees consisting of such Director or Directors as it thinks fit; any committee so formed shall in the exercise of the powers so delegated, conform to any regulations that may be imposed on it by the Board."

Bylaw 57(5): "The President shall... be responsible for all official releases of the League to the public, press and to Members."

Bylaw 58: "The Vice-President shall perform the duties of the President in the absence or disability or refusal of that officer to act, and such other duties as the Board or the President may assign to him from time to time."

Bylaw 73(2): "Such committee [the Supervisory Committee] shall ... d) make an examination of the operations of the League, internal systems of control and affairs; e) receive and investigate any complaints made by any member society affecting the proper running of the League..."

Bylaw 73(4): "By unanimous vote, the Supervisory Committee may call a Special General Meeting of member societies in accordance with Bylaw 25(2), to consider a violation of the Bylaws of the League or any other practice that, in the opinion of the Committee, is unsafe or on authorized."

Bylaw 73(5): "The Supervisory Committee shall send a monthly report to the Board and a yearly report to the Annual General Meeting."

Section 53 of the Act:

"53. Powers of board

Subject to this Act, the regulations and the by-laws, the board shall—

- (a) exercise the powers of the society directly, or indirectly through the employees and agents of the society;*
- (b) direct the management of the business and affairs of the society."*

Section 63 of the Act:

“63. Duties of supervisory committee

The supervisory committee shall ... perform such other duties as are prescribed by this Act, the regulations and the by-laws of the credit union or other society.”

- [46] Taken together, these provisions convey that conducting the business and affairs of the League falls within the remit of the Board, which is required to meet regularly and at least once per month to consider and address these matters. Any decisions concerning the business and affairs of the League are to be made by a simple majority vote of the Board. It is therefore not in keeping with the Bylaws and the Act for any one director to usurp the Board's powers and take it solely upon himself, to consider, address, and make any decision concerning the business and affairs of the Board.
- [47] Although the Board may delegate certain powers to one or more directors, such director is bound by the terms and limits imposed, in the exercise of such power. It is very clear that the Board did not delegate any power to Mr. Samuel to singlehandedly, identify and write to the members of the League informing them of matters of governance affecting the Board or the League. It is the President of the Board who is empowered by the Bylaws to disseminate information to members and the public press. Mr. Samuel is not the President and, although he is Vice President, he is only entitled to perform the duties of President if the President is suffering from disability or has refused to perform his duties or has specifically assigned performance to the Vice President. From the evidence none of these circumstances were in operation, to authorize Mr. Samuel to act as he did.
- [48] It is significant that both the Act and the Bylaws establish a Supervisory Committee with the very specific responsibility for examining the operations of the League, including internal control and affairs, and receiving complaints from any member concerning the proper running of the League. This naturally includes matters of poor governance and is precisely the power and responsibility Mr. Samuel assumed onto himself in contravention of the Act and Bylaws. It is noteworthy that even the Committee to which this responsibility is assigned, is accountable to the Board in the first instance, as it is required to send to the Board monthly reports of its findings and is only required to report to the League annually at the AGM.

[49] Whilst the Supervisory Committee does have the power to call a SGM to consider any violation of the Bylaws or any other practice that it considers unsafe or unauthorized, which may include matters of poor governance, no single member of the Committee is entitled to do so. The decision to call a SGM must be taken by a unanimous vote of that Committee and in accordance with the proper procedure prescribed in Bylaw 25(2).

[50] These provisions clarify that Mr. Samuel did not have the authority to unilaterally consider, write, and disseminate the Report, even if it concerned important matters of corporate governance. That was the responsibility of the Supervisory Committee reporting to the Board, or, if considered necessary to involve the League, then such decision was to be made collectively. Otherwise, such communication falls to the President. Thus, Mr. Samuel acted ultra vires to the Bylaws of the League when he disseminated the Report.

[51] Although the Supervisory Committee was not yet in place when Mr. Samuel wrote and disseminated the Report, on the evidence he was fully aware of the efforts and progress being made to establish that Committee, as he attended and participated in those Board meetings, as a director. The Report was written a mere 10 days, and disseminated a mere 2 days, before the AGM at which the Supervisory Committee was established. In those circumstances, his actions appear insincere, as he could have simply waited until the Committee was established to bring his concerns there. In the absence of the Committee, at the very least, he ought to have adopted the procedure which the Committee would have been required to follow, which is to report his concerns to the Board first. This is the level of care, diligence, and skill one would expect of a reasonably prudent director, especially one who is as keen and intent on upholding good corporate governance, as he says that he is.

[52] Mr Samuel has argued that in writing and disseminating the Report, he was acting consistently with his obligations in articles 3(1) (c) to (h) of the Bylaws, setting out the objects of the League, as follows:

“c) secure active participation in the democratic processes of cooperative control at all levels and in the exercise of officer responsibility

d) provide information and guidance to credit unions and other cooperative leaders and personnel so that the societies they serve will offer the best possible service to members to make such opportunity equitable

- e) Contribute to the development of higher standards of credit union management, operation and supervision by advice and direction in the interest of members and membership of affiliated credit unions.*
- f) Establish and maintain good working relationships with the government and its agencies to assure maximum freedom of action on the part of Credit Unions in the fulfilment of their responsibilities and attainment of their goals.*
- g) Maintain the individual and collective autonomy of credit unions in St. Lucia.*
- h) Study all legislation pertaining to Credit Unions to obtain legislation helpful to the purposes of the Co-operative Movement and to defend the Movement against adverse legislation.”*

[53] It is not for Mr. Samuel to pick, choose and refuse which Bylaws he would like to comply with, which is what he appears to have done when he claims to have acted in fulfillment of articles 3(1) (c) to (h), yet chose to ignore and breach the other articles outlined at paragraph 42 above which demarcate the various powers and the proper procedure. On the contrary he must comply with all the Bylaws and provisions of the Act, and this is where he has fallen short. I agree with Ms. Francis, that it is difficult to see how the matters addressed in the Report would have achieved the objects of the League if the appropriate procedure was breached. Consequently declarations 4 and 5 are denied.

6. Injunction prohibiting the Board from resolving and removing Mr Samuel as a director of the Board of the League on the basis of the Report.

AND

7. Order mandating the Board of the League to convene a Special General Meeting of the members of the League pursuant to its Board Resolution of 23rd October 2019 and within the shortest timeframe provided for under the Bylaws of the League to consider the Report.

[54] It has already been established that by unilaterally writing and disseminating the Report, Mr. Samuel acted in breach of his duties as a director. Furthermore, he has not established any legal wrong committed against him and any loss suffered from the infringement of any legal right to be protected, which would entitle him to either of the final injunctions that he seeks.

- [55] Concerning the grant of a permanent injunction, Ms. Francis relied on the case of **Cambie Surgeries Corporation v British Columbia (Medical Services Commission)**, where Groberman J determined that the court ought to examine whether, in light of the evidence, a claimant has established a legal right to the relief sought, and whether a permanent injunction was an appropriate remedy.⁹ Counsel also cited dicta of Lord Evershed MR in **Pride of Derby and Derbyshire Angling Association, Ltd. and Another v British Celanese Ltd. and Others** that: “[T]he Court will not impose on a local authority, or on anyone else, an obligation to do something which is impossible, or which cannot be enforced, or which is unlawful.”¹⁰ She submits that it would be an act in futility, to grant a mandatory injunction in favour of Mr. Samuel to compel the Board to hold a SGM to consider the Report because that decision rests solely within the discretion of the Board and/or the delegates of the League in accordance with the Bylaws and the Act. Such an order, should it be made, could not rightfully be enforced. I note that her position is supported by **Antow Holdings**, where the Court of Appeal stated that the authorities un-controversially establish that the courts have adopted a non-interventionist attitude when reviewing business decisions.
- [56] In resolving this issue, a good starting point is Bylaw 39 and section 84 of the Act which specifically contemplate and provide the procedure for removal of a director. There is no reason for this Court to abrogate the rights of the Board in that regard, once exercised in the manner authorized by the Act and Bylaws.
- [57] On the evidence, it is not the case that the Board has failed to convene a SGM to consider the Report. The parties all agree that at a meeting held on 23rd October 2019, the Board unanimously agreed to call a SGM to do so. Out of that meeting the SGM of 11th December 2019 and 4th February 2020 were scheduled.
- [58] The notices of 30th November 2019 and 21st January 2020 both state that the meetings were called to first consider the Report and then to consider, if the Board saw fit, Mr. Samuel’s

⁹ 2010 BCC 396 at [28]

¹⁰ [1953] 1 All ER 179 at pp. 197H – 198A

removal. The first paragraph of the letter of 30th November 2019 indicates, that it “was unanimously agreed at the October 22, 2019, meeting of the Board of Directors of the St. Lucia Co-operative Credit Union League Limited (“the League”), a Special General Meeting will be called to address the captioned missive and to determine what, if any action should be taken by the delegates concerning same.”

[59] Likewise, the first matter stated in the notice of 21st January 2020 was “to consider and discuss the missive circulated to delegates by the vice president Mr Brian Samuel on 17th September 2019 via email entitled *Crisis of Leadership Continues to Plague The St. Lucia Cooperative Credit Union League*.” Therefore, Mr Samuel cannot now complain that a meeting to consider the Report, which was unanimously agreed to at the Board meeting of 23rd October 2019, has never been held and seek relief in that regard. There were at least two attempts to have the meeting, the latter of which was frustrated by his own actions, when he obtained the ex parte injunction to prevent the Board from considering his removal, if thought fit.

[60] It is also not the case that the second attempt to hold the SGM on 4th February 2020 amounts to an abuse of process because the allegations against Mr Samuel were dismissed by the Registrar at the first SGM held on 11th December 2019. On this issue, the evidence of the League is preferable to that of Mr. Samuel and is supported by paragraph 10 of the Minutes of a Board meeting held on 30th December 2019¹¹ where it is recorded that the SGM of 11th December 2019 was abandoned because Mr. Samuel had received insufficient notice as prescribed by the Bylaws. The minutes went on to state that the need for a speedy resolution was expressed by a director and a proposed date was agreed. This does not convey that the allegations were dismissed. The SGM was then rescheduled to 4th February 2020 to allow the proper procedure to be followed.

[61] Article 34 of the Bylaws falls under the heading ‘General Meetings’ and provides:

“Special General Meetings may be called by the Board or by the Supervisory Committee and shall be called by the Board within 20 days after the receipt of a

¹¹ See Exhibit BS7

request in writing addressed to the Secretary of the League by five or more voting member societies.”

[62] This provision requires that whenever the Board is requested by five or more voting members to call a SGM, the request being in writing and addressed to the Secretary, the Board must call this meeting within 20 days of receipt of the request. Independent of this, the section also provides that the Board or the Supervisory Committee may call for a SGM, for any purpose and is not specific to one called to consider and vote on removal of a director. The notice of 30th November 2019 merely stated that four directors, in their capacity as delegates *“requested that a resolution be passed by the delegates at an intended Special General Meeting that you [Mr. Samuel] be removed as Director of the Board pursuant to articles 39 and 40 of the Bylaws.”* There is simply no requirement in the Bylaws or the Act that five or more delegates are required to call for a SGM to remove a director, or for a resolution to be passed for that purpose.

[63] Article 39 of the Bylaws governs removal of directors, and it states:

*“Any director **may** be removed from office at any time by resolution of the majority of the duly elected and qualified delegates of member societies present at any duly constituted Mineral¹² meeting called for the purpose; provided that such director shall be informed in writing of the charges against him at least 10 days before such meeting and shall have reasonable opportunity to answer such charges.”*

[64] The procedure for calling a SGM and for removal of a director under article 39 must be followed if such removal is to be properly considered and voted on at a duly constituted SGM. Bylaw 39 is mandatory, despite the use of the word “*may*”, which seems to be merely permissive as to the decision whether a director is to be removed and not as to the procedure to be followed for removal. It requires that a director be informed in writing of the charges against him at least 10 days before the meeting and be given an opportunity to respond.

[65] It is not the case, that Mr Samuel was not made aware of the specific charges against him. The notice dated 30th November 2019 particularized the charges in sufficient detail and

¹² It was generally accepted that the use of the word “**Mineral**” in the section was an error and what should have been stated instead is “**special**”

stated that he would be given the opportunity to defend his actions at the SGM to be held on 11th December 2019 and was entitled to have a representative of his choice at that meeting. In addition, the letter refers to a response to his Report, which further particularized the complaints against him, as being enclosed for reference. Hence, he was informed of the charges against him from as early as 30th November 2019, and that letter indicated he would have the opportunity to defend his actions and be represented at the meeting. Whilst it was accepted that he was short served with notice of that meeting, the procedure was corrected in respect of the meeting of 4th February 2020. Thus was no breach of article 34 of the Bylaws when the Board called the meetings of 11th December 2019 or 4th February 2020, and no breach of article 39 in relation to the later meeting. From the evidence, there was no procedural error or other illegality in calling the meeting that was scheduled for 4th February 2020. In accordance with section 39, a decision on removal could have been considered for just cause and carried on a resolution passed by a simple majority of the duly elected and qualified delegates of member societies present at that meeting. The Board has said that on account of the claim all matters pertaining to the Report have been placed on hold, pending determination of the claim.

- [66] Based on the foregoing, Mr. Samuel has not established any legal right to the injunctions that he seeks. The Board cannot be prevented from considering removal of a director for cause once the proper procedure has been followed. The Board also cannot be mandated to consider the Report, as Mr. Samuel has no legal right in that regard and to order the Board to do so would be an act in futility and would not be legally enforceable. Such order would also be contrary to the general non-interventionist approach adopted by the courts in relation to the business decisions of a body corporate. Mr. Samuel is therefore not entitled to declarations 6 or 7 and they are refused.

8. Such further or other orders, accounts, and/or directives as the court may deem necessary.

- [67] Based on the foregoing, I conclude that Mr. Samuel is not entitled to any further orders or relief.

[68] Mr Herelle sought by way of supplemental skeleton arguments filed on the day before the hearing, to raise for the first time that the League is not a company in the strict sense but a trust, because it is an entity over which the Financial Services Regulatory Authority has oversight. Counsel contends that all the directors on the Board are trustees who owe a fiduciary duty to members of the League and relies on article 916A of the Civil Code¹³ to argue that Mr Samuel acted in conformity with his obligations as a trustee, and a breach of such trust would be a violation or dereliction of duty.

[69] It is trite that Counsel should not attempt in submissions to raise new issues and is bound by what has been disclosed in the pleadings and evidence in the claim. The purpose of pleadings is to enable the other side to know the case to be answered.¹⁴ It is also undesirable for the Court to seek to resolve an issue that did not arise in the pleadings or the evidence without the benefit of full arguments on the point.¹⁵ Introducing this new issue in supplemental arguments filed on the day before trial does not afford the Board the opportunity to respond to it and amounts to trial by ambush, which cannot be countenanced in the context of the Civil Procedure Rules 2000. This new argument was not considered, and, in any event, I do not believe that it would not have resulted in a different outcome.

[70] As a passing observation, from the Act and Bylaws it appears that the League is the body corporate capable of being sued and not the Board as was done here. Although the Board is defined as the governing body vested with the responsibility for managing the affairs of the League it does not appear to be the body corporate or legal person to be named in an action. Notwithstanding, I considered it paramount that the controversy between the parties be adjudicated and proceeded to do so.

¹³ Cap 4.01 of the Laws of Saint Lucia

¹⁴ *East Caribbean Flour Mills v Omiston Ken Boyea et al* SVGHCVAP2006/0012, delivered 16th July 2007, unreported which cited *McPhilemy v Times Newspapers Ltd* [1993] 3 All ER 775, 792J-793A; *Shankiel Myland v Commissioner of Police et al* GDAHCV2012/0045, delivered 9th May 2014, (unreported) per Ellis J at paragraphs 37 and 41 of the judgment.

¹⁵ *South East Asia Energy Holdings v Hycarbex American*, SKBHCVAP2016/0015, at para 34 of the judgment

Conclusion

[71] In concluding, I make the following orders: -

1. Mr Samuel is not entitled to any of the declarations or relief sought and the claim is dismissed.
2. Cost is awarded to the League in the sum of \$7,500.00 in accordance with CPR65.5(2)(b).

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar