

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2015-04009

IN THE MATTER OF EASTERN CREDIT UNION CO-OPERATIVE SOCIETY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 1995

BETWEEN

HARVEY BORRIS

Claimant

AND

EASTERN CREDIT UNION CO-OPERATIVE SOCIETY LIMITED

First Defendant

AND

EPL PROPERTIES LIMITED

Second Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

Claimant: Mr. Kirk Bengochea instructed by Ms. Theresa Hadad

Defendants: Mr. Farid Scoon; Ms. Leeanna Gittens

Date of Delivery: 4th May 2022

JUDGMENT

THE AGREED FACTS

- [1] The Eastern Credit Union Co-operative Society Limited, the First Defendant named herein (“the Co-operative”) is a Credit Union duly incorporated under the **Co-operatives Society Act¹ (“The Act”)** of the Laws of the Republic of Trinidad and Tobago.
- [2] At all material times, the Claimant was a Director of the Co-operative and was first elected as a Director in 2000 and served for a three-year period until 2003. He was elected as an alternate Director in 2009 and assumed the position of a Director in the course of 2009 when a vacancy arose. The Claimant was also elected as a Director of the Co-operative in 2013 for a period of three years until April 2016.
- [3] Pursuant to Section 19 of the Bye-Laws of the Co-operative, the Claimant was appointed a Member of the Executive Committee on the 13th April 2015. The Executive Committee is a Committee of the Board of Directors of the Co-operative.
- [4] The Claimant received the monthly sum of two thousand seven hundred dollars (\$2,700.00) as an Executive Member of the Board of Directors of the Co-operative. The Claimant also received the sum of six hundred and sixty five dollars (\$665.00) per month as a Member of the Housing Committee of the Co-operative and the sum of six hundred and sixty five dollars (\$665.00) as a Member of the Delinquency Committee of the Co-operative.
- [5] EPL Properties Limited was duly incorporated on the 21st day of November 2002 in accordance with the **Companies Act²** as a limited liability company (hereinafter “EPL”). The Co-operative was at all material times the sole shareholder of EPL.
- [6] The Claimant was appointed a Director of EPL on or about the 24th April 2014. The Claimant was appointed the Vice-Chairman of the Board of EPL on the 1st May 2015. The Claimant received the monthly sum of three thousand four

¹ Chapter 81:03

² 1995, Chapter 81:01 of the Laws of the Republic of Trinidad and Tobago

hundred and eighty dollars (\$3,480.00) for his services as Director and Vice-Chairman of the Board of EPL.

- [7] The Co-operative purchased land to develop in Las Viviendas in May 2014 for the sum of nine million dollars (\$9,000,000.00). The Claimant objected to the purchase and raised concerns in relation to same in 2013, 2014 and 2015. Steve Lezama was appointed by the Board of the Co-operative to carry out an investigation into the Las Viviendas property and he presented his recommendations and findings to the Board of the Co-operative on the 27th June 2015. The matter was referred to the internal audit department of the Co-operative for preparation of a special investigative report and a report was issued on the 20th October 2015. An auditing firm Pannell Kerr Forster (PKF) was then engaged on the 3rd November 2015 to conduct an investigative examination of the Las Viviendas purchase and a report was produced in January 2016.
- [8] In September 2015, the Board of the Co-operative agreed to the purchase of a property situate at Foster Road, Sangre Grande. The Claimant recused himself from discussions relating to the purchase of the property situate at Foster Road, Sangre Grande and swore to a statutory declaration to confirm that he was not going to receive any benefit from the purchase. On the 30th September 2015, the Board of the Co-operative revoked the decision to purchase the property situate at Foster Road, Sangre Grande.
- [9] On the 28th October 2015, the Board of EPL terminated the services of the Chief Operating Officer, Mr. Darnley Faria and the Facilities manager, Mr. Angus Murray, by a majority decision. The Claimant voted against the terminations. Both the Chief Operating Officer, Mr. Darnley Faria and the Facilities Manager, Mr. Angus Murray, emailed the Board of the Co-operative and raised complaints in relation to their dismissal.
- [10] A special meeting of the Board of the Co-operative was held on the 9th November 2013. Mr. Wayne Estrada moved a motion to revoke the Claimant's appointment as Director and the appointments of all the other Directors of EPL, with the exception of Janelle Benjamin, and to appoint Wayne Estrada, Gloria Rollingson and Don Isaac as new Directors of EPL. It was also decided by a

majority of the Board of the Co-operative that a Special Meeting of EPL would be held on the 3rd December 2015 and that letters would be issued to the three Co-operative Directors notifying them of the Board's decision and giving them two days to resign as Directors of EPL.

- [11] The Claimant attended the meeting of the Board of the Co-operative on the 9th November 2015.
- [12] Between the 10th and 12th November 2015, the then President of the Co-operative, Alana Blackman, issued Notice of a special meeting of the Co-operative scheduled on the 25th November 2015, *inter alia*, to review irregularities associated with the Las Viviendas Project and to determine whether due process was followed by the Board of the Co-operative in the dismissal of the Directors of EPL and the appointment of new Directors of EPL on the 9th November 2015.
- [13] Sometime in November 2015 and after the 12th November 2015, the Claimant received notice of a proposed Special Board Meeting of the Co-operative to be held on Wednesday 18th November 2015 at 6:00pm and in its agenda the proposed items were, *inter alia*, to determine whether the Board had lost trust and confidence in the Presidency of Ms. Alana Blackman and to consider the appointment of a new President, to consider the replacement of the shareholder representative to EPL, Mr. Darius Figuera and the appointment of a new shareholder representative.
- [14] The then President of the Co-operative, Alana Blackman, sought independent legal advice on the proposed issue and a letter from Messrs. J.D. Sellier & CO., Attorneys-at-Law, was dispatched to the Co-operative on the 18th November 2015 discouraging them from their course of action.
- [15] The Claimant, through his attorneys-at-law, issued a pre-action protocol letter dated the 17th November 2015 to the Co-operative, in relation to the meeting of the 9th November 2015 and the Proposed Special Board Meeting of the Co-operative scheduled to be held on Wednesday 18th November 2015.
- [16] On the 18th November 2015, the Special Board Meeting of the Co-operative was held and Alana Blackman was removed as President of the Executive

Committee and Wayne Estrada was appointed as the President. The Claimant was removed as a Member of the Executive Committee of the Board of the Co-operative and Gloria Rollingson was appointed as a Member of the Executive Committee. The newly elected President of the Board of the Co-operative was directed to withdraw the Notice of Special General Meeting of the Co-operative which had been issued on the instructions of Alana Blackman.

- [17] On the 19th November 2015, the Board of the Co-operative issued a Shareholder's Requisition to the Directors of EPL, including the Claimant, requesting that a Special General Meeting of the Shareholders of EPL be held to remove the Claimant and other named persons as Directors and to appoint new Directors.
- [18] On the 1st December 2015, the Board of the Co-operative issued letters to the Claimant and all other Directors of EPL affirming its decision of the 9th November 2015 to revoke the appointment of members of the EPL Board, revoking the Shareholder's Requisition dated the 19th November 2015 and notifying the Claimant and all other Directors of EPL, save and except Janelle Benjamin, that their appointments were revoked with immediate effect. The Claimant was a member of three Sub-Committees of EPL as at the 1st December 2015.
- [19] The Claimant did not fall within any of the provisions of Clause 4.4.2 of EPL's Bye-Laws which provide for automatic cessation of his directorship.
- [20] On the 15th December 2015, a Notice of Change of Directors was filed by EPL whereby notice was given that Wayne Estrada, Gloria Rollingson and Don Isaac were appointed Directors of EPL on the 1st December 2015 and the Claimant and Alana Blackman, Marlene Attzs, Marcus Solomon, Steve Lezama and David Superville ceased to hold office as Directors of the 1st December 2015.
- [21] The Board of the Co-operative received letters of legal advice from Lex Caribbean dated the 26th October 2015 and the 11th November 2015 before issuing the Shareholder's Requisition dated the 19th November 2015 and the correspondence entitled "Revocation of Appointment of EPL Directors" dated the 1st December 2015.

[22] On the 2nd February 2016, the Claimant was removed from the Housing Committee and Delinquency Committee of the Co-operative.

THE CLAIM

[23] By Amended Fixed Date Claim the Claimant sought the following Reliefs:

- i. A Declaration that the Claimant was unlawfully dismissed and/or unlawfully removed from the Executive Committee and two Sub-Committees of the First Defendant;
- ii. A Declaration that the decision to remove and/or the removal of the Claimant as a director of the Second Defendant was exercised in a manner that was oppressive and/or unfairly prejudicial to and/or unfairly disregarded the interests of the Claimant as a director of EPL Properties Limited and a consequential declaration that the Claimant's removal as Vice Chairman/Director and accordingly Three Sub-Committees of the Second Defendant was wrongful and hence void;
- iii. Rectification of the Company's records reinstating the Claimant as Director of the Second Defendant;
- iv. Damages for wrongful removal of the Claimant from the Executive Committee and two Sub-Committees of the First Defendant and/or an Order for compensation and/or damages for unlawful and/or wrongful removal as a Vice Chairman/Director and as a Member of three Sub-Committees of the Second Defendant pursuant to Section 242 of the **Companies Act**;
- v. Interest;
- vi. Costs.

[24] The Claimant pleaded the following facts in support of his case:

- i. In or about March 2000, the Claimant first became a Director at the Co-operative.

- ii. On the 21st November 2002, the Second Defendant, EPL, was duly incorporated as a limited liability company. At all material times, the Co-operative was the sole shareholder of the Second Defendant.
- iii. On or around the 24th April 2014, the Claimant was made a Director of the Second Defendant and his status as Director and removal from such position is governed by the Bye Laws of the Second Defendant. According to the Bye-Laws of the Second Defendant:
 - a. Unless his tenure is sooner determined, a director shall hold office from the date on which he is elected or appointed until the close of the annual meeting of the shareholders next following but he shall be eligible for re-election if qualified (Bye-Law 4.4);
 - b. A director shall cease to be a director (a) if he becomes bankrupt or compounds with his creditors or is declared insolvent; (b) if he is found to be mentally ill; or (c) if he dies or by notice in writing to the Company he resigns his office and any such resignation shall be effective at the time it is sent to the Company or at the time specified in the notice, whichever is later (Bye Law 4.4.2);
 - c. The Shareholders of the Company may, by ordinary resolution passed at a special meeting of the shareholders, remove any director from office and a vacancy created by the removal of a director may be filled at the meeting of the shareholders at which the director is removed (Bye Law 4.4.3) (the procedure for the calling of a Special meeting of shareholders is governed by Bye Law 12);
- iv. In or about April 2015, the Claimant was appointed to the Executive Committee of the Co-operative. As an Executive Director the Claimant was involved in the day-to-day running of the Co-operative; as such, he was an employee of the company. The duties of the Executive Director also included being a signatory of the Co-operative. The Claimant received a monthly salary as an Executive Director, similar to that of an employee.

- v. At a meeting of the Board of the Co-operative held on or about the 9th November 2015, with the exception of Ms. Janelle Benjamin, Corporate Secretary, the Directors of the Subsidiary Company who comprised of the Chairman Alana Blackman, the Claimant as Vice Chairman, Directors Marlene Attzs, Steve Lezama, Mr. Solomon, Mr. Sylvester were all verbally terminated, unlawfully, after being given an ultimatum to resign as Directors or be removed within two days. These unlawful actions were taken by the First Defendant in breach of the provisions of the Bye-Laws of the Second Defendant and without the Claimant having been given the requisite notice and opportunity to respond.
- vi. The Claimant was a Director of the Second Defendant from in or around April 2014 until the 9th November 2015 when he was illegally removed from the Board of Directors by letter dated the 1st December 2015 received from the First Defendant. The Claimant was at the material time the Vice Chairman of the Board of the Second Defendant and a Member of three Sub-Committees of the Second Defendant. The removal of the Claimant as Director of the Second Defendant and accordingly as Vice Chairman and Member of the Sub-Committees was illegal, void, and contrary to natural justice in that:
 - a. The Claimant was not provided with the requisite notice and opportunity to make representations in writings as to why he should be removed as a Director;
 - b. The Claimant does not fall under any of the provisions of Bye-Law 4.4.2 for automatic cessation of his directorship; and
 - c. The Claimant's Directorship has not expired in accordance with Bye Law 4.4;
 - d. The Claimant's removal as Director was not done validly in accordance with 4.4.3 of the Bye-Laws;
 - e. The Claimant received notice of a special meeting of shareholders for the purpose of removing him from office, as was his entitlement. The said notice was revoked however and the

Claimant's Directorship was terminated without the Claimant being given a proper opportunity to be heard. Accordingly, there could have been and was no valid special meeting of shareholders in respect of the Claimant's removal as a Director of the Second Defendant;

- f. And/or alternatively and without prejudice to the above, the removal of the Claimant as Director was done contrary to the provisions of the **Companies Act**³ in particular Sections 74,75 and 76;
- g. Furthermore, the acts of the Co-operative and Second Defendant in removing the Claimant were oppressive and unfairly prejudicial to and/or unfairly disregarded the rights of the Claimant as Director in accordance with Section 242 of the **Companies Act**.
- vii. At the time that the CEO and Facilities Manager were terminated, the Claimant voted against their termination as he felt it was a breach of Natural Justice and a failure on the part of the Board of the Subsidiary Company to exercise due process.
- viii. In or about the month of May 2014, the Co-operative purchased a property known as the Las Viviendas Development from one Mr. Lambert; however, the proper protocols for the purchase of land were not followed. In particular, the sum of nine million dollars (\$9,000,000.00) was paid to the vendor, Mr. Lambert, without proper searches conducted, and without the usual ninety day process for completion. The purchase price was paid by the First Defendant without the permission of the Commissioner of Co-operatives; strangely, the sum of five million dollars (\$5,000,000.00) was paid for the acquisition of the land and the sum of four million dollars (\$4,000,000.00) was paid for the drawings for the development. The sum paid for the drawings was grossly inflated and the entire transaction was questionable and unlawful.

³ Chapter 81:01

- ix. Prior to this purchase, the Claimant pleaded with the Board of Directors of the Co-operative to reconsider its decision to purchase the said property, but to no avail.
- x. The CEO/General Manager of the Co-operative sought and obtained legal advice from the Office of the Commissioner of Co-operatives relative to the removal of the Claimant as an Executive Director, and they were informed that they could not take direct disciplinary action against the Claimant, but they must act in accordance with the Bye-Laws.
- xi. The said opinion also dealt with the issue of whether there was a conflict of interest on the Claimant's part in relation to the purchase of a parcel of land in Sangre Grande that the Co-operative had decided to purchase from the vendor, who was related to the Claimant. At all material times, the Claimant recused himself from the meetings dealing with this decision and declared the conflict of interest *ab initio*. Furthermore, the negotiations for this property began after Las Viviendas was already purchased.

THE DEFENCE

[25] The Defendant relied on the following facts in response to the Statement of Case:

- i. That the Claimant's status as a Director of the Company was governed by the Bye-Laws of EPL, the **Companies Act 1995**, by the Unanimous Shareholders Agreement and by the Memorandum of Understanding (hereafter "MOU").
- ii. Since the said MOU and Shareholders' Agreement were executed and entered into between the Co-operative and EPL, the appointment and removal and tenure of the Board of Directors of the Company are governed by the provisions to the MOU, the Bye Laws of the Company, the provisions of the **Companies Act 1995**, to the extent that the MOU and Shareholders Agreement were

capable were capable of overriding the Bye-Laws and the **Companies Act 1995**.

- iii. The Claimant's status as a Director of EPL and his removal from such a position are affected by the provisions of the said MOU under the rubric "Board Compositions".
- iv. The Executive Committee is a committee of the Board of Directors of EPL. The Executive Committee is created pursuant to Section 19(1) of the Bye-Laws of the Co-operative which provide that: "*The Board shall at its first meeting to be held within twenty-one days from the date of the Annual General Meeting, elect from its members the Executive Committee of the Society.*"
- v. Section 19(2) of the Bye-Laws of the Co-operative provides that the Executive Committee is comprised of a President, a Vice President, an Assistant Secretary and two Committee Members. At all material times the Claimant was not the President, nor the Vice President nor the Assistant Secretary of the Co-operative, but was one of the two Committee Members of the Executive Committee or as referred to by the Claimant as an "Executive Director".
- vi. As an Executive Director or Member of the Executive Committee, the Claimant was not involved in the day to day management of the Co-operative.
- vii. The Claimant was not involved in the day to day running of the Co-operative, because the day to day running of the Co-operative is not one of the functions of the Board of Directors set out at Clause 18(g) of the Bye-Laws or of the members of the Executive Committee who are not the President, Vice President or Assistant Secretary.
- viii. In so far as the Co-operative is concerned, Bye-Law 17(i) provides *inter alia* that "[A] board or committee member shall cease to hold office if he...." *Holds any place or profit under the Society provided that the granting to a member of an honorarium approved by the*

Board or by the General Meeting shall be deemed to disqualify such member from a seat on the Board or Committee as the case may be.”

- ix. At all material times the Claimant received a stipend or honorarium intended to be used to set off the costs of attending meetings of the board and or the Executive Committee and is not a salary or other remuneration for the provision of services as an employee or contractor for services.
- x. In so far as EPL is concerned, the Claimant is a Director and office holder thereof but there is no contract or service agreement relating to his appointment that entitled him to receive a salary for his services, or any other form of remuneration, save and except that he received a voluntary payment (honorarium) to offset his expenses for attending the meetings of the Board of Directors of the Company. The Claimant is not and never was an Executive Director of the Company.
- xi. The Claimant did not receive a monthly salary as a member of the Executive Committee of the Co-operative or as an Executive Director, as the Claimant describes himself.
- xii. By the MOU, the Co-operative is obliged to appoint four members of the Board of Directors from among the sitting Directors of the Co-operative while the remaining three Directors called Independent Directors are appointed through an approved nomination process.
- xiii. The tenure of the four Co-operative Directors of EPL coincides with their tenure as Committees of the Co-operative which the Co-operative is free to realign or reconstitute at any time until a new board of the Co-operative is elected and qualifies. The fact that the Claimant was appointed to and removed from the Board of the EPL by the First Defendant, pursuant to the Shareholders' Agreement, does not entitle him to reasonable Notice of any

Shareholders' meeting called for the purpose of removing him from office, nor was he entitled to make submissions in writing giving reasons for his objection to any such proposed actions.

- xiv. As member of a Committee of the Board and not in the receipt of any additional remuneration or compensation, or involved in the day to day management of the Co-operative, the Claimant could be removed as a member of the Executive Committee at any time and maintain his position as Director of the Co-operative.
- xv. The meeting of the Board of the Co-operative held on the 9th November 2015 was lawfully convened and the Claimant as a member of the Board of the Co-operative was at all material times aware of the purposes of the meeting of the Board of the Co-operative having been provided with a copy of the agenda and or notice.
- xvi. The Co-operative is bound to give effect to the terms of the MOU and the Shareholders Agreement that was entered into with EPL. The Board of the Co-operative is the organ of the Co-operative that is responsible for putting into effect the terms of the MOU and the Shareholders Agreement.
- xvii. The Claimant as a member of the Board of the Co-operative is bound to give his best efforts and owes a fiduciary duty to the Co-operative to co-operate with the board to give effect to the terms of the MOU and Shareholders Agreement that was entered into with the Company.
- xviii. The meeting of the 9th November 2015 was a duly constituted meeting of the Board of the Co-operative for which proper notice was given to the Claimant and at which a quorum was present. At this meeting the Board of the Co-operative by majority vote effected a reconstitution of its Committee of Members to serve as the four Co-operative Directors on the Board of EPL in accordance with the MOU and Shareholders Agreement.

- xix. The meeting of the Board of the Co-operative was properly conducted in accordance with its Bye-Laws and was also attended by members of the office of the Commissioner for Co-operative Development.
- xx. Alternatively, that the meeting of November 9th 2015, was a duly called meeting of the Shareholders of EPL; this shareholder function is exercisable by the Board of Directors of the Co-operative. Ordinary resolutions of the shareholders of EPL were adopted to remove the Claimant and others from the Board of Directors of EPL, in accordance with Bye-Law 2.2.3 of the Bye-Laws of Company. The meeting of November 9th 2015 was a meeting of the shareholders of EPL.
- xxi. The said meeting of the Board of the Co-operative was convened specifically as shareholders of EPL and not as a regular meeting of the Board of the Co-operative.
- xxii. The agenda or purpose of the meeting of the Board of the Co-operative was dedicated exclusively to the affairs of EPL.
- xxiii. The Claimant as a member of the Board of the Co-operative was at all material times aware of the purposes of the meeting of the Board of the Co-operative having been provided with a copy of the agenda and/or notice of agenda.
- xxiv. The Claimant was provided with adequate notice of the meeting of the Board of the Co-operative in accordance with the provisions of the **Companies Act** which governs the operation of EPL and not the Co-operative.

THE REPLY

[26] By his Reply filed on the 19th December 2017, the Claimant, in answer to the Defendant's averments, alleged as follows:

- i. that neither the alleged Shareholders Agreement dated the 1st June 2003 nor the alleged MOU dated the 20th October 2009:
 - a. complies with S.137(4) of the **Companies Act**⁴ which provides that a Unanimous Shareholders' Agreement be filed with the Registrar within fifteen days of execution;
 - b. by their terms and conditions, fall within the definition of a Unanimous Shareholders' Agreement as provided for by the **Companies Act**;
 - c. by their terms and conditions permits the Co-operative to avoid the requirements and procedure of the **Companies Act** and the Bye-Laws of the Company relative to the convening of Shareholders' Meetings or the removal of the Directors of the Company;
 - d. Are capable of overriding the Bye-Laws and the **Companies Act**.
- ii. that he was taxed on all payments made to him by the Defendants;
- iii. that all Directors appointed by the Co-operative to the Board of the Company are entitled to reasonable notice of any shareholders' meeting called for the purpose of his removal and to submit a written statement;
- iv. that he was not provided with reasonable notice of the meeting of the Board of the Co-operative and further, that the Agenda did not disclose that the meeting had been called for the purpose of his removal;
- v. that the attendance at the meeting of the Members of the Office of the Commissioner for the Co-operative Development supports the Claimant's assertion that the said meeting was a meeting of the Board of the First Defendant and not a shareholder's meeting of the Company.

⁴ Ch. 81:01

EVIDENCE FOR THE CLAIMANT

Marcus Solomon

- [27] Mr. Solomon testified that he was appointed a Director of the Second Defendant and together with the Claimant and others comprised the Board of EPL Properties Ltd on or about April 30th 2015. At a Board Meeting on the 28th October 2015, he raised a motion to terminate the services of the Chief Operating Officer (COO) and Facilities Manager, which was carried by the majority of the Board; the Claimant however objected on the ground that these officers had not been given sufficient opportunity to respond to the allegations.
- [28] Alana Blackman and Janelle Benjamin, who were members of the Board of both Defendants, informed him that the Board of the Credit Union planned to meet in order to discuss the decision taken by the Company's Board on the 28th October aforesaid.
- [29] On the 19th November 2015, he received a shareholder's requisition from the Credit Union requesting that EPL hold a Special General Meeting of the shareholder within twenty one days for the removal of several Directors of the Second Defendant including himself and appointing new board members.
- [30] On the 2nd December 2015, he and the other members of the Board of the Second Defendant were removed with the exception of Janelle Benjamin. The Special General meeting requested by the First Defendant was never held. Mr. Solomon then submitted his resignation from the Board on 3rd December 2015 after receiving a legal opinion from Lex Caribbean.

Steve Lezama

- [31] Mr. Lezama, another former Director of EPL Limited, testified that during his tenure on the Board of the Second Defendant, he was also a member of the Housing Committee of the First Defendant. He asserted that he was instructed to review the purchase of the Las Viviendas project which involved the purchase of land by the Second Defendant. He completed the review and submitted same at a presentation to the Board of the First Defendant on 27th June 2015. In

that report he outlined that there were several issues with the project including a grossly inflated purchase price for the parcel of land. Mr. Lezama claimed to be unaware of the fact that his report triggered an internal investigation of the Second Defendant by the First Defendant. Mr. Lezama also concluded that the Facilities Manager and the COO were not performing their jobs adequately and that the procurement system in place at the Second Defendant was poor.

- [32] On the 28th October 2015 when the Board of the Second Defendant voted to terminate the COO and Facilities Manager, he too recalled that the Claimant objected on the ground that the officers had not been given due process. This witness asserted that after receipt of the Shareholder's requisition from the First Defendant, the board of the Second Defendant met on the 9th November 2015 and agreed to set a date for the Special Meeting of the shareholder and to obtain legal advice.
- [33] On the 1st December 2015, he was served with notice of his termination as a Director of the Second Defendant by the First Defendant at a meeting of the latter's board on 9th November 2015. He later discovered that all the other Directors of EPL had been terminated except Janelle Benjamin.
- [34] In cross-examination, Mr. Lezama stated that he was not familiar with the Bye-Laws of the Credit Union or the provisions of the **Credit Union Act**. He acknowledged that he had been removed from the Housing Committee by a letter from an officer of the Credit Union and was satisfied that he could be removed by the person/entity who had appointed him.

Harvey Borris

- [35] Mr. Borris' evidence in chief mirrored the facts pleaded in his Statement of Case.
- [36] In cross-examination he acknowledged that at the time of the events complained of, he was a Director of the Credit Union and this directorship ended by effluxion of time. He agreed that the Board has the authority to call as many meetings as it deems necessary.

- [37] He asserted that in his role as Director of the First Defendant he was not also an employee of the Credit Union; Mr. Borris later qualified this answer by stating that he was an elected employee of the Credit Union in receipt of a salary. He admitted that when he was elected to the Board in 2013 he did not have a contract of employment with the First Defendant nor had he been allocated an office at its premises - all that his election entitled him to receive was a seat in the boardroom. He explained that as a Board Member his responsibility included carrying out his fiduciary duty to the Credit Union by ensuring that it was properly managed and attending to any other tasks as the Board saw fit.
- [38] Mr. Borris testified further that the Viviendas land was purchased by the First Defendant despite his disapproval of the purchase. With respect to the Special Meeting of the Credit Union called by the Co-operative on the 9th November 2015, the Claimant stated that he was present when the meeting had been called by a majority of the Co-operative's Board of which he was a member. He was also a Director of the Second Defendant having been recommended to that Board by the First Defendant's Board at one of its meetings. He and the other Directors of the Second Defendant were called Shareholder Directors.
- [39] With respect to the Special Meeting of the First Defendant's Board, he received an agenda but did not understand that decisions would be taken; he believed that there was to have been a discussion. He doubted the validity of this meeting where he was removed as a Director of the Second Defendant but clarified that he remained a Director of the First Defendant until the expiry of his term. The Claimant acknowledged that representatives of the Commissioner of Cooperatives office were present at the meeting and they certified that the meeting was properly held. In answer to Counsel, Mr. Borris stated that he was aware that a Shareholder's Agreement existed between the First and Second Defendants.

EVIDENCE FOR THE DEFENDANT

- [40] The Defendant's sole witness, Wayne Estrada filed a witness statement and was cross examined.
- [41] He testified that⁵ the Executive Directors of the Board of the ECU are involved in the day-to-day governance of the Co-operative, and are required to sign cheques and deeds and instruments of charge and do all other functions as may be required by the **Act** or the Regulations or the Bye-Laws of the ECU. The day-to-day functions of the ECU are the responsibility of the General Manager and the paid employees of the ECU. These functions are set out at Bye-Law 20(e). Generally, the Executive Committee meets once per month. The functions of the Executive Committee are set out at Bye-Law 20(a), (b) and (d).
- [42] The First and Second Defendants executed a Shareholders Agreement dated 12th June 2003 and a MOU dated 20th day of October 2009.
- [43] The Shareholders Agreement provides certain limits on the exercise of the powers of the Board of Directors of EPL, whereas, the MOU provides that its purpose is to "*govern the relationship and understanding between two business entities*". The MOU clearly states that its provisions complement the Shareholder Agreement.
- [44] None of the members of the Board receive a salary. The Board, including Executive Directors only receive a monthly stipend or honorarium as determined by the Board pursuant to Bye Law 17(i)(iv), which provides that a person is disqualified and shall cease to hold office as a director if he:
- "...[H]olds any place or profit under the ECU provided that the granting to a member of an honorarium approved by the Board or by the General Meeting shall not be deemed to disqualify such member from a seat on the Board or Committee as the case may be."*
- [45] During Mr. Harvey Borris' tenure since his appointment as a member of the Board of the Co-operative, there have been several points and issues of contention faced by the Co-operative's Board which contributed and influenced

⁵ Para 7 of the witness statement of Wayne Estrada filed on December 14 2018

decisions made concerning the removal of specific individuals as Board Members of the Co-operative's subsidiary, EPL.

- [46] Mr. Estrada conceded that there is no such event as a special meeting since all Board meetings are ordinary meetings save for statutory meetings called once a month for which no notice need be given. All other meetings of the Board are non statutory for which 5 days' notice must be given⁶. The Bye-Laws 18(e) do refer "*special meetings*" of the Board but these are meetings summoned by the President at the request in writing of the Commissioner of Co-operatives at which "*any matter touching the business of the ECU*" may be discussed.
- [47] The Board of the ECU is the organ through which the ECU as shareholder of EPL acts. The Board of the Co-operative was notified of the reason for the meeting and deliberated upon the agenda of its meeting and passed resolutions that it saw fit in the interest of EPL. Among the Agenda items for the meeting is the one at Paragraph 11 of the pre-circulated Agenda of the Board⁷ which states "[T]o consider any changes to the Board of Directors of EPL Properties Ltd. in the interest of the continued viable and harmonious operations of the EPL."
- [48] A meeting of the Board of the ECU was summoned on the 9th November 2015, which meeting was attended by three representatives of the Commissioner's Office. At the said meeting, the Board of the ECU resolved by a majority vote of six in favour and two against and one abstaining, to replace all but one of the Directors of EPL. During this meeting, Mr. Borris and the President recused themselves from the meeting.
- [49] The Board convened on 18th November 2015, and was attended by three representatives of the Commissioner's Office. The Board, after giving due consideration to the matters put before it and after giving Ms. Blackman and Mr. Borris an opportunity to state their side of the story, upon a motion, duly seconded by majority of eight to one with one abstention, resolved to remove Ms. Blackman from the post of President of the ECU, and by a vote of eight for and two against, resolved to remove Mr. Borris as an Executive Director of the ECU.

⁶ Para 21 of the witness statement

⁷ Item No. 64 of the Agreed Bundle

- [50] The Board of the ECU has the inherent power to reconstitute its Executive and the decision to remove Mr. Borris as an Executive Director was and is therefore not illegal. There is no Bye-Law that restricts the Board from removing any member of the Executive Committee. Executive Committee Members serve at the pleasure of the Board.
- [51] In cross examination, this witness stated that he was not aware that that the Claimant's duties included signing cheques on behalf of the First Defendant even though this evidence contradicted his evidence in chief⁸. He did not agree that the Claimant was involved in the day to day operation of the First Defendant.
- [52] Mr. Estrada acknowledged that the Claimant and the then President of the Board of the Co-operative raised concerns in writing about the purchase of the Viviendas estate but the Board of the First Defendant still approved its purchase. He however did not agree that there was cause for concern about its acquisition by the First Defendant despite Mr. Lezama's Report. Mr. Estrada denied that the Claimant was attacked because of his opposition to the Vivendas purchase. He and the Board were of the opinion that the Claimant's opposition to this project was as a result of his interest in promoting the purchase of his brother's parcel of land which the Credit Union bought and later revoked said purchase. Interestingly, the then President's opposition to the purchase, as well as Mr. Lezama's, were not considered personal.
- [53] Mr. Estrada admitted that he moved the motion to remove the Claimant and other Directors from the Board of the Second Defendant - all of whom had objected to the purchase of the Viviendas lands. This witness stated that he considered that Item 11 of the Notice of the meeting of 9th November 2015 was sufficient to put the Directors of the Second Defendant on Notice that they could be removed as Directors of the Second Defendant.
- [54] He admitted receiving advice from attorneys as well as the Commissioner of Co-operatives concerning the removal of the Directors aforesaid, but alleged that he did not recall being advised against their removal without notice. He denied that

⁸ Para 7 of his witness statement

the First Defendant failed to follow their attorneys' advice which it had sought, and removed the Claimant from the Board without notice/due process.

AGREED ISSUES

- [55]
- i. Whether the Claimant in his capacity as an Executive Director of the Executive Committee of the Co-operative was involved in the day-to-day management of the Co-operative and was an employee of the Co-operative?
 - ii. Whether the Claimant was in receipt of a salary as an employee and member of the Executive Committee of the Co-operative?
 - iii. Whether the removal of the Claimant from the Executive Committee at the meeting of the co-operative held on the 18th November 2015 and/or subsequent removal of the Claimant from the sub-committees on the Board of the Co-operatives was lawful?
 - iv. Whether the Shareholders Agreement dated 1st June 2003 [12th June 2003] and the MOU dated 20th October 2009 together or separately comprise a Unanimous Shareholders' Agreement pursuant to Section 137 of the **Companies Act, Chapter 81:01**, or at all?
 - v. If so, whether the Claimant was removed as a Director of the Company in accordance with the Shareholders Agreement and/or the MOU?
 - vi. Whether the Claimant was removed as a Director of the Company in contravention of the Bye-Laws of the Company and the **Companies Act Chapter 81:01**?
 - vii. Whether the Claimant as a Director of the Company, was entitled to be given reasons for his proposed removal, sufficient opportunity to be heard thereon and to oppose his proposed removal and a reasonable opportunity to respond to any charges or allegations against him?
 - viii. Whether the Claimant as a Director of the Company was given reasons for his proposed removal, sufficient opportunity to be heard thereon and to oppose his proposed removal and a reasonable opportunity to respond to any charges or allegations against him?

- ix. Whether the Claimant was entitled to and/or given the opportunity to submit a written statement to the Company for circulation to the Shareholder, that is the Co-operative, prior to his termination as a Director of the Company?
- x. Whether the Claimant as a Director of the Company received notice or reasonable notice was given to the Claimant of a shareholder meeting called for the purpose of removing him from the office?
- xi. Whether the meeting of the Board of the Co-operative held on the 9th November 2015 was lawfully convened and constituted as a Shareholder's meeting?
- xii. Whether the removal of the Claimant as a Director of the Company at the meeting of the Board of the Co-operative was lawful?

UNAGREED ISSUE

- [56] i. Whether the Claimant was removed as a Director of the Company and as an Executive Director of the Executive Committee of the Cooperative and as a Member of the Housing Committee and Delinquency Committee and as a member of three Sub-Committees of the board of the Company as a consequence of his opposition to the Las Viviendas property purchase and proposed development?"

ANALYSIS OF ISSUES (i) and (ii)

- [57] In the **Secretary of State for Trade and Industry v Peter Bottrill**⁹, Lord Woolf MR (as he then was) stated in relation to the test for considering whether a director is an employee or not:

"We recognise the attractions of having in relation to the ERA a simple and clear test which will determine whether a shareholder or a director is an employee for the purposes of the Act or not. However, the Act does not provide such a test and it is far from obvious what Parliament would have

⁹ [1999] EWCA Civ 781

intended the test to be. We do not find any justification for departing from the well-established position in the law of employment generally. That is whether or not an employer or employee relationship exists can only be decided by having regard to all the relevant facts. If an individual has a controlling shareholding that is certainly a fact which is likely to be significant in all situations and in some cases it may prove to be decisive. However, it is only one of the factors which are relevant and certainly is not to be taken as determinative without considering all the relevant circumstances”

[58] It is important to note on this point that Estrada, under cross examination had no quarrel with the assertion that (i) Executive Committee members was involved in the day to day governance of the First Defendant¹⁰; (ii) members of the Executive Committee are required to sign deeds and instruments of charge; and (iii) Members of the Executive Committee are required to do all other functions as are required by the **Act** or regulations or Bye-Laws of ECU¹¹.

[59] In determining these issues I took into account the following facts:

- a. The Claimant, as a Member of the Executive, was a signatory of the First Defendant and involved in the day to day governance of the Co-operative;
- b. Mr. Borris was paid separate sums for his tenure as Executive Director of the First Defendant and memberships of the Housing and Delinquency Committees;
- c. He was taxed on the above payments which were not gratuitous;
- d. That he was a member of the Board of Directors from whose members a Nominating Committee had been formed who had appointed him as an Executive Director as a result of his appointments to two Committees of the Board. It is noted that the Manager of the Credit Union is an ex officio member of the Executive Committee and the Secretary of the Co-operative, albeit a paid employee of the Credit Union;

¹⁰ Page 104 of the Transcript

¹¹ Page 106 of the Transcript

[60] Significantly, Bye-Law 17(i) of the Co-operatives Bye-Laws recognizes that the grant of an honorarium to a Board Member does not exempt him/her from holding office; this rule validates such payments to Directors who stand in a fiduciary relationship to the Co-operative and who are otherwise debarred from entering into a contract for profit with the company. In contrast, the payment of salaries and other emoluments will amount to a breach of such fiduciary duty and Bye-Law 17(i).

[61] It is important to note that Section 2 of the **Act** defines the “board” of a co-operative as meaning the “*board of management or other directing body to whom the management of the affairs of a society is entrusted*” and an “*officer*” of a co-operative as including “*the Chairman or President, secretary, treasurer, member of the board or other person empowered under the regulations or under the bye-laws of a society to give directions with regard to the business of that society*”.

[62] The Credit Union is composed of a membership from which a board of governors or directors is elected. The Board of Directors must be drawn from the membership of the Credit Union and the Credit Union cannot go outside of its membership to attract candidates for governance¹².

[63] According to Section 18(g) of the Bye-Laws of the Credit Union the powers and duties of the Board are “to be responsible for the overall management of the affairs of the Society” and in particular:

- i. to decide upon applications for membership and the suspension of members;
- ii. to appoint the employees of the Society and determine their remuneration;
- iii. to decide on a plan of operation together with a budget before the end of each financial year and to ensure that the plan and budget are followed or revised as and when necessary;

¹² This is in contrast to a limited liability company, such as the Second Defendant, that is empowered by law to go outside of its members/owners/shareholders to attract its governing directorate.

- iv. to determine the rate of interest on savings, deposits and loans to members and to recommend dividends and patronage refunds consistent with the **Act** and Regulations;
- v. to determine the maximum amount which may be lent to a member, with or without security;
- vi. to have charge of investments and all property of the Society;
- vii. to designate the Bank or Banks in which the Societies funds shall be deposited;
- viii. to elect the Executive committee;
- ix. to appoint the Education and Nominating committees in accordance with these bye-laws;
- x. to review the Bye-Laws periodically and to propose amendments to the General Meetings;
- xi. to formulate policies for the Society's operations;
- xii. to take all measures to provide for the conduct of the affairs of the Society for which no provision is specifically made in these Bye-Laws.

[64] Section 19 of the Bye-Laws of the Co-operative under the rubric "Executive Committee" provides at subsections (a), (b) and (c) that:

- (a) The Board shall at its first meeting to be held within twenty-one (21) days of the date of the Annual General Meeting, elect from the members of the Executive Committee of the Society.
- (b) The Executive Committee shall comprise a President, a Vice President, an Assistant Secretary and two (2) Committee Members.
- (c) The General Manager shall be an ex-officio member of the Executive Committee but shall have no vote.

[65] The Board formulates the policy of the Credit Union and that the Manager or Management and employees of the Credit Union are charged with operationalizing the policy of the Board. The duties and the responsibilities to

be carried out by employees are duties such as those duties and responsibilities set out under the rubric of the General Manager at Bye-Law 20(e) of the Co-operative which states among his functions that:

- i. He shall have charge of the cash, securities, books of account, registers and other records of the Society and these shall be at all times open to inspection by the Board of Directors and the Supervisory Committee.
- ii. He shall prepare for the consideration of the Board and Committee, such budgets and financial statements are required.
- iii. He shall ensure that all cheques and other documents of the Society are signed in the manner prescribed by the Board and consistent with the Society's policies.
- iv. He shall ensure the safekeeping of the Society's cash resources in accordance with the policy.
- v. Within fourteen days after the close of each month's business, he shall prepare the Financial Statements as at such date which shall be attested by at least one member of the Supervisory Committee and shall be posted in a conspicuous place in the offices of the Society where it shall remain until replaced by the succeeding month's statement.

[66] The view that a Director is not an employee is supported by Section 20A of the **Central Bank Act of Trinidad and Tobago**¹³, which provides that “*employee*” *does not include a director.*”

[67] In the case of **Brooks v Secretary of State for Trade and Industry**, Morrison J (P) highlighted some of the factors a tribunal should consider in determining whether a director is an employee. He stated that:

“...generally speaking, a director of a company is the holder of an office and is not in employment (See Ms. Millan v Guest (1942) AC 562). Evidence is required to establish that a director is employed by a company. Any descriptive term such as managing director or technical director may provide the first indication of employment. Obviously, the position of a

¹³ Chapter 79:02 of the Laws of Trinidad and Tobago at Section 20A

properly appointed managing director or the so-called working director who draws a weekly wage is one which is more likely to present an arguable case for a contract of employment. In this context the most pertinent question is whether or not there was an agreement to employ a person as managing director which should be either an express contract or minutes at a board meeting or noted by a memorandum, in writing, this is not conclusive. It may then have to be ascertained whether remuneration is by way of salary or by way of director's fees. If the latter, it points away from employment. Then it might be appropriate to consider whether there was remuneration fixed in advance or merely on an ad hoc basis. If the latter, this too points away from employment. In some cases, remuneration may be identified as gratuitous and not by way of entitlement. Again, this would point away from employment. Finally, there is the important consideration of the functions actually performed by the director. Was he merely acting in a directorial capacity or was he under the control of the board of directors?"

[68] **Black's Law Dictionary**¹⁴ defines an honorarium¹⁵ as “(i) a payment of money or anything else of value made to a person for services rendered for which fees cannot legally be or are not traditionally paid; and (ii) a voluntary reward for which no remuneration could be collected by law; a voluntary donation in consideration for services that admit no compensation in money. This is the reason that the Regulations and the Bye-Laws specifically mention that the receipt of the honorarium notwithstanding that it is a voluntary reward for services provided by the Board and Statutory Committees does not disqualify the receiver thereof from holding office. Additionally, the **Income Tax Act of Trinidad and Tobago**¹⁶ spells out the different types of income that are subject to taxation or exemption from taxes as “*emolument income*” and defines the term as meaning “*all salary, wages, overtime, bonus, remuneration, perquisites including the value of board and lodging, stipend, commission or other amounts of services, director's fees, retiring allowances or pension, arising or accruing in,*

¹⁴ Fourth Pocket Edition, Bryan A. Garner

¹⁵ Ibid p. 359

¹⁶ Chapter 75:01 at Section 8.03

or derived from or received in Trinidad and Tobago, but does not include any salary or share of profits arising from a trade, business, profession or vocation carried on by a person either by himself or in partnership with any other person;”

[69] I do not accept that the payment of an honorarium to the Claimant by the First Defendant would entitle him to be described as an employee. As a Director, he was engaged in the governance of the Co-operative; it is normal in such a case to be paid a stipend for such service. The fact that these payments are taxable in his hand cannot alter the character of such payments. As he and the other Executive Directors were advised by the Co-operative ¹⁷, this payment was subject to be taxed in accordance with the provisions of the **Income Tax Act**. Regard is also had to the actual sums paid to the Executive Directors for their service - \$2700.00 per and \$650.00 each per month from which twenty five percent (25%) was to be deducted if they were employed for his tenure on the Housing and Delinquency Committees. These sums are not commensurate with the salary range of an employee engaged in executive office of a large financial institution such as the Co-operative. I also take into account the fact that the Co-operative has consistently described these payments as stipends in its correspondence to the Claimant; while this by itself is not determinative of the issue, it is demonstrative of the fact the First Defendant was making it clear that these payments were not the remuneration paid to an employee but an honorarium paid to its Directors for service.

ANALYSIS OF ISSUE (iii)

[70] The Defendant has asserted, quite correctly in my view, that the Board may reconstitute its committees and remove an officer appointed by it before the expiry of that officer’s term. The issue that falls to be determined, on the facts of this case is whether the procedure adopted in the removal of the claimant was fair. It is to be noted that there is no provision for the removal of directors or officers of the Co-operative in the **Act**, its Regulations or the Co-operatives Bye-Laws.

¹⁷ Page 161 of the Agreed Bundle

[71] As outlined in the Agreed Facts filed herein, on a date after the 12th November 2015, the Claimant was notified of a proposed Special Board Meeting of the Co-operative to be held on the 18th November 2015. The Agenda for the meeting included items such as whether the Board had lost trust and confidence in the Presidency of Alana Blackman, to consider the appointment of a new President, to consider the replacement of the Shareholder representatives to the EPL, Mr. Darius Figuera, and the appointment of a new Shareholder Representative. The meeting proceeded on the 18th of November 2015. At this Special Board Meeting, Ms. Alana Blackman was removed as President of the Executive Committee and Mr. Wayne Estrada was appointed as the President. The Claimant was removed as a member of the Executive Committee of the Board of the First Defendant and Ms. Gloria Rollington was appointed as a Member of the Executive Committee. The newly elected President of the Board was directed to withdraw the Notice of Special General Meeting of the First Defendant which had been issued on the instructions of Ms. Alana Blackman¹⁸. This meeting was meant to be held on the 25th of November 2015.

[72] In **Van Alstyne v Rankin and St Lawrence Corporation Ltd**¹⁹ Justice Collins opined²⁰:

“1. The right to nominate or appoint a Chairman of the Board carries with it the power of removal and whether the nomination is made by election or appointment is immaterial. The election of a Corporate officer is only a method of appointment and confers no greater or different right than if he were appointed and vice versa.

2. The appointment of the plaintiff as Chairman of the Board was for the period from the date of his election (March 22nd 1950) for the ensuing year and until his successor was elected which from a practical point of view would be until the first meeting of directors after the next succeeding annual general meeting of the shareholders of the Corporation defendant which is scheduled to be held on March 30th next. Such appointment or election did not confer any vested right in the plaintiff to hold his office

¹⁸ Paragraph 16 of the Agreed Facts , page 290 of TB 1

¹⁹ 1952 Que. S.C. 12

²⁰ Para 7

until the expiration of his term. The directors who appointed him did not in any way abandon by such appointment their power of removal at any time.

3. The proceedings before the Court did not disclose any reason for the removal and replacement of the chairman and no attempt was made by the defendants to prove that such removal was for cause. It was conceded by the attorney for the plaintiff that the directors were entitled to remove the plaintiff for cause and the Court does not believe that this proposition admits of any legal doubt. A chairman of the board, a president of a corporation or in fact any of its officers or employees all stand in the same relative position with regard to their employment by a corporation. Their employment can be terminated for cause at any time subject to whatever legal claim for damages any such party whose employment is so terminated may have against the corporation in respect of such termination and subject always of course to the terms of any special contract which may exist. The difference in rank and occupation is of no consequence in so far as the right to terminate is concerned. The fact that the plaintiff was elected or appointed directly by the directors gave him no greater right than any other employee of the corporation defendant except that he could only be dismissed by the directors themselves.

4. In the present proceedings the Court must treat the removal of the plaintiff as Chairman of the Board as being a removal without cause but that does not affect the right of the directors to remove. With or without cause the power of the directors to remove remains the same but the practical results may be different. It might give the plaintiff a good action in damages against the Corporation defendant and perhaps also against the directors for unjustified dismissal. The Corporation defendant and the directors might have to justify the dismissal before the Court to avoid the payment of damages to the plaintiff but that is a matter entirely separate and distinct from the right of the directors to dismiss the plaintiff and of no concern to this Court at the moment. The right of hiring and discharging officers and employees of the Company of any rank is clearly a right of the

directors of the Company or of those delegated by the directors for that purpose and is solely a matter of indoor management with which the Court does not usually interfere.

5. The directors of a corporation are the parties who are entrusted by the shareholders with the management of the company. The officers of a corporation are the nominees of those directors. The by-laws of the corporation defendant provide that the Chairman of the Board should be elected by the directors but it appears, in so electing the plaintiff as Chairman, the word appointed was used. The fact is that the directors had the right to nominate the officers of the corporation and whether they chose to exercise such right by election or by appointment, makes no difference for the purpose of these proceedings as the practical and legal results are the same in either event. A motion was duly passed at a meeting of directors appointing the plaintiff as Chairman of the Board and that is a usual method of election in company practice. the Court is satisfied that the plaintiff was properly elected as Chairman. The plaintiff's argument that he could not be replaced because he was elected and not appointed has no merit. The word elected and appointed are synonymous in so far as the appointment of the plaintiff was concerned and the fact that the word appointed was used in the motion bears out this contention. Under either view he was subject to removal by directors whose delegate he was."

[73] The Court, while recognizing the right of the Corporation to remove its directors even without cause, also recognized that where a corporation chose to remove without cause it may be liable in damages for unfair dismissal unless such removal can be justified. As noted earlier, no justification for the Claimant's removal had been pleaded by the First Defendant. Although the Claimant was given notice that the Board intended to review the membership of the Executive Committee to which he belonged, no specific notice was given him that his removal was being considered or the grounds for same. I therefore hold that the removal of the Claimant from the Executive Committee and two Sub Committees of the First Defendant was illegal since he:

- a. was not given any reasonable or sufficient notice of his proposed termination;
- b. was not given any outline of any charges, allegation or shortcomings which form the basis of his proposed removal; and
- c. he was not given a meaningful opportunity to respond to his proposed removal or any allegations or charges against him that formed the basis of such removal.

ANALYSIS OF ISSUES iv, v, vi, vii, viii, ix, x, xi, xii

The issues above are interconnected; I will therefore treat with them together.

Did the Shareholders Agreement and Memorandum of Understanding comprise a Unanimous Shareholders' Agreement pursuant to Section 137 of the Companies Act.

[74] Section 137 of the **Companies Act** states that:

“137. (1) An otherwise lawful written agreement among all the shareholders of a company, or among all the shareholders and a person who is not a shareholder, that restricts, in whole or in part, the powers of the directors of the company to manage the business and affairs of the company is valid.

(2) A shareholder who is a party to any unanimous shareholder agreement has all the rights, powers and duties, and incurs all the liabilities of a director of the company to which the agreement relates, to the extent that the agreement restricts the powers of the directors to manage the business and affairs of the company; and the directors are thereby relieved of their duties and liabilities to the same extent.

(3) If a person who is the beneficial owner of all the issued shares of a company makes a written declaration that restricts in whole or in part the powers of the directors to manage the business and affairs of the company, the declaration constitutes a unanimous shareholder agreement.

(4) Where any unanimous shareholder agreement is executed or terminated, written notice of that fact, together with the date of the execution or termination thereof, shall be filed with the Registrar within fifteen days after the execution or termination, and in default thereof, the Registrar shall be entitled to collect from the company a penalty of one hundred dollars for every month, or part thereof, after the fifteen days that the company fails to file the notice.”

[75] It is not disputed that in breach of Section 137(4) of the **Companies Act** notice of the Shareholders Agreement was not filed with the Registrar within fifteen days of its execution or at all. The penalty for a failure to file such Notice as provided therein is a fine of one hundred dollars for every month that the Notice remains unfiled. No other penalty is proscribed by the statute; I agree with the Defendant’s submission that if Parliament intended to invalidate a Shareholder Agreement for non registration, it would clearly state so in the **Act**. In the absence of such a provision therefore, I hold that the Shareholders Agreement is valid and enforceable as between the parties thereto²¹.

Was the Claimant legally removed from the Board of the Company?

[76] The following provisions of the purported Unanimous Shareholder Agreement are relevant:

“1) The president of the Credit Union shall be the Chairman of the Company unless otherwise determined by the Credit Union. The Board of the Company shall comprise seven (7) Directors.

2) The Credit Union shall appoint the Board of Directors of the Company 3 persons from among the sitting Directors of the Credit Union one of whom shall be the Chairman.

3) The remaining (3) Directors shall be appointed on an independent basis through an approved Nomination Process (Independent Directors).

²¹ Ming Minerals Inc. v Blagdon 1998 Carswell Nfld 54

4) Whenever the provisions of (2) above are infringed, outgoing directors of the Credit Union shall voluntarily resign from the Company. In any event, the Shareholder could exercise his rights to remove any director.”

[77] The Defendant submitted that the Unanimous Shareholder Agreement empowers the shareholder (the First Defendant) to legally remove any director of the company; further, that the Board of the First Defendant removed the Claimant from the Board of the company in accordance with the terms of said shareholder agreement thereby rendering such removal valid.

[78] However, as the parties themselves acknowledge from their submissions, the issue regarding the removal of a director of the company must also be considered in the context of the provisions of the **Companies Act** and the By-Laws of the First Defendant.

[79] Section 76 of the **Companies Act** provides:

“(1) A director of a company is entitled to receive notice of, and to attend and be heard at, every meeting of shareholders.

(2) A director—

(a) who resigns;

(b) who receives a notice or otherwise learns of a meeting of shareholders called for the purpose of removing him from office; or

(c) who receives a notice or otherwise learns of a meeting of directors or shareholders at which another person is to be appointed or elected to fill the office of director, whether because of his resignation or removal, or because his term of office has expired or is about to expire, may submit to the company a written statement giving the reasons for his resignation or the reasons why he opposes any proposed action or resolution.

(3) The company shall forthwith send a copy of the statement referred to in subsection (2) to the Registrar and to every shareholder entitled to receive notice of any meeting referred to in subsection (1), unless the statement is

included in or attached to a management proxy circular required by section 144.

(4) No company or person acting on its behalf incurs any liability by reason only of circulating a director's statement in compliance with subsection (3)."

[80] Bye Law 4.4 of the Second Defendant's Bye Laws states of directors that *"Unless his tenure is sooner determined, a director shall hold office from the date on which he is elected or appointed until the close of the annual meeting of the shareholders next following but he shall be eligible for re-election if qualified."*

[81] Bye Law 4.4.2 states that a director shall cease to be a director *"(a) if he becomes bankrupt or compounds with his creditors or is declared insolvent; (b) if he is found to be mentally ill; or if he dies or by notice in writing to the Company he resigns his office and any such resignation shall be effective at the time it is sent to the Company or at the time specified in the notice, whichever is the later."*

[82] Bye Law 4.4.3 states that *"The shareholders of the Company may, by ordinary resolution passed at a special meeting of shareholders, remove any director from office and a vacancy created by removal of a director may be filled at the meeting of the shareholders at which the director is removed."*

[83] The Defendant contends that the Shareholders Agreement is a statutorily endorsed alternative to the provisions in the Bye Laws of EPL and the **Companies Act** for the appointment and replacement of directors; relying on the **Companies Act**²² it was also contended that the Claimant could not complain about his removal from the Board of the Company since such removal was effected pursuant to the terms of the Shareholder Agreement which empowers the First Defendant to remove the Claimant even where he was not

²² Sections 99(5), and 10:

99(5) Every director and officer of a company shall comply with this Act and the Regulations, and with the articles and Bye-laws of the company, and any unanimous shareholder agreement relating to the company.

10. (1) Subject to subsection (2), if the articles or any unanimous shareholder agreement require a greater number of votes of directors or shareholders than that required by this Act to effect any action, the provisions of the articles or of the unanimous shareholder agreement shall prevail. (2) The articles shall not require a greater number of votes of shareholders to remove a director than the number specified in section 75.

allowed to participate in or speak in the special shareholder's meeting concerning his removal. The Defendant also argued that since the Claimant's removal was done pursuant to the terms of the Shareholder Agreement, the First Defendant was not required to comply with Section 76(1) of the **Companies Act** which provides that notice be given a director of a shareholder's meeting to remove him since the agreement makes no provision for reasons to be given to a director to be removed, or that he be given an opportunity to be heard before such a decision is taken. The Defendant also argued that even where the bye-laws articles of incorporation or unanimous Shareholder Agreement provides that a Director shall only be removed for reasonable cause, a Court will not interfere with the decision of a general meeting on what constituted reasonable cause²³.

- [84] The issue of the legality of the Claimant's removal as Director of EPL must be examined in light of all the circumstances of this case, including the relief sought by the Claimant under this head. The Claimant by his amended Fixed Date Claim Form sought *inter alia*:

“Damages for wrongful removal of the Claimant from the Executive Committee and two Sub Committees of the First Defendant and/or an Order for compensation and/ or damages for unlawful and/or wrongful removal as a Vice Chairman/ Director and as a Member of three Sub-Committees of the Second Defendant pursuant to Section 242 of the Companies Act.”

- [85] Section 242 (1) and (2) of the **Companies Act** states:

“(1) A complainant may apply to the Court for an order under this section.

(2) If, upon an application under subsection (1), the Court is satisfied that in respect of a company or any of its affiliates— (a) any act or omission of the company or any of its affiliates effects a result; (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or (c) the powers of the directors of the company or any of its affiliates are or have been

²³ Para 99 Submissions of Defendant

exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of.”

[86] The governing principle in considering a claim under Section 242 of the **Act** is that of fairness. Did the First Defendant act fairly toward the Claimant when exercising its power of removal pursuant to the Shareholder’s Agreement, its Bye-Laws and the **Act**? In determining this issue I must have regard to all the evidence in the case.

[87] In my view, fairness required that proper Notice be given the Claimant that a shareholders’ meeting was being held on 9th November 2015 to discuss his removal from the Board of the Company. The undisputed evidence in this case is that no such notice was given the Claimant or any other Director that this was the purpose of the meeting on the 9th; indeed Item 11 of the Agenda simply stated:

“To consider any changes to the Board of Directors of EPL Properties Limited, in the interest of the continued viable and harmonious operations of the EPL”.

[88] The Claimant, who was present at the said meeting, testified that he was shocked by the motion advanced by Mr. Estrada to revoke the appointments of six Board Members including himself. Although he and Ms. Blackman objected to this course, the motion carried. Of note as well is that several of the Directors removed at that meeting had not been notified or made aware of the First Defendant’s intention to remove them.

[89] I am of the view that the requirement for Notice as provided for under the Bye-Laws and the **Act** was not met by the First Defendant in this case. Given the importance of the resolution, both for the Directors and the governance of the Company, fairness demanded that firstly, a clearly worded Notice that *‘ordinary minds can fairly understand its meaning’* be served on the Directors to be affected; it should not be a tricky Notice artfully framed.²⁴ The Agenda item was

²⁴ Dhami v Martin 2010 NSWC 770 at para 51

deliberately worded in my view to obscure the intention of the Board to remove the Claimant and other Directors, and deny them the opportunity to respond to the proposed course of action.

[90] With respect to the Claimant's claim for relief pursuant to Section 242 of the **Act**, I had regard to the guidance provided by Ventour J (as he then was) in **Mora Ven Holdings v Krishna Persad & Associates**²⁵ :

“(35) When therefore the OA and the ASA are examined as a whole I have no doubt that the terms and conditions therein expressed would have given rise to certain reasonable expectations on the part of the parties to the said agreements. In particular such Agreements do create reasonable expectations about the manner in which information would be disseminated and how the boards of directors would be constituted. See the case of 820099 Ontario Inc. –v- Harold E. Ballard Ltd. [1991] 3BLR(2nd) 113 at 191.

(36) In other words, in assessing the Plaintiffs' allegations of oppression, unfair prejudice and/or unfair disregard of their interests and/or reasonable expectations, the cases require the Plaintiffs to prove bad faith on the part of the Defendants in proof of oppressive conduct; on the other hand, bad faith is not required in proof of unfair prejudice or unfair disregard of the Plaintiffs' interests as shareholder and/or director, although it may be relevant in determining whether the Defendants have acted unfairly; the issue in such cases is whether the matters complained of have effected an unfair result. See Brant Investment Ltd. –v- Keeprite 3OR (3d) 289 per Mc Kinlay, L.J

(37) The underlying conduct which has given rise to oppression has always been one of unfairness. See Scottish Co-operative Wholesale Society Ltd. –v- Meyer [1959] AC 324 @page 342. In the case of Ebrahimi –v- Westbourne Galleries Ltd. [1972] 2AER 492 the House of Lords looked at the conduct of unfairness against the reasonable expectations of the parties involved. The treatment of what is just and equitable as decided in

²⁵ H.C.A No. 2839 of 2002

the Ebrahimi case has led Markus Koehnen the author of the text “Oppression and Related Remedies” to observe that since the Ebrahimi case “courts have increasingly ignored the distinction between the three statutory components and have looked with greater frequency to the reasonable expectations of the parties to determine whether oppression has occurred.”

(38) In looking at the reasonable expectations of the parties the Court is entitled to look beyond their strict legal rights. In the case of Main –v- Delcan Group Inc. [1999] O.J. No. 1961 decided by the Ontario Superior Court of Justice it was Lederman, J. who observed that although a shareholder agreement is often viewed as reflecting the reasonable expectations of shareholders:

“It must be noted, however, that shareholders’ expectations may not be static over time and legal analysis is sensitive to their potential evolution. Accordingly, the relationship between principals must be looked at from a practical standpoint. The oppression remedy is to be administered on the understanding that a court does not interfere lightly with the internal affairs of the corporation. In assessing whether judicial intervention under the oppression remedy is warranted, there exist three key issues that must be addressed:

(i) Was the impugned conduct outside the range of reasonable business judgment;

(ii) Was the impugned conduct inconsistent with the reasonable expectations of the complainants; and

(iii) Did the impugned conduct cause prejudice to the Complainant?”

[91] While it is acknowledged that a Court will not lightly interfere with the internal affairs of a Co-operative, the Court in an oppression action, in determining whether judicial intervention is required, will have regard to the issues outlined above, which I will now assess.

Was the conduct outside the range of reasonable business judgment?

- [92] The actions of the First Defendant must be examined against the backdrop of events pleaded by the Claimant²⁶ and testified to by himself and his witnesses. In or about May 2014, the Co-operative purchased a parcel of land known as the Las Vivendas Development for nine million dollars (\$9,000,000.00) without any title searches being conducted, without statutory approvals and a valuation of said lands. Additionally, the sum of four million dollars (\$4,000,000.00) had been paid for incomplete design drawings and the cost of developing the lands for housing was higher than the estimated figures of the First Defendant's Board²⁷.
- [93] Mr. Borris strenuously protested against this reckless expenditure of Credit Union funds as early as 2013, to no avail. Mr. Lezama, a member of the Board of the Second Defendant and Housing Committee of the First Defendant, a qualified and experienced Project Manager was asked to review the purchase of Las Vivendas land and produced a Report to the Board of the First Defendant outlining these and other issues with the purchase. Ms. Alana Blackman, another Board Member also raised objection to the purchase and she too was removed. In cross-examination, Mr. Estrada admitted that since its purchase, no houses have been built on the land which is subject to severe flooding. The Defendants did not dispute these events and as noted earlier, proffered no reason for the Claimant's removal from the Board.
- [94] I agree with the Claimant's submission that the purchase of the Vivendas property was conducted outside the range of reasonable business judgment which framed the events that followed. The First Defendant's purchase of these lands in the absence of all the usual safeguards as to price, searches, approvals and in the face of the Claimant's objections was neither reasonable nor sound.

²⁶ Para 16 of the Amended Statement of Case

²⁷ Paras 5 and 6 of the Witness Statement of Steve Lezama

Was the impugned conduct inconsistent with the reasonable expectations of the Complainant?

[95] As a Director of the Second Defendant, the Claimant had the following reasonable expectations:

- i. that he would be allowed to perform his duty of directorship honestly and in good faith with a view to the best interest of the Defendants without fear of reprisal or victimization from any members of the Board of Directors;
- ii. that should the question of his removal arise he would be afforded the rights of due process afforded to him under Section 76 of the Companies Act namely, to be given clear and sufficient notice of his proposed removal along with a meaningful opportunity to respond; and
- iii. that his fellow Directors will engage with him in good faith.

[96] From the evidence before me these reasonable expectations were not met. On the unchallenged evidence before me, the Claimant rightfully raised strenuous objection to the First Defendant's actions relative to the purchase of a parcel of land at considerable expense to the Credit Union, without the necessary safeguards for such a large investment being adhered to. He was correct to raise the fundamental issue of the suitability of the land for its intended purpose- the construction of houses given that it was prone to flooding, no approvals had been obtained and a grossly inflated price had been paid for incomplete drawings. The timeline of events as outlined above establishes on a balance of probability that the actions of the First Defendant in removing him from the Board of the Second Defendant and from the Executive Committees of the First Defendant were retaliatory.

Did the impugned conduct cause prejudice to the Complainant?

[97] The prejudice occasioned the Claimant was the sudden and public removal from the directorship of a company affiliated with one of the major financial institutions in the country. I take judicial notice of the fact that the ECU is

possibly the largest credit union in the country, so that Mr. Borris' removal from its affiliate, the EPL, must have caused him some embarrassment, especially in the circumstances where he was deprived of the opportunity to address any issues which would have influenced the decision of the Board. The fact that the First Defendant gave no reasons for his removal would not have lessened the prejudice since it may have given rise to harmful speculation as to the reason for his removal. Additionally, Mr. Borris suffered the loss of the stipend payable to him as Director of the Second Defendant as well as the stipend for his tenure on the Executive of the First Defendant.

[98] I therefore hold that pursuant to Section 242 of the **Companies Act** that:

- i. the impugned conduct in relation to the Claimant and the Las Viviendas Property was outside the range of reasonable business judgment;
- ii. the impugned conduct was inconsistent with the reasonable expectations of the Claimant and was not the response or conduct that should be reasonably expected when a director fulfils his statutory duty; and
- iii. the Claimant suffered severe prejudice from the Defendants' conduct.

[99] I also hold that:

- a. The Claimant's removal from the Executive Committee and two Sub Committees of the First Defendant was illegal since he:
 - i. was not given any reasonable or sufficient notice of his proposed termination;
 - ii. was not given any outline of any charges, allegations or shortcomings which form the basis of his proposed removal; and
 - iii. he was not given a meaningful opportunity to respond to his proposed removal or any allegations or charges against him that formed the basis of such removal.
- b. Neither the terms of the Shareholders Agreement dated the 1st of June 2003 nor the alleged MOU dated the 20th of October 2009, permits the First Defendant to avoid the requirements and procedure of the

Companies Act Chapter 81:01 and the Bye-Laws of the Second Defendant relative to the convening of shareholders meetings or the removal of Directors of the Second Defendant;

- c. The Claimant was not provided with the requisite notice and opportunity to make representations in writing as to why he should not be removed as a Director of the Second Defendant;
- d. The Claimant is entitled to damages for his unlawful dismissal from the Executive Committee and Sub-Committees of the First Defendant and his unlawful removal from the Board of Directors of the Second Defendant;
- e. The Claimant is entitled to receive an award of compensation pursuant to Section 242(3)(j) of the **Companies Act since**
- f. The Claimant is entitled to all such relief sought under Section 242 of the **Companies Act** since:
 - i. The conduct of the Defendants was outside the range of reasonable business judgment; the Las Viviendas property having been purchased in the face of clear and rational objections;
 - ii. The conduct of the Defendants was inconsistent with the reasonable expectations of the Claimant, namely:
 - that he would be allowed to perform his duty of directorship honestly and in good faith with a view to the best interest of the Company without fear of reprisal or victimization from any members of the Board of Directors;
 - that should the question of his removal arise he would be afforded the rights of due process afforded to him under Section 76 of the **Companies Act** namely, to be given clear and sufficient notice of his proposed removal along with a meaningful opportunity to respond; and
 - That his fellow Directors will engage with him in good faith.

iii. The Defendants belated allegation that the Claimant was removed due to his behaviour regarding the La Seiva Property is neither pleaded nor proven;

iv. The Claimant suffered serious prejudice from the Defendants' conduct.

[100] As Vice Chairman/Director of the Second Defendant, the Claimant was paid an honorarium of three thousand four hundred and eighty dollars (\$3480.00) per month. He had been appointed continuously from the 24th April 2014 to the 9th November 2015. It is reasonable to suppose Mr. Borris who had been elected for a second term as a Director of the First Defendant and a member of the Executive of the ECU that his appointment to the Second Defendant, they have continued at least until the end of his term as Director of the First Defendant in April 2016. As a result, I hold that he ought to be paid the honorarium of \$3480.00 three thousand four hundred and eighty dollars (\$3480.00) from December 2015 to April 2016.

[101] In the circumstances I Order:

- a. Judgment for the Claimant against the Defendants;
- b. The Defendants do pay to the Claimant Special Damages as follows:
 - (i) The sum of three thousand four hundred and eighty dollars (\$3480.00) for five (5) months;
 - (ii) The sum of two thousand seven hundred dollars (\$2700.00) for five (5) months;
- c.
 - (i) Damages for wrongful removal of the Claimant from the Executive Committee and two Sub-Committees of the First Defendant in the sum of one hundred and twenty thousand dollars (\$120,000.00);
 - (ii) Damages for unlawful and/or wrongful removal as a Vice Chairman/Director and as a Member of three Sub-Committees of the Second Defendant pursuant to Section 242 of the **Companies Act** in the sum of one hundred and fifty thousand dollars (\$150,000.00);

- (d) The costs of the injunction obtained by the Claimant against the First Defendant be paid by the First Defendant to the Claimant to be assessed by a Registrar in default of agreement;
- (e) The Defendants do pay interest on the above sums at the rate of four percent (4%) from the 16th June 2017 to the date of Judgment 4th May 2022;
- (f) The Defendants do pay to the Claimants the prescribed costs on the above sums.

**Joan Charles
Judge**