REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. S-027 of 2013

BETWEEN

PAN TRINBAGO INC.

Appellant

AND

KEITH SIMPSON
DENISE L.J. HERNANDEZ
MAURICE ALEXANDER
STEADSON C. JACK

Respondents

PANEL

P. Jamadar J.A.

N. Bereaux J.A.

M. Mohammed J.A.

APPEARANCES

Mr. K. Garcia instructed by Ms. V. Jaisingh for the appellant

Mr. R. L. Maharaj S.C. and Ms. N. Badal instructed by Ms. V. Maharaj for the respondents

DATE DELIVERED: 23rd February, 2015

I have read in draft the judgment of Mohammed J.A. I agree with it and do not wish to add anything.

P. Jamadar
Justice of Appeal

I too agree.

N. Bereaux
Justice of Appeal

JUDGMENT

Delivered by: M. Mohammed J.A.

Introduction

1. The steel pan is the national instrument of Trinidad and Tobago. The appellant (Pan Trinbago Inc.) is a non-profit body incorporated in Trinidad and Tobago by virtue of the Pan Trinbago Act[1] and is dedicated to the promotion and development of the steel pan and the steel band movement throughout the world.[2] The appellant's objectives include the preservation of the steel pan as an indigenous musical art form and the national musical instrument of the Republic of Trinidad and Tobago.[3] It is referred to as the world governing body for steel pan and steel band music.[4]

2. The Convention is the supreme legislative and judicial authority of the association and is convened once in every three calendar years (the triennial elections) during the period September 1 to October 31, to determine the general policy of the association and to elect

[1] No. 5 of 1986
[2] *ibid* at section 3 - *Purpose of Pantrinbag*o; Article 4 of the Constitution of Pantrinbago 1986
[3] see Article 4 (5) of the Constitution of Pan Trinbago 1986
[4] *ibid* at Article 4 (1)

members to the Central Executive Committee (CEC).[5] The affairs of the appellant are managed by the CEC whose powers are prescribed by the Constitution of Pan Trinbago Inc. 1986 (the Constitution).[6] The CEC may exercise all of the powers of the Convention in the management of the association during the intervals between the Conventions and general meetings of the General Body.[7]

3. This case primarily concerns the interpretation of the Constitution to determine the criteria for eligibility to hold office in the CEC. The respondents brought an action for breach of contract when the appellant rejected their individual nominations for election to the CEC. At the trial, the appellant conceded the case against the first respondent. After considering the relevant provisions of the Constitution, the judge declared that the first and second respondents were eligible to hold office in the CEC and awarded them nominal damages. The appellant was ordered to pay prescribed costs in relation to the claims of the first and second respondents. The claims of the third and fourth respondents were dismissed and they were ordered to pay the prescribed costs of the appellant.

4. This is an appeal against the declarations made in favour of the first and second respondents, the award of nominal damages and the orders for costs. The grounds of appeal filed by the appellant raise the following five (5) issues:
    i. What are the criteria for eligibility for election to the CEC and whether eligibility by delegation was an issue which was open to the judge to consider having regard to the pleadings in the case?
    ii. Whether the judge's finding that the steel band to which the second respondent belonged was in good financial standing was one that was reasonably open to him, having regard to the evidence presented at the trial?
    iii. Whether the judge was right to grant declaratory relief to the first respondent on the sole basis that the appellant conceded the case?
    iv. Whether it was open to the judge to award nominal damages to the first and second respondents without hearing submissions on the issue and if so, whether the sum of

[5] *ibid* at Article 7 A(I)(a)
[6] see section 8 of Act No. 5 of 1986
[7] see Article 7 B(3) of the Constitution

$5000.00 awarded was excessive?

v. Whether the orders for costs were plainly wrong?

Summary of Opinion

5. The test for eligibility to contest the triennial elections must be gleaned from the Constitution and the Pan Trinbago Inc. T.C. Constitution Bye-Laws (the Bye-laws). The judge held that to be eligible to hold office in the CEC the nominee must have been a delegate, or an out-going CEC member, and the steel band to which they belonged must have been in good financial standing. The judge came to this conclusion after considering the Constitution in its entirety. The judge's interpretation of the Constitution in relation to eligibility for election to the CEC was correct. Further, the issue of eligibility for election to the CEC was expressly raised in the parties' pleadings and it was accordingly open to the judge to consider whether eligibility was confined to delegates.

6. It was a question of fact whether or not it was unfair for the appellant to claim that the steel band, Neal & Massy Trinidad All Stars (Neal & Massy), had not paid its dues in light of the option given to steel bands to authorize the appellant to pay those dues. The test for an appellate court's reversal of primary findings of fact therefore applies. The evidence as a whole supports the judge's finding that Neal & Massy had continuously authorized the deduction of the relevant dues and fees by the appellant. Neal & Massy was considered, less than three (3) months before the deadline for nomination, to be in good financial standing for the annual Panorama steel pan competition. Only members in good financial standing were allowed to register for the Panorama competition. The appellant therefore treated Neal & Massy as being in good financial standing before the waiver form was submitted. It was reasonably open to the judge, on the evidence, to find that it would be unfair for the appellant to claim that the band was not in good financial standing for the purpose of the elections. It cannot be demonstrated that the judge was plainly wrong in his factual conclusion that Neal & Massy was in good financial standing. The second respondent must therefore be considered to have been a member of a steel band in good financial standing at the material time and was eligible to contest the elections of the CEC.

7. Generally, declarations ought not to be made on admissions. However, it would be appropriate for the court to grant a declaration, on an admission, in appropriate cases where there are no factual disputes or where the denial of declaratory relief would lead to injustice to the claimant. The first respondent was not a delegate but, the uncontested evidence is that the first respondent was an out-going CEC member. The judge did not expressly consider whether or not the case of the first respondent was properly made out. However, it is apparent from his analysis that he was aware that the first respondent was not a delegate but was rather an out-going CEC member. The first respondent therefore met the requirement for eligibility for nomination as outlined by the judge. This case is one in which the declaration sought was necessary to afford justice to the claimant. There is no basis to interfere with the judge's declaration in relation to first respondent.

8. Nominal damages are generally awarded to mark the fact that there has been a breach of contract in circumstances where there is no quantifiable loss caused by that breach. The quantum of nominal damages to be awarded is at the discretion of the court, having regard to the particular circumstances of the case. In this case the appellant is the world governing body for steel pan and acts as the sole representative for members in all matters related to the development, promotion and performance of steel pan and steel bands. The first and second respondents were denied their right, pursuant to the Constitution, to contest the election of the appellant's governing body. An award of nominal damages was appropriate. The sum of $5000.00 awarded was not inordinately high or exorbitant. There is no basis upon which to interfere with the judge's discretion.

9. The first and second respondents are successful litigants who are entitled to costs because their claims sought to establish a legal right and not merely to recover nominal damages. The judge had the discretion to take into account various matters when determining who should pay costs and whether the prescribed quantum should be varied. The exercise of that discretion in this case required that the judge hear submissions from the parties. The judge failed to solicit submissions on the issue and was plainly wrong. In addition, the order for costs made by the judge in favour of the first and second respondents was an unusual one in that it departed from the order recommended by the Civil Procedure Rules 1998 (the CPR).

The judge has an inherent jurisdiction to make such an unusual order but he was required to give reasons for so doing. The judge did not give any reasons for his departure. The judge was plainly wrong in his failure to give reasons. In consequence, this court is now required to determine the appropriate order for costs.

10. The orders for costs are set aside. For this reason only, among the several grounds of appeal advanced, the appeal is allowed in part. All the other grounds of appeal are unsuccessful. The parties will be heard on the appropriate orders to be made on the issue of costs.

Background

11. A Convention was scheduled, to facilitate the triennial elections, and was to be held on October 28th, 2012. On August 24th, 2012, and in relation to the triennial elections, the Secretary of the CEC circulated nomination forms, membership forms, delegate forms and waiver forms to the appellant's member steel bands. The nomination forms were to be returned by October 6th, 2012 in accordance with the Constitution.[8] The delegate forms were to be returned by October 8th, 2012. The waiver forms were forms by which member steel bands could request a waiver of the payment of registration fees and annual dues but there was no specified deadline for the return of that form.[9]

12. Nomination forms naming the four respondents as candidates were submitted on October 4th, 2012. By letters dated October 15th, 2012 the Secretary of the CEC informed the first and second respondents that they would not be allowed to contest the elections because they were not delegates of a member steel band pursuant to Article 7(a)(ii) of the Constitution. A similar letter followed in relation to the third respondent on October 22nd, 2012. The fourth respondent did not see his name appearing on the final list of persons to compete in the elections on October 16th, 2012 and he made enquiries of the Secretary. The fourth respondent was verbally informed that he would not be permitted to contest the elections because he was not a named delegate of his steel band.

[8] see Article 10(8) of the Constitution – nomination forms are to be returned twenty-one (21) days prior to the date prescribed for the elections
[9] see pg. 333 of the record of appeal

13. The respondents brought a claim against the appellant on October 23rd, 2012 which contended that the appellant was in breach of the provisions of the Constitution, having wrongfully rejected their nominations forms. The respondents claimed that the Constitution did not require them to be delegates in order to contest the elections. It was further claimed in the alternative, that if the Constitution required nominees to be delegates in order to contest the elections, the appellant was estopped from rejecting the nominations of the respondents since there was a settled practice whereby persons who were not delegates were allowed to contest the elections. As a result of these proceedings the Convention was postponed and an election for the CEC has not been held since.

14. In its defence filed on October 31st, 2012 the appellant: (i) did not indicate why the first respondent was not permitted to contest elections; (ii) pleaded that the second respondent was a member of a steel band, namely Neal & Massy, but that steel band was not in good financial standing at the material time as was required by the Constitution; and (iii) pleaded that the third and fourth respondents were not members of steel bands as they did not appear on the membership list for the steel band they claimed to be a member of, and even if they were, that steel band was not in good financial standing at the material time. The defence also indicated that the practice has always been that one or both of the delegates appointed by member steel bands would be nominated to hold office in the CEC.

15. At the trial, the appellant conceded the case of the first respondent. After considering the relevant provisions of the Constitution and the evidence before him, the judge gave judgment in favour of the first and second respondents and dismissed the claims of the third and fourth respondents.

The relevant provisions of the Pan Trinbago Inc Constitution 1986

16. It is convenient to set out at an early stage the relevant provisions of the appellant's Constitution:

ARTICLE 6 – MEMBERSHIP

…..

2. Membership in the Association shall be of an Ordinary, Honorary or Affiliate nature and shall be based on such criteria established or varied from time to time by the General Body.

……

SECTION A – ORDINARY MEMBERSHIP

i. This form of membership shall be restricted to bona fide Steelbands.

ii. Each ordinary member shall be entitled to hold office in and to attend and vote at all meetings of the Association ……

SECTION B – HONORARY MEMBERSHIP

i. This form of membership shall be conferred upon such individuals, groups, ensembles and/or associations ….who or which in the collective opinion of the members of the Central Executive Committee have made a outstanding contribution to the development, enhancement or expansion of the steelband movement.

ii. No honorary member shall be entitled to hold office in or vote at meetings…….

SECTION C – AFFILIATE MEMBERSHIP

i. This form of membership shall be granted to recognized steelband tuners, arrangers, solo steelpan or steelband players……..

ii. No affiliate member shall be entitled to hold office in or to vote at meetings……

ARTICLE 7 – STRUCTURE

The organizational structure of the Association shall be composed of:-

(A) The General Body

(B) The Central Executive Committee

(C) Regional Committees

PART A. THE GENERAL BODY

The General Body shall consist of all classes of members of the Association.

ii. Each member steelband shall elect two (2) delegates to act as its representatives to the General Body and shall inform the Secretary of the Central Executive Committee of the names of such delegates.

iii. Only those members and/or delegates who are in good financial standing with the

Association shall be entitled to attend and vote at the meetings of the General Body.

MEETINGS OF THE GENERAL BODY

The meetings of the General Body shall be convened as follows:-

i. Convention

ii. Special Convention

iii. Annual General Meeting

iv. Extraordinary General Meeting.

I. CONVENTION

a. The convention shall be the supreme legislative and judicial authority of the Association and shall be convened once in every three calendar years during the period September 1 to October 31 to determine general policy of the Association and to elect members to the Central Executive Committee.

b. Attendance at the Convention shall be open to all members of the Association but only those Ordinary members who are in good financial standing with the Association shall be permitted to vote thereat.

……

PART B. CENTRAL EXECUTIVE COMMITTEE

1. At each Convention the General Body shall elect persons from their number who shall comprise and be designated as the Central Executive Committee and they shall be Ex-Officio Directors of the Association.

ARTICLE 10 – ELECTIONS

……

5. Only such members of the General Body as are in good financial standing may be eligible for election to any office of the Association.

…….

7. Any delegated member of a financial steelband or any out-going Central Executive Committee member shall be eligible for election to any office of the Association.

The judgment below

17. The appellant's position at the trial was that it would not contest the claim of the first respondent. The judge then went on to consider the other claims. The main issue for consideration was the eligibility criteria for election to the CEC. The resolution of that issue required the interpretation of the Constitution. Having accepted that the Constitution constituted a contract between the appellant and the respondents (its members), the judge then went on to lay out the approach to be adopted to the interpretation of the Constitution at paragraph 16 of his judgment:

> "*16. The law on interpreting contracts is clear. The primary source for understanding what the parties meant is their language interpreted in accordance with the conventional usage and where the parties have used unambiguous language the courts must apply it even if it produces a commercially improbable result. However, the process of interpretation is a 'unitary exercise' in the sense of the background. If, in that context, there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*

18. Upon analyzing the Constitution as a whole, the judge made the following findings:
    i. The membership of the appellant consists of ordinary, honorary and affiliate members (Article 6);
    ii. The General Body of the appellant consists of all classes of members but only ordinary members are entitled to hold office, attend and vote at elections. Ordinary membership is restricted to bona fide steel bands by Article 6A(i). In order to vote, an ordinary member must be in good financial standing (Article 7A(iii)). Honorary and affiliate members are not entitled to hold office or vote, but they can attend meetings of the appellant (Articles 6B and C, 7A(I)(b));
    iii. By Article 7A(ii), each member steel band shall elect two delegates to act as its representatives to the General Body;
    iv. There is a difference between a "member" and a "delegate". The ordinary member, which refers to steel bands, is made up of individuals. It is from this pool of individuals that a steel band will delegate two persons to attend and vote at meetings.

The ordinary membership lies with and is vested at all times in the steel band itself and not any particular individual. The General Body therefore does not consist of the delegates under Article 7A(i) but of the ordinary members, that is the steel bands themselves (in addition to the other classes);

v. The delegates elected by the ordinary members exercise the right to vote on behalf of the ordinary member steel bands and not in their own right as they are simply the representatives of the ordinary members to the General Body;

vi. The use of the designation "delegated member" in Article 10(7) (*mistakenly quoted as 10(6) by the judge*)[10] refers to the delegate elected by the ordinary member. The designation 'member' appears to refer to the relationship between the delegate and his steel band and not the relationship between the delegate and the appellant. The addition of the word 'member' while unnecessary, does not render the designation ambiguous;

vii. Article 10(7) therefore clearly prescribes those persons who are to be eligible for election as being the persons delegated as representatives to the General Body or outgoing CEC members;

viii. Article 7 B(1) supports the interpretation that persons who are to be eligible for elections are delegates or outgoing CEC members. It provides: *"At the Convention the General Body shall elect persons* ***from their number*** *who shall comprise and be designated as the Central Executive Committee…"* (trial judge's emphasis);

ix. The number of the General Body is prescribed by way of membership under Article 7A and, in respect of steel bands, relate only to the two delegates elected by each steel band to be their representatives to the General Body. The General Body admits of no other persons (save for those admitted by virtue of honorary or affiliate membership). The use of the word *number* in Article 7B(1) is specific to the quantum of persons legally entitled to form the General Body comprising representatives of the members. Should there therefore be any other nominee for a post on the CEC other than those delegated by the individual steel band (ordinary members), such person would not by definition be included in the *number* of person comprising the General Body and would therefore be ineligible for elections.

[10] see para 17(vi) of the judgment below

19. The judge concluded that eligibility for election to the CEC was twofold. The candidate was first required to be a delegate within Article 7 A (ii) of the Constitution (or, an outgoing CEC member). The second requirement, and the threshold test for eligibility for election to any office of the appellant, was that the member had to be in good financial standing.

20. The third and fourth respondents were not delegates, nor was it contended that they were past CEC members. The judge then considered whether there was evidence to support an established practice that persons who were not delegates were allowed to contest elections. An established practice of that nature may have been sufficient to found an argument that the appellant was in effect estopped from rejecting the nominations of the third and fourth respondents simply because they were not delegates.

21. The judge considered and noted that the first respondent gave evidence that he was not a delegate when he first contested the elections for the post of Trustee in 2009.[11] Additionally, Mr. Louis Patrick Arnold, President of the CEC during the period 1996-2009, gave evidence that there was an established practice that persons other than delegates would contest the elections of the CEC.[12] Mr. Arnold's basis for asserting that such a settled practice existed was that he himself was not a delegate when he was appointed to the post of President in 1996.[13] The judge found that a deviation from that which is prescribed by the Constitution, on only two occasions, was not sufficient evidence to satisfy the Court that there was a 'settled practice'.[14] The claims of the third and fourth respondents were accordingly dismissed.

22. The second respondent was a delegate and so the judge then had to consider whether the second limb of the eligibility criteria was met, that is, whether the steel band to which she belonged, Neal & Massy, was in good financial standing. The judge understood 'good financial standing' to mean that all fees (registration fees, annual dues and membership fees)

[11] see para 21 of the judgment below
[12] *ibid* at para 29
[13] *ibid*
[14] see para 25 of the judgment below

owing to the appellant had been paid off.[15] There was evidence that the appellant would give member steel bands the option to either the pay fees when they became due or authorize the appellant to deduct it from the appearance fees owed to the steel bands. Appearance fees (a subvention provided by the government) are paid by the appellant to each steel band registered for the Panorama competition. The authorization for the deduction was done via the waiver form. It was not disputed that appearance fees were owed to Neal & Massy. The waiver form, in relation to Neal & Massy, was filed after the deadline for the filing of nominations. Despite the late submission of the waiver form, the judge found that it would be unfair for the appellant to claim that Neal & Massy had not paid its dues in light of the option provided to the steel band, as a matter of practice, to have the dues deducted from the appearance fees owed to it. Further, there was evidence that Neal & Massy was treated as being in good financial standing for the purpose of registering for the steel band Panorama competition in 2013 before the steel band had regularized its financial position. The claim of the second respondent therefore succeeded.

23. The judge proceeded to make the following orders:

> *"i. Judgment for the first and second claimants against the defendant as follows:*
>
> *a. It is hereby declared that the first and second claimants have been duly nominated and are eligible candidates for election to the offices of the Central Executive Committee.*
>
> *b. The defendant shall pay to the first and second claimants nominal damages for breach of contract in the sum of $5,000.00 each.*
>
> *ii. The defendant shall pay the prescribed costs of the claims of the first and second claimants in the sum of $14,000.00 each.*
>
> *iii. The claims of the third and fourth claimants are dismissed.*
>
> *iv. The third and fourth claimants shall pay the prescribed costs of the defendant in the sum of $14,000.00."*[16]

[15] *ibid* at para 38
[16] see para 49 of the judgment below

Issues

i. What are the criteria for eligibility for election to the CEC and whether eligibility by delegation was an issue which was open to the judge to consider having regard to the pleadings in the case?

24. On behalf of the appellant it was contended that eligibility for election to the CEC was set out in Article 10 (5) of the Constitution. To be eligible, a candidate must be a member player of a member steel band which is in good financial standing subject to the steel band (or member player) not being otherwise disqualified under the Constitution. It was contended that Article 10(5) is clear and unambiguous and does not provide that only delegates can be elected to the CEC. It was submitted that the judge was plainly wrong in his interpretation of the Constitution. The judge was plainly wrong because Article 7 does not set out any criteria for eligibility but rather sets out the rights[17] and disabilities[18] of a member steel band. According to the appellant, eligibility is determined exclusively by Article 10 of the Constitution and for that reason is expressly headed 'Elections'. Further, it was submitted that Article 10(7) simply confirms and clarifies that any person who is named as a delegate is *also* eligible for election to office. Article 10(7) does not set out the criteria for election but must be read in conjunction with the other provisions of Article 10.

25. The respondents accepted that Article 10 of the Constitution contains the criteria of eligibility of persons to contest elections to the CEC. The respondents also accepted that Article 10 is not ambiguous and has not been made subject to Article 7 of the Constitution. On behalf of the respondents it was submitted that whether or not a person had to be a delegate to contest elections was never in issue between the parties. It was contended that the defence filed by the appellant challenged the respondents' nominations based solely on the financial standing of the respondents and whether they in fact belonged to a member steel band. The respondents suggested that the judge may have mistakenly formed the view that eligibility based on delegation was in issue because the nominations were initially refused on the basis that the respondents were not delegates. On behalf of the respondents it was submitted that

[17] to have representatives at the General Body
[18] the possible disqualification of the representatives

the judge had a duty to decide the issues which were defined by the pleadings and not issues which he was of the view ought to have been raised.[19]

Discussion and Conclusion

26. The respondents' statement of case referred to a settled practice whereby members of financial steel bands were permitted to contest elections.[20] In its defence, the appellant denied a practice of allowing members, other than delegates, to contest elections. It averred that the practice has always been that one or both of the delegates appointed by member steel bands would be nominated to hold office.[21] This was repeated in the appellant's statement of facts where the appellant also submitted that no other person (aside from delegates) have been nominated for elections save persons who were outgoing CEC members in accordance with Article 10(7) of the Constitution.[22] The respondents' submission that the subject of eligibility by delegation was not in issue is therefore not a tenable one. The main issue in the case involved a consideration of the criteria for eligibility to the CEC. A consideration of eligibility by delegation was in turn necessary and quite central to the determination of the criteria for eligibility to the CEC.

27. The appellant and the respondents both contend that Article 10 of the Constitution is clear and unambiguous and should be decisive of the criteria for eligibility to the CEC. Particular focus is placed on Article 10(5). Article 10(5) stipulates that members of the General Body in good financial standing may be eligible for election to any office of the association. If this article is read in isolation, it would permit any member of the General Body (all classes of members) to hold office. This would stand in opposition to Article 6 which expressly prohibits honorary and affiliate members from holding office. Reading Article 10(5) to the exclusion of the other provisions of the Constitution therefore leads to a result which is not in keeping with the Constitution.

[19] see Bullen & Leake & Jacob's "*Precedents of Pleadings*" 17th Edn, 2012 at para 1-11
[20] see para 7 of the respondents' statement of case filed October 23rd, 2012 at pgs 11-12 of the record of appeal
[21] see pg. 119 of the record of appeal
[22] *ibid* at pg. 489

28. The General Body consists of ordinary, honorary and affiliate members. Article 6 makes it clear that only ordinary members are permitted to hold office. Reference to "*members of the General Body eligible for election*" in Article 10(5) must therefore be in relation to ordinary members only. Ordinary membership is restricted solely to steel bands. An entire steel band cannot hold a post in the CEC, nor is an entire steel band permitted to attend and vote at meetings. For this reason, two representatives (delegates) are vested with the power to act on behalf of the steel band. These two representatives are clothed with the identity of the steel band for the purpose of enforcing the steel band's rights at meetings. A purposive and common sense approach, and at the same time a pragmatic one, to the interpretation of the Constitution leads to the conclusion that the two representatives or delegates are the persons referred to by Article 10(5) as being *"eligible for election to any office of the Association*".

29. The interpretation adopted by the judge, as indicated in the judgment below, is reinforced by Article 7 B(1) of the Constitution. Article 7 B(1) requires the General Body to elect from among its members at a convention, persons to be designated as the CEC. As noted before, only ordinary members are permitted to hold office. Ordinary members are represented by delegates at the convention. Members of the various steel bands, other than their delegates, may also attend the convention.[23] However, if they are present, they will be present in their own personal capacities, as members of steel bands become members of the appellant when they are registered by their band.[24] A steel band player can only be classified as an affiliate member. An affiliate member is prohibited from holding office in the association, and by extension, the CEC. The delegates are the only persons of the General Body at the Convention that can hold office and vote in the elections. Article 7 B(1) must therefore be taken as referring to the delegates choosing from among themselves, persons to be elected to the CEC.

30. The Constitution is a contract between the association and its members and must be interpreted in accordance with the plain language and definitions used by the association in the Constitution. When the Constitution is considered in its entirety and construed in a

[23] see Article 7A(I)(b) of the Constitution
[24] see article 1.4 of the Bye-laws

purposive manner, it is apparent that a nominee must be a delegate, or an outgoing CEC member, in order to be able to contest the elections of the CEC. The judge was guided by the correct principles in his interpretation of the Constitution and the appellant has not demonstrated any material flaw in the judge's analysis in this regard.

ii. Whether the judge's finding that the steel band to which the second respondent belonged was in good financial standing was one that was reasonably open to him, having regard to the evidence presented at the trial?

31. On behalf of the appellant, it was submitted that the eligibility criteria to contest elections must be satisfied by a candidate as of nomination day and a person who is disqualified from standing for election as of that date, remained disqualified although the default is remedied before the elections. In support of this submission reliance was placed on the case of ***Chaitan v The Attorney General***.[25] It was submitted that the second respondent was required to be in good financial standing as at nomination day (October 6th, 2012) for the purpose of satisfying the eligibility criteria for nomination. To satisfy that criterion, the second respondent's steel band, Neal & Massy, was required to be in good financial standing by nomination day because the financial standing of a delegate is directly connected to the financial standing of the member steel band which it represents.[26] The waiver form authorizing payment of annual dues owed by Neal & Massy, from monies owed to it from the appellant, was not submitted until October 17th, 2012. It was thus submitted that Neal & Massy, and by extension the second respondent, was not in good financial standing, pursuant to the Constitution, at the material time.

32. It was further submitted on the appellant's behalf that the evidence adduced was to the effect that the appellant could not deduct sums payable to it from sums owed to its members unless the appellant was first authorized to do so. The appellant could not deduct the dues *automatically* or on its own motion. For this reason it was submitted that the judge's finding, that it would be unfair for the appellant to claim that Neal & Massy was not in good financial

[25] *(2001) 62 WIR 244*, per de la Bastide CJ, at pgs. 285-290
[26] see Article 12(3) of the Constitution

standing, because Neal & Massy had continuously authorized deductions, was contrary to the overwhelming weight of the evidence. According to the appellant, the judge may have confused the evidence that Neal & Massy had 'continuously' authorized payment with a "*one-off perpetual authorization*" by the steel band.[27] It was necessary for Neal & Massy to submit the waiver form to regularize its financial status. It is submitted that the waiver form constituted undisputed evidence that there was in existence no practice by which registration fees were automatically deducted.

33. On behalf of the respondents it was submitted that the judge demonstrated that he had regard to both the evidence of the witnesses for the respondents and the appellant. It was undisputed that the appellant owed Neal & Massy appearance fees for 2011 and 2012. The second respondent in her witness statement gave evidence that the appellant was continuously authorized to automatically deduct fees (registration fees, annual dues and membership fees) due to the appellant, from Neal & Massy, from the appearance fees. This evidence was not challenged under cross examination. It was submitted that the finding that Neal & Massy was in good financial standing was a finding of fact and the appellant had failed to demonstrate that the finding of the trial judge contained material inconsistencies or inaccuracies. The appellant therefore had not crossed the high threshold required to permit successful appellate review of the judge's finding of fact on this issue.

34. It was further contended on behalf of the respondents that the submissions of the appellant ignored the common sense approach adopted in relation to club cases. According to the respondents, there is a considerable degree of informality in the conduct of the affairs of clubs. The courts have to be ready to allow concepts of reasonableness, fairness and common sense to be given more than their usual weight when confronted with claims which appear to be based on any strict interpretation and rigid application of the letter of the rules.[28] It was submitted that the appellant has always adopted a flexible and common sense approach in its dealings with the membership in relation to determining a member's financial status. Despite claims that the member was not in good financial standing, the appellant was registered for

[27] see para 6.13 of the submissions of the appellant filed on April 08th, 2013

[28] ***Re GKN Bolts and Nuts Ltd Sports and Social Club Leek and others v Donkersley and others*** *[1982] 2 All ER 855* per Megarry V-C at 857

the 2013 Panorama competition on July 19th, 2012 when it was made clear that only members in good financial standing would be allowed to compete. Further, the respondents emphasized that unlike the nomination forms, the waiver forms did not contain a deadline date for its return. The respondents contended that the judge was therefore correct in his findings.

35. In reply, the appellant submitted that there has to be scrupulous observance of the rules in relation to club cases.[29] It was further submitted that the fact that some of the members of an association may have acted in breach of the Constitution could not override the provisions of that Constitution.[30] It was therefore not open to the judge to by-pass the clear requirement of Article 10(5) which required a candidate to be a member to be in good financial standing.

36. The case of ***Cheng Chih Tiao Hui Pin Wang***[31] was cited as an authority in support of the appellant's argument that a settled practice on the part of an association was incapable of overriding the provisions of the constitution of that association. In response, the respondents contended that the facts of the case of ***Cheng*** were far removed from the facts of this case. That case concerned legislation in Australia which provided for incorporated associations to have constitutions that were to be approved by a regulator. The governing Act in Australia mandated that rules of the association could only be modified by special resolution to be approved by the commissioner. According to the respondents, the regime in ***Cheng*** is similar to the regime established by the Cooperatives Societies Act[32] whereby the rules or bye laws of a society may only be implemented or amended with the consent and approval of the Commissioner of Cooperative Development. As such, the rules of the association in ***Cheng*** would have an effect akin to statute. The respondents therefore submitted that it was dangerous to draw an analogy to that case.

[29] *ibid* at 863 per Megarry V-C
[30] ***Cheng Chih Tiao Hui Pin Wang & Anor. v Sheng Chin Lain & Ors***. [2010] WASCA 189 at paras 69 and 80-85
[31] *ibid*
[32] Chap. 81:03

The law on appellate reversal of findings of fact

37. The judge found that it would have been unfair for the appellant to claim that the steel band was not in good financial standing having regard to the option given to steel bands to have outstanding dues deducted from appearance fees owed to them. The judge therefore gave consideration to whether or not an established practice existed which in effect estopped the appellant from claiming that the band was not in good financial standing. That consideration was one that could have only been determined as a question of fact.

38. It is only in a rare case that an appellate court will interfere with a trial judge's findings of primary fact. Such a case would include (a) one in which there is no evidence to support the findings; (b) a decision which is based on a misunderstanding of the evidence; or (c) a decision, which no reasonable judge could have reached.[33] It is necessary therefore to consider the evidence which was before the judge, bearing in mind the high threshold to be crossed when an appellant is attempting to reverse a judge's finding of fact. The judge's decision ought not to be disturbed unless it can be demonstrated that it is "affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong".[34] In deciding whether the trial judge was "plainly wrong", the Court of Appeal must consider whether, in the face of the evidence as a whole, "it was permissible for the trial judge to make the findings of fact which he did make".[35] The Court must identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. This would include a failure to analyze properly, the entirety of the evidence.[36] The fact that the appellate court may come to a contrary conclusion on the evidence is not a sufficient basis to reverse the judge's findings, if, there is a proper evidential basis upon which the trial judge could have concluded as he did.[37] It is only a difference of view which exceeds the ambit of reasonable disagreement that would warrant a conclusion that the judge

[33] per Lord Neuberger in ***re B (A child) (Care Proceedings: Threshold Criteria)*** *[2013] 1 WLR 1911*
[34] per Sir Andrew Leggatt in ***Mitra Harracksingh v Attorney General of Trinidad and Tobago & Anor*** *[2004] UKPC 3* at para 10, there applying the dicta of Lord Sumer in ***Owners of Steamship Hontestroom v Owners of Steamship Sagaporack*** *[1927] AC 37* at page 47
[35] per Lord Hodge at para 12 in ***Beacon Insurance Company Limited v. Maharaj Bookstore Ltd.*** *[2014] UKPC 21*
[36] ***Choo Kok Beng v. Choo Kok Hoe*** *[1984] 2 MLJ 165* per Lord Roskill at pg 168-169
[37] ***Attorney General v Anino Garcia*** *Civil Appeal No. 86 of 2011* per Bereaux J.A. at para 18

below had gone wrong.[38]

The Evidence

39. Article 3 of the Bye-laws stipulates that members must register the names of the members of the band by August 31st of each year and that registration fees are to be paid upon the registration of those players. Article 9.1 of the Bye-laws outlines that each ordinary member shall pay a registration fee, an annual due and membership annual dues for each member of its stage side or permanent members as per registration.

40. The evidence in chief for the respondents consisted of the witness statements of each respondent, Mr. Douglas Williams, Chairman of the Northern Region of the appellant, and Mr. Louis Patrick Arnold. All of the witness statements were adopted by the respective witnesses and counsel for the appellant was given an opportunity to cross examine each witness.

41. The evidence of the first respondent was that: "*It has been the practice of the Defendant since its incorporation that each member steelband has the option to either pay fees payable to the Defendant under Articles 9 and 3 of the Constitution Bye Laws when they become due or to authorize the Defendant to automatically deduct fees payable under the said Articles 9 and 3 from appearance fees and assistance fees payable by the Defendant to member steelbands.*"[39] This evidence was not challenged in cross examination.

42. The second respondent advanced evidence to the effect that Neal & Massy was in good financial standing because "***Neal and Massy has continuously authorized the Defendant to automatically deduct all fees due under Article 9 and 3 of the Constitution Bye Laws from all appearance fees and assistance fees which are payable by the defendant to it. ....****member steelbands have been able to either pay all fees and dues payable to the Defendant when they become due or to authorize the Defendant to deduct fees and dues payable by the steelband*

[38] see ***Jackson v Murray*** *[2015] UKSC 5* per Lord Reed at paras 27-38
[39] see para 8 of the witness statement of Keith Simpson filed on November 9th, 2012 - pgs 207 – 215 of the record of appeal

from appearance fees and assistance fees payable by the Defendant to the steelband."[40][emphasis added] The second respondent was not cross examined on this particular evidence.

43. Mr. Douglas Williams stated that *"each member steelband has the option to either pay fees payable to the Defendant under Articles 9 and 3 of the Constitution Bye laws when they become due or to authorize the Defendant to automatically deduct fees payable under the said Articles 9 and 3 from appearance fees due to us."*[41] There was no cross examination on this component of Mr. Williams' statement.

44. Mr. Louis Patrick Arnold also gave evidence on the issue of payment of fees and this evidence was not the subject of cross examination. Paragraph 7 of his witness statement read:

> *"7. I recall that the practice during the period of time in which I was President of the Central Executive Committee was that a member steelband had the option to either (1) pay the dues and fees due to the Defendant when they became due or (2) to authorize the Defendant to deduct the dues and fees payable by it from the appearance and assistance fees due to it from the Defendant. If a member steelband exercised the second option, the Defendant automatically waived the payment of fees and dues owed by the member steelband on the date they became due until the Defendant deducted them from the said appearance and assistance fees owed by it to the member steelband.* ***Member steelbands which exercised this option were always treated with as being in good financial standing with the defendant."***[42](sic) [emphasis added]

45. Mr. Richard Forteau, Secretary of the CEC since 1988, submitted a witness statement on behalf of the appellant. It was Mr. Forteau who refused the nominations of all four respondents. At paragraph 24 of his witness statement, which he adopted as evidence in

[40] see para 4 of the witness statement of Denise L.J. Hernandez filed on November 9th 2012 - pgs 217-224 of the record of appeal
[41] see pgs 239-242 of the record of appeal – witness statement of Douglas Williams filed on November 9th 2012
[42] *ibid* at pgs 243-268 of the record of appeal – witness statement of Louis Patrick Arnold filed on November 9th 2012

chief, Mr. Forteau said:

> *"24……there is no process by which a member can continuously authorize the automatic deduction of all fees (including annual dues and registration fees) due under Article 9 and 3 of the Bye Laws from all appearance fees and assistance fees payable by Pan Trinbago. A request for waiver* form*, such as appears at "RF4" must be completed every time a steelband requests to have annual dues and registration fees waived."*[43]

46. Under cross examination Mr. Forteau accepted that, "*having regard to the objective of the organization I would try to interpret the constitution not in a restrictive manner. I would try to interpret the constitution to allow for as much participation by members. Full democratic system. I would agree that Pantrinbago has a duty to construe it in that way"*.[44] (sic)

47. When questioned about Neal & Massy's registration for Panorama Mr. Forteau went on to say *"…This is a registration form for Panorama 2013. My signature is there at the bottom. I see a column marked receipt 19th July 2012. This was the registration form to register Trinidad All Stars to Panorama 2013. The registration form was accepted by m*e. … As at the *deadline for the registration of Panorama I was treating it as being a financial member being in good standing. Before and to the deadline. I accepted the registration form."*[45] (sic)

Discussion and conclusion

48. At the trial it was not disputed that the appellant owed Neal & Massy appearance fees. It was also not disputed that the steel band was considered to be in good financial standing for Panorama registrations in July 2012. Counsel for the appellant argued that a distinction should be made between the consideration of a steel band's financial standing for the purpose of the annual Panorama competition and a consideration of a steel band's financial standing

[43] see pgs 269 – 345 of the record of appeal
[44] see pg 1641 of the record of appeal - the notes of evidence
[45] see pgs 1641-1643 of the record of appeal – the notes of evidence

for the purpose of prequalification for an election. We are unable to identify the core logic behind the distinction sought to be made.

49. As identified above, the evidence supported the judge's finding that the steel bands, and in particular Neal & Massy, had continuously authorised deductions by the appellant.[46] There was no finding by the judge that the deduction was automatic as suggested by the appellant. The deduction was continuous in that Neal & Massy consistently exercised the option to have the fees owed to the appellant deducted from the appearance fees owed to the steel band. We agree with the judge's reasoning that the option extended to steel bands to have fees deducted from monies owed to it, coupled with having accepted Neal & Massy as financial mere months before the elections, rendered it unfair to use the steel band's failure to pay fees in a timely fashion as a ground to challenge the eligibility of the second respondent.

50. The case of ***Chaitan v The Attorney General*** relied on by counsel for the appellant is unhelpful in the present context because it deals with the national election process which is a highly regulated one and not characterized by any degree of informality. Reliance on that case ignores the general approach to club law cases which allows for concepts of reasonableness, fairness and common sense to be given more than their usual weight.

51. The appellant has not demonstrated that the judge was plainly wrong to find that Neal & Massy was a member in good financial standing. In the face of the evidence as a whole, it was permissible for the trial judge to make the findings of fact which he did. That conclusion was one that was reasonably open to the judge. The appellant has not identified a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his factual conclusion in this regard.

iii. Whether the judge was right to grant declaratory relief to the first respondent on the sole basis that the appellant conceded the case?

52. On behalf of the appellant it was submitted that having established the criteria for eligibility

[46] see para 46 of the judgment below

for election to the CEC as dependent on nominees being delegates the judge was wrong to have granted declaratory relief to the first respondent based *simpliciter* on the appellant not contesting the claim. It was not disputed that the first respondent was not a delegate. However, the judge still declared that the first respondent was duly nominated because of the appellant's concession. It was submitted on the appellant's behalf that the declaration was granted notwithstanding the fact that evidence was not led in support of the first respondent's claim for declaratory relief, nor were steps taken to enter judgment against the appellant. It was submitted that the judge ought to have paused to consider the specific footing on which declaratory relief was being granted.

53. On behalf of the respondents it was submitted that the evidence of the first respondent became undisputed as a result of the appellant not contesting his claim. The Court was therefore entitled to make the declaration because the evidence of the first respondent was that he was once a member of the CEC. The first respondent therefore met one of the criteria identified by the judge for nomination. It was further submitted that an appeal is against the decision and not the reasons.[47] There being a basis upon which the judge could have found that the first respondent was eligible to contest elections, namely that the first respondent was a former member of the CEC, the appellate court should not interfere with the judge's ruling. The respondent also contended that the first respondent was not required to enter judgment against the appellant because it was not open to him to obtain judgment in default pursuant to Part 12 of the CPR as the appellant did not formally withdraw its defence against him.

The law

54. The Court ought not to make declarations of right either on admission or in default. In the case of ***Wallersteiner v Moir***[48] Buckley L.J. said at page 251:

> *"If declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence, and a fortissimo, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has*

[47] see ***Vibert Dos Santos v Francis Approo*** *(1970) 17 WIR 215*; ***Yhap v Ross*** *(1944) LRBG 57.*
[48] *[1974] 3 All ER 217*

acted fraudulently. Where relief is to be granted without trial, whether on admissions or by agreement or in default of pleading, and it is necessary to make clear on what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be on such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation."

55. In ***Wallersteiner***, Scarman LJ saw the position as being less rigid and considered that it would be open to the court to grant a declaration by consent where that was necessary to do justice between the parties:

"..... I believe, the duty of the court to exercise caution before committing itself to sweeping declarations; to look specifically at each claim, and to refrain from making declarations, ***unless justice to the claimant can only be met by so doing****. Generally speaking, the court should leave until after trial the decision whether or not to grant declaratory relief and, if so, in what terms..."*[49] [emphasis added]

56. The case of ***Claude Denbow & Ano. v The AG of T&T***[50] was relied on by the appellant. In that case Pemberton J considered the authorities on granting declaratory relief on admissions and at paragraph 19 said:

"DECLARATORY RELIEF

Much has been written on this special jurisdiction of the Court to grant declaratory relief. I do not intend to traverse that ground in this decision. Suffice it to say that in the absence of special or exceptional circumstances, ***or in appropriate cases, such as where there is no possible defence or where there are no factual disputes and the denial of such relief will cause the claimant an injustice*** *the Court will not readily grant declaratory relief based on admissions."* [emphasis added]

According to the appellant, it could not be said that the denial of declaratory relief to the first respondent would have caused him injustice as he was not a delegate of his member steel band.

[49] *ibid* at pg 252; later applied in the case of ***Animatrix Ltd & Ors v Jeffrey O'Kelly*** *[2008] EWCA Civ 1415*
[50] *CV 2005-00740*

Discussion and conclusion

57. The grant of declaratory relief upon admissions or concessions is not barred in all instances. Where it is appropriate the court will grant the relief sought. In this case, the judge found that eligibility for elections was based first on whether or not the candidate was a delegate or an outgoing CEC member. It was not disputed that the first respondent was not a delegate of a member steel band and the judge was alive to this in his ruling.[51] Similarly, it was also not disputed that the appellant was an outgoing CEC member. The judge makes express reference to the fact that the first respondent was elected Trustee of the CEC in 2009.[52] The first respondent, as an outgoing CEC member, met the criteria for nomination as there was no dispute about the financial standing of the band to which he belonged. The first respondent was thus wrongly excluded from the election process. The declaration was necessary to do justice in this particular case to ensure that the first respondent is afforded his right to contest the elections, in accordance with the Constitution.

iv. Whether it was open to the judge to award nominal damages to the first and second respondents without hearing submissions on the issue and if so, whether the sum of $5000.00 awarded was excessive?

58. On behalf of the appellant it was submitted that the award of nominal damages was inappropriate because there was no claim for nominal damages. It was submitted in the alternative that even if the judge's award of nominal damages was appropriate, the judge ought to have (i) invited the parties to make submissions on the amount of such an award and (ii) established a conventional figure/standard for the award. Reliance was placed on the learning of Professor S.M. Waddams in ***The Law of Damages***.[53] After noting that the court has awarded different figures in the past for nominal damages Professor Waddams said:

> "*It is submitted that there is good reason for the courts to re-establish a conventional figure. This is particularly important where the defendant wishes to make a payment into court. If the defendant knows that the figure for nominal damages is, say, $1, the*

[51] see para 24 of the judgment below
[52] see para 21 of the judgment below
[53] 2nd Ed. (Aurora, Ont. Canada Law Book) at c. 10.20;

defendant can safely make a payment into court of that amount. It is in the public interest to discourage unnecessary litigation, and the rule governing payment into court is designed to further that interest. The defendant who concedes that the plaintiff's right has been infringed but asserts (as it turns out correctly) that there is no loss, should be entitled to know what amount to pay into court in anticipation of an award of nominal damages. In inflationary times some might argue that the amount should be perpetually increasing, but this argument ignores the nature of nominal damages, which is not to give compensation for anything that could be bought with money but to mark symbolically the infringement of a right. Provided that the amount is not so low as to be confused with contemptuous damages, a small and fixed conventional sum seems appropriate. It is suggested that $1, which appears to be the figure having most authoritative support in Canadian cases, should be adhered to"

59. The appellant submitted that the range of the award of nominal damages in the High Court over the last ten years has typically been from $100[54] to $25,000.[55] There was one instance in which $250,000 was awarded.[56] It was thus submitted that the judge ought to have first established a conventional award because no standard existed. In addition, the judge provided no reasons for the figure arrived at. The appellant contended that the judge having failed to set a standard, it was open to this Court to now do so because the sum of $5,000 awarded could not reasonably be characterized as nominal. It was submitted that a nominal sum would have been in the range of $1 to $5.

60. In response, the respondents submitted that the claim form did seek damages as a relief. Though it did not specify what type of damages there was no requirement in law that general or nominal damages be specifically pleaded. There is also no requirement for the parties to be heard on whether nominal damages ought to be granted and on the quantum of such damages. The quantum of nominal damages to be awarded is at the discretion of the court, having regard to the particular circumstances. The respondents submitted that it could not be

[54] see ***Luthel John v Hollis Collins*** *HCA 544 of 2002* (delivered July 21st 2010) at pg 12
[55] see ***Persad-Maharaj v Persad-Maharaj*** *CV 2007- 00923* at para 43
[56] see ***RBTT Merchant Bank Limited & Ors v Reed Monza & Ors.*** *CV 2010-03699* at paras 9 - 16

said that the award was inappropriate having regard to the role of the appellant as the world governing body for steel pan. The award reflects the gravity of the denial of the respondents' right to contest elections in accordance with the Constitution.

Discussion and conclusion

61. The court fixes a small sum, referred to as nominal damages, in order to mark the fact that there has been a breach of contract, but not in any way to compensate the claimant, where no loss has been proven.[57] Nominal damages are generally awarded to mark the fact that there has been a breach of contract in circumstances where there is no quantifiable loss caused by the breach. The quantum of nominal damages to be awarded is at the discretion of the court, having regard to the particular circumstances of the case.

62. In this case the appellant is the world governing body for steel pan and acts as the sole representative for members in all matters relative to the development, promotion and performance of steel pan and steel bands. The first and second respondents were denied their right, pursuant to the Constitution, to contest the election of the appellant's governing body. An award of the sum of $5000 representing nominal damages was not inordinately high or exorbitant. In light of the range highlighted by the appellant, it cannot be said then that a conventional award, in Trinidad and Tobago, would be in the range of $1 to $5. There is no basis upon which to interfere with the judge's discretion.

v. Whether the orders for costs were plainly wrong?

63. The judge ordered the appellant (defendant) to pay the prescribed costs of the first and second respondents (claimants) in the sum of $14,000 each and that the third and fourth respondents (claimants) pay the prescribed costs of the appellant in the sum of $14,000[58].

64. On behalf of the appellant it was submitted that the judge should not have awarded the first

[57] see ***Mappouras v Waldrons Solicitors*** *[2002] EWCA Civ 842*
[58] see para 23 of the judgment above

and second respondents costs because an award of nominal damages does not entitle a plaintiff to costs. An award of nominal damages does not necessarily suggest that a plaintiff is successful.[59] Further, a successful party has no legal right to costs but only a reasonable expectation of receiving them, subject to the court's discretion in that regard.[60] It was contended that where only nominal damages are awarded the cases reveal three possible outcomes with respect to costs: (i) the judge could have awarded costs to the successful party; (ii) each party could have been directed to pay their own costs; or, (iii) the judge could have ordered the successful party to pay costs. Therefore, it was submitted that the judge ought to have invited submissions from the parties on whether the first and second respondents should have been awarded costs at all.

65. On behalf of the appellant it was also submitted that the judge unjustly awarded costs payable by the appellant to the first and second respondents on a different basis from the costs payable to the appellant by the third and fourth respondents. The judge did not point to any conduct that would have justified a less advantageous costs order and should have invited submissions on the issue. It was argued that since the award of costs was an exercise of a judicial discretion, such a differentiation by the judge without any stated or justifiable basis was plainly wrong. It was not for the parties to guess at what factors might have been considered by the judge in arriving at the different costs order. Rather, it was for the judge to state the basis of the award and it was an error of law for the judge to have failed to do so.

66. On behalf of the respondents it was submitted that pursuant to Part 66 of CPR, the general rule is that the costs of the successful party must be paid by the unsuccessful party if the court is to award costs. Having found in favour of the first and second respondents, the Court was entitled to order that the appellant pay their costs. They were in fact successful despite the appellant's submissions that an award for nominal damages does not mean a claimant is successful. The claim was not just for damages but for relief to allow the parties to contest elections of the CEC. Having regard to the findings of the Court, they were indeed successful litigants.

[59] ***Anglo-Cyprian Trade Agencies ltd. v Paphos Wine Industries Ltd***. *[1951] 1 All ER 873*
[60] see ***Metis National Council Secretariat Inc. v Dumont*** [2008] CarswellMan 598 at para 46 per F.M. Steel J.A.

67. On the respondents' behalf it was further submitted that the costs orders of the judge were appropriate having regard to the pleaded cases. It was submitted that the judge was right to order that the third and fourth respondents collectively pay costs to the appellant because the facts in support of those claims were similar and/or the same. They both claimed to be members of the same steel band who duly submitted nomination forms. The appellant defended the third and fourth respondents' claims on an identical basis in that it claimed they were not members of the same steel band and were not in good financial standing. It was also submitted that the judge was right to order that the appellant pay the costs of the first and second respondents individually because those claims were not closely intertwined and were treated as separate claims by the parties. Those two claimants did not belong to the same steel band and the appellant's defence to the claims was different. The appellant did not contest the claim of the first respondent and denied the eligibility of the second respondent because of the financial standing of the steel band to which she belonged.

68. In reply to the respondents' submissions, the appellant contended that: (i) the fact that the respondents were members of different steel bands; (ii) one of the respondents was held out to be a delegate; (iii) two of the respondents were not registered members of a member steel band; and (iv) the steel band to which one of the respondents belonged was not financial, were not factors that could justify making a differential award for costs. There was one common issue which was whether the respondents were eligible to contest elections. There was one statement of case filed, dealing jointly with the claims of the respondents and one defence was filed. It was submitted therefore that the factors identified by the respondents could not justify an award of costs on a different basis.

Principles governing the orders for costs in this case

69. The general rule is that the court must order the unsuccessful party to pay the costs of the successful party.[61] A claimant who recovers nominal damages ought not necessarily to be regarded in the ordinary sense of the word as successful.[62] In certain cases he may be

[61] see Rule 66.6 (1)
[62] ***Anglo-Cyprian Trade Agencies ltd. v Paphos Wine Industries Ltd***. *[1951] 1 All ER 873*

considered a successful party, for example, where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained.[63] It is therefore necessary to examine the facts of the particular case to determine the extent to which a claimant who recovers nominal damages may properly be regarded as a successful party.

70. The general rule is that where rule 67.4 does not apply and a party is entitled to the costs of any proceedings, those costs must be calculated in accordance with the percentage specified in Appendix B to Part 67 of the CPR against the appropriate value of the claim.[64] Rule 67.4 provides for the award of fixed costs which are applicable where the claim is for a specified sum of money and the defendant does not defend the claim. In this case the prescribed costs regime is therefore applicable.

71. When determining prescribed costs, the value of the claim in the case of the claimant, is to be decided by the amount agreed or ordered to be paid.[65] In the case of the defendant, the value of the claim in relation to the case may be determined in one of two ways: (i) where the claim is for damages and the claim form does not specify an amount that is claimed, the value may be as agreed between the parties or stipulated by the Court; or (ii) where the claim is not for a monetary sum it may be treated, subject to an application to determine the value of the claim, as a claim for $50,000.[66]

72. The first and second respondents were awarded a sum of $5,000 in nominal damages. Following the CPR, this would suggest that the value of the claim should be treated as being $5,000. The prescribed order for cost in that instance should generally not exceed thirty percent of $5,000, being $1,500. However, there seems to be a practice developing where claims without a monetary sum are generally valued at $50,000. Speaking on the approach to

[63] *ibid* at page 874 per Delvin J
[64] see Rule 67.5
[65] see Rule 67.5(2)(a)
[66] see Rule 67.5(2)(b)

prescribed costs in the Eastern Caribbean in the case of ***Maxymych v Global Convertible Megatrend limited***,[67] Joseph-Olivetti J said:

> *"I note en passant that under 65.5(2)(a) in the case of a successful claimant in a non monetary claim the value of the claim is "the amount agreed or ordered to be paid and that there is no provision for the value to be fixed at $50,000 or for the court to value the claim under r. 65.6(1)(a). However, to cure a seeming omission the practice seems to have arisen of applying the same rules as governs the defendant under 65.5(2)(b)(iii) as this seems to be what was contemplated by CPR when one reads 65.5 and 65.6 together."*

73. The ***Caribbean Civil Court Practice*** *2011 Ed* notes that there are cases where costs assessed or fixed by reference to the low amount of the value do not justly reflect the considerable complications of law or fact.[68] In ***Donald v A-G Grenada***[69] it was pointed out that the rules do not intend that the prescribed costs regime should inflexibly be applied in order to determine the costs payable.

74. In Trinidad and Tobago, rule 67.5(4)(a) of the CPR entitles the court to award a proportion of the costs detailed in the scale of prescribed costs. The court has the discretion to award a portion of that outlined in the prescribed scale but must take into account matters set out in rule 66.6(4), (5) and (6) which includes the conduct of the parties.[70] Where there is to be a consideration of the factors identified at rule 66.6(4),(5) and (6) the judge is required to invite

[67] *Claim No. 246 of 2006* (British Virgin Islands)
[68] see page 352
[69] *Civil Appeal No. 32 of 2003*
[70] In particular it must have regard to— (a) the conduct of the parties; (b) whether a party has succeeded on particular issues, even if he has not been successful in the whole of the proceedings; (c) whether it was reasonable for a party— (i) to pursue a particular allegation; and/or (ii) to raise a particular issue; (d) the manner in which a party has pursued— (i) his case; (ii) a particular allegation; or (iii) a particular issue; (e) whether a claimant who has won his claim caused the proceedings to be defended by claiming an unreasonable sum; and (f) whether the claimant gave reasonable notice of his intention to issue a claim. (6) The conduct of the parties includes— (a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties complied with any relevant pre-action protocol; and (b) whether either or both parties refuse unreasonably to try an alternative dispute resolution procedure.

submissions from the parties on the just award to be made. Jamadar J.A. in the case of ***Favianna Gajadhar v Public Service Commission***[71] noted at paragraphs 6 and 7:

> *"6. Having determined the substantive matter in favor of the appellant, the trial judge decided the issue of costs without hearing the parties on either what was an appropriate order to make, or on the assessment of costs payable. In our opinion the judge's approach to the issue of costs was erroneous.*
>
> *7. First, having determined the matter in circumstances where neither party addressed the issue of costs, the correct approach to be taken, as is the consistent practice in these courts, was to invite the parties to make submissions on both aspects of costs: the appropriate order to make and the reasonable quantum to be awarded. Rule 66.6 CPR, 1998 contemplates an exercise of judicial discretion in determining who should pay costs. Further, the factors to be considered and weighed are contextually bound and are capable of producing different outcomes depending on the circumstances of each case. As such, parties should generally be given the opportunity to make representations – fairness and justice demand no less and the decision making process can only benefit from such an approach."* [emphasis added]

75. It is clear from rule 66.6 (4), (5) and (6) that the court has a discretion to vary costs orders prescribed by the CPR. However, where there is a move away from the general guidelines, the judge must give a reason for so doing. A judge is obliged to give reasons for making an unusual order as to costs, unless, of course, the reasons are deducible from the rest of the judgment. The consequence of a failure to give reasons when reasons are required will often be to require this court to set aside the costs order made and exercise an original discretion to determine the appropriate order to make as to costs.[72]

Discussion and Conclusion

76. The claims of the first and second respondents sought primarily to enforce their right to

[71] *CA Civ P-170 of 2012*
[72] ***David Sims et al v Audubon Holdings Limited et al*** **– Caribbean Civil Court Practice 2011** ***at pg. 353***

contest elections as in accordance with the Constitution. It was not merely an action for damages. The appellant's submission that they should not be regarded as 'successful' is rejected.

77. As indicated above, the prescribed costs regime applied to this case. The general rule was that the orders should have been decided by the prescribed scale. Though the rules set guidelines for the order that should be imposed, the judge had the discretion to vary that order. That discretion should have been exercised after hearing submissions from the parties. The judge failed to solicit submissions before deciding on a figure. The correct approach to be taken was to invite the parties to make submissions. The judge was required, as a matter of procedural fairness, to invite submissions from counsel on both sides in an attempt to ascertain what would be a just award in the circumstances. Further, the judge appears to have departed from the recommended costs award in relation to the first and second respondents. This departure is in addition to the apparent differentiation in the awards in that the appellant was ordered to pay costs on a different basis to that on which the third and fourth respondents were required to pay costs. The judge did not provide reasons for the departure or the differentiation. This was an unusual award which required that the parties be informed of the reason behind the order. The reason for the award is not deducible from the case and so this court must now determine an appropriate order.

78. For these reasons, the judge was plainly wrong in that he failed to solicit submissions on the issue of costs. The judge was also plainly wrong in his failure to provide reasons for the unusual award that was made.

Disposition

79. The appeal is allowed only on the issue of the appropriateness of the orders for costs. The judge's order in this regard is set aside and we shall hear attorneys' submissions on the issue. All the other grounds of appeal raised by the appellant have not been successful.

P. Jamadar
Justice of Appeal

N. Bereaux
Justice of Appeal

M. Mohammed
Justice of Appeal