

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 27/2010**

**APPLICATION NO 106/2011**

**BEFORE:**   **THE HON MR JUSTICE PANTON P**  
                 **THE HON MR JUSTICE DUKHARAN JA**  
                 **THE HON MISS JUSTICE PHILLIPS JA**

<b>BETWEEN</b>	<b>BENTLEY ROSE</b>	<b>APPLICANT</b>
<b>AND</b>	<b>CITY OF KINGSTON CO-OPERATIVE CREDIT UNION LIMITED</b>	<b>RESPONDENT</b>

**Leighton Miller instructed by Gayle Nelson & Company, for the applicant**

**Emile Leiba instructed by DunnCox for the respondent**

**24 May, 17 June and 29 July 2011**

**PANTON, P**

[1] I have read the reasons for judgment of my brother Dukharan JA and agree with his reasoning and conclusions. I have nothing to add.

**DUKHARAN JA**

[2] On 17 June 2011, we refused this application and awarded costs to the respondent to be agreed or taxed. These are our reasons for so doing.

[3] Before us was an application to enlarge time within which to file an application for permission to appeal against an order of Mangatal J, made on 15 January 2010, whereby she struck out the applicant's statement of case and dismissed an application for summary judgment. The applicant also sought the grant of relief from sanctions for his failure to comply with rule 26.1 (2) (c) of the Civil Procedure Rules.

### **Background**

[4] The applicant is a businessman and was at all material times a member of the respondent, the City of Kingston Co-operative Credit Union Limited ("C.O.K.") which is a credit union registered under the Co-operatives Societies Act.

[5] Between the years 1996 and 1997, the applicant borrowed two separate loans from C.O.K. in the sums of \$1,300,000.00 and \$630,000.00 which were secured by shares belonging to the applicant held at C.O.K. and by bills of sale over three motor vehicles owned by him, respectively. An additional security in the sum of US\$20,000.00 was provided by the applicant to C.O.K. by way of hypothecation. The loans were consolidated in May 1997 with the applicant's total indebtedness to C.O.K., at that time, being \$1,995,895.78. The agreement between the parties was for the debt to be repaid in monthly installments, in the amount of \$81,082.00 per month for 48 months commencing in June 1997.

[6] The applicant made the first 12 payments after which, through oral communication, he advised an agent of C.O.K., in or about June 1998 that he was unable to continue making payments due to a depletion of his business resources

caused by a massive fraud perpetrated against him and his companies by two bank managers, both of whom were convicted for the said fraud in May 2003. The applicant therefore asked that his outstanding loan balance be realized from his available security. It has always been a rule of C.O.K. that no member should be permitted to withdraw shares or deposits in excess of the amount hypothecated and/or used to secure a loan and this rule was observed in respect of the applicant. No further communication or contact was made by C.O.K. with the applicant with respect to the loan until about April 1999 when he was visited by a bailiff employed by C.O.K. to recover two of the motor vehicles which were used to secure the loan. Within a few days of the bailiff's visit, the said vehicles were transported by the applicant, one each, to the Island Special Constables Credit Union on the instructions of the bailiff. The applicant said that the vehicles were in excellent working condition with no missing parts.

[7] The applicant alleged that he received no further communication from C.O.K. regarding the loan, after the delivery of the vehicles, until 14 April 2000 when he attended upon the offices of C.O.K. to collect the title for the third motor vehicle which was used as security for the loan. There and then, he said, he was verbally informed by an agent of C.O.K. that he was indebted to C.O.K. of over \$1,280,000.00 million. After protesting strongly, the applicant said he was asked to return in seven days. Upon his return, he said he was informed by the said agent that no money was owing on the loan but the agent refused to accede to his request to put same in writing.

[8] Subsequently, in or about July 2001, C.O.K. brought arbitration proceedings against the applicant under the Co-operatives Societies Act, claiming that the applicant was indebted to it in the total sum of \$1,225,748.18 as at 7 May 2001. The applicant claimed that due to his inability to attend a particular hearing in these arbitration proceedings in September 2001, and despite C.O.K.'s failure to provide certain information requested concerning the accounting for and disposition of his securities, an award was made against him for the sum claimed. As a result of the award, C.O.K. obtained judgment against him in the Sutton Street Resident Magistrate's Court and renewed warrants of commitment and took out judgment summonses against him between September 2001 and 5 January 2006.

[9] The applicant claims that by virtue of a subsequent arbitration order handed down in 2004, the award made in 2001 was overturned. As a result, an order was made at the commitment hearing in the Sutton Street Resident Magistrate's Court on 20 February 2006 setting aside the judgment and subsequent process.

[10] By way of a claim form and particulars of claim filed on 25 April 2008, the applicant commenced proceedings in the Supreme Court against C.O.K. in which he sought a declaration that he is not indebted to C.O.K. at all. He also claimed damages for malicious falsehood in that C.O.K. has over many years, and repeatedly, maintained falsely that he is indebted to it knowing full well that he is not. He further claimed damages for conspiracy, negligence for breach of contract for C.O.K.'s failure to account

for a sum of US\$20,000.00 as well as for C.O.K.'s sale at an undervalue of two motor vehicles owned by him over which C.O.K. had bills of sale and aggravated damages.

[11] The particulars of claim set out a number of particulars of injurious falsehood, including that C.O.K. persisted in making this false claim and sought to embarrass him during the fraud proceedings against the two bank managers. It also set out particulars of aggravation, breach of mortgagee's duty, loss, expense and damage as well as remedies sought.

[12] On 10 November 2008, the applicant filed a notice of application for summary judgment against C.O.K. The orders sought were couched in the following terms:

- "(i) A Declaration that the Claimant is not indebted to the Defendant at all.
- (ii) A Declaration that the Defendant's statements as to the Claimant's alleged indebtedness were made maliciously, and without just cause or excuse, causing the Claimant to suffer damage as a result.
- (iii) That there be a hearing for the assessment of damages in the claim."

[13] Subsequently, on 3 February 2009, C.O.K. filed a notice of application for court orders to strike out the applicant's claim. The application sought inter alia, the following orders:

- "(1) That the Claimants statement of case be struck out as an abuse of the process of the court pursuant to C.P.R 26.3 (1) (b); and/or

- (2) That the Claimants statement of case be struck out as it discloses no reasonable ground for bringing the claim pursuant to C.P.R 26.3 (1) (c)."

[14] Both applications were heard before Mangatal J on 23 June and 23 July 2009, she having heard the application made by the respondent to strike out the applicant's claim, first. On 15 January 2010, the learned judge made the following orders:

- "(a) The Claimant's Statement of Case is struck out on the ground that it is an abuse of the process of the court, pursuant to Rule 26.3 (1) (b) of the C.P.R.
- (b) The Claimant's application for summary judgment filed November 10, 2008 is dismissed.
- (c) Costs are awarded to the Defendant in respect of both applications, to be taxed if not agreed or otherwise ascertained."

[15] On 31 May 2010 Brooks JA (Ag) granted the applicant an extension of time within which to file notice and grounds of appeal. It was further ordered that the notice of appeal filed on 5 March 2010 "is deemed properly filed". This order was appealed by C.O.K. and on 21 September 2010, this court set aside the order of Brooks JA (Ag) and ruled that it was incumbent on the applicant to have first obtained permission to appeal before seeking an extension of time to file the notice and grounds of appeal.

[16] It is against this background that the applicant now seeks an enlargement of time within which to file application for permission to appeal out of time.

## **Issues**

[17] The issues to be determined are:

- (1) Whether just and reasonable grounds exist for the exercise of this court's discretion in granting the application.
- (2) Whether the appeal has a reasonable prospect of success.

## **Submissions**

[18] Mr Miller, for the applicant, submitted in his written and oral submissions, that the failure to apply to this court for permission to appeal was based on the misapprehension of the applicant's attorneys-at-law, that the judgment of the court below was a final judgment, since it purported to bring the matter to a final conclusion. The failure to comply was not due to the applicant but to his attorneys-at-law.

[19] He further submitted that the applicant's prospective appeal has a real chance of success as the judge below fell into error in her findings of fact and law. He said there were significant features in the judgment open to challenge.

On the findings of fact, Mr Miller challenged the learned judge's finding that "the Registrar (of Cooperative Societies) found that Mr Rose was indebted to COK in the sum of \$1,335,792.52". This, he submitted, was completely erroneous, as the learned judge failed to take cognizance of the fact that the Registrar made no such finding and erroneously attributed to the Registrar, the "findings and reasons", of an unqualified auditor contained in the said auditor's report. He further submitted that the finding of the learned judge that the applicant's indebtedness had already been decided by a competent tribunal, i.e. by arbitrator Stanley Moore and was never appealed from, was

erroneous and incomplete as the matter of the applicant's indebtedness was heard in ex parte proceedings. This was also done without the production of any material by C.O.K. in substantiation of its purported claim.

[20] Mr Miller also submitted that the Registrar was not competent in considering an appeal to him against arbitrator Douglas Archibald's ruling which was in his, the applicant's favour. Mr Miller further submitted that the learned judge failed to take due cognizance of the fact that a judgment summons brought at the instance of C.O.K. against the applicant in the Resident Magistrate's Court was decided in favour of the applicant on the basis that both parties had participated in the subsequent arbitration. The parties were estopped from questioning the effect of the subsequent (Archibald) ruling as overturning the original (Moore) award.

[21] Mr Miller also challenged the findings of the learned judge that no proper cause of action for malicious falsehood has been made out. This is on the basis that the actual language has not been set out in the particulars of claim. He said the learned judge failed to apply the legal principle that a statement of injurious falsehood may be oral or written, and even conduct conveying a false representation may be sufficient.

[22] Mr Miller referred to the cases of **Anisminic Limited v Foreign Compensation Commission** [1969] 2 AC 147 and **Mahon v Air New Zealand Limited et al** [1984] 1 AC 808.

[23] Mr Leiba, for C.O.K., submitted that permission to appeal ought to be refused as over one year has elapsed since judgment was delivered. He said that in order for this court to exercise its discretion, proper affidavits should have been filed.

[24] Mr Leiba further submitted that the applicant has no real chance of success as the basis of his claim has been decided by the court below and that on the basis of section 50 (5) of the Co-operative Societies Act (the Act) the decision was final. He further submitted that the applicant failed to appeal to the Registrar under the Act and the learned judge was correct in striking out the applicant's case. He submitted that this court would also be bound by the provisions of section 50 (5) of the Act.

[25] On the issue of the applicant's application for a declaration that C.O.K.'s statements regarding his indebtedness were made maliciously and without just cause or excuse, as set out in his claim, Mr Leiba submitted that was predicated upon a determination being made by the court that he was not indebted to them. That issue, he said, had already been decided in favour of C.O.K. by an arbitrator who was appointed by the Registrar pursuant to section 50 of the Act.

[26] As stated, does just and reasonable grounds exist for the exercise of this court's discretion in granting the application? Before determining this issue, it will be necessary to determine whether the prospective appeal has a reasonable prospect of success. In deciding whether a claimant's statement of case discloses any reasonable grounds for bringing a claim, the court applies the test used in summary judgment applications, that is, whether the claimant has a real prospect of succeeding on the

claim. See **Swain v Hillman and Another** [2001] 1 All ER 91 where at page 92 it was stated that "real" means realistic as opposed to a fanciful prospect of success, per Lord Wolfe.

[27] The applicant has stated in his claim form that he is not indebted to C.O.K. at all and has sought damages for malicious falsehood, conspiracy, negligence, breach of contract as well as aggravated damages. C.O.K. has denied in its defence that the applicant is entitled to any of the reliefs claimed.

[28] In 2001, pursuant to section 50 of the Act; a dispute between the applicant and C.O.K. concerning the balance of debt due and owing to C.O.K., was referred to the Registrar of Co-operatives Societies, who by order dated 2 July 2001 referred the dispute to arbitration for disposal. The arbitrator ordered that the applicant pay to C.O.K. the sum of \$1,225,748.18 (inclusive of principal and interest at a rate of 24.4% per annum). The applicant did not appeal this award. For convenience, section 50 of the Act is set out as follows:

## **Disputes**

"50 - (1) If any dispute touching the business of a registered society arises -

- (a) among members, past members and persons claiming through members, past members and deceased members; or
- (b) between a member, past member, or person claiming through a member, past member or deceased member, and the

society, its committee, or any officer of the society; or

- (c) between the society or its committee and any officer of the society; or
- (d) between the society and any other registered society;

such dispute shall be referred to the Registrar. A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, shall be deemed to be a dispute touching the business of the society within the meaning of this subsection.

- (2) The Registrar shall, on receipt of a reference under subsection (1), refer it for disposal to an arbitrator or arbitrators.
- (3) Any party aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Registrar within such period and in such manner as may be prescribed.
- (4) A decision of the Registrar in an appeal under subsection (3) shall be final and shall not be called in question in any civil court.
- (5) The award of the arbitrator or arbitrators under subsection (2) shall, if no appeal is preferred to the Registrar under subsection (3), or if any such appeal is abandoned or withdrawn, be final and shall not be called in question in any civil court and shall be enforced in the same manner in all respects as if the award had been a judgment of a Resident Magistrate."

[29] The core of the claim by the applicant before Mangatal J was a claim for a declaration that he is not indebted to C.O.K. and is seeking to rely upon that declaration as a basis for his claim for damages for malicious falsehood.

[30] I agree with the learned judge that the matter of the applicant's indebtedness has already been decided by a competent tribunal. The tribunal was established under the Act for resolving disputes between C.O.K. and its members. It is quite clear that the applicant having now appealed, the "Moore award" is final and binding on the applicant, see section 50 (5) of the Act. In the Co-operative Societies Regulations, 1950, there is express provision (Regulation 45), allowing an award to be made ex parte where a party having been notified of a hearing fails to attend.

[31] On the issue of malicious falsehood, it was the finding of the learned judge that the claim form and particulars of claim does not raise a cause of action for malicious falsehood. Nowhere does the statement of case set out the words complained of in respect of various different proceedings and situations which allegedly occurred at different times and places and which were allegedly stated by several different persons.

The learned judge said at page 17 of the judgment:

"However, the actual language or words have not been set out, whether strictly or at all. This is vital for a claim in respect of malicious falsehood and on that basis alone, it is plain that no proper cause of action has been made out. In addition, I note that the Particulars of Claim speak about loss of reputation, without specifying the matters necessary for raising defamation. The Statement of Case demonstrates a lack of appreciation that whereas the tort of defamation protects the claimant's reputation, the tort of malicious

falsehood protects the claimant's interest in his property or trade (or economic interests more generally). Further, the law is that where the claimant has not alleged or cannot prove special damage, the claimant must allege that the words in question were calculated to cause pecuniary damage to him in his trade or business. This does not appear to have been clearly or effectively pleaded in this case."

I agree with the above finding of the learned judge.

[32] It is noticeable that in the particulars of claim filed on behalf of the applicant, there is no mention of the appeal which the applicant brought to the Registrar in relation to the Archibald award. There is also no reference where the Registrar found the applicant indebted to C.O.K. in the sum of \$1,335,792.52. There is also no mention of the fact that the applicant filed an application seeking leave to apply for judicial review.

[33] I am of the view that the proceedings brought by the applicant are an abuse of the process of the court and the doctrine of estoppel applies. In **Carl Zeiss - Stiftung v Rayner and Keeler Limited** [1966] 2 All ER 536 at page 564 Lord Guest, quoting from Spencer Bower on res judicata stated:

"The rule of estoppel by res judicata, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decisions on the merits."

On the issue of abuse of process, Lord Diplock said in **Hunter v Chief Constable of the West Midlands** [1982] A.C. 529 at page 536:

"... this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

[34] I am of the view that the learned judge was correct when she said at paragraph [54] of the judgment:

"Parliament has seen it fit to legislate that the Registrar is the final tier in the adjudicatory process in relation to certain types of disputes involving Co-Operatives Societies. There is no right of appeal to this court in relation to the merits of the Registrar's decision and Mr. Rose is estopped from raising the issues which were determined by the Registrar anew. The only manner in which Mr. Rose could have challenged the Appeal award of the Registrar is by way of judicial review, and that would not be a challenge on the merits. It seems to me that Mr. Rose would have to successfully do that before he could properly make a claim, the basis for which is allegedly that C.O.K. is falsely claiming that he is indebted to it. He has not successfully challenged the relevant decision and thus, the finding by the Registrar that Mr. Rose is indebted to C.O.K. remains extant. It is thus altogether unfair and untenable for Mr. Rose to be allowed to maintain that C.O.K.'s claim that he is indebted to it is false."

[35] I hold the view that the applicant's prospective appeal has no reasonable prospect of success. Even if this court was mindful to enlarge time in which to file the

appeal out of time, the applicant has an unwinnable case where continuance of the claim would be a waste of the court's resources on both sides. Consequently, I would refuse the application. There shall be costs to the respondent to be taxed, if not agreed.

**PHILLIPS, JA**

[36] I too agree with the reasoning and conclusions of Dukharan JA.