IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. 189 of 2023

BETWEEN:

[1] EVERALDO PUCK
[2] JUANA TERRY
[3] OMAR HUITZ
[4] TIMOTEA SANCHEZ
[5] ADDY CAMARA
[6] UDALBERTO MUÑOZ
[7] CARLOTA BACAB
(BOARD OF DIRECTORS OF SAINT FRANCIS XAVIER CREDIT UNION LIMITED)

[8] RAFAEL DOMINGUEZ SR.
(GENERAL MANAGER OF SAINT FRANCIS XAVIER CREDIT UNION LIMITED)

Claimants

and

[1] KAREEM MICHAEL
(THE REGISTRAR OF CREDIT UNIONS)

Defendant

Appearances:

Rt. Hon. Dean O. Barrow SC and Mr. Adler G.L. Waight for the claimants
Mr. E. Andrew Marshalleck SC and Mr. Yohhahnseh Cave for the defendant

---

2023: October 30th;

2024: April 15th.

JUDGMENT

[1] **ALEXANDER, J.:** By Fixed Date Claim Form dated 20th April 2023, the claimants who comprise the Board of Directors and General Manager of the Saint Francis Xavier Credit Union Limited ("the credit union") sought judicial review and constitutional relief arising out of the decisions of the Registrar of Credit Unions ("the Registrar") to:

i. appoint an Administrator under Section 61 of the Credit Union Act Cap. 314 ("CUA") over the credit union;
ii. levy a fine on the credit union on 24th February 2023; and
iii. issue certain directives to the credit union on 16th February 2023 concerning certain loans given by the credit union.

[2] The claimants sought the following reliefs on behalf of the credit union:

i. a declaration that the decision of the Registrar made on 10th March 2023, to appoint an Administrator over the credit union is unlawful, disproportionate, procedurally improper, and violative of the claimants' constitutional right to equal protection under law.
ii. an order of certiorari to quash the Appointment.
iii. a declaration that the decision of the Registrar made on 24th February 2023, to issue fines against the credit union, is unlawful and ultra vires the CUA.
iv. an order of certiorari to quash the decision to fine.
v. a declaration that the Registrar's loan corrective directions to the credit union made on 16th February 2023 are unlawful and ultra vires the CUA.
vi. an order of certiorari to quash the Loan Corrective Measures.

[3] I dismiss the application for judicial review of the appointment of the Administrator and the imposition of the loan directives of the Registrar as contained in the letter of 16th February 2023. I grant the reliefs sought by the claimants in respect of the decision of the Registrar made on 24th February to impose the fine.

Background

[4] The general backdrop giving context to the current proceedings is broadly undisputed. I have read and meticulously combed through all the affidavits and documentary evidence which are

before me. The facts are extensive and agreed by parties, so I propose to set out the relevant facts in summary form in this judgment. Where necessary I will refer in detail to specific facts in my analysis. The credit union is the second largest credit union in Belize with an asset base estimated at over one hundred and seventeen million dollars. The Registrar is also the Governor of the Central Bank who is the Registrar of Credit Unions by virtue of section 5 of the CUA.

[5] On 13th April 2022, the Board of the credit union passed a unanimous resolution not to renew the contract of its general manager Rafael Dominguez Sr. who is the deponent on behalf of the claimants in these proceedings. By resolution dated 22nd June 2022, the Board also terminated the employment of Rafael Dominguez Jr. as Branch Manager of the Caye Caulker Branch, and Lina Garcia as Branch Manager of the San Pedro Branch for breach of the credit union's Oath of Secrecy and Confidentiality Agreement. Mr. Dominguez Sr. is the father of Mr. Dominguez Jr., and the common law spouse of Ms. Garcia.

[6] The credit union convened an Annual General Meeting ("AGM") on 26th June 2022 where a new Board of Directors was elected composed of the first seven of the eight claimants in these proceedings (Mr. Dominguez Sr. is the eight claimant). The new Board then reinstated Mr. Dominguez Sr. as general manager and his common law wife and son to their previous posts as branch managers. Thirteen employees were also suspended by the new Board including the internal auditor, compliance officer, information technology and monitoring officers.

[7] There was notable public disquiet about the management and personnel shakeup at the credit union. On 8th June 2022, the Belize Credit Union League ("the League") wrote to the Registrar requesting regulatory intervention into the affairs of the credit union as there was a risk that the situation if allowed to continue would cause irreparable harm to the credit union and the wider credit union movement in Belize. Concern was also conveyed to the Registrar by at least one other credit union: the Holy Redeemer Credit Union.

[8] On 28th June 2022, the Registrar wrote to the new Board expressing concern about the suspension of the thirteen employees, the reinstatement of Mr. Dominguez Sr, Mr. Dominguez Jr and Ms. Garcia and invited the Board to a meeting to discuss the situation. A virtual meeting between the new Board and the Registrar was held the following day 29th June 2022 where

the personnel changes, the mass suspension of staff, reported cases of misappropriation of funds, release of confidential information and the financial condition of the credit union were discussed.

[9] On 30th June 2022, auditor Shawn Mahler submitted a report dated 25th June 2022, to the Board and the Registrar, on an Agreed Upon Procedures Report - Cash, Expenditures, Withdrawals and Transfers ("First Mahler Report"). This report was commissioned by the previous board of directors in office immediately before the AGM. Ms. Mahler concluded that there were "significant deficiencies and material weaknesses in the credit union's internal control over cash management, related party transactions, expenditure processing cycle, anti-money laundering, risk management and compliance, governance and oversight responsibilities."

[10] Clearly alarmed by the contents of the First Mahler Report, the Registrar commissioned Ms. Mahler under section 60(5) of the CUA to conduct a special examination of the credit union. He also appointed examiners to conduct a risk-focussed examination of the credit union under section 60(1) of the CUA.

[11] The section 60(1) examination began on 6th July 2022 and was conducted by examiners from the Central Bank. On 12th August 2022 the examination concluded, and the examiners produced their report which found significant deficiencies in credit risk management, internal audit, internal controls, information technology, foreign exchange services and corporate governance. The examiners also highlighted numerous breaches of policies, procedures, by-laws, and contraventions of the CUA and the Exchange Control Regulations Act, some issues were recurring. The Registrar formed the view that the weaknesses identified threatened the financial interests of members of the credit union. The examiners' report recommended and communicated several corrective actions to the Registrar and the Board of the credit union.

[12] On 24th August 2022, the Registrar met with the Board, the supervisory committee, the credit committee, and Mr. Dominguez Sr., as the general manager of the credit union, to discuss the contents of the report. By letter dated 30th August 2023, the Registrar wrote to the Board setting out the timeframes within which he required that the corrective actions identified are to be taken. There then ensued a series of correspondence between the Registrar and the Board

on the progress of the corrective actions culminating in a letter from the Registrar to the credit union on 1st March 2023 in which he pointed to the Board's continued disregard and failure to adhere to specific directives and deadlines and invited the Board to make representation by 2nd March 2023 as to why the Registrar should not impose penalties on the credit union or take any further action for failure to comply with the Registrar's directives as requested. Mr. Everaldo Puck, as chairman of the Board responded on 2nd March 2023 stating, "I have no argument to present as to why the Registrar should not impose penalties or take further action toward the Credit Union." At that date several corrective actions remained incomplete to the dissatisfaction of the Registrar. The letter asked for an extension up to 10th March 2023 to comply with outstanding issues.

[13] Moreover, in July 2022 the Registrar also commenced a special investigation of the credit union under section 60(5). By letter dated 5th July 2022, the Registrar informed the Board of the appointment of Ms. Mahler to conduct the section 60(5) special examination. On 8th July 2022, the Board responded by letter pledging full support and cooperation. However, by letter dated 9th July 2022, the Board objected to the special investigation and raised doubts as to the legal basis upon which Ms. Mahler was appointed. The Registrar responded on 11th July 2022 setting out his opinion which led him to form the view that the investigation was necessary to safeguard the interests of the members of the credit union. Ms. Mahler attended the offices of the credit union in Corozal and commenced her investigation on 12th July 2022.

[14] Ms. Mahler's examination concluded on 21st August 2022, and she submitted her report to the Registrar on 6th September 2022 ("the Second Mahler Report"). She concluded that:

> … there is an overall breakdown of internal controls throughout the entire Credit Union. The breakdown of controls is based on deliberate interference by management and the Board of Directors to override policies and procedures for their benefit. The systematic breakdown has been a progression of the Credit Union business over the past decade. There is no accountability by the General Manager who has been at the helm of the institution for over two decades.

Some 14 recommendations were made to form an action plan to correct the deficiencies identified.

[15] The Second Mahler Report was forwarded to the Board on 7th September 2022 by the Registrar who expressed concern about the findings and required that decisive action be taken

to implement the recommendations with dispatch. He requested an update on an action plan by 12th September 2022. Similar to what had unfolded after the section 60(1) examination report was produced, there ensued a series of correspondence between the Registrar and the Board. This time the Board outrightly took issue with the findings contained in the Second Mahler Report. Instead of implementing its recommendations, the Board sought legal advice and instructed a consultant, Mr. Cedric Flowers, to conduct an overview of the Second Mahler Report. Mr. Flowers produced a draft report on 28th December 2022 and made recommendations ("the Flowers' report"). The Board indicated that it was inclined to accept the action plan proposed by Mr. Flowers. However, the Registrar made clear to the Board that the Flowers' report did not touch on critical aspects of the Second Mahler Report including specifically identified alleged instances of misappropriation and or misdirection of members' funds and other violations of the credit union's policies. He reiterated the requirement for the credit union to implement the recommendations contained in the Second Mahler Report, which remained outstanding and extended the time for compliance.

[16] On 6th February 2023, the Board by letter provided its comments on the specific findings contained in the Second Mahler Report. The Registrar responded by email the following day that the responses were unsatisfactory and reiterated that the weaknesses, as identified in the Second Mahler Report, which were mirrored in the First Mahler Report and the other examination reports, be addressed by the Board with urgency.

[17] On 20th February 2023, the Registrar wrote to the President and the Executive Director of the League inviting them to a meeting on 21st February for an "update on issues and concerns regarding SFXCU and the possible options which are being explored, or which the Registrar is empowered to undertake, including the appointment of an Administrator. I ask that the League be prepared to share its views with respect to such matters." The meeting took place as planned, with the Registrar making a presentation on the situation at the credit union and soliciting the League's views on the appointment of an Administrator. The League held an extraordinary Board meeting on 22nd February 2023 to discuss the issues arising out of the meeting with the Registrar. By letter of the same date to the Registrar, the League advised that it was raising no objections to forthcoming steps to be taken by the Registrar to deal with

the "lamentable situation" at the credit union, and to protect members' interest "thereby instilling continued confidence in the wider credit union movement."

[18] By letter dated 24th February 2023, the Registrar levied a fine on the credit union in the sum of $2000 for non-compliance with his instructions to "take immediate steps to recover all monies paid to Mr. Rafael Dominguez Sr. in relation to his claim for compensation for defamation of character, as well as legal fees associated with this claim". There was a further penalty of $100 for each day of non-compliance.

[19] Additionally, between the 17th to 20th January 2023, another examination of the credit union took place. This examination was to determine whether the credit union had been accurately reporting its level of non-performing loans. A report was produced to the Registrar who wrote to the Board on 16th February 2023 on the findings and gave the Board until 28th February 2023 to confirm adherence to the corrective actions itemized in the letter.

[20] On 10th March 2023, the Registrar appointed Mr. Martin Marshalleck as Administrator of the credit union pursuant to section 60(1) of the CUA. Mr. Martin Marshalleck has since assumed control of the credit union in accordance with the provisions of the CUA.

[21] On 29th March 2023, the claimants filed an application for judicial review of the Registrar's decisions to appoint an Administrator, fine the credit union by letter dated 24th February 2023 and to issue loan corrective directions to the credit union by letter dated 16th February 2023. Evidence was given by Mr. Dominguez Sr. for the claimants and by the Registrar on his own behalf. Both witnesses were cross examined. I will take each decision in turn in my analysis.

Analysis

Appointment of an Administrator

[22] The grounds on which the Administrator's appointment is challenged are:

i. On a constitutional basis the appointment breached their natural justice rights and right to equal protection of the law. The Registrar failed to give the claimants adequate notice of his decision to appoint the administrator, did not

invite the claimants' views on the intended appointment, and did not consider such representations as the claimants were able to make to him.

ii. The appointment is bad in law because the Registrar failed to consult with the Belize Credit Union League.

iii. The appointment is outwit Section 61 since there were no administrative or other problems of a gravity capable of jeopardising the operational stability or the financial viability of the credit union.

iv. The appointment was motivated by the Registrar's dislike for and hostility to the claimants and his desire to strip them of control over the credit union; it was thus motivated by extraneous considerations that are in a Padfield sense improper.

v. The appointment was disproportionate and thus unlawful.

Submissions of the claimants

[23] Mr. Barrow submitted that the Registrar's power of appointment is expressly premised on the existence of certain precedent facts. If those facts do not exist, the Registrar has no jurisdiction to make an appointment under Section 61. Subsection (c) under which the Registrar proceeded required that the problems or issues facing the credit union be of a weight or nature that threatens the financial stability or operational viability of the credit union within an appreciable timeframe and that the problems that exist under subsection (c) must be of a sort kindred in nature with those under subsections (a) & (b). Mismanagement or negligence *simpliciter* cannot support an appointment. The mismanagement or negligence "must constitute a degree of dereliction that materially and imminently threatens the financial stability or operational viability of the credit union." According to Mr. Barrow, the Registrar admitted in cross-examination that the credit union was nowhere near collapse or in any financial distress and it was thus not open to the Registrar to appoint an Administrator simply because he felt that the credit union was heading to a collapse of some sort. The precedent conditions for the triggering of a section 61 appointment were not met.

[24] Mr. Barrow went on to submit that the appointment was made for an improper purpose because of the Registrar's personal hostility towards the claimants and his desire to show them who was boss by 'flexing' and stripping them of control over the credit union. He argues

that the Registrar disliked the entire control structure of the credit union and all those populating that structure. His appointment of an Administrator was the easiest way to supplant all those whom he saw as 'undesirables'. His condemnatory view of all the personnel operating the credit union is suggestive of a lack of the proper weighing-up to be expected of a regulator. Mr. Barrow submitted that the Registrar's wholesale deprecation of the key personalities at the credit union reflects an absence of the quality of judicious, balanced appraisal required from a regulator. The Registrar's attitude and actions showed him to be a stranger, indeed antipathetic, to due process.

[25] On the allegation that the League was not consulted, Mr. Barrow refined that submission to be that the League was not properly consulted. He relies on the case of **Basdeo et al v Guyana Sugar Corporation Limited**[1] which provides that the "consultation process embraces more than just affording an opportunity to express views and receive advice. It involves meaningful participation and overall fairness." That is the character of consultation required by section 61, but which was not followed by the Registrar. Mr. Barrow submits that the Registrar gave insufficient time to the League to provide a response and did not give them all the materials required to make meaningful comments. Indeed, he points out that the Registrar did not even tell the League that he was planning on appointing an Administrator. Furthermore, the League was consulted after the Registrar had already made up his mind and so the consultation was treated as a mere formality.

[26] Mr. Barrow argues that the Registrar was bound to but did not consult with the claimants prior to the appointment in breach of the claimants' rights to natural justice as an aspect of the guarantee of procedural fairness in the right to equal protection of the law in the Constitution. This is so not least because the appointment was calculated to cause particular prejudice 'to an individual or particular groups of individuals.' According to him, the evidence shows that the Registrar had decided upon that appointment as early as 22nd February 2023 well before the Registrar had written to the claimants on 2nd March 2023, seeking their views concerning whether he 'ought to impose penalties on the credit union or take any other further action'. That was nothing but a mockery since the Registrar had already made up his mind. That apart,

[1] [2018] CCJ 24 (AJ).

it could not satisfy the consultation threshold because it did not raise the prospect of Administration (upon which, in any event, the Registrar had fastened over a week before).

[27] Finally, Mr. Barrow contended that there were less intrusive means, some of which were already in place, to address the issue. Indeed, the CUA vested a panoply of powers in the Registrar under sections 76, 83 – 85. All of those powers were available to him, and none would have required the draconian unseating of the democratically elected leadership of the credit union. Their use would also have been conducive to a more effective, permanent fix than Administration. Finally, resorting to those sections would have spared the credit union what has already proven to be a long and expensive Administration. Therefore, the appointment was disproportionate.

Submissions of the Registrar

[28] In response, Mr. Marshalleck submitted that section 61(1) of the CUA is properly invoked. Where the Registrar forms the opinion that any one of the three distinct factual circumstances described in section 61 is in existence, he is entitled to appoint an Administrator over the affairs of a credit union. It is clear on the facts that the Registrar premised his appointment of the Administrator on his opinion that certain administrative or other problems faced the credit union, which may jeopardise the stability of the credit union, making it necessary to appoint an Administrator to protect the equities and interests of the members. That opinion was well supported by the facts and matters before the Registrar at the time of the appointment. In those circumstances, it is irrelevant that liquidity levels and the financial position of the credit union were at the time of the appointment satisfactory. In addition, the section does not require that the administrative or other problems facing the credit union must cause its imminent collapse or even currently threaten its stability. The use of the word “may”, in reference to the threat or jeopardy to the stability of the credit union, implies that the threat need not be present or even imminent. It suffices that, in the opinion of the Registrar, the said administrative or other problems had the potential to threaten the stability of the credit union.

[29] On the issue of consultation with the League, Mr. Marshalleck points to the evidence as being a complete answer to the claimants’ complaint. He submitted that the claimants have not

sought to challenge the documentary evidence, which corroborates the fact of prior consultation with the League, nor did they through their attorneys utilize the opportunity to cross-examine the Registrar on the veracity of his assertion that the consultation did take place. The Registrar did not compel the League to respond by a particular date. In that context, the contention that the League was not afforded adequate time to respond is without foundation. It was the League which chose to issue a formal response on 22nd February 2023 after it had convened an extraordinary general meeting of its directors. Further the League itself did not request any additional time for consideration of the issues raised. There is no evidence that the League regarded itself as not having been given an adequate opportunity to respond.

[30] Mr. Marshalleck argues that the claimants have utterly failed in their duty to discharge the heavy burden placed on them to prove that the Registrar appointed the Administrator for a purpose other than the achievement of the objects of the legislation. In fact, the claimants have erroneously sought to conflate the fact that the Registrar drew the conclusion that the Board needed to be removed because of the appointment of an Administrator with an indication of personal hostility to the current Board. However, it was only after the Board and management neglected and/or refused to correct the administrative deficiencies, as pointed out by the Registrar, that he ultimately appointed an Administrator.

[31] On the ground of a breach of natural justice in the making of the appointment, Mr. Marshalleck contended that there is no express statutory requirement stipulated in section 61 providing for advance notice to be given to the credit union or its managers and/or members of the Board before an Administrator may properly be appointed. If any implication is to be made of any notice requirement in the interest of procedural fairness, it must be that notice is to be given to the credit union, as distinct from the individual members of its Board or management. In this case, however, the statute provided for notice and consultations with the League of which the credit union is a part, so that how notice is to be given is already statutorily prescribed. There is no need for any implication of an additional notice requirement. In any event, Mr. Marshalleck submitted that the implication of a requirement of prior notice in the present circumstances would likely frustrate the intent and purpose of the powers vested in the

Registrar as contemplated by the relevant provisions of the CUA. Consequently, there was no breach of natural justice and no breach of the Constitution.

[32] Finally, he submitted that the claimants' reliance on proportionality as an independent ground of challenge is misplaced and misconceived. The Registrar's response to the administrative deficiencies at the credit union was an entirely rational and appropriate **graduated** response that began with onsite examinations and enhanced supervision. These were followed by directives issued pursuant to Section 6 of the CUA for corrective actions to be taken.

Discussion

[33] I shall review in turn each of the grounds identified in the Fixed Date Claim Form challenging the decision to appoint an Administrator.

Power to appoint an Administrator in section 61(1) of the CUA

[34] Section 61 of the CUA :

> 61.–(1) Where the Registrar is of the opinion that in his view of (i) the liquidity levels as required by section 51(1) of this Act or (ii) the financial position of a credit union as disclosed by examination or investigation under section 60 of this Act or (iii) certain administrative or other problems facing the credit union which may jeopardise the stability of the credit union, it is necessary to appoint an Administrator to protect the equities and interests of the members, he or she may, after consultation with the League appoint an Administrator and fix his remuneration which will be paid out of the funds of the credit union.
>
> (2) The Registrar may appoint the League or any other fit and proper person as Administrator of that credit union.
>
> (3) An Administrator appointed under subsection (1) of this section, shall have the powers and may perform all or any of the duties of the officers of the credit union, shall be responsible to the Registrar for the conduct of the business of the credit union and shall carry out all orders and directions of the Registrar with respect to the credit union, and may pay the expenses of administration out of the funds of the credit union.
>
> (4) Where an Administrator is appointed under subsection (1) of this section, the directors, officers and the manager of the credit union shall not thereafter, during the time that the

Administrator remains in charge of the conduct of the business of the credit union, exercise any of the powers conferred upon them by this Act or the by-laws,

Provided that the Administrator may delegate to the directors, officers or the manager, specific duties as may be necessary to efficiently carry out the business of the credit union.

(5) The Administrator shall take all steps and do all things necessary to protect the equities of the members and the rights of creditors of the credit union, and shall maintain, so far as is practicable, the services of the credit union to its members.

(6) Directions under this section shall be such as appear to the Registrar to be desirable in the interest of the members and potential members of the credit union whether for the purpose of safeguarding its assets or otherwise, and may, in particular,

(a) require the credit union to take certain steps or to refrain from adopting or pursuing a particular course of action or to restrict the scope of its business in a particular way;
(b) impose limitations on the acceptance of deposits, the granting of credit or the making of investments;
(c) prohibit the credit union from entering into any other transaction or class of transactions;
(d) require the removal of any director or officer.

(7) For the purposes of this section, the Administrator shall have access to all books, accounts, securities, documents, vouchers and cash of the credit union and any security held by the credit union.

(8) Subject to the approval of the Registrar, the Administrator may call a special meeting of members to report to them on the affairs of the credit union and the steps taken by the Administrator to protect their equities; a report may also be given to interested creditors.

(9) The Administrator shall conduct the business of the credit union until the Registrar is satisfied to have the management of the credit union's affairs resumed by its officers or until the credit union is merged with another credit union or is converted into another entity or is dissolved and a Liquidator is appointed to wind up the credit union's affairs.

(10) A credit union which fails to comply with any requirement or contravenes any prohibition imposed by any direction or order under this section commits an offence.

[35] I begin with the construction of section 61(1) to identify what are the circumstances in which the appointment of an Administrator may be made. This is a question of law. The first principle of statutory interpretation is the plain meaning of the words used. The language used in the section must be read in the context of the Act, the legislative intent of Parliament and the scheme set up by the statute. Support for this approach is found in the decision of the

Caribbean Court of Justice (CCJ) in **Jeffrey Sersland MD v St Matthews University School of Medicine Limited[2]:**

> [42] The purposive approach is generally regarded as the modern approach and is based on the recognition that the interpretation of a statute cannot be founded on the wording of the legislation alone. The essence of the approach is admirably encapsulated by Professor E A Driedger in Construction of Statutes (2nd edn, Butterworths 1983) where he writes:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[36] It cannot be disputed that the CUA was set up for the registration, administration, and regulation of credit unions in Belize. Section 61(1) is found in Part VIII of the Act, which deals with inspection inquiry and supervision of credit unions by the Registrar. By its very nature, the inspection, inquiring and supervision of credit unions do not depend on the consent of the credit unions themselves. Section 61(1) enables the Registrar to appoint an Administrator to protect the equities and interests of the members where the Registrar is of the opinion that such an appointment is necessary in his view of either:

i. the liquidity levels as required by section 51(1); or
ii. the financial position of a credit union as disclosed by examination or investigation under section 60; or
iii. certain administrative or other problems facing the credit union which may jeopardise the stability of the credit union.

[37] It is clear from the language of the sections that, contrary to Mr. Barrow's submission, either the state of the company's liquidity, or its financial position consequent upon a section 60 examination or certain administrative or other problems (which may jeopardise the stability of the credit union) may warrant the appointment of an Administrator. Each of these bases do not have to be related to the other. The section offers three separate and distinct bases to justify the appointment of an administrator. Either one suffices. There could be no liquidity or financial issues, but administrative problems which may jeopardize the credit union's stability, and the latter would be sufficient for the Registrar to make the appointment. Similarly, there could be no administrative problems, but low liquidity levels and the latter is enough for the Registrar to form the view that the appointment is necessary.

---

[2] [2022] CCJ 16 (AJ).

[38] Of course, none of this means that the Registrar is given *carte blanche* authority to intervene whenever he wants. He must not act arbitrarily. There must be a reasonable basis for him to form his opinion on the state of the credit union's liquidity, financial position or administrative or other problems going to its stability. Nevertheless, it is to the Registrar that the statute gives the power to decide whether an appointment is made. That is a technical specialist function and one which the court is not equipped to undertake. The court's opinion should not be substituted for the Registrar's. It is my function to determine the legality of the decision to appoint the Administrator not the merits of appointing one: see **Humberto Patt v AG**.[3]

[39] At paragraphs 160-165 of his affidavit the Registrar deposed:

> 160. On the 10th day of March, 2023, I appointed Mr. Martin Marshalleck as Administrator of SFXCU pursuant to the statutory powers vested in me by Section 61 of the CUA.
>
> 161. I did so after having considered the general state of affairs of the SFXCU including that many significant weaknesses and material deficiencies identified in the First and Second Mahler Reports and by my offices Special Examination, the representations of the Board of SFXCU relative to the Reports which had documented the said deficiencies via in person meetings and correspondence and the Board's intransigence or reluctance to implement corrective measures to remediate the said deficiencies.
>
> 162. I formed the opinion that there was a distinct risk that administrative and other problems facing the credit union may jeopardize the credit union.
>
> 163. The Board of SFXCU, the General Manager and the relevant Committees were subsequently formally notified of the said appointment on the said 10th day of March, 2023.
>
> 164. I thereafter held a Press conference to update the general public as to my decision to appoint the Administrator and to offer assurance to the members of the SFXCU that their deposits were safe, that the Credit Union would continue in the normal course of business and that the credit union was in good financial standing.
>
> 165. I wanted to mitigate the risk of a run on deposits which would have been very detrimental to the credit union. Thankfully, that did not occur.

---

[3] Claim No. 65 of 2010 paras. 12 & 13 where Justice Awich stated, "Judicial review jurisdiction is not an appeal jurisdiction … but a supervisory one, exercised to determine the lawfulness, not the merit of the decision or act or omission of an inferior court, a tribunal, public authority or anyone performing a public function."

[40] According to the Registrar, he formed the opinion that there "was distinct risk that administrative and other problems facing the credit union may jeopardize the credit union." These administrative and other problems were reflected in the first and second Mahler reports, the reports of the special examination, the representations of the credit union's Board relative to the reports and the intransigence or reluctance of the Board in implementing corrective measures.

[41] Since 2021, the report of an examination of the credit union carried out pursuant to section 60(1) of the CUA outlined a number of deficiencies in the areas of credit risk assessment, internal audit, information technology infrastructure and corporate governance (see page 7 of the report). The report then set out detailed corrective actions required to remedy all the specific issues identified in each area of deficiency. By letter dated 30th August 2021, the Registrar advised the then president of the credit union's Board to implement the corrective actions within the stipulated timeframe. The credit union's Board undertook to implement the corrective measures, but full compliance was delayed.

[42] The first Mahler report was commissioned by the Board of the credit union as of 25th June 2022 and was disclosed to the Registrar on/by email of 30th June 2022. The report concluded that "the assessment has revealed unusual transactions with little to no business justification" and "significant deficiencies and material weaknesses in the Credit Union's internal control over cash management, related party transactions, expenditure processing cycle, anti-money laundering risk management and compliance, governance and oversight responsibilities." These were the findings of an audit conducted by an auditor appointed by the credit union itself and not the Registrar.

[43] Following on the first Mahler report was the report of the risk focussed examination of the credit union prepared by Central Bank officials, which was ordered by the Registrar pursuant to section 60(1) of the CUA to commence on 6th July 2022. The report concluded, as outlined in the overview section:

> The examination revealed that while the pandemic has heightened SFXCU's vulnerability to credit risk, the credit union has not strengthened its credit risk management, particularly as it relates to the timely identification, forward-looking measurement, and mitigation of credit risk.

> Furthermore, The Central Bank identified significant non-compliance with the Credit Policy and Procedures Manual (Credit Policy), inadequate training of staff, and a high degree of discretion in the credit approval and administration processes.
>
> Given the numerous deficiencies identified, SFXCU's corporate governance function was deemed to be extremely inadequate, and the fitness and propriety of the Board (past and present) and management to conduct the affairs of the credit union in a safe and sound manner was questionable. Corporate governance practices and activities of the Board and Management were mostly driven by self-interest, discounting the risk and possible loss to the credit union.
>
> The Credit Committee was not effectively executing its mandate of overseeing the credit union's overall credit risk management function, and the Supervisory Committee was not fulfilling its vital role of ensuring that SFXCU has an effective internal controls system in place. Additionally, the Board and Senior Management did not always perform to their optimum capacity and were not exercising reasonable care and due diligence in carrying out their duty of ensuring that SFXCU complies with all applicable laws, regulations, its By-laws, and policies. There was a strong culture of non-compliance at all levels and there was no accountability for non-compliance.
>
> Several issues went undetected and were recurring, raising concern about the effectiveness of reviews being conducted by the IA, highlighting the urgent need to equip this function with adequate resources and training. It is also imperative that the IA obtains professional certification to oversee and manage the audit function. Furthermore, it is of major concern that the Internal Audit function lacked independence, as the IA was given operational responsibility for and authority over auditable activities. Also, the absence or failure of key structures for a sound internal control environment requires the implementation of urgent remedial actions.
>
> The Central Bank also determined that risk management practices relating to SFXCU's IT infrastructure need strengthening to mitigate the credit union's exposure to cyber threats, and to ensure business continuity and operational resilience.

[44] The second Mahler report was produced pursuant to the special examination ordered under section 60(5) of the CUA. Ms. Mahler's report was wide-ranging and detailed with conclusions scathing of the Board and management of the credit union. She concluded that:

> Based on my findings, I have determined that there is an overall breakdown of internal controls throughout the entire Credit Union. The breakdown of controls is based on deliberate interference by Management and the Board of Directors to override policies and procedures for their benefit. The systemic breakdown has been a progression of the Credit Union business over the past decade. There is no accountability by the General Manager who has been at the helm of the institution for over two decades. The General Manager has been the primary instrument of the abuses to the Credit Union which created

> a culture of unethical and fraudulent (sic) across sections of the institution by other members of staff.
>
> …this crusade by Management and those charged with the governance of the Credit Union has led to over $5.1million in actual losses…

[45] By letter dated 7th September 2022, the Registrar advised the Board that the issues in the second Mahler report "have the potential to compromise the safety of members' funds as well as the financial stability of the credit union." He asked the credit union to immediately take decisive actions to address the critical issues cited in the second Mahler report, to recover the financial losses incurred by the credit union, and to develop and submit a plan of action detailing the measures that will be instituted to mitigate the recurrence of the actions and practices cited by 12th September 2022. In response, the chairman of the Board indicated by letter dated 22nd September 2022 that the directors found it important to have a 'thorough study' of the report and to seek legal advice before taking the actions requested by the Registrar.

[46] By letter dated 30th September 2022, the Registrar expressed his dissatisfaction with the Board's response and advised that "there currently exists substantial grounds to examine whether the Board is able to discharge its fiduciary responsibilities as stipulated in the CUA to act in the best interest of the credit union." He extended the time to 5th October 2022 to provide a satisfactory response to the matters raised in his letter of 7th September 2022.

[47] The Board replied by letter dated 5th October 2022 complaining of the treatment and threats meted out by the Registrar to the present Board. They pointed out that similar requests were not made to the previous Board and that the thrust of the Registrar's letters were to implicitly accuse the Board of the wrongdoing identified in the Mahler reports. After threatening judicial review, the Board indicated that it would produce "a Plan of Action during the course of the next week setting reasonable and well considered goals." No action was taken in respect of the matters raised by the Registrar in his letter of 7th September 2022.

[48] No plan of action was produced by the Board as promised in its 5th October 2022 letter, however, on 14th October 2022 the Board by letter to the Registrar indicated that it was

decided to appoint an independent consultant, one Cedric Flowers, to conduct an overview of the second Mahler report, dialogue with Ms. Mahler and to evaluate the systems in place.

[49] On 17th October 2022, the Registrar responded by letter and extended the time to 21st October 2022 for the credit union to address the matters raised in his letter of 7th September 2022. No response was made to the matters in the Registrar's 7th September 2022 letter. However, Mr. Flowers submitted his draft report dated 28th December 2022 to the credit union, which forwarded the same to the Central Bank on 4th January 2023. He concluded that "the policies formulated and adopted by SFXCU are sound, relevant, and where applicable, are in accordance with the provisions of the Credit Union Act". The Flowers report then proceeded to make recommendations "designed with a view to prevent or minimize circumvention of the processes by the persons charged with protecting the Credit Union, while improving oversight."

[50] There then ensued a series of correspondence between the Registrar and the credit union on the scope and status of the Flowers report. By letter dated 6th February 2023, the Board provided the Registrar with an overview of and response to specific allegations made in the second Mahler report and expressed that the "Board found Mahler's report to be overall unreasonable and inaccurate" but they committed to "pursue implementation of policies which we believe will enhance that protection and guard against the types violations (sic) alleged by Mahler." No commitment was made to address the matters in the Registrar's 7th September 2022 letter, or the concerns raised in the recommendations to the second Mahler report.

[51] In these circumstances, the Registrar formed the view expressed in paragraph 150 of his affidavit that:

> 150. It appeared to be that in all the circumstances based upon the correspondences exchanged in relation to this issue that SFXCU had no intention of investigating the matters contained in the Second Shawn Mahler Report or the specific allegations of misconduct contained in the said Report. To the extent that the Board thought the investigation conducted by Ms. Mahler was either biased or deficient, I would have thought it incumbent on the Board or the Supervisory Committee to have ordered their own investigation to either confirm or refute the serious allegations of misconduct or misappropriation contained in the said Report.

[52] The test in section 61(1)(c) is that the administrative problems 'may' jeopardize the stability of the credit union. In other words, there must be an objective risk to the stability of the credit union. The CUA does not go so far as to require the **collapse** of the credit union before an Administrator is appointed. Indeed, a primary function of a regulator, like the Registrar, is risk management and the prevention of collapse. So, the duty of the Registrar is to appoint an Administrator where in his opinion the administrative or other problems facing the credit union are likely to jeopardise its stability. The Registrar did not wake up one morning and decide to appoint an Administrator. There is a long history of reports on the unsatisfactory state of the administration of the credit union and non-performance of corrective action mandated by the Registrar.

[53] In my judgment, the view adopted by the Registrar that there existed, "certain administrative or other problems facing the credit union which may jeopardise the stability of the credit union" was reasonable having regard to the investigative reports, examinations, and other correspondence available to the Registrar. These all pointed to serious administrative deficiencies in the credit union and a refusal or inability of the Board to accept the corrective measures ordered by the Registrar. The CUA does not require the Registrar to be satisfied that allegations contained in the reports were proven on the legal standards of proof applicable in a court of law. All it requires is that there exist sufficient facts for the Registrar to make up his mind and that the Registrar's opinion not be tainted with arbitrariness. The opinion formed by the Registrar, in this case to appoint an Administrator, was not arbitrary but was based on reasonable grounds. Therefore, I find that the Registrar was entitled as a matter of law to invoke section 61(1)(c) of the CUA.

Consultation with the Belize Credit Union League

[54] Section 61(1) of the CUA provides that where the Registrar considers it necessary to appoint an Administrator, he may only appoint the Administrator "after consultation with the League." The section itself contemplates that the Registrar must consider the appointment of an Administrator necessary before he consults with the League. It is only after consultation can the appointment be made and Mr. Barrow's submissions to the contrary is without merit. The evidence is that at least by February 2023, the Registrar had formed the view that it was

necessary to appoint an Administrator and engaged in discussing terms of reference with a potential Administrator by at least the 22nd or 23rd of February 2023, however, no appointment was made at that time.

[55] In pursuance of the statutory duty to consult the League, the Registrar by letters of 20th February 2023 wrote to Mr. Mark Menzies, President of the League and Mr Gemayel Babb, the Executive Director of the League inviting them to a meeting at the Central Bank's Headquarters on Tuesday 21st February 2023. In the letter the Registrar stated:

> *The agenda for the meeting will include an update on issues and concerns regarding SFXCU and the possible options which are being explored, or which the Registrar is empowered to undertake, including the appointment of an Administrator. I ask that the League be prepared to share its views with respect to such matters.*

[56] It is the evidence of the Registrar at paragraph 157 that at the meeting with the President and Executive Director of the League on 21st February 2023, "I made a presentation on the state of affairs at SFXCU and I sought the views of the Belize Credit Union league with respect to the appointment of an Administrator for SFXCU."

[57] Following the meeting, on 22nd February 2023 the League held an Extraordinary Meeting of the Board of Directors to "ascertain BCUL's position on the topic of yesterday's consultation" (see Tab 60 of KM 1). By letter of even date, the League's Executive Director advised the Registrar that "BCUL trust that due process was afforded to SFXCU and that all forthcoming decisions will be for the greater good and continuation of SFXCU's presence…" There was no objection to the appointment of an Administrator or to any other action by the Registrar in respect of the credit union.

[58] There is no evidence to the contrary from the claimants save an except for an unsigned document at Tab 67 annexed to the 1st Dominguez affidavit, which purports to be the minutes of a meeting between members of the League and certain Board members of the credit union. The minutes indicate that no consultation took place between the Registrar and the League. However, this is in direct contradiction with the evidence supplied by the Registrar, which included the correspondence from the League on 22nd February 2023. I prefer the evidence of the Registrar in this regard as more probable than the claimants' since the former's were

supported by official correspondence from the League. No attempt was made in the 1st Domiguez Sr affidavit to prove the accuracy of the unsigned and unadopted minutes. No evidence was brought of any official letter or other correspondence from the League to the credit union stating that no consultation occurred. Neither did the League appear in these proceedings to give evidence on affidavit or otherwise to contradict the Registrar's version.

[59] Prima facie, the League was consulted on the appointment of an Administrator and given information to support why the Registrar considered the appointment necessary in their meeting on 21st February 2023. The League's Board then met in an extraordinary session and offered no objections to the appointment. Indeed, there is no evidence that the League considered that it was not consulted or not properly consulted. However, the claimants contend that the exercise that took place between the Registrar and the League fell short of what the law requires for a proper consultation.

[60] They point to the case of **Basdeo (supra)** as laying down the formula for a valid and effectual consultation process. In that case, officials on behalf of two Guyanese Trade Unions representing certain sugar workers sought to quash the decision of the Guyana Sugar Corporation and the Minister of Agriculture to sever the employment of approximately 4400 sugar workers at, and to close the operations of, Rose Hall and Enmore Sugar Estates/La Bonne Intention on the ground that they had not been properly consulted. The CCJ held:

> [27] In this case, the primary source of the duty to consult was statutory. Section 23(5) of the Trade Union Recognition Act provides, that where a trade union has been certified and an employer considers closing an undertaking, "The union concerned must be consulted before a final decision to close is taken." In interpreting the meaning and extent of this provision, the common law duty to consult, repeatedly stated in the jurisprudence, is relevant. R v. Brent London Borough Council ex parte Gunning pronounced certain basic principles (commonly known as the Gunning principles"). There ought to be:
>
> i. Consultation when the proposals are still at a formative stage;
> ii. Adequate information on which to respond;
> iii. Adequate time in which to respond;
> iv. Conscientious consideration by an authority to the consultation.
>
> [28] The Gunning principles have been widely accepted and applied. Modern trends indicate that the consultation process embraces more than just affording an opportunity to express views and receive advice. It involves meaningful participation and overall fairness. Representation from those affected by the proposed decision need not, unless

the statutory provisions indicate to the contrary, be accepted or even responded to. But they must be taken into consideration.

[61] It is true that that formula has been described as a 'prescription for fairness' in **R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts**.[4] However, the formula is not to be used as a straitjacket. What may amount to sufficient time or sufficient information in one case may not be so considered in another. In **R v North and East Devon Health Authority, ex parte Coughlan**[5] Lord Woolf MR, elaborated at paragraph 112 that:

> **It has to be remembered that consultation is not litigation**: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this. [My emphasis].

[62] In **Fletcher v Minister of Town Planning and Country Planning**[6], it was held at page 500 B-D that:

> If a complaint is made of failure to consult, it will be for the court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held… In deciding whether consultation has taken place, regard must, in my judgment, be paid to the substance of the events and it cannot be conclusive either way according to whether the parties said in terms that a consultation…was taking place, or to take place, or was intended, or whether nothing relative to this was said at all.

[63] It seems to me that the proper approach to determining whether a lawful consultation within the meaning of section 61(1) took place requires that I stand back and take a panoramic view of the content of the events which took place between the Registrar and the League and determine whether the four 'Gunning principles' are discernible from the exercise which took place.

---

[4] [2012] EWCA Civ. 472, 126 BMLR 134, at para 9.
[5] [2001] QB 213.
[6] [1947] ALL ER 496.

[64] On 20th February 2023, the President and the Executive Director of the League were invited to a meeting with the Registrar to be held on 21st February 2023 on "the possible options which are being explored, or which the Registrar is empowered to undertake, including the appointment of an Administrator." At this point, the Registrar had not yet made any appointment and I am satisfied that the decision was still in the formative stage since the section only requires that consultation precede appointment without any limitation on the length of time before the appointment is made.

[65] During the meeting, a presentation was made on the state of affairs of the credit union and the League's views on the appointment of an administrator were solicited. That this occurred is confirmed in the letter from the League's Executive Director to the Registrar on 22nd February 2023 that "the Central Bank presented a report containing a timeline of transgressions that on the face of it the BCUL is unable to condone." There is no evidence of either the information supplied being insufficient or that the Registrar imposed a time-limit on the League. In fact, the latter convened an extraordinary meeting the next day to consider the materials placed before it by the Registrar and raised no objections to the "all forthcoming decisions". There was no request for more time or further information. It must be accepted that the League was provided with sufficient information and enough time to consider that information in the absence of evidence to the contrary. Indeed, if crucial information was lacking the League would not have acted as speedily as it did. Enough information was given to the League such that it considered it possible and necessary to give its views with alacrity and which it did. I do not accept the argument of Mr. Barrow in his submissions in reply that what was required to satisfy consultation was "extended, serial consultations" and that appropriate time was not given to the League or even sufficient consideration of the League's position.

[66] Since the League raised no objections to the appointment, there is no controversy that the product of the consultation was conscientiously taken into account by the Registrar who went on to make the appointment of an Administrator on 10th March 2023. In those circumstances, I find that consultation with the League within the meaning of section 61(1) of the CUA occurred consistent with the 'prescription of fairness' outlined in **Gunning**. Therefore, when

the appointment was made on 10th March 2023, the Registrar had satisfied the requirement of prior consultation with the League.

Natural Justice and Breach of the Constitution

[67] Although not expressly required by section 61(1), the claimants say that as a matter of procedural fairness guaranteed by the right to equal protection of the law in the Constitution, the Registrar was required to consult with the claimants prior to the appointment and give them an opportunity to make representations why the appointment should not be made. The prejudice which the appointment of the Administrator wrought on the Board and management of the credit union was detailed at paragraph 8 of the 1st Dominguez affidavit:

> 8. The Registrar made that Appointment without giving SFXCU and the Board any warning or prior notice of his decision. He installed Mr. Martin Marshalleck as Administrator with immediate effect. Mr. Marshalleck then immediately suspended the Board, the Credit and Supervisory Committees and me. In appointing the Administrator, the Registrar thereby prevented the Board from running, and me from managing, the affairs of the SFXCU.

[68] As a matter of law, the Administrator did not suspend the credit union's Board, Credit and Supervisory Committees and the general manager. Section 61(4) states:

> (4) Where an Administrator is appointed under subsection (1) of this section, the directors, officers and the manager of the credit union shall not thereafter, during the time that the Administrator remains in charge of the conduct of the business of the credit union, exercise any of the powers conferred upon them by this Act or the by-laws,
>
> Provided that the Administrator may delegate to the directors, officers or the manager, specific duties as may be necessary to efficiently carry out the business of the credit union.

[69] The powers of the Board, officers and managers of the credit union are automatically suspended when an Administrator is appointed. It is likely that what the Administrator did not do in this case was to delegate specific functions to the Board and manager. Nevertheless, the argument remains the same: the appointment deprived the Board, officers, and the general manager from exercising the powers conferred on them by virtue of their offices.

[70] It is a cardinal principle of public law that where an individual will be prejudiced by a particular course of action undertaken by a public authority, natural justice demands that that individual

be given an opportunity to respond to the proposed course. In other words, the individual should be consulted. However, in this case the statute only expressly required consultation with the League as a prerequisite to the appointment. No mention is made of giving prior notice to the credit union and giving the opportunity for representations to be made.

[71] At paragraph 121 of the Registrar's affidavit, he concedes that he gave no prior notice of the appointment of an Administrator to the Board of Directors or other officers of the credit union. The question then is whether he was justified in law to give no such notice.

[72] There is no statutory requirement on the face of section 61 itself to give prior notice of the Registrar's intention to appoint an Administrator. All that is required is that there be prior consultation with the League. This is not the same as consultation with the Board and management of an individual credit union. However, it has long been accepted that the common law rules of natural justice (of which the opportunity to be heard is a characteristic feature) will not be excluded unless by the clear expression or necessary implication of statute. However, "in considering what procedural fairness in the present context requires, account must first be taken of the interests at stake." See **Regina (West) v Parole Board**.[7]

[73] In **Century National Merchant Bank and Trust Co. Ltd. v Davies**,[8] the Minister was authorized by statute to assume temporary management of the bank and did so with immediate effect. It was argued for the bank that the notice of immediate assumption of temporary management given by the minister was invalid since reasonable prior notice was required. At pages 638-639, Lord Steyn, giving the opinion of the Board, ruled:

> A prior notice of an intention to assume temporary management may cause grave problems. Would it be appropriate for the directors who are given prior notice of the minister's intention to continue to accept deposits or honour cheques? The directors would be in a most invidious position in regard to carrying on the operations of the bank. The risk of advance notice of the minister's intention leaking out, once it is communicated to the bank, must also be substantial. Such a leak would be headline news in Jamaica. It would tend to alarm depositors. It might very well lead to a run on the bank. Confidence is the lifeblood of banking. A run on a bank may not only finally destroy any prospect of reconstruction of a bank but it may have systemic consequences in the sense of adversely affecting the banking sector as a whole and thus the national economy. Finally, there is the risk that directors or other insiders, who have been responsible for unsound practices,

[7] [2005] 1 WLR 350 [29]-[30].
[8] [1998] AC 628.

may destroy incriminating records. The context therefore supports their Lordships' view that paragraph 1 of Part D does not require prior notice.

That leads to the appellants' related argument that the notice given on 10 July 1996 was in breach of standards of procedural fairness. Counsel for the appellants argued that at the very least the minister should have given the bank an opportunity to make representations to the effect that it would be wrong to assume temporary management rather than present a winding up petition. He invokes a common law principle which is a cornerstone of administrative law in the United Kingdom and in Jamaica. Nevertheless, the limitations of that principle must be borne in mind. In Wiseman v. Borneman [1971] A.C. 297, 308, Lord Reid said:

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

For the reasons already explained their Lordships are satisfied that the statutory right of appeal to the Court of Appeal, exercising wide original jurisdiction, should be sufficient to achieve justice to the bank. Moreover, and for reasons also explained, a prior opportunity for the directors and other insiders in the bank to make representations that a temporary management is inappropriate is both impractical and contrary to the public interest. The argument based on procedural unfairness must be rejected. [Emphasis added]

[74] The same principle was applied in **Suisse Security Bank & Trust Ltd v Governor of the Central Bank of The Bahamas**[9] which involved the governor's immediate suspension of the bank's operating licence and an appointment of a receiver. No notice was given prior to either action. It was argued that the governor failed in breach of procedural fairness to give prior notice to the bank that he was minded to suspend the licence together with an opportunity to respond before taking any such step. Lord Mance held at paragraph 36 that:

> **36** Their Lordships consider that similar considerations govern the present case. The wording of the present statutory power is even clearer than in Century National Merchant Bank Ltd v Davies. It is also significant that the present statutory provision does not permit any appeal against a decision to suspend. The Governor must be able to act quickly, in view of the various risks that may materialise in a situation where, before he can act at all, he must already be of the opinion that the bank's business is being carried on in a manner detrimental to the interests of the public or of depositors or other creditors or in a

[9] [2006] 1 WLR 1660.

situation like that under section14(1)(b) where he must be of the opinion that the bank is contravening one of his directions or the Act itself. To require notice and an opportunity for objections in such a situation would be bound in almost every case to lead to arguments and delay. Meanwhile the bank's existing management would be in charge and have the continued opportunity-indeed what the less scrupulous might see as a last chance-to act to its detriment. In the present case, the Governor had, in their Lordships' view, ample justification for considering that he had to act at once. Further, the prevarication and non-cooperation that the Central Bank and Mr Winder as receiver experienced after the suspension confirm the delay that would probably have followed if prior notice had been given. As it is, the suspension and receivership meant that there was at least the possibility that Mr Winder could locate and lay hands on SSBT's assets. Unfortunately, both the Barclays Bank and the UBS assets appear in the event to have eluded him-the former being transferred out of The Bahamas on instructions unknown to a destination unknown in late April 2001. [Emphasis added]

[75] It appears to me that procedural fairness as a dimension of natural justice does not require prior notice and an opportunity for representations to be made in circumstances where a regulator is taking temporary management of a financial institution as in this case. This is not to say that in an individual case there may be particular facts which demand some aspect of notice and an opportunity to be heard. In his reply, Mr. Barrow maintained that the claimants in our case deserved prior notice and that **Davies** (supra) and **Suisse Security Bank** (supra) were not applicable. In **Davies** the bank was insolvent and tethering on the verge of collapse and in **Suisse Security Bank**, there was real concern about liquidity issues. In our case, the Registrar had no excuse for not giving prior notice or failing to afford the claimants individually to make representations as the issues that led to the appointment were not urgent and existed at least since 2021. It was unlikely that giving notice would cause harm of a widespread or calamitous nature such as to override the normal requirement of notice to the claimants. The Registrar's failure, he argued, was clear procedural unfairness.

[76] In this case, I am satisfied that there was no statutory or common law requirement for the Registrar to give notice and hear representations from the credit union before appointing an Administrator, such notice will be inimical to confidence reposed in the credit union and usher in the risk of evidence being destroyed or harm being unleashed upon the credit union by less well-intentioned directors and officers. It would lead to unnecessary arguments and delay while the problems, which the Registrar has identified as facing the credit union, continue to fester.

[77] Further, the consultation with the League goes a long way to discharging the requisites of natural justice by allowing the Registrar to get a fresh perspective on the facts and the views of the broader credit union industry. Additionally, section 67(6) of the CUA provides:

> (6) Unless otherwise provided, a party or any other person aggrieved or adversely affected by any order or decision of the Registrar under this Act may appeal therefrom to the Tribunal within two (2) months of such order or decision and a further appeal shall lie to a judge in chambers within one (1) month of any order or decision of the Tribunal.

[78] The decision of the Registrar to appoint an Administrator is not excluded from this right of appeal and is sufficient to achieve justice for the aggrieved directors and officers of the credit union and the credit union itself. To afford a prior opportunity to make representation would be impractical and contrary to the public interest. See **Davies** (supra). Indeed section 67(6) may indeed have been an alternative remedy and a bar to judicial review, however, it was not relied upon in any way by Mr. Marshalleck.

[79] Since I have found that there was no breach of natural justice, it follows that the claimants' case for a breach of the right to equal protection of the law in section 6 of the Constitution does not come off the ground and is dismissed.

Improper purpose

[80] Although I have found that the Registrar was entitled to make the appointment and that both the requirements of the section and natural justice were complied with, the claimants' case is that the appointment is nevertheless bad in law because it was motivated by an improper purpose. Mr. Barrow submitted that the improper motive was "the Registrar's personal hostility towards the Claimants and his desire to show them who was boss by 'flexing' and stripping them of control over the SFXCU."

[81] To put it in the negative, the Registrar's discretion is limited to the extent that it must not be so used as to frustrate the objects of the statute which conferred it. See **Padfield v Minister of Agriculture, Fisheries and Food**.[10] In that case Lord Upjohn at page 717 said:

---

[10] [1968] 1 ALL ER 694.

> The Minister in exercising his powers and duties conferred on him by statute can only be controlled by a prerogative order which will only issue if he acts unlawfully. Unlawful behaviour by the Minister may be stated with sufficient accuracy for the purposes of the present appeal (and here I adopt the classification of Lord Parker CJ in the divisional court): (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration. There is ample authority for these propositions which were not challenged in argument. In practice they merge into one another and ultimately it becomes a question whether for one reason or another the Minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings which I have mentioned.

[82] Mr. Barrow argued that:

> …the Registrar disliked the entire control structure of SFXCU and all those populating that structure. His appointment of an Administrator was the easiest way to supplant all those he saw as 'undesirables'. His condemnatory view of all the personnel operating SFXCU is suggestive of a lack of the proper weighing-up to be expected of a regulator. We submit that the Registrar's wholesale deprecation of the key personalities at SFXCU reflects an absence of the quality of judicious, balanced appraisal required from a regulator. The Registrar's attitude and actions showed him to be a stranger, indeed antipathetic, to due process.

I understood that submission to be that the Registrar was not concerned with securing the objects of section 61 of the CUA but instead was using the statute to displace the Board and management of the credit union simply because he felt that they were undesirables. In other words, the Registrar was taking into account what Lord Upjohn described as "some wholly irrelevant or extraneous consideration."

[83] It was for the claimants to prove that the Registrar's appointment of an Administrator was for an improper purpose. At paragraph 33 of the 1st affidavit of Mr. Dominguez, he averred to "what the Board considered to be the Registrar's preference for the old Board, and his hostility against the new Board and the Members' democratic decisions" and in paragraph 153 that, "I and the Board feel that the Regulator simply did not approve of the Board that the AGM chose in June of 2022." More evidence was required than merely the feelings of the Board. That feeling was not corroborated by the documentary evidence which disclosed that. To the contrary, the Registrar never descended into personalities in his correspondence with the Board and management of the credit union and neither did Mr. Barrow point me to any specific

document (other than the Cabinet Report) in which personal animosity featured overtly or by inference. The Registrar's reasons have always been the same: the failure of the Board and management to take the corrective actions required by the Registrar.

[84] The Cabinet Report to which Mr. Barrow pointed also does not support the argument. The statement in the report that "the problems were systemic and that they required wholesale changes [of the management of the credit union]" does not demonstrate that the Registrar disliked the Board or the management. What was being reported was that the Registrar identified certain administrative and other problems facing the credit union and required the Board and management to address the same without success and the Registrar believed that the required changes could only be brought about with a change in the management of the credit union. Provided that the Registrar's concerns about the credit union are *bona fide* (and I have found that they are), he did exactly what the CUA envisaged. The Registrar's view of the ability of the Board and management to effectively implement corrective measures as required is a relevant consideration.

[85] This is further corroborated by the evidence of the Registrar. In his affidavit, he stated the factors which prompted the appointment of an Administrator:

> 173. I did determine that having regard to the failure of the Board to properly adopt corrective measures aimed at correcting the administrative deficiencies and weakness identified in the Special Examination Report, the First and Second Mahler Reports and the Boards failure to remediate the said administrative problems facing the credit union the appointment of an Administrator was required. I formed the opinion that there was a distinct risk that administrative and other problems facing the credit union may jeopardize the credit union.
>
> 174. In particular, the refusal of the Board to properly investigate and take decisive measures in respect of allegations of misconduct and misappropriation of members funds jeopardized the stability of SFXCU because it had the potential to undermine the confidence of members or potential members of the Credit Union in the ability of the institution to properly manage their financial interests.
>
> …
>
> 195. I have noted the averments made by the Deponent in Paragraph 33 of his 1st Affidavit. I categorically reject the suggestion that I had any preference for the old Board and hostility to the new Board. Beyond the bare assertion that I had a preference for the old Board I note that the Deponent has not shared any fact or basis to support the said conclusion.

196. In contrast with the Deponent, I have neither a personal or pecuniary interest related to whether SFXCU was administered by the Board as constituted prior to the AGM or the newly constituted Board.

197. It would appear based on the Deponent's own words that the Board, from as early as June, 2022, considered me an adversary rather than an impartial Registrar whose statutory duties and responsibilities were meant to complement their fiduciary responsibilities. At the time I had merely written to the Board expressing my concerns about staff suspensions and asking for a meeting.

[86] That evidence remained unshaken in cross-examination. Having had the opportunity, at first hand, to see and hear the evidence of the Registrar, rigorously tested in cross-examination, I found him to be a credible witness whose evidence could be relied upon. Contrary to the submission of Mr. Barrow, there was no conflict between the Registrar's response that should the Board and management resume their position there was nothing to stop them from ignoring the Registrar "we might end up in a situation like this again". This statement also does not in any way demonstrate personal hostility to the Board and management.

[87] In my judgment, the claimants have utterly failed to prove that the Registrar's decision to appoint an Administrator was motivated by hostility for the Board and management of the credit union or indeed for any other improper purpose. I note, if only to dismiss it, that the claimants appear to be under the misconception that something in section 61 of the CUA turns on whether or not the Board was elected by the membership of the credit union. The Board of all credit unions are elected by the members and the fact that the Board has been so elected is immaterial to the operation of section 61 which turns on the views formed, *bona fide*, by the Registrar. Whether or not an Administrator is appointed does not depend on the outcome of the credit union's last or any annual general meeting and a failure to take a Board's election into account does not and cannot colour the decision of the Registrar with impropriety.

Excessiveness

[88] The claimants contend that the appointment of an Administrator was disproportionate since there were less intrusive means (some of which were already in place) to address the issue. Indeed, the CUA vested a panoply of powers in the Registrar under sections 76, 83–85. In this way, the appointment of an administrator was draconian and unlawful.

[89] At the outset, there is nothing in section 61 or indeed the Act as a whole, which requires other tools to be utilized before an Administrator is appointed and it is not for this court to imply such a requirement into the statute. Indeed Mr. Barrow does not point to the contents of any section of the CUA which imposes the tiered approach to the appointment of an Administrator which he advocated for in this court. So long as the Registrar's views come within the three heads expressed in the section 61(1) and the procedural requirements are satisfied, the appointment of an Administrator is open to the Registrar. The fact that the CUA gives other coercive powers to the Registrar is of no moment.

[90] In his reply submissions, Mr. Barrow has refined his case on proportionality to be one of unreasonableness and irrationality. He submitted that the Registrar acted in a way no reasonable regulator could have properly acted. The Registrar took the nuclear option of supplanting the entire Board and management structure of the credit union instead of singling out and isolating the individuals who were suspected of wrongdoing, so this was irrational. This is essentially Wednesbury unreasonableness. I have already found that the Registrar had a reasonable basis for the appointment of an Administrator and I am loathe to hold that he (the Registrar) acted irrationally in doing that which the statute allowed him to do.

[91] In any event, the evidence shows that the Administrator was not the Registrar's first port of call. He commissioned examinations and inspections and issued directives over many months. It is only when those efforts failed did the Registrar seek to appoint an Administrator. The decision was rational and an inevitable step in the saga which unfolded between the Central Bank and the credit union.

[92] Consequently, the proportionality ground is without merit and must be rejected. The claimants have failed to prove that the appointment of the Administrator was unlawful on every ground they have advanced. I will dismiss their application for judicial review of the appointment of the Administrator.

The Fine

[93] The claimants have challenged as *ultra vires* and illegal the decision of the Registrar to fine the credit union on 24th February 2023. By letter of that date, the Registrar wrote:

> I write further to my letter of 20 February 2023 requiring St Francis Xavier Credit Union Ltd (SXFCU) to take immediate steps to recover all monies paid to Mr Rafael Dominguez Sr in relation to his claim for compensation for defamation of character, as well as legal fees associated with the claim.
>
> SFXCU failed to provide confirmation of adherence to the requirement by Wednesday, 22 February, 2023, as requested. Consequently pursuant to section 58(3) of the Credit Unions Act, which states that the credit union is liable to pay $2,000.00 for non-compliance and a further penalty of $100.00 for each day of noncompliance, the Registrar hereby calls upon SFXCU to immediately pay a penalty of $2,200.00 as of today's date.
>
> Note that continuous non-compliance to submit the requested information will result in an additional $100.00 per day being levied.

[94] Section 58 of the CUA provides:

> 58.–(1)The Board of Directors of every credit union shall,
>
> (a) immediately after approving the annual financial statement,
>
> (i) if the credit union is a member of the League, send to the Registrar and the League a copy of the financial statement and the management letter which the auditor may provide, and such other information as the Registrar and the League may require;
>
> (ii) if the credit union is not a member of the League, send to the Registrar a copy of the financial statement and the management letter which the auditor may provide, and such other information as the Registrar may require;
>
> (b) supply gratuitously to every member, upon request, a copy of the last annual return;
>
> (c) furnish the Registrar with monthly returns, monthly performance ratios, and such other returns and such other information as may from time to time be required;
>
> (d) provide every return and other document required for the purposes of this Act in such form as the Registrar may prescribe.
>
> (2) A copy of the annual audited financial statements and management letter mentioned in subsection (1)(a)(i) and (ii) of this section, shall be submitted to the

> Registrar within two months of the close of the financial year of a credit union or the League, or such longer period as the Registrar may permit in writing.
>
> (3) Any credit union which fails to comply with the requirements stipulated in subsections (1) and (2) of this section, shall be liable to pay, on being called upon to do so by the Registrar in writing, a sum of two thousand dollars($2,000), and where a non-compliance with the said provisions continues, there shall be levied a further penalty of one hundred dollars($100) for each day of non-compliance.

[95] That section requires the provision by the Board of Directors of a credit union of annual financial statements, annual returns, management letters, monthly returns and performance ratios, other returns and documents to the members, Registrar and the League. The failure of a credit union to supply any of the documents identified attracts a fine on demand by the Registrar of $2000.

[96] By his letter dated 24th February 2023, the Registrar imposed a fine on the credit union pursuant to section 58(3) of the CUA for a failure "to take immediate steps to recover all monies paid to Mr Rafael Dominguez Sr in relation to his claim for compensation for defamation of character, as well as legal fees associated with the claim." This has nothing to do with the furnishing of the documents to which section 58 relates or indeed to any document. As a matter of law, section 58(3) did not give the Registrar any power to levy the fine in the letter of 24th February 2023.

[97] In cross-examination, the Registrar sought to bring the fine into section 60(9) of the CUA since it was a failure of the credit union to provide documentary proof that the monies were recovered which the Registrar had required under section 60(3). I will consider this point for completeness, but the fine was levied pursuant to section 58(3) and that is the decision which is under review and which I have found to be *ultra vires* and illegal.

[98] Section 60(3) and (9) states:

> (3) An examiner conducting the examination of a credit union or the League referred to in subsection (1) of this section, shall have the power to require the production of all books, records, accounts, writings, and documents of any kind as well as data or information held, stored or transmitted by electronic means.
> …

(9) If a credit union or the League fails to provide information or documents to an examiner as required by section 60(3) of this Act, such credit union or the League shall be liable to pay, on being called upon to do so by the Registrar in writing, a penalty of two thousand dollars ($2,000), and where the said failure continues, there shall be levied a further penalty of one hundred dollars ($100) for each day of noncompliance.

Subsection 3 empowers an examiner conducting an examination of a credit union to require the production of all books and documents as required. The operative portion of subsection 3 is that it applies where the examiner is "conducting the examination of a credit union." In other words, the examination must be ongoing. This power is necessary for the effective execution of the examination.

[99] The examination to which that corrective action (to recover the monies paid) relates was long since completed. There was no ongoing examination to which subsection 3 applied. Consequently, no fine could be imposed pursuant to subsection 9. The levy of the fine by letter dated 24th February 2023 is *ultra vires* and illegal and I will grant an order of certiorari to remove and bring into the High Court and quash the decision to levy the fine.

Loan Corrective Directions

[100] The claimants also challenge the decision of the Registrar on 16th February 2023 to require the credit union to take corrective actions arising out of an onsite examination of the credit union's loan portfolio under section 60(1) of the CUA. The corrective actions were:

1. The Board is to ensure that SFXCU implements the following corrective actions:
2. Ensure that the classification of loans is in accordance with CUA Requirement No. 1;
3. Immediately classify the seven (7) loans that were assessed as non-performing by the Central Bank (see Annex I), as well as all loans which SFXCU identified as NPL, based on the review required in Central bank's letter dated 16 December 2022;
4. Submit an amended CUR 8 for month ending December 2022 by 24 February 2023;
5. Ensure that the credit union implements Board-approved procedure to properly assess:
    i. Members' repayment capacity;
    ii. Identification of well-defined credit weaknesses;
    iii. Application of shares to loans; and
    iv. Accurate reporting of SFXCU's true level of NPL.

The Board is to submit confirmation of adherence to this corrective action by 28 February 2023.

6. Ensure that assessment of repayment capacity and basis for declassifying loans (where applicable) are adequately supported and documented. The Board is to submit confirmation of adherence to this corrective action by 24 February 2023.

[101] At paragraph 175 of the Registrar's affidavit, he stated that the "directives in respect of corrective actions made (sic) pursuant to section 6(2) of the CUA." That section provides:

> Where the Registrar has reasonable grounds to believe that an affiliate or official of a credit union is committing or pursuing or is about to commit or pursue any act or course of conduct that is detrimental to the interests of the shareholders or depositors, or is a violation of this Act or any regulation, order, directive, instruction or condition imposed by the Registrar, he may require the credit union to perform such actions considered necessary to rectify the situation.

[102] Mr. Barrow contends that the Registrar has no general power to issue open-ended directions to the Board under Section 6(2) or any other provision of the CUA. He points to the definition section of the CUA which defines "officer" or "official" as an employee of the credit union and does not include a director or a member of the Supervisory Committee or a member of the Credit Committee. The significance of that section, says Mr. Barrow, is that the Registrar may only issue directions to a credit union where the detrimental conduct occurs at a level below the Board and supervisory bodies. This is so because the CUA provides a specific regime for dealing with complaints about those bodies and members of those bodies and the Registrar is not to insert himself into the ordinary governance of the credit union, which is exactly what is achieved by his loan correction directives.

[103] All the definition section clarifies is that section 6(2) is geared towards the actions of an employee of the credit union as distinct from a member of the Board or of the supervisory and credit committees. An employee cannot (without the Registrar's consent) be a member of the Board or any committee of the credit union. See section 27(4) of the CUA. On account of the actions of that employee, the subsection gives the Registrar the power to require the credit union to take steps to rectify the situation. It does not mean that by 6(2) the Registrar is only allowed to give directions to employees to rectify their actions. The burden is on the credit union itself to rectify the situation. The CUA at section 6(2) surely envisages a power in the Registrar to impose a *regulation, order, directive, instruction or condition* on a credit union.

[104] The corrective actions itemized in the letter of 16th February 2023 are directed towards rectifying

a situation where the employees of the credit union (including the manager who is charged with the day to day running of the credit union) are managing and operationalizing the loan portfolio in a manner inconsistent with CUA Requirement 1 which is a directive imposed by the Registrar relating to the classification of loans and other assets. That infringement is what the Registrar, in his loan directives of 16th February 2023, is requiring the credit union to rectify. The loan directives fall within the Registrar's power in section 6(2) and are not *ultra vires* the CUA.

Conclusion

[105] In the premises, I will dismiss the application for judicial review of the appointment of the Administrator and the imposition of the loan directives of the Registrar as contained in the letter of 16th February 2023.

[106] In respect of the fine levied by the Registrar in his letter of 24th February 2023 I shall:

i. Grant a declaration that the decision of the Registrar made on 24th February 2023 to issue a fine against the Saint Francis Xavier Credit Union is *ultra vires* the Credit Union Act and illegal.

ii. Grant an order of certiorari to bring into the High Court and quash the decision of the Registrar dated 24th February 2023, to issue a fine against the Saint Francis Xavier Credit Union.

[107] I shall hear the parties on costs.

Martha Alexander
High Court Judge