[2023] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CIVIL APPEAL NO COA2019CV00030

BETWEEN	**SHELDON GORDON**	**1ST APPELLANT**
AND	**PATRAE ROWE**	**2ND APPELLANT**
AND	**ARLEEN MCBEAN**	**1ST RESPONDENT**
AND	**THE POLICE FEDERATION**	**2ND RESPONDENT**

CONSOLIDATED WITH

SUPREME COURT CIVIL APPEAL NO COA2019CV00061

BETWEEN	**ARLEEN MCBEAN**	**APPELLANT**
AND	**SHELDON GORDON**	**1ST RESPONDENT**
AND	**PATRAE ROWE**	**2ND RESPONDENT**
AND	**THE POLICE FEDERATION**	**3RD RESPONDENT**

Mrs Symone Mayhew QC for Sheldon Gordon and Patrae Rowe

Mrs Jacqueline Samuels-Brown QC for The Police Federation

Hugh Wildman instructed by Hugh Wildman and Co for Arleen McBean

13, 14 and 15 October 2020 and 29 September 2023

Police – Police Federation – removal of chairman of the Police Federation – whether disciplinary procedure necessary for removal – Constabulary Force Act, ss 26, 67 and 71 – Constabulary Force Act, Second Schedule, ss 20 and 22, Police Service Regulations, 1961 – Interpretation Act, s 35

Civil Procedure – Legal personality – Whether Police Federation can sue and be sued – Whether members of the Police Federation can be sued in their

private capacity for actions of a committee of the Federation – Constabulary Force Act, ss 67, and 72

Civil Procedure – Injunction – interim mandatory injunction granted – whether there is a serious issue to be tried – whether damages is an adequate remedy – balance of convenience – whether interim mandatory injunction should be granted where it decides the issue – whether an undertaking as to damages is always required

Civil Procedure – Costs – Costs in interlocutory applications

BROOKS AND D FRASER JJA

[1] On 29 January 2019, as the chairman of the Police Federation ('the Federation'), Corporal Arleen McBean attended a meeting of the Central Committee of the Federation ('the Central Committee'). Although there was previous discord between some of the members of the Central Committee and herself, she did not expect that by the end of the meeting, she would have lost her position as chairman. However, at that meeting, she was removed from that position by a vote of no confidence, and the then general secretary, Inspector Sheldon Gordon, was elected chairman of the Federation in her stead. Sergeant Patrae Rowe was elected as the Federation's general secretary in the same meeting.

[2] Corporal McBean found this development unacceptable. As a result, she sued the Federation, Inspector Gordon and Sergeant Rowe ('the respondents'). On 18 February 2019, she applied to the Supreme Court for an *ex parte* mandatory injunction against the respondents, seeking to be reinstated as the Federation's chairman until the expiry of the period for which she had been elected to serve, that is, May 2019.

[3] Following the filing of that application, Corporal McBean, on 22 February 2019, filed a fixed-date claim form against the respondents.

[4] The parties attended before Bertram Linton J on 27 February 2019 for a hearing of the application for the injunction. The learned judge granted the application for the mandatory injunction, set the date for the first hearing of the fixed-date claim form and ordered costs against Inspector Gordon and Sergeant Rowe. Bertram Linton J did not use the term "interim" in her order, however, it seems that she intended to grant an

interim injunction, since the principles on which she relied, as set out in her written judgment, governed that of an interim injunction.

[5] Inspector Gordon and Sergeant Rowe filed a joint appeal against Bertram Linton J's decision. The Federation, as the second respondent to Inspector Gordon and Sergeant Rowe's appeal, filed a counter-notice of appeal. The Federation also contended that Bertram Linton J had erred in granting the mandatory injunction, reinstating Corporal McBean.

[6] They also filed applications in the Supreme Court to strike out Corporal McBean's claim against them. Those applications succeeded. On 19 June 2019, L Pusey J struck out the claim against Inspector Gordon and Sergeant Rowe on the basis that they had not been sued in a representative capacity and that the claim disclosed no reasonable claim against them, as individuals. He struck it out against the Federation because, according to his ruling, the Federation has no legal capacity, that is, it could neither sue nor be sued.

[7] Although by the time L Pusey J had handed down his decision, the period for which Corporal McBean was elected to serve as chairman, had expired, and another chairman (Sergeant Rowe) had been duly elected, she filed an appeal against L Pusey J's decision. Her appeal has been consolidated with that of Inspector Gordon and Sergeant Rowe for this court's resolution.

[8] The above chronology shows that the practical issues behind each of these appeals were spent by the end of May 2019. At that time, the injunction had, at least, expired, a new administration had been elected, and the court could not have extended Corporal McBean's tenure as chairman. Nonetheless, the parties have pursued their respective appeals.

The respondents' position

[9] Apart from supporting the orders that they sought and received from L Pusey J, the respondents contend that the Central Committee was entitled to take the steps that it did. The respondents point out that by being chosen as chairman of the Central Committee, Corporal McBean came to be regarded as the chairman of the Federation.

Relying on section 35 of the Interpretation Act, they submit that since the Central Committee chose Corporal McBean as the chairman, it could also remove her as chairman and there was nothing in the Act that restricted the Central Committee's power to remove her. They contend that the Central Committee removed her from the post of chairman, through a regular vote, properly moved and seconded. The vote, they contend, did not constitute disciplinary action, as contemplated by section 71 of the Constabulary Force Act ('the Act') and nothing in the Act prevents the Central Committee from taking the action that it did.

[10] The respondents assert that Bertram Linton J was in error to have found that Corporal McBean had a strong case with a high probability of success.

[11] Inspector Gordon and Sergeant Rowe filed several grounds of appeal. The grounds are:

> "i. The learned judge erred when she found that there was a serious issue to be tried and that the Claimant had a high degree of assurance of success on the claim as filed.
>
> ii. The learned judge erred in considering points of law that were not raised on the Claimant's Fixed Date Claim Form in her assessment of whether there was a serious issue to be tried and a high degree of assurance of success on the claim.
>
> iii. The learned judge erred in finding that exceptional circumstances existed in this case and as such the failure of the Applicant to give an undertaking in damages was not a bar to the grant of an injunction especially as the Claimant did not expressly seek relief from giving the undertaking in damages.
>
> iv. The learned judge erred in her finding that the grant of the mandatory injunction would not effectively dispose of the claim and accordingly she erred in failing to apply a higher standard in the exercise of her discretion.
>
> v. The learned judge erred in her assessment of whether there was greater prejudice in the grant or refusal of the injunction.

vi. The learned judge exercised her discretion wrongly in ordering costs against the Appellants on the injunction application instead of an order for costs to be costs in the claim."

[12] The Federation filed the following grounds of appeal in its counter-notice of appeal:

"i. The learned [judge] erred when she found that there was a serious issue to be tried and that the claimant (now the 1st respondent) had a high degree of assurance of success on the claim as filed.

ii. In finding that there was a serious issue to be tried, the learned judge failed to have regard, or sufficient regard to the procedure for appointing the now 1st respondent as chairman of the Police Federation (now the 2nd respondent) and that it lay within the powers of the Central Committee to appoint as well as replace the chairman.

iii. The learned judge failed to take into account that the decision being challenged by the claimant (now 1st respondent) was made by the Central Committee of the now 2nd respondent, Police [F]ederation.

iv. The learned judge erred in considering points of law that were not raised on the claimant's (now 1st respondent's) Fixed Date Claim Form in her assessment of whether there was a serious issue to be tried and a high degree of assurance of success on the claim.

v. The learned judge erred in finding that exceptional circumstances existed in this [case] and as such, the failure of the claimant (now 1st respondent) to give an undertaking in damages was not a bar to the grant of an injunction as the claimant (now the 1st respondent) did not expressly seek relief from giving the undertaking in damages.

vi. The learned judge erred in that she conflated the exercise of disciplinary powers with an executive decision that lay within the ambit of the Central Committee of the now 2nd respondent to appoint and replace officers thereof.

vii. The learned judge erred in failing to apply the literal interpretation to the clear and unequivocal language of the governing statute relative to the powers and responsibilities of the Central Committee of the now 2nd respondent and the selection of a chairman of the now 2nd respondent.

viii. The learned judge erred in her finding that the grant of the mandatory injunction would not effectively dispose of the claim and accordingly she erred in failing to apply a higher standard in the exercise of her discretion.

ix. The learned judge failed to take into account that having regard to the imminence of the (now 2nd respondent) Annual General Meeting at which a new Central Committee, inclusive of the chairman, is to be selected; the granting of the mandatory injunction would in effect finally dispose of the issues raised in the claim.

x. The learned judge erred in her assessment as to where greater prejudice lay in the grant or refusal of the injunction.

xi. In assessing where the greater prejudice and the balance of convenience lay, the learned judge erred in her assessment of the evidence and the standard to be applied in assessing same; in that, *inter alia*, the learned judge;

a. relied on '*the* ***impression*** *that there was … a dysfunction among members of the Central Committee*' and that '*the parties* ***seemed*** *to be operating without reference, agreement, or consensus*.' (Emphasis added);

b. proceeded on the basis that consensus was required to legitimize [the] decision of the Central Committee of [January 29,] 2019;

c. failed to take into account relevant evidence including that the now 1st respondent raised no objection to the deliberations of the Central Committee relative to her functions and incumbency as chairman of the now 2nd respondent.

xii. In assessing where the greater prejudice lay, the learned judge failed to have regard or sufficient regard to the impact of the reinstatement of the claimant (now 1st respondent) on the operations of the Central Committee of, and *ipso facto* the 2nd respondent as a whole; particularly having regard, but not limited to, the learned judge's findings that '*things had broken down so badly that things had become tense and the parties were no more in a position to deal with the issues among themselves*' and that in arriving at the decision to replace the now 1st respondent, there was '*disapproval from [only one] member of the committee*'[.]

xiii. The learned judge failed to have regard to the alternative internal procedure available to the now 2nd respondent to challenge the decision to remove her as chairman of the now 2nd respondent.

xiv. The learned judge exercised her discretion wrongly in ordering costs against the appellants on the injunction." (Italics as in original)

Corporal McBean's position

[13] Corporal McBean contends that she was elected to serve in the post of chairman for the period May 2018 to May 2019. She argues that the provisions of the Act, which create the Federation, do not allow for her removal unless by way of disciplinary action under section 71(1) of the Act. She contends that the Act allows only the Commissioner of Police to take such action and, consequently, her purported removal on 29 January 2019 was invalid. She supports the decision of Bertram Linton J and contends that L Pusey J was in error in making the findings that he did.

[14] Corporal McBean's grounds of appeal from L Pusey J's decision are as follows:

"a) That the Learned Trial Judge erred in law when he ordered in his Oral judgment of June 20, 2019, that the Fixed Date Claim Form, brought by the Appellant against the Respondents, be struck out.

b) That the Learned Trial Judge erred in law in failing to appreciate that the Police Federation is a creature of statute and as such, one can obtain declaratory relief against the Police Federation, if the Federation acts in breach of the Constabulary Force Act, under which the Police Federation is established.

c) The Learned Trial Judge erred in law in confusing the requirement of statutory permission for a Statutory Body to enter into civil obligation and the availability of the remedy of declaratory relief against a statutory body that acts in breach of the statute under which it operates.

It is submitted that one does not need statutory approval to challenge the action of a statutory body whenever that Statutory Body [acts] ultra vires, in breach of its enabling statute.

d) The learned Trial Judge was clearly wrong in law in holding that to bring a claim in private law for declaratory relief against the 1st and 2nd Respondents, is unreasonable.

It is submitted that this ruling by the Learned Trial Judge is devoid of legal foundation."

[15] Corporal McBean's inclusion of submissions in her grounds of appeal is in breach of rule 2.2(5) of the Court of Appeal Rules ('CAR').

The issues

[16] The issues raised by the two appeals and the counter-notice of appeal may be condensed as follows:

a. whether a chairman of the Federation may be removed from office other than through disciplinary action pursuant to section 71(1) of the Act;
b. whether Bertram Linton J erred in granting an interim mandatory injunction;
c. whether Bertram Linton J erred in awarding costs to Corporal McBean;
d. whether the Federation may sue and be sued; and
e. whether Inspector Gordon and Sergeant Rowe may be sued in their private capacity in this context.

[17] Issues d and e deal with questions of jurisdiction and will be considered before the other issues.

Issue d. whether the Federation may sue and be sued

[18] This aspect concerns the appeal from the decision of L Pusey J, referred to above.

[19] In the court below, counsel for the respondents applied to strike out Corporal McBean's claim, partly on the basis that it disclosed "no cause of action because the [Federation] is not a proper party as it has no legal persona" (paras. [6] and [7] of L Pusey J's judgment). L Pusey J identified the issue before him, on this complaint, at para. [27] as being:

> "…whether the [Federation] which is not a juristic person can be sued **in a private law action** which seeks declarations as to whether there have been actions taken by the [Federation] which are contrary to the [Act]." (Emphasis supplied)

[20] L Pusey J ruled, at para. [29] that:

> "…both parties to an action seeking declaratory relief in a private law action must have legal personality. Private law actions must be between two existing legal entities. It is also my view that the [Federation] is not a juristic person and **cannot be a party to an action in private law**." (Emphasis supplied)

[21] He, therefore, held that "it would be impossible for [Corporal McBean] to seek orders against the [Federation]" (see para. [30]). It is important to note that the learned judge pointed out that he understood Corporal McBean's claim to be one in private law. He said, in part, at para. [16] that "[Mr Wildman] confirmed that the remedy sought in this matter was not one of judicial review but a claim in private law".

[22] In this court, learned counsel for Corporal McBean, Mr Wildman, argued that counsel for the respondents, as well as L Pusey J, erred in identifying the issue as they did. Mr Wildman submitted that the issue had nothing to do with whether the Federation could sue or be sued. Learned counsel submitted that the point to be considered was whether the Federation's action of dismissing Corporal McBean, was valid. He argued that once a statutory body exceeded its jurisdiction, as the Federation did in this case, the court could declare the impugned action as a nullity. He relied on, among others, the cases of **Dyson v Attorney-General** [1911] 1 KB 410, **London**

Association for the Protection of Trade and Another v Greenlands Ltd [1916] 2 AC 15, **Cooper v Wilson and others** [1937] 2 KB 309, **Carlton Smith v Lascelles Taylor and others** [2015] JMCA Civ 58 and rule 56.9 of the Civil Procedure Rules ('the CPR'), in support of his submissions.

[23] He further submitted that the Federation was created by statute and, therefore, was subject to declarations that its actions were invalid.

[24] It is important to note that the learned judge pointed out that he understood Corporal McBean's claim to be one in private law. Viewed in this context, **Dyson v Attorney-General** does not assist Corporal McBean's position. In that case, an action was brought against the Attorney-General to test the validity of the notices issued by the Commissioners of Inland Revenue. The issue which arose during the case dealt with a specific public law situation, namely, whether a declaration could be granted against the Attorney-General as the representative of the Crown. Cozens-Hardy MR identified the Attorney-General's contention in that case on page 417:

> "…But then it is urged that in the present action no relief is sought except by declaration, and that no such relief ought to be granted against the Crown, there being no precedent for any such action."

[25] Fletcher-Moulton LJ set out his interpretation on page 420, saying:

> "The Attorney-General contends that he is not the proper defendant, that no such declaration as is asked could ever have been obtained in any Court against any defendant, and that, therefore, none such can now be obtained in the High Court, and that the subject has no remedy, but can only defend actions for penalties when he is sued."

[26] The court in that case ruled against the Attorney-General's contention on the basis that the Rules of Court, of the day, allowed declarations to be granted in appropriate cases (Order XXV r 5) and, secondly, that the Crown was subject to the declarations sought where the interests of the Crown were not directly affected. The issue in law, in that case, is quite different from the present case. There was no question of unincorporated entities in that case and no question of Crown immunity in this case.

[27] Similarly, rule 56.9 of the CPR does not assist Corporal McBean. That rule concerns applications for administrative orders. Although this court's judgment in **Carlton Smith v Lascelles Taylor and others** is authority for stating that the court may grant declarations in both public and private law cases (Corporal McBean's case, on all accounts, is a private law claim), there is nothing in rule 56.9 of the CPR that speaks to the capacity of a party to sue or be sued. The rule stipulates the method of applying for an administrative order, the steps that must be taken in making such an application, the contents of the affidavit that should accompany the application and the process that should follow the filing of an application.

[28] In **London Association for the Protection of Trade and Another v Greenlands Ltd**, Lord Parker of Waddington, in asserting that a claim against an entity that had no legal status, was improper, made the following statement on page 38, on which Mr Wildman relies:

> "The London Association for the Protection of Trade is not a corporate body, nor is it a partnership, **nor again is it a creation of statute**. The plaintiffs were wrong in making it a defendant to the action…" (Emphasis supplied)

[29] Mr Wildman argues that the Federation is created by statute and, therefore, falls within the category of entities that may be sued. However, the authorities do not support such a blanket statement.

[30] Firstly, in **L C McKenzie Construction Ltd v The Minister of Housing and The Commissioner of Lands** (unreported), Supreme Court, Jamaica, Suit No E200/72, judgment delivered 13 November 1972 ('**L C McKenzie**'), Duffus CJ found that although the Commissioner of Lands had been established by statute as a corporation sole, with the power to "acquire, hold and dispose of land and property", the Commissioner was "not given the power to sue nor may he be sued". Duffus CJ made a similar finding concerning the Minister of Housing, which was also designated by the Housing Act as a corporation sole. Based on his finding, the learned Chief Justice ruled that the Commissioner and the Minister could not be sued, were entitled to the protection of the Crown Proceedings Law and an injunction could not be ordered against them.

[31] In **Linton Thomas v The Minister of Housing and Ivanhoe Jackson v The Minister of Housing** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 60 & 61/1983, judgment delivered 22 June 1984 ('**Linton Thomas**'), this court held that the Minister of Housing, who was designated a corporation sole, by the Housing Act, did not have the power to sue and could not be sued. The court considered a submission by counsel in that case, which is very similar to Mr Wildman's submission on this point. The court recorded on page 8 that:

> "[Counsel for the appellants'] most potent submission was that the authorities establish that when departments or ministers of government are incorporated by statute without an express provision to sue or be sued they are entitled to sue in their own name and are liable to be sued…"

[32] Rowe JA, on page 11 advised that it is important that each statute be examined to determine whether the corporation sole can sue and be sued. He said:

> "Each statute creating a Corporation Sole must be individually examined to discover whether from its terms the Corporation Sole is empowered to sue and is liable to be sued."

[33] The court, therefore, rejected counsel for the appellants' submissions and confirmed the validity of the reasoning and conclusion of Duffus CJ in **L C McKenzie**. The court said, in part, on page 15:

> "[**L C McKenzie**] was delivered on November 13, 1972 and has ever since informed the practice in respect of suits in matters arising from the implementation of the powers of the Minister of Housing under the Housing Act. It is a decision which in my view accords with principle and authority and ought to be affirmed."

[34] In **Andrew Hamilton and others v The Assets Recovery Agency** [2017] JMCA Civ 46 ('**Andrew Hamilton**'), Morrison JA, as he then was, after analysing the cases dealing with the point, echoed similar sentiments to that of Rowe JA in **Linton Thomas**, that the issue of whether a statutory entity can sue and be sued depends on the construction of the particular statute. Morrison JA said in paras. [54] to [55] that:

> "[54] There can be no question that, in order to institute and maintain legal proceedings, all litigants must have legal status of some kind, some sort of separate legal existence or persona. But it is clear that there is no fixed route to such status. **In every case in which it is said to derive from statute, it will be necessary to consider the particular statute relied on in order to discern the intention of Parliament**. At one end of the spectrum, there will be clear cases, such as, for instance, a company incorporated under the Companies Act, which 'has the capacity ... rights, powers and privileges of an individual'. Equally clear will be the case of a body corporate established by statute to which section 28 of the Interpretation Act applies, which will have the power to, among other things, sue in its corporate name.
>
> [55] However, as the cases show, **even the designation by statute of a body as a corporation sole does not necessarily vest in that body the right to sue or be sued in its own name**. Every case therefore calls for careful scrutiny of the particular statute in order to determine the legislative intent with regard to the particular body under consideration. **In this case, as it seems to me, the various powers conferred on [the Assets Recovery Agency] by [the Proceeds of Crime Act] - to apply or initiate court proceedings for forfeiture orders and other pecuniary penalty orders, restraint orders, civil recovery orders, and to take and defend proceedings in respect of property vested in it as a result of a recovery order – are clear indicators that Parliament must necessarily have intended that it should enjoy legal status for these purposes**. Similarly, in my view, the reference in section 71(2) to [the Assets Recovery Agency's] 'cause of action', in the context of a provision relating to limitation of actions, is only explicable on the basis that Parliament intended that [the Assets Recovery Agency] should have the power to file and maintain an action in court." (Emphasis supplied)

[35] The principle that Rowe JA then later Morrison JA identified is respectfully accepted as being completely accurate. In applying it to this case, it is necessary to analyse the statutory context, in which the Federation is placed.

[36] The Federation is created by section 67 of the Act. The section states the purpose and composition of the Federation and the media through which it should act. It provides as follows:

"(1) **For the purpose of enabling the Sub-Officers and Constables of the Force to consider and bring to the notice of the Commissioner of Police and the Minister all the matters affecting their general welfare and efficiency**, **there shall be established in accordance with the Second Schedule an organization to be called the Police Federation** which shall act through Branch Boards, Central Conferences and a Central Committee as provided in that Schedule.

(2) No representations shall be made by the Federation in relation to any question of discipline, promotion, transfer, leave or any other matter, unless some question of principle are involved.

(3) The Police Federation shall be entirely independent of and unassociated with any body outside the Force.

(4) The Minister may by order from time to time amend the Second Schedule.

(5) Every order made under this section shall be subject to negative resolution." (Emphasis supplied)

[37] The other sections of the Act that refer to the Federation are sections 68-72. Only section 72 provides any assistance to the current analysis. It speaks to the Federation's establishment and handling of money. It states:

"(1) Notwithstanding anything to the contrary it shall be lawful for the Police Federation to establish a fund, to be called the Police Federation Fund, (hereinafter referred to as 'the Fund') with the contributions of voluntary subscriptions from members of the Federation and other persons, and to administer the Fund for the welfare, relief and assistance of its members and for such other purposes as the Central Committee may, from time to time, and subject to regulations made under subsection (2), think fit.

(2) The Federation shall, with the approval of the Minister, make regulations with respect to the collection of voluntary subscriptions and for the use and management of the Fund.

(3) The Federation shall keep proper accounts in relation to the Fund and a statement of such accounts, audited annually by a person appointed by the Federation

and approved by the Minister, shall be submitted annually to the Minister.

(4) The expenses relating to auditing the accounts shall be paid from the Fund."

[38] The Second Schedule of the Act ('the Second Schedule') sets out the rules of the Federation. It details the pyramid structure of the Federation, whereby the members of the various ranks below the rank of assistant superintendent vote for people within their rank to represent them in Branch Boards. The members of the Branch Boards, choose from among their members, people to represent them in Central Conferences and, in turn, the members of the Central Conferences choose their representatives to the Central Committee. The members of the Central Committee select a chairman from among its members. That person is considered the chairman of the Federation. The rules of the Federation need not be quoted here.

[39] The above outline of the statutory context of the Federation does not readily suggest that the Federation has been given the power to sue and be sued. L Pusey J quite properly highlighted that section 67 stipulated the role of the Federation as being the vehicle "to grant the members of the Force a rather circumscribed means to communicate with the leadership of the Force about 'matters affecting their general welfare and efficiency'" (see para. [23] of L Pusey J's judgment). It may be said that section 72, at best, gives the Federation the power to hold and manage a fund and to appoint an auditor, but those powers do not, by themselves, imply the power to sue or the liability to be sued. Finally, nothing in the Second Schedule even hints at a bestowing of legal personality.

[40] L Pusey J, although acknowledging that "unincorporated entities can be parties to judicial review or … can appear by way of representatives" (para. [27]), concluded that non-juristic persons "cannot be a party to an action in private law" (para. [29]). That conclusion is consistent with the learning in **Andrew Hamilton** and the cases to which it referred.

[41] **The Junior Doctors Association and The Central Executive of the Junior Doctors Association v The Attorney General** (unreported), Court of Appeal,

Jamaica, Motion No 21/2000, judgment delivered 12 July 2000 ('**The Junior Doctors** case') is conclusive of this aspect of the case. In that case, the then Chief Justice issued an injunction against the Junior Doctors Association and the Central Executive of the Junior Doctors Association. Those entities sought leave to appeal from the learned Chief Justice's refusal to discharge those orders and to strike out the proceedings against them as being "a nullity".

[42] In this court, the judges of appeal, who heard the application for leave to appeal, treated it as the hearing of the appeal and allowed the appeal. They were unanimous in their view that since the Junior Doctors Association and the Central Executive of the Junior Doctors Association were not legal entities, the injunctions made against them were nullities. Forte P, on pages 5-6 of the judgment, among other things, referred to section 97 of the Judicature (Civil Procedure Code) Law, which prevailed at the time and said, in part:

> "**In order then to sue the members of the appellant Association, it was necessary for the respondent to bring the action against named members of the Association in a representative capacity**. This was not done. Ms. Lewis for the respondent in an excellent attempt at preserving the order of the Learned Chief Justice, contended that the naming of the Central Executive of the Association was sufficient as it described an identifiable body of persons. In my view this was not sufficient, as the members of the Executive were not described by name in the suit. The provisions of Section 97 of the Civil Procedure Code were therefore not adhered to and consequently there was no proper defendant in the action. **As a result, I had no option but to conclude that the process was a nullity**. In the event, the appeal was allowed, and the order for injunction set aside." (Emphasis supplied)

[43] Bingham JA, on page 11 of the judgment, expressed a similar view:

> "**Turning to the main question as to the validity of the order, it is clear that directed as it was against these two bodies who were not known to law, the order was bad on the face of it**. Both these named bodies, although known to the society at large, were not

> identifiable as having a legal personality capable of suing and being sued…." (Emphasis supplied)

[44] Langrin JA agreed. He stated that once the procedure is a nullity it cannot be waived by the parties. He said, in part, on pages 19-20:

> "…Once the proceedings is [sic] a nullity and it is brought before the Court for a declaration as to its nullity or otherwise we feel constrained in the interest of justice and time to deal with it."

[45] Section 97 of the Judicature (Civil Procedure Code) Law (the predecessor to the CPR), to which the court referred, provided:

> "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued or may be authorised by the Court or a Judge to defend, in such cause or matter, on behalf of or for the benefit of all persons so interested."

The provision, among other things, authorised a method by which a non-juristic entity could be represented in litigation. Bingham JA referred to the procedure on page 11 of the judgment. He continued:

> "…The law allows for such unincorporated body [sic] of persons to proceed at law as a party to legal proceedings by virtue of a named person being authorised by the court to act in a representative capacity for and on behalf of himself and the particular association or body with the same interest."

[46] Part 21 of the CPR, similarly, allows for the appointment of representative claimants and defendants and provides a process by which that may be done. In this case, as in **The Junior Doctors** case, the authorised procedure was not used and consequently the result should be the same with respect to the non-juristic entities.

[47] Despite that learning, it cannot be ignored that the Federation was a party to **The Police Federation and Others v The Commissioner of the Independent Commission of Investigations and Another** [2018] JMCA Civ 10, in which this court ruled that the Independent Commission of Investigations, which was created by statute, was not a juristic person, and therefore could not initiate prosecutions, as it

was seeking to do. There was, however, no issue raised, at least in this court in **The Police Federation and Others v The Commissioner of the Independent Commission of Investigations and Another**, as to the Federation's standing or capacity. The case does not assist Corporal McBean's contentions.

[48] **Cooper v Wilson and others**, on which Mr Wildman also relies, is authority for the principle that when a statutory body acts without jurisdiction it can be challenged in an action for declaration that the decision is null and void. Greer LJ adumbrated that principle on page 324 of the report, saying:

> "The case of *Andrews v. Mitchell* [[1905] AC 78] seems to me to support the view that a claim for a declaration that a statutory body acted without jurisdiction can be dealt with by an action for a declaration that the decision in question was null and void…." (Italics as in original)

[49] The case does not provide the clear support that Mr Wildman contends. Neither in **Andrews and Others v Mitchell** [1905] AC 78 (cited in the quotation above) nor **Cooper v Wilson and others**, was an unincorporated entity involved, as a party.

[50] In **Andrews and Others v Mitchell**, the arbitration committee of a friendly society, in the absence of one of its members, passed a resolution expelling him from the society on the grounds of fraud and disgraceful conduct. He sued the trustees of the society (not the society by name), in the county court, claiming damages for the wrongful expulsion and an injunction. The trustees applied for a writ of prohibition to prevent the hearing in the county court. Darling J dismissed the trustees' application. The King's Bench Division affirmed the dismissal so too did the Court of Appeal and the House of Lords.

[51] Similarly, in **Cooper v Wilson and others**, a former sergeant of police sued the Chief Constable of Liverpool, a police superintendent as well as the individual members of the Watch Committee of Liverpool, not the Watch Committee by name. The former sergeant of police claimed declarations that he was improperly dismissed from the force.

[52] Based on the above analysis, it must be said that L Pusey J was correct in ruling that the Federation was not a proper party to the proceedings that Corporal McBean filed. The fixed date claim filed and the injunction granted against it were "nullities". As was indicated on page 19 of **The Junior Doctors** case, Corporal McBean's claim amounts to "a fundamental failure to comply with the requirements of the law".

Issue e. Whether Inspector Gordon and Sergeant Rowe may be sued in their private capacity in this context

[53] Inspector Gordon and Sergeant Rowe complain that Corporal McBean has no claim against them that has any likelihood of success. As mentioned above, she has sued them respectively in their personal capacities, and not as representatives of the Central Committee or of the Federation. However, it was not them, or either of them, who removed her from office. It was the Central Committee that took that step.

[54] L Pusey J summarised his view of Corporal McBean's claim against Inspector Gordon and Sergeant Rowe at paras. [33] and [34] of his judgment thus:

> "[33] …My understanding of [Corporal McBean's] evidence is that on the fateful day in January 2019 there was a vote on a motion to remove [Corporal McBean] as Chairman. Even if [Inspector Gordon and Sergeant Rowe] orchestrated or benefitted from this decision it was not a decision of them as individuals but of the Central Committee of the [Federation].
>
> [34] Therefore, any action against [Inspector Gordon and Sergeant Rowe] should be against them as representatives of the [Federation] and not in their personal capacity. I am unaware of any legal principle that confers personal liability for the acts of individual members of a decision making body or committee in the absence of fraud, deception or criminal illegality. Had [Corporal McBean] acted against [Inspector Gordon and Sergeant Rowe] on behalf of the Central Committee or the [Federation], I do not think that there could be a challenge to the action."

[55] Mr Wildman likened Inspector Gordon and Sergeant Rowe to Mr Hogger, the port manager in **Barnard and others v The National Dock Labour Board and Silvertown Services Ltd** [1953] 2 QB 18 ('**Barnard**'), who, Denning LJ, as he then

was, described as "a usurper". Mr Wildman's reference is not an apt analogy. Mr Hogger's situation, in **Barnard**, is entirely different from the positions of Inspector Gordon and Sergeant Rowe. Mr Hogger was delegated to take actions and did take actions, which he was not entitled to take. However, the board that granted him that authority was itself a delegate, and it had no authority to further delegate its power. It was in that context that Denning LJ described Mr Hogger as "a usurper", although he was at pains to say that he did not do so "unkindly".

[56] Unlike Mr Hogger, Inspector Gordon and Sergeant Rowe have not taken any steps in their personal capacities or even on behalf of the Central Committee. All their actions were as members of the Central Committee, in the conduct of a meeting of that entity. There is nothing which can impugn L Pusey J's finding on this issue. Corporal McBean's appeal, in this regard, must also fail.

Issue a. whether a chairman of the Federation may be removed from office other than through disciplinary action

[57] It is to be noted at the outset of the discussion of this issue that the court, for these purposes, is only concerned with the material and submissions that were before Bertram Linton J. Learned counsel for Inspector Gordon and Sergeant Rowe informed this court that the issues of jurisdiction and the validity of the claim were not raised before Bertram Linton J. It would, therefore, be unfair to assess the exercise of her discretion based on material or refined arguments that were advanced after she made that decision. The issue of the liability of the chairman to be removed from office will, therefore, be considered in the context of an assessment of Bertram Linton J's exercise of discretion in granting the interim injunction.

[58] It is also to be noted that this court will not lightly disturb the exercise of discretion by a judge at first instance unless it is plain that the judge has erred (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1). In this case, Bertram Linton J was exercising a discretion given to her by section 49(h) of the Judicature (Supreme Court) Act and she acknowledged that she was guided by the well-established principles set out in **American Cyanamid Co v Ethicon Ltd** ('**American Cyanamid**') [1975] AC 396; [1975] 1 All ER 540 and **National**

Commercial Bank Jamaica Limited v Olint Corp Limited [2009] UKPC 16; [2009] 1 WLR 1405 ('**NCB v Olint**'). It is, however, noted that **American Cyanamid** did not involve a mandatory injunction. In the latter case, however, their Lordships of the Privy Council did give guidance concerning the consideration of applications for interlocutory injunctions, whether they be mandatory or prohibitory. They said, in part, at paras. [19] and [20]:

> "[19] There is however no reason to suppose that in stating these principles [in **American Cyanamid**], Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603, 682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, 'a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted.'
>
> [20] For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see the *Films Rover* case, *ibid.* What matters is what the practical consequences of the actual injunction are likely to be. It seems to me that both Jones J and the Court of Appeal proceeded by first deciding how the injunction should be classified and then applying a rule that if it was mandatory, a 'high degree of assurance' was required, while if it was prohibitory, all that was needed was a 'serious issue to be tried.' Jones J thought it was mandatory and refused

> the injunction while the Court of Appeal thought it was prohibitory and granted it."

[59] The principles outlined in **American Cyanamid** require a court, which is considering an application for an interim injunction, to determine:

a. if the applicant has raised a serious issue to be tried;
b. whether damages will provide an adequate remedy; and
c. if damages will be inadequate, ascertain where the balance of convenience, or more accurately, the balance of inconvenience, lies.

Did Corporal McBean raise a serious issue to be tried?

[60] An examination of the legislative structure will assist in determining whether the Central Committee was entitled to vote to remove her as its chairman, without the need for any disciplinary action having been taken against her.

[61] The Act does not provide any guidance concerning the removal of a chairman. Section 20 of the Second Schedule speaks to the selection of the chairman. It states:

> "Each Branch Board, Central Conference and the Central Committee shall choose its Chairman and the Secretary from among its own members."

[62] Importantly, however, section 22 of the Second Schedule addresses the operation of the Central Committee. It provides that the Central Committee is entitled to regulate its procedure. The relevant portion reads:

> "Subject to the provisions of these Rules, every Branch Board, Central Conference or the Central Committee may regulate their own procedure, including the appointment of committees or sub-committees…"

[63] In the absence of any provision that deals with the removal of a chairman, guidance may be gleaned from section 35 of the Interpretation Act which grants any authority, which appoints any person, the power to remove the person it appoints. The section provides:

> "Where by or under any Act a power to make any appointment is conferred, then, unless the contrary intention appears, the authority having power to make the

> appointment shall also have power to remove, suspend, reappoint or reinstate any person appointed in exercise of the power."

[64] Although section 20 of the Second Schedule uses the term "choose" in reference to the section of the chairman of the Central Committee, that term may be held to be included under the rubric of "appointment". The Merriam-Webster dictionary (Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/appoint, accessed 3 July 2023) defines "appoint" to include "to name officially". The Merriam-Webster dictionary also defines "choose" as "to decide on especially by vote" (https://www.merriam-webster.com/dictionary/choose, accessed 3 July 2023). The Collins English Dictionary, sixth edition, 2003, similarly, defines "appoint" as "to assign officially, as for a position, responsibility", and "choose" as "to select (a person, thing course of action, etc.) from a number of alternatives". Those definitions allow for a conclusion that the Central Committee's choosing of its chairman, who is thereby the chairman of the Federation, was an appointing of the individual to that post. The members of the Central Committee, having chosen Corporal McBean as its chairman, were entitled, by section 35 of the Interpretation Act, to remove her from that position.

[65] Corporal McBean's position that her removal as chairman could only be effected by disciplinary action is misplaced. Section 71 of the Act, on which she relies, does not assist her. The section states:

> "(1) Notwithstanding anything to the contrary disciplinary proceedings may be taken against a person who is acting in the capacity of a member of the Police Federation under any of the specified provisions and for that purpose such provisions shall apply to him in that capacity in like manner as they apply to him in his capacity as a member of the Force.
>
> (2) In this section 'specified provisions' means-
>
> (a) rules made under section 26;
>
> (b) the Police Service Regulations, 1961, or any other regulations for the time being in force made pursuant to section 135 of the Constitution of Jamaica in

> relation to the powers, duties or procedure of the Police Service Commission."

[66] Section 26 of the Act speaks to the creation of rules for the discipline of the Constabulary Force, while the Police Service Regulations, 1961 speak to disciplinary action being taken against members of the Constabulary Force. None of these provisions apply to these circumstances.

[67] It is true that, based on the Police Service Regulations, 1961, only the Commissioner of Police has the authority to initiate disciplinary proceedings against a corporal of police, but contrary to Corporal McBean's stance in this matter, the removal of the chairman of the Central Committee is not automatically a disciplinary matter, which only the Commissioner of Police may take. The removal of the chairman would also fall under the purview of the Central Committee as a part of regulating its procedure.

[68] There remains, however, the question of whether the Central Committee is obliged to follow any general overarching rules in regulating its procedure.

[69] Bertram Linton J considered that there may be issues of natural justice and procedural fairness. She considered that there were disputes as to fact concerning matters that led to disagreements between Corporal McBean and some other members of the Central Committee. The learned judge took the view that these were disputes that had to be resolved at a trial. She said, in part, at para. [44] of her judgment:

> "The disparity in the versions advanced before the court, as to whether [Corporal McBean] was lawfully removed from her post as Chairman of the [Federation], has convinced me that there is indeed a serious issue to be tried…."

[70] After referring to section 22 of the Second Schedule of the Act, the learned judge concluded that there were issues to be settled concerning the procedure that the Central Committee was permitted to use in regulating its procedure. She said at para. [45]:

> "The question then is: Is the procedure which is purely within the discretion of the members of the Central Committee

> subject to the rules of Natural Justice, where there are contending and contrasting accounts to be settled?"

[71] The learned judge answered her question in para [73] of her judgment. She said, in part:

> "…I am of the view that [Corporal McBean] has made a clear case for herself, which on the tenets of Natural Justice may well have reasonable and likely success at trial. The issue may well also stand to be adjudicated as a general set of rules may need to be established to deal with the circumstances that have arisen in the [Federation]."

[72] Although the respondents assert that Corporal McBean did not raise the issues of natural justice and fairness in her fixed date claim form, it is not a great stretch to find that these were implied in both the fixed date claim form and in her affidavit in support of the application for the injunction. The meeting in question, on her account was arranged for the Central Committee "to assess the internal issues and address them in a fulsome way" (see para. 33 of her affidavit in support of the *ex parte* application for court orders for mandatory injunction). However, during the meeting, Inspector Gordon, who was chairing the meeting, "invited motions from the floor" (see para. 37 of her affidavit in support of the *ex parte* application for court orders for mandatory injunction). Sergeant Rowe moved a motion expressing no confidence in Corporal McBean's leadership and thereafter the meeting voted to have a new chairman appointed. Corporal McBean's assertion, in both the claim form and the affidavit, was that the process that led to her removal was illegal.

[73] On Corporal McBean's account, although she was aware that there was some disharmony among the members of the Central Committee, the no-confidence motion and the following developments were unexpected. She says she had no warning of them. In the circumstances, it cannot be said that Bertram Linton J was wrong in finding that there were serious issues to be tried. Since the issue of a breach of natural justice was impliedly raised in the claim form and the affidavit in support of the application for the injunction, which were before the learned judge, she was entitled to consider it and the respondents' complaint that Bertram Linton J did not afford them an opportunity to address her on that point cannot result in the decision being disturbed.

Were damages an adequate remedy?

[74] Unusually, Bertram Linton J considered the balance of inconvenience before she considered the question of whether damages would be an adequate remedy, but that unusual course does not detract from her overall consideration of the case.

[75] There is no issue joined in this case as to whether damages would have been an adequate remedy for Corporal McBean. There were no financial consequences to her removal from the office of chairman. Neither was there any suggestion of financial consequences for the respondents. They sought to indicate that there were issues of mismanagement of the Federation's funds, but there was no indication of a fear of any recurrence. Neither Inspector Gordon nor Sergeant Rowe suggested that they would suffer any financial loss from granting the injunction. The learned judge found that damages would not be an adequate remedy for them either (see para. [56] of Bertram Linton J's judgment).

Where does the balance of inconvenience lie?

[76] In in **RJR–MacDonald Inc v The Attorney General of Canada** [1994] 1 RCS 311 at page 342, Sopinka and Cory JJ addressed the issue of which of the two competing parties would suffer the greater harm from the granting or refusal of an injunction and referred to the exercise as "assessing the 'balance of inconvenience'". It is in this context that the term "inconvenience" is used.

[77] Bertram Linton J found that there was a risk of irreparable harm to Corporal McBean, but no such risk to the respondents. She said at para. [51] of her judgment:

> "I am persuaded therefore from the above narrative, in the various affidavits that there is a high possibility of irreparable injury to [Corporal McBean's] reputation and the possibility of the loss of good will. It is the view of the court that [Corporal McBean] in this case stands to suffer irreparable harm in these circumstances if the injunction is not granted. By contrast the Respondents have a short tenure to the period scheduled for a new Committee to be appointed as the evidence is that elections are due in May of 2019."

[78] There can be no fault in her assessment of the case from this standpoint. It cannot be said that she was wrong.

Was an undertaking as to damages necessary?

[79] The respondents have complained that Bertram Linton J erred in failing to insist that Corporal McBean gave the undertaking as to damages that usually is required of an applicant for an injunction, especially a mandatory injunction. This was also an aspect that was subject to the learned judge's discretion.

[80] In this regard, she said that the requirement of the usual undertaking as to damages (also referred to as "counter undertaking" or "cross-undertaking") is not an inflexible condition for the grant of an injunction, but that each case should be considered on its own merits. It appears that the learned judge decided not to impose the condition of an undertaking as to damages for three main reasons:

a. there was unlikely to be any significant financial loss on either side if the injunction were granted or if it were refused;
b. there was a "very high public interest component" to the case; and
c. Ms McBean had made "a strong prima facie case with a high degree of success at trial".

[81] Learned counsel for Inspector Gordon and Sergeant Rowe argued that the purpose of a cross-undertaking as to damages is to protect a person injuncted if the injunction is later proved to have been undeserved. They contend that the requirement to provide the cross-undertaking as to damages is only waived in exceptional circumstances and this case did not constitute such circumstances.

[82] In **NCB v Olint**, the Board at para. 16 confirmed that the purpose underlying the granting or withholding an injunction of an interim injunction is to improve the chance of the court being able to do justice after a determination of the merits at trial. The cross-undertaking in damages is usually important in that context where it could "provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained" (see para. 16 of the judgment).

[83] Their Lordships recognised, however, that "it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy" (para. 17). In that

context the authorities also make it clear that the tendering of a cross-undertaking is not always conditional to the grant of an injunction.

[84] In **Allen and others v Jambo Holdings Ltd** [1980] 1 WLR 1252; [1980] 2 All ER 502, the plaintiffs sought a Mareva injunction to prevent a Nigerian company from removing its aircraft from England. The plaintiffs were legally aided and it was said that their undertaking would be insufficient. The court found that the legally aided litigant should not be in a worse position than other plaintiffs and should not be denied the Mareva injunction just because he is poor in a situation where the rich litigant would be granted it. Lord Denning MR pointed out that it is the justice of the case that is important. He said, in part, on page 506 of the latter report:

> "…I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it. One has to look at these matters broadly."

That principle would also apply if the applicant is unable to give any undertaking.

[85] In **Caravelle Investments Ltd v Martaban Ltd and King & Co; The Cape Don** [1999] FCA 1505, the Federal Court of Australia also recognised that there is no inflexible rule that there be an undertaking as to damages. The court, citing **Allen and others v Jambo Holdings Ltd**, said in para. 25:

> "There is no inflexible rule that a plaintiff should be denied interlocutory relief unless he can give a meaningful undertaking. In *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252 an impecunious plaintiff was not denied injunctive relief. On the other hand in *Cambridge Credit Corp Ltd v Surfers Paradise Forests Ltd* [1977] QR 261 evidence as to the substance of the plaintiff and the worth of his undertaking was received." (Italics as in original)

[86] In this case, Bertram Linton J cannot be said to have erred in the exercise of her discretion regarding the cross-undertaking in damages. She may have erred in including as a reason that the case had a "high public interest component", even though she may have restricted the "public", in that context, to the rank and file of the constabulary force. This is because the claim was only for the protection of Corporal McBean's interest. However, the circumstances of this case are unusual because of the absence

of any potential significant financial impact on either side of the grant of the mandatory injunction.

[87] The indication that there are unlikely to be any significant financial consequences for the respondents is a valid basis for waiving the requirement of the cross-undertaking. The absence of a cross-undertaking does not prevent the respondents, if they were eventually successful, as they turned out to be, from recovering their costs of the litigation.

Issue b. Whether Bertram Linton J erred in granting an interim mandatory injunction

[88] In **NCB v Olint** the Privy Council cautioned that in cases in which interim mandatory injunctions are sought, the applicant usually asserts that the inconvenience to them is more likely to be irremediable (see para. 19). Their Lordships pointed out that "[w]hat matters is what the practical consequences of the actual injunction are likely to be" (see para. 20). The court's aim, their Lordships advised, is to adopt the course that "is more likely to produce a just result" (see para. 16), ensuring that, as Megarry J said in **Shepherd Homes Ltd v Sandham** [1971] Ch 340, 351, there is "a high degree of assurance that at the trial it will appear that the injunction was rightly granted".

[89] Although this was an application for a mandatory injunction, which this court is treating as an application for an interim mandatory injunction, and Bertram Linton J was aware that granting Corporal McBean's application would ensure that she would remain in office until the end of the tenure of the office to which she was elected, it cannot be said that the learned judge was wrong in her analysis. She considered the justice of the case and arrived at her decision on that basis. To have refused the mandatory injunction would have meant that Corporal McBean would have been denied any relief. There would have been no opportunity to correct the situation had the injunction been refused. The fact that this court may have arrived at a different decision is irrelevant.

[90] The respondents complain that granting the mandatory injunction gave Corporal McBean her entire remedy. That is true, but since no issue was raised before the

learned judge about the capacity of the parties, she would have been entitled to find that the loss to the respondents in the circumstances of the grant of the injunction was less than the loss to Corporal McBean had the injunction been refused.

[91] The Federation included a ground of appeal that Corporal McBean had an alternative internal procedure available to the now 2nd respondent to challenge the decision. There was no expansion of that ground in the submissions. Nothing further need be said of it.

Issue c. Whether Bertram Linton J erred in awarding costs to Corporal McBean

[92] Bertram Linton J, unusually, ordered costs to Corporal McBean against Inspector Gordon and Sergeant Rowe. She gave no reason for this step.

[93] The usual order in such applications is for costs to be costs in the claim so that the party who is eventually successful in the claim can recover the costs incurred in connection with the interim injunction. The rationale for the usual order is that the court, at the stage of the application for the interim injunction, is not seised with all the evidence, the issues in law are not usually all identified, and the submissions are not yet refined. The learned author, David Bean QC, in the eighth edition of his work, Injunctions, stated in para. 5.32 that the order of costs in the claim "is a common form of order when the merits of the case are not yet clear".

[94] This court, in **Tara Estates Limited v Milton Arthurs** [2019] JMCA Civ 10, reinforced the principle. Straw JA (Ag), as she then was, pointed out such an order is usually appropriate when there are still matters to be settled. She said at para. [51]:

> "[The judge at first instance] awarded costs to the respondent to be taxed if not agreed. He gave no reasons for not abiding by the usual order on applications for interim injunctions that costs shall be in the claim. **Given that there are various issues to be ventilated and resolved at trial, we formed the view, in concurrence with the appellants' arguments in respect of this ground, that the costs awarded ought to have awaited the outcome of the claim**. The costs order made against the appellant was therefore varied to be costs in the claim." (Emphasis supplied)

[95] In this case, although Bertram Linton J acknowledged, in para. [44] (cited in para. [69] above), that there was a disparity of versions, which convinced her that there was a serious issue to be tried, she did not recognise that situation in her order for costs. She erred in that regard.

[96] Consequently, her award of costs to Corporal McBean must be set aside and replaced by an order for costs to be costs in the claim. It is noted that those costs would eventually go to the respondents since they were the eventual victors in the claim, by virtue of the later order by L Pusey J.

Conclusion

[97] These appeals should not have progressed after the expiry of the term for which Corporal McBean was elected as by then the issues had become moot. They may, however, be said to have served some purpose in that there has been some clarification of the status of the Federation and the operation of the Central Committee. The answers to the issues raised may be stated as follows:

a. the Central Committee is entitled, under the provisions of the Second Schedule of the Act, to remove the person whom it has chosen to be its chairman;
b. Bertram Linton J's exercise of her discretion to grant an interim mandatory injunction in the circumstances of the case was not wrong given the issues that were raised at the application for the injunction, particularly since the issue of jurisdiction had not been raised before her;
c. Bertram Linton J erred in granting costs to Corporal McBean at the stage of an interim injunction where a dispute as to fact existed;
d. the Federation, since it has no legal personality, was not a proper party, for these purposes;
e. Inspector Gordon and Sergeant Rowe were not proper parties to the claim as they had not been sued as representatives of either the Central Committee or the Federation.

Costs

[98] The respective parties have each had some measure of success, but when each appeal is considered separately the required orders become more clear. The respondents have had some success in their appeal against the orders of Bertram Linton J. They should have 25% of the costs of that appeal. Corporal McBean should not have any costs in that appeal. This is especially so as, strictly speaking, had the jurisdictional issues been considered Corporal McBean would not have been entitled to an injunction. The respondents should have their costs in her appeal against the orders of L Pusey J as they were completely successful in that appeal.

[99] The parties are at liberty to file written submissions within 14 days of this order if they or any of them are of the view that some other order as to costs should be made.

EDWARDS JA

[100] I have read, in draft, the joint judgment of Brooks and Fraser JJA. Although I agree with the orders given in this matter, it is with some reluctance that I agree with the conclusion with regard to the issuance of the mandatory interim injunction granted by Bertram-Linton J. It seems to me that, this court having determined in the appeal against L Pusey J's order that the proper defendants to the claim were not before the court below, then, in my view, it must follow that the mandatory injunction against them, which turned out to have settled the issue on behalf of one party, could not have been properly made. Although the issue was not argued before Bertram-Linton J, it is an issue that goes to her jurisdiction to grant the order at all, in view of the parties before her. Although the issue came to light in hindsight, since jurisdiction is a matter of law, it is for that reason that I am hesitant, to agree that Bertram-Linton was correct to make the order she did.

[101] Since an injunction is ancillary to a substantive relief sought, which the high court must have the jurisdiction to grant, if it is found that there was no jurisdiction to grant the substantive relief, how can it be possible to find that the ancillary relief was properly granted without the jurisdiction to do so? It would have made, I suppose, some difference if what had been requested was an interlocutory injunction, and the

issue of the wrong party could have been raised and the injunction discharged at some stage before the trial or at trial. As it turned out, the issue of the wrong parties was only argued before L Pusey J, which resulted in the claim being dismissed. By that time, the mandatory interim injunction had already run its course, and unfortunately, by the time Pusey L J came into the picture, it was clear it ought not to have been granted at all.

[102] It is against that background that I respectfully and reluctantly disagree with my brothers on that point. I agree with their reasoning and conclusion on all other issues.

BROOKS JA

ORDER

(a) The respondents' appeal in Appeal No COA2019CV00030 is allowed in part.

(b) The order of Bertram Linton J awarding costs to Corporal McBean is set aside and an order of "costs to be costs in the claim" is substituted therefor.

(c) All other orders of Bertram Linton J are affirmed.

(d) Corporal McBean's appeal in Appeal No COA2019CV00061 is dismissed and the orders of L Pusey J are affirmed.

(e) The respondents should have 25% of their costs of the appeal filed by them.

(f) Costs to the respondents in the appeal filed by Corporal McBean.

(g) Should any party be of the view that some other order as to costs of the appeal should be made, that party or those parties are at liberty to file and serve written submissions in that regard on or before 13 October 2023, failing which the order as to costs shall stand.

(h) If such submissions are filed, the other parties shall file and serve written submissions in response on or before 27 October 2023.

(i) The court will consider the written submissions and render its decision on them without further oral hearings.