

11/12/5

**JUDGMENT**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 02180

CIVIL DIVISION

**BETWEEN**

**BENTLEY ROSE**

**CLAIMANT**

**AND**

**CITY OF KINGSTON CO-OPERATIVE**

**DEFENDANT**

**CREDIT UNION LIMITED**

IN CHAMBERS

HEARD: 23<sup>RD</sup> June, 23<sup>rd</sup> July 2009, 15<sup>th</sup> January 2010.

Mr. Leighton Miller and Mr. Gayle Nelson instructed by Mr. Gayle Nelson and Co. for the Claimant.

Mr. Jermaine Spence and Miss Colleen Weise instructed by Dunn Cox for the Defendant.

STRIKING OUT APPLICATION UNDER RULE 26. 3(1) (b AND (c)) C.P.R.-  
CO-OPERATIVE SOCIETIES ACT- OUSTER CLAUSE- WHAT IS ABUSE OF  
PROCESS- WHETHER ISSUE ESTOPPEL APPLIES TO PROCEEDINGS  
BEFORE DECISION-MAKER OTHER THAN COURT- ABSOLUTE  
PRIVILEGE- WHETHER APPLIES - WHETHER NO REASONABLE  
GROUNDS DISCLOSED IN STATEMENT OF CASE FOR BRINGING  
CLAIM- CAUSE OF ACTION- MALICIOUS FALSEHOOD- MATTERS THAT  
MUST BE ALLEGED- WHETHER WORDS COMPLAINED OF  
SPECIFICALLY PLEADED

**Mangatal J:**

1. The Claimant "Mr. Rose" is a businessman and was at all material times a member of the Defendant, the City of Kingston Co-Operative Credit Union Limited "C.O.K."
2. C.O.K. is a leading credit union registered under the Co-Operative Societies Act "the Act".
3. At this hearing, two applications were scheduled. One is an application for summary judgment filed on behalf of Mr. Rose on November 10 2008. The other is an application by C.O.K., to strike out Mr. Rose's Claim, the application having been filed February 3<sup>rd</sup> 2009.
4. Mr. Rose's application is made pursuant to Rule 15.2 (b) of the Civil Procedure Rules 2002 "the C.P.R.", which states that the court may give summary judgment on the claim or on a particular issue if it considers the defendant has no real prospect of successfully defending the claim or the issue.
5. C.O.K.'s application is made pursuant to Rule 26.3 (1)(b) and 26.3(1) (c) of the C.P.R. Rule 26.3(1)(b) gives the court express power to strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out is an abuse of the process of the court. Rule 26.3.(1)(c) allows the court to strike out a statement of case or a part of it if it appears to the court that it discloses no reasonable grounds for bringing the claim.
6. As Mr. Rose's application for summary judgment was filed ahead of C.O.K.'s application to strike out the claim, I heard the application by Mr. Rose first. However, as a matter of logic, as I raised with the parties, it appears to me that I should reach a decision in relation to the striking out application first. This is so because if Mr. Rose's claim is struck out, there would be no substratum on which to attach his claim for summary judgment. It

would only be necessary to go on to rule on Mr. Rose's application for summary judgment if C.O.K.'s application to strike out is dismissed.

### **STRIKING OUT APPLICATIONS**

7. It has been pointed out by our Court of Appeal, that in relation to applications under Rule 26.3(1)(c ), which provides that the court may strike out the statement of case or part of it, if it discloses no reasonable ground for bringing the claim, the court is to have regard solely to the pleading, or statement of case under attack. This is so whether or not one takes the view that Rule 26.3(1)(c ) is wider than the former rules which spoke of the court's power to strike out a pleading where it "failed to disclose a reasonable cause of action". See **Sebol Limited and others v. Ken Tomlinson and others**, SCCA No 115/2007 delivered 12<sup>th</sup> December 2008, paragraphs 16 and 18, per Dukharan J.A., and **Gordon Stewart v. John Issa**, SCCA16/2009 delivered 25<sup>th</sup> September 2009, paragraphs 13 and 14, per Cooke J.A., and paragraphs 31 and 32, per Morrison J.A.
  8. On the other hand, under Rule 26.3(1)(b), where the court is permitted to strike out statements of case or parts which constitute an abuse of the process of the court, the court is not limited to the pleadings, and is free to examine and have regard to Affidavit evidence and any other relevant factors.
- Mr. Rose's Claim**
9. The statement of case, i.e the Claim Form and the Particulars of Claim filed on behalf of Mr. Rose consists of 7 pages, and I shall attempt to summarize the salient matters.
  10. Mr. Rose states that he obtained two loans from C.O.K. at different times. The loans were consolidated and as at May 1997 his indebtedness to C.O.K. was \$1,995,895.78. Details as to the monthly payments and other terms of the loans are also set out.

11. Details are pleaded of how the loans were secured, including by means of shares and fixed deposit accounts held at C.O.K., and also by Bills of Sale over 3 motor cars.
12. Mr. Rose states that additional security was provided to C.O.K. by way of hypothecation of a sum of US \$20,000.00 deposited in Mr. Rose's bank account at a branch of National Commercial Bank Jamaica Limited "N.C.B.".
13. He made the first 12 payments but then had to advise C.O.K.'s legal officer attorney-at-Law Ms. Indera Persaud that he could not keep up with the payments and that C.O.K. should therefore realize the outstanding loan balance from the security available. He communicated that his inability to make further payments was due to a massive fraud perpetuated against him and on his companies by 2 Bank Managers, namely Winston McKenzie and Melanie Tapper. Subsequently both of these persons were convicted for the fraud in the Half Way Tree Resident Magistrate's Court.
14. Mr. Rose states that he heard nothing further from C.O.K. until sometime about April 1999 when a bailiff employed to C.O.K. came and seized two of the motor vehicles in respect of which C.O.K. had bills of sale.
15. Subsequently C.O.K. brought arbitration proceedings in or about July 2001 under the Act, claiming that Mr. Rose was indebted to C.O.K. in an alleged total sum of \$1,225,748.18 as at May 7, 2001.
16. Mr. Rose claims that due to his inability to attend a particular hearing in these arbitration proceedings in September 2001, and despite C.O.K.'s failure to provide information requested concerning certain accounting and in relation to disposition of securities, an award was made against him for the sum claimed.
17. As a result of this award C.O.K. obtained judgment against him in the Sutton Street Resident Magistrate's Court and renewed warrants of commitment and took out judgment summonses against him.

18. Mr. Rose claims that in July 2004 a subsequent arbitration order overturned the award made in September 2001. As a result, the judgment and subsequent process were set aside.
19. The Particulars of Claim then set out a number of particulars of injurious falsehood, including that C.O.K. persisted in making this false claim and sought to use it to embarrass him during the fraud proceedings against the 2 bank managers. It is alleged that a Director of C.O.K., in-house Attorney-at Law, and relative of Melanie Tapper, Ms Donna Parchment, acted as C.O.K.'s agent. She directed learned Queen's Counsel who appeared for Ms. Tapper, Mr. Ian Ramsay, now deceased, to suggest to Mr. Rose during the criminal proceedings in which he was a witness, that he owed C.O.K. \$ 14 Million.
20. In the claim it is also stated that C.O.K. sought to have Mr. Rose incarcerated in 2006 on a judgment summons, which summons was based on the false claim that Mr. Rose was indebted to C.O.K. since May 2001 in the sum of over \$1.2 Million. Yet, the claim continues, this was at a time when the arbitration finding in 2004 had nullified C.O.K.'s claim.
21. Essentially, the claim is for:
  - a. a declaration that Mr. Rose is not indebted to C.O.K. at all;
  - b. Damages for Malicious Falsehood in that C.O.K. has over many years, and repeatedly, maintained falsely that Mr. Rose is indebted to C.O.K., knowing full well that he is not.
  - c. Damages for breach of contract for C.O.K.'s failure to account for a sum of US\$20,000 as well as for C.O.K.'s sale at an undervalue of two motor vehicles owned by Mr. Rose, over which C.O.K. had bills of sale.
  - d. Aggravated Damages.
22. A number of "particulars of aggravation" are set out, and claims for loss of reputation and business custom, including a claim for injury

to business custom and credit in the sum of \$150 Million dollars and legal and auditor fees of \$100 Million.

23. Although in the Claim Form there is mention of a claim for damages for conspiracy and for money had and received, no such claims have been raised, fleshed out or particularized in the Particulars of Claim, and thus cannot properly be considered as forming part of the claim. Arguably, the claim in respect of the US\$20,000.00 could be the subject of a claim for money had and received. However, it has not been properly pleaded as such.

#### **THE DEFENCE OF C.O.K.**

24. There are several lines of Defence, but in substance, C.O.K. are saying that Mr. Rose could not get a declaration that he is not indebted to C.O.K. because:
  - a. C.O.K. pursuant to section 50 of the Act, duly applied for the dispute between itself and Mr. Rose as to his indebtedness to be submitted to arbitration and the dispute was referred to arbitration by the Registrar of the Co-Operative Societies "the Registrar" on July 2, 2001. On September 17 2001, an award was made by the arbitrator Mr. Stanley Moore in C.O.K.'s favour in the sum of \$1,225,158.18 with interest at the rate of 24.4% per annum on the balance of the principal until realization of the sum awarded. Arbitration costs and fees of \$10,000.00 were also awarded. C.O.K. stated that Mr. Rose did not appeal the award.
  - b. On or about June 20 2003, Mr. Rose filed a Statement and Particulars of Dispute with the Registrar" concerning matters of accounting between C.O.K. and himself and this was not in fact an appeal from the award made by Mr. Moore. The dispute was referred to Mr. Douglas Archibald for arbitration and his award was handed down on or about July 2004. In any event, Mr. Rose himself appealed the award of the

arbitrator Archibald to the Registrar. After a hearing on the 2<sup>nd</sup> of February 2005, the award of Mr. Archibald was overturned by the Registrar in his written award given on February 28, 2005. The Defence further states that any pronouncement by the Arbitrator Mr. Archibald that he was overturning the original award by Mr. Moore would have been done in error and ultra vires his powers since the matter was not before him and he was not sitting as an appellate tribunal and the original award was outside his purview.

- c. The Defence further submits that in light of the proceedings referred to above, including the claim with regard to the motor vehicles and alleged failure to account for a hypothecated US\$20,000, the substance of the issues and matters raised in the entire claim and particulars of claim, have already been litigated and determined by a competent tribunal, and it has been determined that Mr. Rose is in fact indebted to C.O.K. Therefore Mr. Rose is estopped from raising these matters and issues in subsequent proceedings or from re-litigating them by virtue of the Act and by virtue of the law generally and is not entitled to the declaration sought.

- 25. The Defence also alleges that in so far as any aspect of the claim relates to causes of action, loss or damage which accrued more than 6 years before the date of this action, including the claims as to the motor vehicles and alleged failure to account for a US sum hypothecated, the Defendant relies on the Statute of Limitations (21 James 1. Cap. 16, or 4 Anne Cap. 16) and or the Limitations of Actions Act, and avers that Mr. Rose is prevented from bringing such claims now, the limitation period having run.

26. As regards the claim to damages for malicious falsehood, the Defendant states that no injurious falsehood was committed by C.O.K. in respect of Mr. Rose as alleged or at all.
27. In relation to the claim to the hypothecated sum, C.O.K. claims that this sum was never released to it and that in fact, it is C.O.K. that released its interest in a hypothecated sum of US\$20,000.00 being held at the National Commercial Bank in respect of an account belonging to Mr. Rose.

**C.O.K.'s Application to Strike Out**

28. C.O.K.'s application to strike out was filed sometime after the Defence. It is supported by the Affidavit of Indera Persaud, filed on February 3<sup>rd</sup> 2009. This Affidavit was filed both in respect of Mr. Rose's application for Summary Judgment, and in respect of C.O.K.'s application. Ms. Persaud's Affidavit substantially restates the allegations in the Defence and exhibits the relevant applications, Awards, and Grounds of Appeal. Mr. Gayle Nelson, Attorney at Law for Mr. Rose who plainly has been involved in all of the relevant proceedings, filed an Affidavit on February 9 2009 in reply to the Affidavit of Ms. Persaud.
29. At paragraph 10 of her Affidavit, Ms. Persaud refers to the Registrar's award as being dated November 23<sup>rd</sup> 2004. I am not too sure what the correct date is, since on the document exhibited as the appeal award, there is also a date, of March 3<sup>rd</sup> 2005, and another date is stated in the Defence. However, those dates appear to be of no moment. The award indicates that the Registrar, in addition to a number of other findings, found that Mr. Rose was indebted to C.O.K. at the relevant time in the sum of \$1,335,799.52.
30. At paragraphs 11 and 12 of her Affidavit, Miss Persaud states as follows:

*11. That the Claimant, being dissatisfied with the decision of the Registrar proceeded to file on May 7, 2005 an Application*



*for Leave to Apply For Judicial Review and for Declarations in the Supreme Court of Judicature of Jamaica, being Claim No. HCV 1225 of 2005. That the substantive relief sought by the Claimant in the Judicial Review application is an order for Certiorari to quash the decision of the Registrar taken on November 23, 2004. A copy of the said application is exhibited hereto.....*

*12. That I have been advised and do verily believe that Judicial Review Proceedings were never concluded. That I do verily believe that the progress or lack thereof in respect of the Judicial Review Proceedings ought not to be attributed to the Defendant herein as the documents which would properly be required for Judicial Review Proceedings are those documents which were before the Registrar and which documents would have informed the award made. Further, that such documents ought properly to have been provided by the office of the Registrar of Co-Operative Societies, the Respondent to the Application for Judicial Review.*

31. I note that in the Claim and Particulars of Claim filed on behalf of Mr. Rose, there is no mention of the appeal which Mr. Rose himself brought to the Registrar in relation to the award made by Mr. Archibald. Nor is there any reference to the Registrar's appeal award itself, where the Registrar found that Mr. Rose was indebted to C.O.K. in the sum of \$1,335,792.52. Further, there is no mention of the fact that Mr. Rose filed an Application Seeking leave to Apply for Judicial review, specifically seeking an order of Certiorari to quash the decision taken by the Registrar on November 23<sup>rd</sup> 2004. Indeed, the appeal to the Registrar is for the first time mentioned in the Affidavit of Gayle Nelson in Support of the Application for Summary Judgment filed September 30 2008, at paragraph 6(3), page 3. The application for judicial review is mentioned for the first time in

paragraph 6(4) and 6(5), pages 3-5 (inclusive) of Mr. Nelson's Affidavit.

32. At paragraphs 13 and 14 of Ms. Persaud's Affidavit she states that C.O.K. obtained a Judgment Summons in respect of Mr. Moore's award on June 28, 2005 and on January 5, 2006 received a Warrant of Commitment in aid of enforcement of the Judgment Summons. She states that it is pursuant to these validly obtained orders that C.O.K. endeavoured to have the Bailiff execute the Warrant in the vicinity of the Half Way Tree Court, because difficulty had been encountered in locating Mr. Rose elsewhere. At paragraph 15 of Ms. Persaud's Affidavit, she exhibits a copy of the Affidavit on which reliance was placed by Mr. Rose in setting aside the judgment and subsequent process obtained by C.O.K. Ms. Persaud states:

*15. That the Claimant, without concluding the Judicial review proceedings, appeared at the Resident Magistrate's Court in January 2006 and relied on the award of Mr. Douglas Archibald, which was incorrectly represented to the Court as an appeal overturning the 2001 award of Mr. Moore, for which the Judgment Summons and the Warrant of Commitment had been issued. The Claimant at that time also failed to disclose that he had appealed against the award of Mr. Archibald to the Registrar who had decided on appeal that the Claimant was in fact indebted to the Defendant at the material time. The Claimant also failed to disclose that he had commenced Judicial Review Proceedings against the Registrar. The Claimant in 2006 procured the setting aside of the Judgment Summons and the Warrant of Commitment in circumstances where there was not full and frank disclosure to the court, in abuse of the court's process.*

**The Submissions of C.O.K.**

33.Mr. Spence , in his written submissions, has provided a very useful summary at paragraph 12, pages 4-5, as follows:

- A. *The Defendant properly submitted the dispute to the Registrar of Co-Operative Societies in July 2001, pursuant to the Co-Operative Societies Act which regulates the settlement of disputes between a co-operative society and a member or former member.*
- B. *That the Claimant, who clearly felt aggrieved by the award of Mr. Stanley Moore delivered on September 17, 2001, had recourse by way of Appeal to the Registrar of Co-Operative Societies and having failed to avail himself of the said recourse is bound by the award.*
- C. *That the second arbitrator, Mr. Douglas Archibald was not and could not have been sitting as an appellate tribunal when he purported to overturn the award of Mr. Stanley Moore as he was not the Registrar of Co-Operative Societies, to which an appeal of the decision of the Arbitrator is properly referable.*
- D. *That the issues which the Claimant seeks to raise in the instant claim relies on a finding that the Claimant is not indebted to the Defendant, which is essentially a question of fact already determined by a competent tribunal namely, the arbitrator appointed pursuant to the Co-Operative Societies Act, in favour of the Defendant and therefore should not be entertained by this Honourable Court in contravention of the Co-Operative Societies Act.*
- E. *That the Claimant's indebtedness has already been decided and by the doctrine of estoppel by res judicatum, he is completely barred from claiming that*

*he is not indebted, which claim is the basis upon which he relies in respect of his claim for (alleged) malicious falsehood.*

- F. *That the Statement of Case of the Claimant discloses no proper cause of action, as pleaded or at all.*
- G. *If statements were made about the Claimant's indebtedness, they were made in the course of Court proceedings or for the purpose of enforcing the arbitral award pursuant to the Co-Operative Societies Act and such statements are absolutely privileged in all the circumstances and ought not to be the basis of any action.*
- H. *That in all the circumstances, the Claimant has no reasonable ground for bringing the claim, his indebtedness having already been decided; and further, that the Claimant by bringing the instant claim seeks to call into question the decision of the arbitrator, which constitutes an abuse of the process of this Honourable Court and should be struck out.*

34. In relation to submission A, C.O.K. submits that, C.O.K. being registered under the Act, is governed by its provisions. Mr. Spence made reference to provisions of the Act, in particular section 50. Sub-Sections 50(1)(a) and (b) state:

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

*(a) among members, past members and persons claiming through members, past members and deceased members; or*

*(b) between a member, past member, or person claiming through a member, past member or deceased member, and the society, its committee, or any officer of the society;*

*..... such dispute shall be referred to the Registrar.*

35. Sub-section 50(1) further states that :

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

36. In paragraph 2 of the Act, "Registrar" is defined as follows:

*"Registrar" means the Registrar of Co-Operative Societies appointed under section 3 and includes any person exercising such powers of the Registrar as may be conferred upon him under that section.*

37. Sub-section 50(2) provides:

*(2) The Registrar shall, on receipt of a reference under subsection (1), refer it for disposal to an arbitrator or arbitrators.*

38. Sub-section 50(3) provides that:

*"Any party aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Registrar within such period and in such manner as may be prescribed.*

Section 50(5) of the Act prescribes that:

*"The award of the arbitrator or arbitrators under subsection (2) shall, if no appeal is preferred to the Registrar under subsection (3), or if any such appeal is abandoned or withdrawn, be final and shall not be called in question in any civil court and shall be enforced in the same manner in all respects as if the award had been a judgment of a Resident Magistrate.*

39. I note that in **The Co-Operative Societies Regulations, 1950**, there is specific provision for the proceedings before the arbitrator to be conducted as nearly as possible to proceedings in a court of law.

There is express provision allowing an award to be made ex parte where a party has been notified of a hearing and fails to attend- see Regulation 45. Mr. Rose appears to have been notified of the hearing date when the award was made but claims he was unable to attend. The Regulations also prescribe 14 days from the date of an award as the time limit within which an appeal must be lodged. Regulations 43, 44 and 46 make it clear that the procedures for referral of a dispute, and procedures for lodging an appeal, are quite different from each other.

40. Mr. Spence submits, in relation to his submission C, as follows:

*28.... Section 50(4) of the Act prescribes that*

*“ A decision of the Registrar in an appeal under subsection (3) shall be final and shall not be called in question in any civil court.”*

*Consequently, if any weight is to be given to the second arbitration proceedings( despite the previous submissions regarding the continuing validity of the first arbitrator Mr. Moore’s award), the appeal award by the Registrar is final and binds the parties. Therefore, any statements made thereafter about the Claimant’s indebtedness would also have been made reasonably and with just cause.*

41. Submission E relies upon the doctrine of estoppel per rem judicatum and issue estoppel, and the leading case of **Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd.** [1966] 2 All E.R. 536. At page 564 H-I Henn Collins J. quoting from **Spencer Bower on Res Judicata** stated :

*The rule of estoppel by res judicata, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped*

*in any subsequent litigation from disputing or questioning such decision on the merits.*

42. In relation to its submission F, i.e. that the Claimant's Statement of Case, discloses no proper cause of action, C.O.K. submits:

*35. There are certain essentials of an action for malicious falsehood, namely:*

*(a) the Defendant has published about the Claimant words which are false;*

*(b) that they were published maliciously;*

*(c) that special damage has followed as the direct and natural result of their publication.*

*36. The first threshold which the Claimant must cross is to prove that the statement about his indebtedness was false. To that end the Claimant must "strictly set out and prove the words complained of as in an action for defamation." Maule J. in **Pater v. Baker** (1847) 3 C.B.831 at 868, which was quoted in **Clerk & Lindsell on Torts**, 18<sup>th</sup> Edition, at 1247 states:*

*"If the statement is true, however malicious the defendant's intention might be, no action will lie." Further, at page 1248 of the said text, as well as being false, the Claimant must prove that the action was calculated to cause actual economic harm.*

### **MR. ROSE'S SUBMISSIONS**

43. In response to C.O.K.'s application, Mr. Leighton Miller, on behalf of Mr. Rose, made written submissions. He submitted that C.O.K.'s submissions were erroneous because the exercise of statutory powers based on a mistaken view of the facts will be quashed where there is no evidence available to the decision-maker on which, properly directing himself as to the law, he could reasonably have formed that view. Mr. Miller also referred to the reviewable nature of decisions by statutorily empowered bodies, where they have acted in

breach of natural justice or where the decision is a nullity. Mr. Miller cited a number of cases, including **Anisminic Ltd. v. Foreign Compensation Commission et al** [1969] 2 A.C. 147.

44. As regards subsection 50(4) of the Act, Mr. Miller submits that the authority cited on behalf of C.O.K. in support of the effectiveness of the ouster clause, is superceded by the authority of **Anisminic**. He submits that in that case, the House of Lords was not deterred by an ouster clause from holding that the respondent commission had rejected the appellant's claim on a ground which they had no right to take into account and that their decision was consequently a nullity.
45. In relation to the submission that the words complained of have not been specifically pleaded, Mr. Miller argued that the false words are that the Claimant is indebted to the Defendant in the sum of over \$1,225,748.18
46. As regards the claim that certain aspects of the claim are statute-barred, Mr. Miller submitted that, in reliance on **Salmond and Heuston on the Law of Torts**, 19<sup>th</sup> Edition, page 172, as the malicious falsehood was published on a number of occasions, every publication constitutes a new libel and a separate action will lie for each publication. He therefore submitted that the statutory limitation provisions relied upon by C.O.K. were inapplicable to the present claim.

### **RESOLUTION OF THE ISSUES**

#### **WHETHER MR. ROSE'S STATEMENT OF CASE DISCLOSES NO REASONABLE GROUNDS FOR BRINGING THE CLAIM**

47. In my judgment, the Statement of Case, constituted by the Claim Form and Particulars of Claim, does not raise a cause of action for malicious falsehood and nor does it disclose any reasonable cause of action of malicious falsehood, or injurious falsehood as this tort is sometimes called. Nowhere does the Statement of Case set out the



words complained of in respect of various different proceedings and situations which allegedly occurred at different times and places and which were allegedly stated by several different persons. In the particulars of malicious falsehood set out in paragraph 28 of the Particulars of Claim, there is the repeated phrase that the Defendant has “made a false claim”. However, the actual language or words have not been set out, whether strictly or at all. This is vital for a claim in respect of malicious falsehood and on that basis alone, it is plain that no proper cause of action has been made out. In addition, I note that the Particulars of Claim speak about loss of reputation, without specifying the matters necessary for raising defamation. The Statement of Case demonstrates a lack of appreciation that whereas the tort of defamation protects the claimant’s reputation, the tort of malicious falsehood protects the claimant’s interest in his property or trade (or economic interests more generally). Further, the law is that where the claimant has not alleged or cannot prove special damage, the claimant must allege that the words in question were calculated to cause pecuniary damage to him in his trade or business. This does not appear to have been clearly or effectively pleaded in this case-see **Bullen and Leake, Precedents of Pleadings**, 12<sup>th</sup> Edition, pages 544-547, under the heading “Statements of Claim-Injurious Falsehood” and section 5 of our Defamation Act.

48. However, Mr. Rose also raised the cause of action of breach of contract in his Particulars of Claim, particularly in relation to the U.S.\$20,000 and the sale of the motor vehicles. Since the court must decide the question of whether the Statement of Case raises a cause of action by having regard solely to the pleadings, or Statement of Case, it cannot be said that the whole Statement of Case can be struck out on that ground. This is because the Statement of Case raises breach of contract as a cause of action,

albeit rather shakily. The claim is somewhat amorphous and it is difficult to discern where the claim of malicious falsehood ends, and the claim for breach of contract begins.

49. **WHETHER MR. ROSE'S STATEMENT OF CASE IS AN ABUSE OF THE PROCESS OF THE COURT**

However, the question of abuse of process is not of the same nature and different considerations apply.

50. It seems to me that Mr. Miller may have confused the court's powers by way of judicial review with the court's original jurisdiction to hear and determine issues between parties on their merits. In judicial review, the court exercises its' supervisory functions in relation to statutorily constituted bodies or tribunals, or other bodies possessing decision-making powers, concerned with the administration of public law. Broadly speaking, the courts will only interfere where the decision involves illegality, irrationality or procedural impropriety - **Council for Civil Service Union v. Minister for the Civil Service** case [1985] A.C. 374. . The control which the court exercises is of a supervisory, and not an appellate nature. Indeed, at an earlier stage, judicial review proceedings were filed on behalf of Mr. Rose in relation to the decision of the Registrar, but those proceedings have not been proceeded with. The claim before me now is not a claim for judicial review, it is at its core, a claim by Mr. Rose for a declaration that he is not indebted to C.O.K. and he is seeking to rely upon that declaration as a basis for his claim for damages for malicious falsehood.
51. I agree with Mr. Spence that the matter of Mr. Rose's indebtedness has already been decided by a competent tribunal, which tribunal was established under the Act for the purposes of resolving disputes between C.O.K. and its member or former member. The award made by Mr. Moore was never appealed from, and therefore, pursuant to sub-section 50(5) the award of the arbitrator was final, should not

have been called in question in any civil court, and fell to be enforced in the same manner as a judgment of a Resident Magistrate's Court. As regards the referral of disputes brought by Mr. Rose, which were referred to Arbitrator Douglas Archebald, these proceedings were not, and could not be, in the nature of appeal proceedings; only the Registrar is statutorily empowered to hear appeals. Thus, in so far as Mr. Archebald purported to overturn the decision of Arbitrator Moore, he was acting outside of, and in excess of his powers. However, in any event, the decision of Mr. Archebald was appealed from by Mr. Rose himself. The Registrar made his award in or about November 2004, which award held that Mr. Rose was indebted to C.O.K. If weight is to be given to those second proceedings, which I am inclined to do, since those are the proceedings which Mr. Rose appears to be relying on, what is relevant is not Mr. Archibald's award, but rather the appeal award by the Registrar, which according to sub-section 50(4) of the Act, is final and binding on the parties. The only challenge that could be brought to that decision of the Registrar would be by way of judicial review, which proceedings Mr. Rose in fact started, but for whatever reason, those proceedings have not been brought to a conclusion. In those circumstances, the award of the Registrar remains intact and cannot be side-stepped in the manner in which Mr. Rose appears to be attempting to do in the present proceedings. It is not an answer to the status of the Registrar's appeal award to say, as Mr. Miller has sought to do, that since the appeal was filed by Mr. Rose and not C.O.K., C.O.K. cannot rely upon it to impugn the 2<sup>nd</sup> arbitration proceedings. This is so, even if, as Mr. Miller submits, the sole ground of appeal raised by Mr. Rose with which the Registrar did agree, is that C.O.K. was guilty of failing to provide adequate information and "was negligent with the management of the information cycle"- see Summary, paragraph 9A. If Mr. Miller's

proposition is correct, one wonders why then did Mr. Rose's legal advisors see it necessary to file the judicial review proceedings in relation to the Registrar's appeal award in the first place. Mr. Rose cannot file an appeal and then, dissatisfied with the outcome, act as if it is inapplicable and non-existent.

52. Even if Mr. Rose's present claim may have different objectives than the objectives in relation to the disputes submitted to arbitration, these proceedings revolve around a finding of fact as to his indebtedness. That factual determination has already been made adversely to him-Paragraph 9C of the findings and reasons. Further, the matters of the U.S.\$20,000 and the proceeds of sale from the motor vehicles were also dealt with by the Registrar-paragraphs 2, 5 and 9E. I agree with Mr. Spence that the doctrine of issue estoppel applies, which means that Mr. Rose is estopped from raising those issues anew in these proceedings. The law does not permit such a course-see **Carl-Zeiss Swiftung v. Rayner & Keeler Ltd. (No. 2)** [1966] 2 All E.R. 536 at 564, and paragraph 980 of **Volume 16(2)** of **Halsbury's Laws of England, 4<sup>th</sup> Edition Re-issue, Lexis Nexis, UK, 2003**, cited by Mr. Spence. Paragraphs 1535, 1567, and 1569 of **Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 16**, make it clear that the doctrine of estoppel, in relation to court proceedings has been extended by analogy to arbitration proceedings and proceedings before tribunals. Mr. Rose is bound by the previous finding of the Registrar that he is indebted to C.O.K. and thus he cannot maintain that any claim or statement by C.O.K. that he is indebted to it is untrue.
53. However, even where a matter does not fall within the scope of issue estoppel, it may nonetheless be struck out as vexatious or frivolous; to relitigate a question which in substance has already been determined is an abuse of process-paragraph 981 **Halsbury's, 4<sup>th</sup> edition Re-Issue Volume 16(2)**.

54. In light of the real difficulties which Mr. Rose did encounter in getting information from C.O.K. in relation to his accounts, debts and securities, it is with some regret that I find that these proceedings are clearly an abuse of the process of the court. Parliament has seen it fit to legislate that the Registrar is the final tier in the adjudicatory process in relation to certain types of disputes involving Co-Operative Societies. There is no right of appeal to this court in relation to the merits of the Registrar's decision and Mr. Rose is estopped from raising the issues which were determined by the Registrar anew. The only manner in which Mr. Rose could have challenged the Appeal award of the Registrar is by way of judicial review, and that would not be a challenge on the merits. It seems to me that Mr. Rose would have to successfully do that before he could properly make a claim, the basis for which is allegedly that C.O.K. is falsely claiming that he is indebted to it. He has not successfully challenged the relevant decision and thus, the finding by the Registrar that Mr. Rose is indebted to C.O.K. remains extant. It is thus altogether unfair and untenable for Mr. Rose to be allowed to maintain that C.O.K.'s claim that he is indebted to it is false. Although under the C.P.R., the courts can take a more flexible approach in relation to the nature of the proceedings before it, this is not case in which the Registrar, the decision maker in relation to the judicial review proceedings, is a party. These proceedings could not be interpreted as a collateral challenge to the Registrar's decision. Indeed, the Registrar's decision is not even mentioned in Mr. Rose's Statement of Case. The failure to advert to the judicial review proceedings, or for that matter, to the fact that Mr. Rose had appealed to the Registrar in relation to the arbitrator Archibald's decision, and that in fact the Registrar had handed down an appeal award is, at the very least, perplexing. Mr. Nelson's reference to the appeal award and the judicial review proceedings in his Affidavit,

cannot cure the defect. Mr. Rose appears to have adopted a similar approach in the Sutton Street Resident Magistrate's Court proceedings. A court adjudicating without knowledge of these earlier proceedings would be gravely misled as to the current state of relevant circumstances. If this claim were to be allowed to proceed to trial, the inevitable result would be that the court would be asked to grant relief not properly available. That surely would bring the administration of justice into disrepute.

55. I find that the Statement of Case filed on behalf of Mr. Rose exhibits all of the features of abuse of process described by Lord Diplock in **Hunter v. Chief Constable of the West Midlands** [1982] A.C. 529, 536 C-D, cited by Mr. Spence:

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

56. The question of whether or not statements allegedly made were privileged does not strictly need to be addressed, in light of my findings as to abuse of process. However, for completeness, I have addressed my mind to it. It is clear that any statements made in any of the proceedings, complained of are privileged see **Co-Partnership Farms v. Harvey Smith** [1918] 2 K.B. 405 at 408 cited by Mr. Spence, and the case of **Bottomley v. Brougham** [1908] 1 K.B. 584, 587 referred to in the **Co-Partnership** case. Mr. Miller submitted that the privilege attaches to the proceedings in which the statement was made. Hence, he argues, no privilege attaches to C.O.K. in this matter by virtue of the instructions given by a former in-house lawyer of C.O.K. in the fraud trial because C.O.K. was not a party to the

proceedings in the fraud trial. I cannot agree with Mr. Miller. The allegation is that Counsel for Melanie Tapper suggested to Mr. Rose in the course of cross-examination that he was indebted to C.O.K. in the sum of \$14 Million and that he did so based on the instigation of a former in-house lawyer of C.O.K., who was also a relative of Melanie Tapper. It seems to me that in so far as what was actually said or published during the fraud proceedings is alleged to have been urged by C.O.K.'s in-house Attorney, if the suggestion complained of was put forward, it was made by the advocate appearing for one of the accused and therefore would be absolutely privileged. In any event, I agree that nothing in Mr. Rose's Statement of Case indicates the basis upon which he alleges or avers that this in-house lawyer was at the time acting on behalf of C.O.K. or that any statement emanating from her, or incited by her, was done on behalf of, or as representing C.O.K.

The claim with regard to the bailiff's actions or statements similarly has no proper basis and does not seem to create any cause of action, whether malicious falsehood or otherwise.

More importantly, the claim in respect of all of these situations allegedly involving the tort of malicious falsehood, must fail because the statement of case does not properly identify the words complained of.

57. Having determined that this claim amounts to an abuse of process, it is not strictly necessary for me to deal with the submission regarding limitation periods. However, suffice it to say, that I agree with C.O.K.'s submission on this point as set out in paragraph 22 of the Defence.
58. The relief sought at paragraph (1) of C.O.K.'s application filed February 3<sup>rd</sup> 2009 is therefore granted, and I order as follows:

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