IN THE CARIBBEAN COURT OF JUSTICE

Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF THE EASTERN CARIBBEAN SUPREME COURT (Dominica)

CCJ Appeal No DMCV2018/001
Court of Appeal of the Eastern Caribbean Supreme Court (Dominica) No. 7 of 2013

BETWEEN

MARIETTE WARRINGTON **APPELLANT**

AND

DOMINICA BROADCASTING CORPORATION **RESPONDENT**

Before the Honourables: **Mr. Justice A. Saunders, President CCJ**
Mr. Justice J. Wit, JCCJ
Mr. Justice D. Hayton, JCCJ
Mr. Justice W. Anderson, JCCJ
Mr. Justice D. Barrow, JCCJ

Appearances

Ms. Cara Shillingford and Mr. Jonathan Bhagan for the Appellant

Mr. Roger C Forde, QC and Ms. Trish Latoya Bryan for the Respondent

JUDGMENT
of
The Honourable Justices Wit, Hayton,
Anderson and Barrow
Delivered by Mr. Justice Barrow

And

CONCURRING JUDGMENT
of the Honourable Mr. Justice Saunders, President

Delivered on the 30th day of November 2018

JUDGMENT OF THE HONOURABLE MR. JUSTICE DENYS BARROW

Introduction

[1] At the root of this dispute as to the terms of the appointment of the appellant, Ms. Warrington, as General Manager by the respondent, Dominica Broadcasting Corporation, is the question whether there was a valid appointment. The courts below decided the purported contract of employment was invalid for non-compliance with the statutory provision that requires the Board of the Corporation to act on the advice of the Prime Minister in appointing its managers.

[2] Section 6(6) of the Dominica Broadcasting Corporation Act Chap 45:06 of the laws of the Commonwealth of Dominica ("the Broadcasting Act") provides:

> (6) "The Board acting on the advice of the Prime Minister shall appoint –
> (a) a Director of Broadcasting who shall undertake the general supervision of the broadcasting and information services of the State, and such other duties as the Prime Minister may from time to time assign him;
> (b) two managers one for radio broadcasting services and the other for television broadcasting services;
> (c) a Secretary; and
> (d) with the approval of the Minister, such other officers and persons as may from time to time be required with such terms and conditions of service and remuneration as may be determined."

[3] Ms. Warrington's claim for damages for the wrongful termination of her engagement was unsuccessful in both the High Court and the Court of Appeal, on the dispositive ground that the Board had not acted on the advice of the Prime Minister in reappointing her as its manager. For that reason, the Court of Appeal held, any agreement the Board made with Ms. Warrington to appoint her as manager was void and unenforceable.[1]

The history between the parties

[4] There was a long employment history between Ms. Warrington and the Corporation, dating back to May 1993 when she was appointed Sales Director. More recently, she

[1] DOMHCVAP2013/0007 Warrington v Dominica Broadcasting Corporation at [50]

was employed as the General Manager and Accountant of the Corporation for approximately 8 years, under two separate employment contracts. The first contract commenced in January 2001 and ended on 31 December 2003. The second commenced on 1 January 2004 and ended on 31 December 2008 ("the 2004 contract"). After that contract expired, Ms. Warrington continued to perform the duties of General Manager and Accountant until her employment was terminated in 2010. During that period, she continued to be paid a monthly salary of $5,000.00 and to receive the allowances for which the 2004 contract provided. She claimed she also continued to be entitled to the specified gratuity of 20% of salary paid for the period she served.

[5] The 2004 contract provided that not less than six months prior to the completion of the term of engagement Ms. Warrington should give notice to the Corporation of her desire to enter into a new service agreement with the Corporation. The Corporation should then decide whether to offer her further employment and if it did, it would be on such terms and for such periods as may be mutually agreed.

[6] On 25 June 2008, Ms. Warrington wrote and requested further employment with the Corporation as General Manager "under similar terms and conditions except for" an increased salary and for the termination provision to specify that it should be for cause. The Corporation never responded to this request in writing. At a Board meeting held on 24 July 2008 her re-appointment was discussed. A decision was taken unanimously by the Board to re-appoint her. Again, this decision was never communicated to Ms. Warrington in writing. However, the decision was communicated to Ms. Warrington on the day of the meeting when she was asked by the Chairman to amend the minutes of the board meeting to record the decision.

[7] After that decision had been taken, the Board decided to advertise the position of General Manager and Ms. Warrington was instructed to broadcast the advertisement.

On 15 August 2008 Ms. Warrington applied for the position. She was the only person to apply. The Corporation did not respond to her application.

The period after the 2004 contract

[8] In November 2008, Ms. Warrington applied for vacation leave before the expiration of the 2004 contract. The Board approved vacation leave from 12 December 2008 to 11 January 2009. It seems the Board consciously decided on a vacation end-date that ran into a new period of employment, this being consistent with its previous decision to re-appoint Ms. Warrington. On 12 January 2009 Ms. Warrington returned to work and two days later she wrote to the Chairman to inquire about her employment status resulting from her letter of the 25 June 2008 and the Board's unanimous decision to re-appoint her. Again, she received no response. From 12 January 2009 to 14 April 2010 Ms. Warrington continued to perform the duties of General Manager and Accountant and received the same salary and allowances as under the 2004 contract. Although early in the new period Ms. Warrington scored high on an appraisal of her work performance, during her employment, the Corporation became dissatisfied with her.

[9] One year after the date of the appraisal, on 3 March 2010, Ms. Warrington received a letter informing her that she was on a month to month contract. Then on 14 April 2010 she was given a letter terminating her services. She was paid a total of $7,965.87, comprising her net salary for the month of April ($1,965.87, after deductions) and an honorarium of $6,000. Ms. Warrington believes she was entitled to more.

The advice of the Prime Minister

[10] The case for the Corporation was that during the period of employment following the expiry of the 2004 contract the Board met several times and discussed Ms.

Warrington's re-appointment but the advice of the Prime Minster, as required by section 6(6) of the Broadcasting Act, was never received and so no decision could have been taken to re-appoint her. The evidence given on behalf of Ms. Warrington was that the Prime Minister actually gave his oral advice approving her employment. At a minimum, she contended, the Prime Minister's advice was implicitly given. In contradiction, the evidence given on behalf of the Corporation was that the Prime Minister did not advise on the appointment of Ms. Warrington.

[11] In its judgment, the Court of Appeal reproduced, at [38], the summary made by the High Court judge in considering the conflict in the evidence as to the Prime Minister's advice. The specific evidence reveals more than conflict and needs to be reproduced in full. On behalf of Ms. Warrington, Mr Joel Joseph, a former board member, said in his witness statement:

> "4. I can say that on the 17th day of February 2009 I attended a meeting with the Prime Minister … for the purpose of consulting on the matter of the appointment of a General Manager following the expiry of Mariette Warrington (sic) employee contract.
> "5. Also present at the said meeting were fellow Board members …. At that meeting an instruction was given by the Prime Minister which was that Mariette Warrington should be offered a contract for a further 3 years (sic) employment in the capacity as General Manager of Dominica Broadcasting Corporation."

[12] The conflicting evidence on behalf of the Corporation appeared in the witness statement of Mr. Aurelius Jolly, a former board member (and later Chairman), who stated:

> "16. On 17th February 2009, the Board of Directors met with the Prime Minister to discuss the affairs of the [Corporation]. I was present. One of the matters discussed was the position of manager. The Prime Minister's (sic) stated that he was yet to receive any formal communication from the Board and that he would await such communication before making a decision."

[13] After pointing to the opposing versions of what occurred in the meeting with the Prime Minister, the Court of Appeal conducted a full review of the evidence on this matter

that was before the High Court, including the cross-examination of Ms. Warrington's witness and the conflict between his evidence and Board Minutes. The court concluded that it had been open to the learned judge to find on a balance of probabilities that the Prime Minister had not given advice to the respondent on the appointment of a Manager. Ms. Warrington strongly challenges that conclusion on the present appeal.

[14] There was no discussion in the judgments or the submissions of what constitutes "the advice of" the Prime Minister. The expression does not appear to be used in any technical or specialized way. The expression seems simply to refer to a communication or indication from the Prime Minister. In its context, there is no reason to think that it requires the Prime Minister to initiate the process of identifying a candidate. In an everyday bureaucratic or institutional way, the natural thing would be for the Board (as they did in this case) to advertise for candidates and short-list suitable persons for the Prime Minister to select one. Or the Prime Minister could know a suitable person and advise (or communicate) that this was his choice. Or the Board could itself select a candidate and ask the Prime Minister to advise if he approved that candidate. Or, as here, there could be an incumbent, of whose re-appointment the Prime Minister needed to communicate or advise his approval.

[15] It does not appear that the requirement of the advice of the Prime Minister involved anything more than his communicating that he approved or accepted the candidate, whether enthusiastically or not. This dispels the nuance that the Prime Minister's advice was to be treated as equivalent to, or in the nature of, an instrument of appointment. It must be remembered that it was the Board which appointed; not the Prime Minister. Even after the Prime Minister advised, the formality of making the appointment rested with the Board. It would not have been competent for the Prime Minister to make the appointment, no matter how formal and solemn an instrument or

letter of appointment he may have issued. This confirms that the requirement for the Prime Minister's advice was of limited scope, was of no administrative law or governance significance, and had no impact on the functioning of the Corporation. As will be discussed below, it was of purely political significance.

The significance of the meeting with the Prime Minister

[16] The courts below did not regard as significant the commonly established fact that, on 17 February 2009, the Board met with the Prime Minister and discussed "the matter" of the appointment of Ms. Warrington. But this was a most significant fact in the context of this case. A number of conclusions follows from the fact that this meeting with the Prime Minister occurred.

[17] Firstly, the Prime Minister knew that Ms. Warrington had been the General Manager of the Corporation for a number of years. Secondly, he knew that she was currently functioning as such General Manager. Thirdly, because the Board was discussing the position of manager with him in the meeting, he knew that the Board had kept on Ms. Warrington, performing in the position. The Corporation's Chairman and sole witness, Mr. Aurelius Jolly, said in his witness statement that the Board "allowed" Ms. Warrington to perform the duties of General Manager while "it awaited word from the Prime Minister on whether or not he approved the grant of a new contract to her." Fourthly, according to this witness, the Prime Minister stated in the meeting he would await formal communication on the matter of Ms. Warrington's appointment. Fifthly, the singular inference from the preceding facts, and the Board Minutes generally, is that the Prime Minister approved of and acquiesced in Ms. Warrington's engagement as General Manager, after the expiry of her 2004 contract, even if not the length of her engagement. Sixthly, it is a certain inference that if he had not approved, Ms. Warrington would not have remained employed as General Manager with the

Corporation so that, as late as 17 November 2009, the Board needed to again arrange "to meet with the Prime Minister re the Manager's contract."

[18] This last quote, from the Board Minutes of that date, reveals that what was engaging the Board, and perhaps the Prime Minister, all this time was not the selection of Ms. Warrington as General Manager, but the length of her contract. This repeatedly appears in the Minutes, beginning with the Minutes of 27 January 2009, where the Board is shown to have discussed the length of the proposed manager's contract with the Minister for Information, who promised she would request the approval of the Prime Minister for at least a two-year contract or a six-months contract. It is most revealing that neither the Board nor the Minister mentioned asking for the Prime Minister's advice on the selection of Ms. Warrington as Manager. It appears the Board and Minister took it as a given that he approved of her continuing as Manager. This raises the inference, though not the conclusion, that the Prime Minister's approval was a known fact, and not a mere assumption.

[19] Subsequent Minutes show that what continued to engage the Board was the duration of the contract and there was much vacillation on that score, including proposals to offer month to month employment, a six-months contract and a contract for a number of years (as well as to terminate the engagement). The inference that the Prime Minister knew and approved of Ms. Warrington's appointment is strengthened by looking at other early Minutes. In the Minutes for 10 February 2009 appears the report from a director who had met with the Prime Minister and discussed with him the appointment of a Manager. The director reported that the Prime Minister "had advised" that the positions of General Manager and Accountant should be separated. Later in these Minutes is a summary of the discussion "regarding the reappointment of Miss Warrington" and the conclusion that, based on what had occurred in the meeting with

the Prime Minister, "the critical issue was for how long Miss Warrington could be legally hired without liability to the Corporation." The Chairman then asked for the Board to be provided with a legal opinion to be presented to the Prime Minister for his advice on the matter.

[20] The Minutes for 27 March 2009 show the Board decided, following receipt of the legal opinion from a leading labour law scholar at the University of the West Indies, "that Ms. Warrington's employment on a month to month basis should be terminated within a reasonable period of time without an offer for further employment and that she be paid in lieu of notice." It was also decided to send a copy of the opinion to the Prime Minister.

[21] There can be little doubt that the Prime Minister, by approving the continued performance by Ms. Warrington of the duties and functions of General Manager and engaging with the Board on the question as to the duration of her contract, thereby communicated his acceptance that she had been appointed the Corporation's General Manager, even though the Board had not settled on the period of engagement. It is clear that the Prime Minister had determined, or had been led to think, and clearly both he and the Board accepted and expected, that he would be the one to settle on the period of Ms. Warrington's engagement, but this is not what the law provided. Section 6(6) (b) provides that the Board, acting on the Prime Minister's advice, shall appoint its managers. It does not provide that the Prime Minister shall advise on or approve the terms and conditions of service of the appointee. This is in stark contrast with the provision in sub-section (6) (d) that "with the approval of the Minister" the Board shall appoint such other officers as may be required "with such terms and conditions of service and remuneration as may be determined."

No requirement for formality

[22] When, therefore, the Prime Minister accepted Ms. Warrington's appointment by, at least, acquiescing in her continued performance in the position of Manager, there was practically nothing really left for the Prime Minister to do. The Board was no less "acting on the advice of the Prime Minister" because the advice came by way of acquiescence in an appointment that had already commenced. It does not affect the validity of the advice because it was (or may have been) given retroactively. The unexceptional nature of this proposition is shown in *Whitfield v Attorney General of the Bahamas*[2] where the validity of the continuation in office of the Chief Justice was challenged. The Government had accidentally failed to comply with constitutional requirements in time to obtain the Governor General's permission for the judge to continue in office, before the date of his retirement. An instrument formalising the grant of permission was issued some weeks later and stated the permission took effect on the retirement date. The challenger argued that permission to continue in office could only be given while the incumbent held office. After he had retired, he could not continue; he had ceased to hold office as the effect of the retirement.

[23] Although it did not form part of the reasons for dismissing the challenge and the subsequent appeal, it is interesting to note the determination of the first instance judge that the Government could appoint a servant of the State with retroactive effect. His lordship decided that neither the general law nor the constitution prevented it and, as well, there was no requirement for the Governor General's permission to be given in writing.[3]

[24] That view on the validity of a retroactive re-appointment to one of the highest constitutional offices supports the idea that the appointment of the manager of a statutory corporation may be validated by the retroactive approval of the Prime

[2] (1989) 44 WIR 1
[3] *Ibid* pg. 18

Minister. The case is also persuasive against the Corporation's submission that section 6(6) (b) of the Broadcasting Act should be interpreted to mean that the advice of the Prime Minister should be in writing. The Corporation argued that Parliament could not have intended that the advice of the Prime Minister could be implied or given by conduct and that the Court had the jurisdiction to read the words "in writing" into the Act. Quite simply, there is no legal principle or authority that supports the Corporation's submission that the Court should read into the section a requirement for writing. There is no substance to the argument.

[25] As the Corporation's case was conducted in the High Court, counsel who then appeared proceeded on the footing, as seen in his cross-examination of Ms. Warrington, that the requirement for the Prime Minister's advice would have been satisfied by obtaining his approval or consent. As discussed,[4] what was described in the legislation as "acting on the advice of the Prime Minister" was simply a device for ensuring political control over the staffing of the State's broadcasting organ. As counsel below recognized -- advice, approval or consent -- it all came down to the same thing and required no formality. Indeed, the advice required was simply of the Prime Minister's approval or consent.

Condition precedent

[26] In consequence of this Court's conclusion that the undoubted approval and acquiescence of the Prime Minister satisfied the requirement for the Board to act on his advice in appointing Ms. Warrington, there is no need to decide on the Corporation's submission that the requirement in section 6 (6) (b) for the Prime Minister's advice to be given created a condition precedent to the existence of any contract appointing a General Manager. The decision that the advice could validly be

[4] See above, at [15] and [16], and below at [32]

given retroactively leaves no room for this argument. However, because the judgments in both courts below upheld this submission and the matter was fully argued before us, it may be helpful to examine the thesis.

[27] The Corporation's submission, based on the now dismissed premise that no advice was given, was that the contract contemplated by the section did not come into effect; see: *Aberfoyle Plantation Ltd v Cheng*[5] and *Johnson Johnrose v Dominica Broadcasting Corporation*.[6] The proposition was that obtaining the Prime Minister's advice was a condition precedent to the Corporation appointing a Manager, so that it would have been *ultra vires* or beyond the power of the Corporation to have made an appointment without such advice. However, whether this requirement was indeed a condition precedent to the creation and existence of the contract of employment, so that if it was not satisfied the appointment was invalid, was not discussed in either of the judgments. It was simply taken to be so, even if the terminology was not used in the lower courts.

[28] The requirement of the Prime Minister's advice is thoroughly discussed in the judgment of the Court of Appeal beginning at [19] with the submission of counsel for the Corporation that making the appointment without the advice would be *ultra vires*. The following passage is reproduced from Wade & Forsyth's Administrative Law:[7]

> "Any administrative act or order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of legal effect. This is because in order to be valid it needs statutory authorisation, and if it is not within the powers given by the Act, it has no legal leg to stand on. Once the court has declared that some administrative act is legally a nullity, the situation is as if nothing had happened."

[29] After considering the evidence as to whether the advice of the Prime Minister had been obtained, the court observed at [34] that section 6(6) of the Broadcasting Act, requiring

[5] 1960 1 AC 115
[6] Civil Appeal No 11 of 1999
[7] Sir William Wade & Christopher Forsyth, Administrative Law (8th edn., Oxford University Press 2000) p. 36

the advice of the Prime Minister to be obtained, meant just what it said and that the Corporation could only enter into the relevant employment contract where the Prime Minister had given his advice that such person be appointed. At [50] the court concluded that the failure of the Corporation to get the advice of the Prime Minister meant that any contract it entered into for the appointment of a manager would be void and unenforceable.

[30] There was no discussion of what made obtaining the advice a condition precedent so that failure to obtain it rendered the appointment void. It is not every failure to satisfy a requirement that results in an invalid exercise of power.[8] To decide whether invalidity is the consequence of non-compliance, it must first be considered what Parliament intended would be the consequence of failure to satisfy the requirement.[9] A good first step in that process is to consider how integral to the exercise of the power is compliance with the requirement, and that analysis calls for an examination of the relevant provisions of the Broadcasting Act.

[31] The Corporation is established by section 3 of that Act and section 4(1) states that the Corporation shall be managed by a Broadcasting Board, consisting of a Chairman, a Deputy Chairman and such other members as the Minister responsible for Broadcasting Services may from time to time determine. There follows provision as to the qualifications of the persons whom the Minister may appoint, termination of appointments by the Minister and the maximum duration of the appointment. Section 6 specifies the quorum of the Board, its capacity to do things, provides for conflict of interest situations and that the Board may regulate its own procedure. Then comes section 6(6), reproduced at [2] above, which provides for the Board to appoint officers

[8] Sir William Wade & Christopher Forsyth, Administrative Law (11th edn., Oxford University Press 2014) p. 183
[9] *Ibid*. See: the discussion in fn. 67 and the scepticism attributed by the authors to Toulson LJ (as he then was) in *TTM v London Borough of Hackney* [2011] EWCA Civ 4 that the imputed intention of the legislature may be really an oratorical device for clothing the judge's view of the seriousness of the non-compliance with the mantle of the legislature's intention.

including a Director of Broadcasting, two Managers, a Secretary and such other officers and persons as may from time to time be required.

[32] The limited purpose of requiring the Board to act upon the advice of the Prime Minister in appointing these officers is readily apparent from seeing in the Act the degree to which broadcasting, and oversight of the Corporation were not the portfolio responsibility of the Prime Minister. The Act gave charge of the Corporation to the Minister responsible for Broadcasting Services: not the Prime Minister; section 2(1). It was the Minister who controlled the financing of the Corporation, sections 15 and 16; who could make rules as to advertisements, section 9(4); who could direct it what to broadcast and not to broadcast, section 13; who could make regulations, section 22. In sum, the only role the law gave to the Prime Minister was to 'advise' on senior staffing.

A political rather than administrative requirement

[33] The objective of securing of political control is readily seen in the structure of the Corporation and this is said intending no criticism. The Dominica Broadcasting Corporation Act was passed in 1975, in the period of Associate Statehood, before The Commonwealth of Dominica became independent of Britain (on 3 November 1978). The Premier and his Government would have been still in the process of taking control of national affairs given to them as part of the constitutional devolution of full internal self-government. The Corporation was created to serve as the successor to the National Broadcasting Station, as indicated in section 2(2), and was made responsible for radio and television broadcasting. In colonial times, broadcasting would have been the responsibility of a department of Government and, therefore, under the direct control of the administrative bureaucracy, the "civil service". When the Government chose to relocate that control in a statutory corporation it also chose how to, and who should

control that corporation. Hence, the requirement that the Board should act on the advice of the Prime Minister in making appointments of certain officers and should determine the duties of the Director of Broadcasting, who would supervise the broadcasting and information services of the State.

[34] It is apparent that the requirement of the Prime Minister's advice for the appointment of certain officers of the Corporation was not directed to the structure, functioning, administration or powers of the Corporation. Those matters, pertaining to the legal affairs and governance of the Corporation, and to the Corporation's exercise of the powers conferred on it by its statute, are the subject of other sections of the Broadcasting Act. The requirement for the Board to act on the advice of the Prime minister, was a staffing requirement, directed at ensuring that the Board could only appoint a person selected or approved by the Prime Minister. It ensured that no person who the Prime Minister found objectionable or unsatisfactory could be appointed. The requirement was consistent with the structure created in section 6: the composition of the Board was completely determined by the Minister. On top of this, Parliament imposed the requirement that this politically appointed Board could only appoint a General Manager upon the advice of – meaning, selected by or, at least, with the approval of -- the Prime Minister.

[35] As a practical matter, had there been a failure to obtain the advice of the Prime Minister it would only have been an oversight. It is inconceivable that the Board would deliberately purport to make an appointment that was not advised by the Prime Minister. Such a wayward and defiant board would, presumptively, have been summarily fired. Thus, in real-world terms, non-compliance with the requirement to obtain the advice of the Prime Minister could only ever be a mere technicality that would be easily, and simply corrected or acquiesced in. Upon its discovery, a defective appointment would likely have been easily acquiesced in as valid by the Prime

Minister, and by everyone else who mattered, because, otherwise, the appointment would have immediately been brought to an end upon discovery of the defect.

[36] This reasoning feeds into the discussion in paragraph [16] above of the significance of the 17 February 2009 meeting with the Prime Minister and the recognition that the Prime Minister approved of the continuation in office of Ms. Warrington. As mentioned, the Prime Minister, by that approval, effectively communicated to the Board his advice that Ms. Warrington should be reappointed to the post of General Manager and as discussed, a formally deficient appointment was capable of being ratified and validated retroactively. Even on the contrary view, now rejected, that this approval ought not to be treated as amounting to advising in favour of the appointment, the fact is there was, as already indicated, such acquiescence in the appointment that it amounted to approval. A failure to satisfy the alleged requirement of formally obtaining the Prime Ministerial advice – as would have occurred if there had been a requirement of writing -- would not have been intended by Parliament to result in invalidity. This principle is now discussed.

The effect of non-compliance

[37] It used to be that a distinction was drawn between mandatory and directory provisions and this enabled courts to conclude that failure to comply with a mandatory requirement made the exercise of power void, whereas failure to comply with a directory requirement made the action unlawful but not void.[10] In *Project Blue Sky Inc v Australian Broadcasting Authority*[11] the majority of the High Court of Australia referred to this distinction, at [92] and the uncertainty that attended it. Their Honours endorsed the criticism of the use of the "elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have

[10] Woolf, Jowell, Donnelly and Hare De Smith's Judicial Review (8th edn. 2018) Sweet and Maxwell Thomson Reuters 5-057
[11] [1998] HCA 28, (1998) 194 CLR 355

substantially complied with a statutory command and those which have not. They stated

> "93 … They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. … A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid … In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute" [emphasis added].

[38] The observation was also made[12] that courts have always accepted that it is unlikely that it was the purpose of the legislation that an act done in breach of a statutory provision should be invalid, if public inconvenience would be a result of the invalidity of the act.[13] This is consistent with the observation of Brennan CJ in the Project Blue Sky case that "If there has been non-compliance with a provision which does not affect the ambit or exercise of the power, the purported exercise is valid."[14] More recently, the New Zealand Supreme Court stated in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*[15] "the correct modern approach to procedural requirements is for the courts to focus not on literal classification but rather on what should be the legal consequence of non-compliance with a statutory or regulatory provision."

[39] The good sense of the modern approach invites a similar conclusion, in the present case, that it is unlikely that it was the purpose of Parliament that a failure to obtain the formally conveyed advice of the Prime Minister to renew the appointment should result in its invalidity, if no purpose would be served by the consequence of invalidity.[16] It is manifest, on the facts of this case, where the Prime Minister accepted

[12] *Ibid*, [97]
[13] Supra (n. 11), 5-069.
[14] Supra (n. 13), [41]
[15] [2011] NZSC 158; [2012] 2 N.Z.L.R. 153 at [74]
[16] Supra (n.12)

the fact of Ms. Warrington continuing to perform as General Manager, that the failure to obtain the Prime Minister's advice in a formal manner was a trifle. As stated, the Prime Minister's approval and acquiescence amounted to retrospectively advising on the appointment. This Court is satisfied that Parliament did not intend such a trifling failure to result in the invalidity of the appointment.

The duration of the appointment

[40] On the conclusion that the appointment was valid, it remains to address the terms of the appointment. When Ms. Warrington asked to be re-employed on similar terms, as mentioned in [6] above, those terms included a fixed term contract terminable upon 6 months' notice. However, the Board never communicated its agreement to re-employ Ms. Warrington on similar terms and, as discussed above at [19], the Board vacillated as to the period for which it had re-employed her; it never settled in its own collective mind on that term. It is this fact which reinforces the submission of the Corporation that the Labour Contracts Act Chap 89:04 does not apply to supply this missing ingredient, while Ms. Warrington argues it does.

[41] The Labour Contracts Act would have been hailed at the time of its passing, in 1983, as a progressive piece of legislation and, as will shortly be seen, it took a radical step in protecting employees' rights. Its short title identifies it as an Act to make provisions whereby every employer is required to provide each employee within its application with a written contract specifying certain particulars of his employment. Its purpose also included providing the contents of a basic labour contract. The basic approach of the Act is to provide that within 14 days of employing an employee, an employer must provide to the employee a written contract containing the basic terms on which s/he was employed; that if the employer failed to do this he committed an offence; and that

to correct that failure the Act imposed upon the parties a basic labour contract, in the terms set out in the schedule to the Labour Contracts Act.

[42] The comparable legislation in England was the Industrial Relations Act 1971 which was many times updated by later legislation, including the Employment Rights Act 1996. In all the reincarnations, the seminal requirement for the employer to provide written terms of employment to the employee, which was a major way of protecting employees, never attained the force that was given to it in the Dominican Broadcasting Act. In England, the employer was required to provide within two months of the commencement of employment, a written statement of specified terms but not a contract. As the updated legislation provides, if the employer failed to give this statement or it omitted the specified terms, the remedy the law provided was for the employee to complain to an employment tribunal to determine what particulars ought to be included in such a statement. It is settled law[17] that the tribunal cannot insert terms which should have been agreed but were not agreed. The sanctions which may be awarded in competent proceedings may include an award to the employee of not less than two but no more than four weeks wages.[18]

[43] This very brief comparison is enough to bring home the realization that the Labour Contracts Act dared to do what the English legislation refrained from doing, which was to interfere with the hallowed English law concept of freedom of contract. The Dominica Act imposed a contract on employers when they failed to comply with their statutory obligation to provide a written contract to employees. In this context, the contract the Labour Contracts Act imposed in this employment relationship is as stated in section 2(3), which provides:

> "(3) This Act does not apply to an employer in respect of the employment of an employee –

[17] *Eagland v British Telecommunications* [1990] IRLR 328
[18] See Astra Emir Selwyn's Law of Employment (19th ed. 2016) 3.112 – 3.122

(a) …
(b) …
(c) …
(d) …
(e) who, having been a party to a labour contract with the employer pursuant to this Act, is re-engaged in the same or similar employment by the employer after an absence from the employment of less than six months; who shall be presumed unless the contrary appears, to be employed on the same terms as his former contract;
(f) …
(g) …
(h) …"

[44] On the case for Ms. Warrington, by operation of law, the contrary not having appeared, the presumption applied that Ms. Warrington was re-engaged on the terms of the former contract, including the terms as to duration and notice. The Corporation submits the direct opposite, which is that the contrary appears: that the Board expressed a clear intention to not employ Ms. Warrington on the same term as to period of employment as was in the former contract. This submission is better addressed after considering the Court of Appeal's determination that the Labour Contracts Act did not apply. The court decided that the Labour Contracts Act did not apply because the Broadcasting Act made specific provision for the advice of the Prime Minister to be obtained before a contract could be created. Therefore, the court held, if the Labour Contracts Act applied it would make nugatory the provision of the Broadcasting Act and, to avoid that unintended result, it held the Labour Contracts Act did not apply.

[45] With respect, this conclusion misses the point that the Labour Contracts Act could only apply to import the former contract, to operate as the contract of the current employment, in a situation where the Board had failed, in its statutory duty, to provide a written contract of employment to Ms. Warrington. The Act applied to cure that default, and not to override or render nugatory the requirement of obtaining the advice

of the Prime Minister. The Act overrode and made nugatory the Board's failure to provide a written contract to Ms. Warrington.

[46] To expand, take the hypothesis that the Board had obtained and acted on the advice of the Prime Minister and had appointed Ms. Warrington as Manager, but had failed to give her a written contract (which is what Ms. Warrington's witness testified occurred). In that scenario the Labour Contracts Act would have applied to presume the former contract operated. That is the essence of the Act – to ensure that an employee has the benefit of a written contract. The Act was not intended to apply or not apply according to the reason why an employer failed to give the employee a written contract. The protection of employees was the core reason for passing the Act. The Corporation cannot be permitted to deny the Act's application, and its protection of this employee, by the Corporation relying on its own failure to satisfy internal procedures for appointing senior staff.

[47] As indicated, this is the true nature of the requirement that the Board must act on the advice of the Prime Minister – it is a matter of internal procedure. It is a misplaced concern that the application of the Act, to compensate for the Board's failure to satisfy that procedural requirement and, more fundamentally, its failure to satisfy the obligation to provide a written contract, makes the procedural requirement nugatory. The Board's failure to obtain the formal advice of the Prime Minister and give Ms. Warrington a written contract is what made nugatory so much of what transpired. It may be reiterated that at any time after the former contract began to operate, pursuant to the Labour Contracts Act, it was open to the Board to obtain the formal advice of the Prime Minister, provide a new written contract and displace the application of the former contract.

[48] Since the Board could do that at any time, it makes no sense to hold that the Labour Contracts Act and the former contract did not apply and that there was no contract. That conclusion would deny, for no good reason, the protection – the insistence that there must exist a written contract -- that was the fundamental reason for enacting the Act. It was Ms. Warrington's kind of situation Parliament intended to protect, with the Act's presumption that the former contract should apply. Here, the employer, the Corporation, failed in its basic obligation to its employee under the law: it failed to deal fairly with Ms. Warrington; it failed to uphold good labour practice and good administration; and failed to provide Ms. Warrington with the statutorily mandated written contract. Ms. Warrington was entitled to the protection provided in the Act. The application of the Act does not render nugatory the requirement of the Prime Minister's advice.

[49] The Corporation also argued that the Act does not apply and, therefore, there can be no presumption of the operation of the former contract because the opening words of section 2(3) of the Labour Contracts Act state "This Act does not apply …" to an employee who is re-employed. We interpret section 2(3) to mean that the Act does not apply to the situation where an employee is re-engaged and where, therefore, there exists the presumption (created by the Act) that the former contract operates. In such a situation, there is no need for the Act to apply to impose the obligation on the employer to provide a written contract within 14 days, or to import the basic labour contract so as to govern the undocumented employment relationship, or to criminalize the employer's failure to provide a written contract. It is in that way that the Act does not apply. As has been seen, it was a fundamental purpose of the Labour Contracts Act to make the terms of an employee's contract of employment certain, by being reduced to writing. Therefore, it was consistent with its scheme that this Act operated to

presume the terms of the re-engagement were the terms of the former contract, including the terms as to duration and notice of termination.

[50] It may now be appreciated that the Labour Contracts Act was intended to protect employees by prohibiting the very conduct the Corporation seeks, even now, to uphold – to deny certainty to an employee as to the terms of her contract of employment. That proscribed conduct enabled employers in the past to abuse employees by leaving it open to employers to tell an employee, at whatever stage the employer chose, that a certain term, however unfair to the employee, was a term of the employment. This is what the Act was passed to prohibit. To repeat, where the employer fails to provide the terms of the employment in writing, within 14 days, the Act operates to provide – to impose -- terms contained in the basic labour contract and it is not open to the defaulting employer to say he did not intend those terms to apply.

[51] In the same way, in this case, it is not open to the Corporation to say the terms of the former contract did not operate because the Corporation did not intend the fixed term provision to apply. When the Act says the terms of the former contract apply unless the contrary appears, that contrary would most likely appear by way of the agreement of the parties or operation of law or by a collective agreement. It would make little sense for the Act to presume the application of "the same terms as [the] former contract" but permit the exclusion of one or more of the terms, by the employer unilaterally saying that it did not agree to them and, worse, being unable to allege any contrary agreement. The radical reach of the Labour Contracts Act with its intrusion on freedom of contract has been seen, and there is no escaping the legislative insistence that there must be a contract and the imposition of terms of a contract upon an employer. This compels the conclusion that the employer is not permitted to contend that he did not agree to terms that the law imposes.

[52] Accordingly, the Court is satisfied that by operation of law Ms. Warrington was employed, following the expiration of the 2004 contract, "on the same terms as [her] former contract". In particular, she was employed on a contract for five years, from 1st January 2009 to 31 December 2013, and pursuant to which either party could terminate on giving six months' notice or paying six months' salary in lieu of notice. This does no hardship to the Corporation when it is recollected that the Corporation was always in the dominant position of being able to give six months' notice to terminate, without cause, regardless of whether it was a contract for six months, one year or five years.

Termination

[53] By terminating Ms. Warrington's employment otherwise than in accordance with the termination provision in the 2004 contract, the Corporation acted in breach of contract and became liable to pay as damages to her, what she would have received if termination had been done in accordance with the contract. The termination provision of the 2004 contract has caused some confusion. Clause 6 states:

> "Determination of Engagement
> 6 The Corporation may at any time determine the engagement of the Person Engaged on giving her six months (sic) notice in writing or paying her six months (sic) salary and all benefits due to her under Clause 10,[19] and full compensation for salaries lost for any period remaining on this agreement. The Person Engaged may at any time determine the engagement by giving six months (sic) notice to the Corporation or pay to the Corporation six months (sic) salary in lieu of notice" [emphasis added].

[54] Counsel for Ms. Warrington argued that the underlined words meant Ms. Warrington was to be paid the equivalent of the salary lost for the unexpired period of her contract. However, this is not what the contract says. The contract says the Corporation must pay *"full compensation for*;" it does not say '*the amount of*' salaries lost. The use of

[19] Clause 10 provided for a gratuity of 20% of the amount of salary drawn during the period of engagement.

the word "compensation" in a contractual provision dealing with termination, naturally evokes advertence to damages for breach of contract.

[55] Considered without reference to statute, if a fixed term contract does not permit termination (unlike the 2004 contract) and an employer wrongfully terminates, what an employee will be entitled to will be an award of damages for breach of contract in accordance with the general law of damages. The object of an award of damages is to compensate a claimant for the loss she suffers. An elementary principle of compensation is that it is intended to put the innocent party in the position she would have been if the contract had been performed and thus the amount awarded must not exceed the loss suffered from the failure to comply with the termination provisions of the contract.[20] Another elementary principle is that the innocent party must take reasonable steps to mitigate (or minimise) the loss suffered.[21] Thus, a terminated employee must go out into the job market and seek alternative employment. Hypothetically, a wrongfully terminated employee could end up securing another job at a salary greater than the lost salary. In such a situation, the terminated employee would have suffered no loss and be entitled to no compensation. Of course, there are other hypotheses: the employee may end up accepting employment at a substantially reduced salary or the employee may be unable to find alternative employment, despite all reasonable efforts. In either case, the employee would be entitled to compensation for the salary lost but the limits of compensation must be recognised.

[56] In *Dominica Agricultural and Industrial Development Bank v Mavis Williams*[22] the Court of Appeal of the Eastern Caribbean Supreme Court discussed the limits of an award of damages in a case of wrongful dismissal. The court stated that it is not the

[20] Halsbury's Laws of England > Damages (Volume 29 (2014)) > 8. Measure of Damages in Contract > (1) General Principles > (i) Introduction > 499. Compensatory function of damages for breach of contract.
[21] *Symrise AG v Baker & McKenzie (a firm)* [2015] EWHC 912 (Comm), [2015] All ER (D) 328 (Mar)
[22] Dominica Civil Appeal No. 20 of 2005 Judgment delivered 29 January 2007

rule that a claimant may recover for all unavoidable losses, with no limit as to the period for which damages for loss of earnings may be awarded. At [50] the court stated:

> "The object of an award of damages is not to compensate an employee for being unemployed, purely and simply. It is to compensate her for the loss of earnings, which the law presumes in her favour, she suffered from not having been given notice. If an employee has been given reasonable notice before being terminated the former employer cannot be liable to compensate the employee if the employee fails to obtain new employment after the notice period expires. This is the limit upon the [employee's] entitlement."

The entitlements

[57] In this case, the contract provided for termination, so that the Corporation could have terminated in accordance with its provision and would not have been liable for damages for breach of contract. The termination provision of the contract shadowed the general law of damages and payment of compensation for breach of contract. but it went distinctly further. The contract provided that in addition to payment of six month's salary in lieu of notice and the specified gratuity, the employee was to be paid "compensation for" the salary she lost for the remaining period of the contract. Ms. Warrington, therefore, was potentially entitled to more than the stipulated six months' salary. But she was entitled to this as compensation for loss. Consistent with the standard rule that she who asserts must prove, this meant the burden was on the claimant, Ms. Warrington, to prove her loss, so as to enable the amount of compensation for that loss to be determined. Evidence of loss had to be given. Ms. Warrington was not simply entitled, beyond the contractually stipulated six months' salary, to the equivalent of salary for the remaining period of her contract. Unfortunately, the case Ms. Warrington presented did not direct itself to this necessity. In examination-in-chief Ms. Warrington testified that she had obtained employment as an accountant some four months after the termination. No evidence was presented

that she received a lower salary so as to entitle her to compensation for lost salary, after the agreed six-months' salary entitlement, and so no award can be made to her on that account.

[58] Ms. Warrington is, of course, entitled to those benefits for which the former contract provided. She is entitled to what she would have received if the Corporation had terminated in accordance with, and not in breach of, the termination provision in the 2004 contract. As discussed, in accordance with the termination provision, Ms. Warrington would have been entitled to the six months' salary in lieu of notice and this amount is to be regarded in law as agreed liquidated damages. The advantage of having this pre-estimate of damages is that both parties are certain of what is to be paid. Thus, the employer knows that the damages for loss of salary is limited to six months and there is no uncertainty of leaving it open for a court to decide if loss of salary should be for nine or twelve months or a longer period. For her part, the employee knows that she must be paid that pre-estimated amount, with no concern that she may be disentitled to any portion of it for failure to mitigate her loss, during that period. It is on that basis that Ms. Warrington is entitled to damages for breach of the termination provision in the 2004 contract which provided for:

Six months' salary at $5,000.00 per month	= $30,000.00
Gratuity of 20% of salary drawn during the period of engagement ($80,000.00)	=$16,000.00
Balance of accrued leave (22 days)	=$ 6,300.00
	=$52,300.00

[59] We award interest on this sum at the rate of 5 per cent per annum[23] from 23 June 2013, the date of the judgment in the High Court, until payment. We award basic costs of

[23] As provided by section 7 of the Judgments Act Ch 4:70 of the Revised Laws of Dominica

$37,800.00, together with disbursements to be assessed by the Registrar, if not agreed by 14th December, 2018. We award prescribed costs of the claim, based on the sum now awarded, in the High Court and the Court of Appeal and leave undisturbed the award of costs of the counterclaim.

[60] Accordingly, the appeal is allowed and judgment in favour of the Appellant is to be entered in the High Court for damages, interest and costs, in the amounts determined.

JUDGMENT OF THE HONOURABLE MR. JUSTICE SAUNDERS, PRESIDENT

[61] I agree with the judgment delivered by Justice Barrow. But additionally, I wish to approach the case from an alternative perspective. The key question is What was Ms Warrington's employment status during the period following the expiry of her 2004 five-year contract? Counsel for the Board argued that the approval in writing of the Prime Minister was a "condition precedent" to her employment as Manager after the 31 December 2008; that such approval was never obtained; and that she therefore had no employment contract.

[62] The reality is that Ms Warrington continued to perform the functions of Manager for a period of 15 months after the expiry of her 2004 contract. If, as contended by the Board, the Prime Minister had not advised her appointment, would that mean that she had no employment status for those 15 months? Would it mean that the Corporation could simply dismiss her at will, with no notice, or with such notice as they unilaterally found convenient to their own interests? What exactly was her status during this period?

[63] In *Shrewsbury v Telford Hospital NHS Trust*,[24] Mrs Justice Slade noted that the true nature of the employment arrangement where a contract is *ultra vires* the putative employer is "a difficult question". Indeed, there is not a great deal of case law on the point. The parties referred us to the case of *Eastbourne Borough Council v Foster*.[25]

[64] In that case, a Council executive's contract was terminated for redundancy a year short of when the executive would have reached his 50th birthday and become eligible for an enhanced pension. In order to get him past his 50th birthday, the parties contrived to keep him in employment but the Council had no power to do so. When advised as to the *ultra vires* nature of the executive's "employment", the Council sought to reclaim amounts he had had been paid on the basis that his continued employment had been *ultra vires* and void. The Court of Appeal found that although the agreement was itself ultra vires, regard still had to be had to the realities of the situation. In the words of the court, at [32], "the conduct of the parties still exists in the real world and cannot be ignored for all purposes." Overruling the trial judge, the Court of Appeal found that the engagement during the relevant period was still one of employment.

[65] Law must be premised on principle and must also make sense. Notwithstanding the requirement that the Prime Minister should advise or approve the appointment of the manager, it would be unreal to suppose that, throughout the 15 months after the expiry of the 2004 contract, there was no employment arrangement in existence between Ms Warrington and the Board. Ms Warrington was dutifully carrying out the functions of the office and for this she was being paid. The Board was always fully aware of this. If either party desired to end that relationship, they were obliged to do so on notice.

[24] [2009] UKEAT/499/08
[25] [2002] ICR 234, CA

[66] It was quite inappropriate for the Board, unilaterally and belatedly, to seek to impose a one month notice period. Apart from its inappropriateness, that period was unreasonably short. What was a reasonable period? Given the status of the job Ms Warrington held, a six month notice period was reasonable and was the very least the Board could have afforded Ms Warrington. In all the circumstances, in any event, the judgment of the Court of Appeal should be set aside.

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ D. Barrow

The Hon Mme Justice D. Barrow