COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.12 OF 2006

BETWEEN:

NATIONAL COMMERCIAL BANK OF DOMINICA
MINISTER FOR FINANCE AND ECONOMIC PLANNING
ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

Appellant

and

JULIUS CORBETTE

Respondent

Before:

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| The Hon. Mr. Michael Gordon, QC | Justice of Appeal |
| The Hon. Mr. Denys Barrow, SC | Justice of Appeal |
| The Hon. Mr. Hugh Rawlins | Justice of Appeal |

Appearances:

Mr. Joffrey Harris SC and Ms Joelle Harris for the first Appellant
Mr. Anthony Astaphan SC and Ms. Heather Felix Evans for second and third Appellants
Mr. Marcel Commodore, Mr. Carden Clarke and Ms. Hazel Johnson for the Respondent

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2006: November 14;
2007: January 15

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JUDGMENT

[1] BARROW, J.A.: The respondent succeeded in the High Court against the first named appellant (the Bank) and the second named appellant (the minister) on his claim for damages for wrongful dismissal from his employment as general manager of the Bank. The judge held that the minister had not acted on behalf of the State and accordingly struck out the third named appellant as a party, he

having been made a party solely because proceedings against the State must be commenced in the name of the Attorney General.[1] As a result of an inquiry made by this court in a case management conference, counsel for the respondent acknowledged when the hearing began that there had been no proper basis for entering judgment against the minister (since the minister at all times acted solely as an organ of the Bank, much like a board of directors) and accepted that the judgment against the minister should be set aside. The appeal therefore proceeded with the Bank as the sole appellant.

[2] The Bank was a corporation created by the National Commercial Bank Act[2] (the Act) for the purposes, among others, of encouraging and fostering the development of agriculture, commerce, industry, tourism and housing in Dominica and to mobilise funds for the purpose of such development. The Act provided for the appointment of an eight member Board of Directors, the chairman of which was to be appointed by the minister, and for the appointment of a General Manager, who was also to be appointed by the minister. The Act provided that the business of the Bank was to be managed and conducted by the Board, the General Manager and other officers. The Act made the General Manager a member of the Board. All the powers of the Bank were vested in the Board and the Board was empowered to delegate to the General Manager such power as would enable him to carry out his functions as chief executive officer of the Bank.[3] The Act provided that the Board should keep the minister informed of the monetary and banking policy of the Bank and for the minister, after consultation with the General Manager, to give to the Bank directions of a general character as to the policy to be followed by the Bank in the exercise of its functions and for the Bank to give effect to any such directions.[4]

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[1] State Proceedings Act Chapter 7:80 section 14 (2) Laws of the Commonwealth of Dominica 1990
[2] Chapter 74:02 of the Revised Laws of Dominica. The Bank in fact ceased to exist as a result of the repeal of the Act that created it by the National Bank of Dominica Repeal Act No. 18 of 2003, effective 4th December 2003. The savings provisions of the repealing Act vested all assets, rights and liabilities of the Bank in a successor company, the National Bank of Dominica, incorporated under the Companies Act, No. 21 of 1994.
[3] Sections 41 and 42 of the Act
[4] Section 6 of the Act.

[3] By an agreement in writing dated 26th July 1998 the Bank, acting by the minister, appointed the respondent as its general manager for a term of five years commencing 1st July 1998. Clause 5 of the agreement contained the following provision for termination:

> "5. If the Person Engaged shall at anytime after the signing hereof neglect or refuse or from any cause other than ill-health not caused by his own conduct as provided in Clause 4 become unable to perform any of his duties or to comply with any instruction or direction, or shall disclose any information respecting matters of the Bank to any unauthorized person or shall be guilty of serious misconduct, the Bank may terminate his engagement forthwith and thereupon all rights and advantages reserved to him by this Agreement shall cease."

[4] The respondent, a national of Dominica, had been recruited from abroad. In early 2000, as a result of general elections, new persons were appointed both as minister and chairman of the Board, replacing those who were serving when the respondent was recruited in 1998. Most of the other members of the Board changed, as well. It was the respondent's case that his troubles began shortly after the new chairman was appointed. Differences developed between the Board and the respondent and the relationship deteriorated. Matters reached the point where in early April 2001 the chairman met unofficially with other directors, in the absence of the respondent, and advanced a case for terminating the engagement of the respondent. At a formal meeting of the board held on 6th April the other members of the Board communicated to the respondent their view that they should part ways and they and the respondent discussed the alternatives of termination or resignation. The respondent subsequently decided that he would not resign.

[5] Various players held various conversations and discussions after that board meeting and matters came to a head on 18th April when the Board met and decided to send to the minister a memorandum setting out their complaints against the respondent and recommending his termination. In turn the minister sent a

letter to the respondent requiring him to respond by the following day to the Board's allegations. The respondent got the minister to extend the time to respond, firstly, until 20th and then until 23rd April 2001, when he sent in his response.

[6] On 29th May the minister sent for the respondent and handed to him a letter, dated 29th May 2001, in which the minister stated he had given careful consideration to the respondent's letter defending himself against the allegations and recommendation made by the Board but that the minister did not accept that the respondent's response was a sufficient answer. As a result, the Minister stated,

> "… I hereby terminate your employment as General Manager of NCB with effect from May 29 2001, and in accordance with Clause 5 of your Employment Agreement, on grounds that you have consistently failed to satisfactorily perform duties related to your job, and comply with instructions and directions given you by the Board of Directors."

## The statements of case

[7] In his statement of claim[5] the respondent stated his understanding of the termination provision as being that

> "the Bank was entitled to summarily terminate the Claimant's appointment to the office of General Manager on grounds, including neglect, refusal or inability to perform "any" of his duties or failure to comply with "any instruction or direction".

The respondent stated[6] that from the date of his appointment until the month in which the Board decided to seek the termination his employment he received no notification whatsoever of concern from anyone as to his performance and that no official evaluation at all had been done of his performance.[7] No one had issued him a written warning as to any unsatisfactory performance on his part, the

[5] At paragraph 7 of the statement of claim
[6] At paragraph 9 of the statement of claim
[7] At paragraph 12

respondent stated.[8] He stated that during his tenure he performed his duties to the best of his ability and the Bank did exceptionally well under his tenure.[9]

[8] The Bank did not accept the respondent's statement as to the scope of the Bank's ability to terminate and instead stated[10] the position to be

> "… the Claimant's engagement could be summarily terminated, inter alia, for the neglect, refusal or inability from any cause … to perform any of his duties or neglect refusal or inability from any cause … to comply with any instruction or direction (and not only in the case of a "failure to comply" in the latter instance as alleged by the Claimant)."

[9] "There were express and/or implied terms of the contract", the Bank stated[11], that the respondent would at all times

> "(1) Perform his duties with reasonable care and skill; and/or
>
> "(2) Perform his duties with reasonable competence; and/or
>
> "(3) Comply with any instructions or directions of the Board …
>
> "(4) Not act in a manner which would destroy the relationship of mutual trust and confidence between himself and the Board … and the [Minister]."

No issue was taken in the course of the trial with that assertion.

[10] In its Defence the Bank repeatedly raised the issue of the respondent's performance and competence. The Bank denied the respondent's claim that he was never notified of concerns about his performance and stated[12] that the Board of Directors and individual directors "frequently expressed their concern to and in the presence of the Claimant of the unsatisfactory performance of his duties." The Bank contended[13] that during the period August 2000 to April 2001 the respondent's performance had "proved unsatisfactory in that he consistently

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[8] At paragraph 13
[9] At paragraph 14
[10] At paragraph 5 of the Bank's Defence (hereafter the Defence).
[11] At paragraph 7 of the Defence
[12] At paragraph 8 of the Defence
[13] ibid

demonstrated inadequate skills" and in addition "the Claimant regularly failed to comply with general and specific instructions from the Board".

[11] The Bank stated: "As a result of the Claimant's consistent unsatisfactory performance of his duties, the Board of Directors of the [Bank] as well as the [Minister] (to whom a copy of all Board Minutes are sent), began to lose, and lost all confidence in the ability of the Claimant to properly and satisfactorily manage the affairs of the [Bank]."[14]

[12] In support of its claim that the claimant was in breach of the express and/or implied terms of his contract of employment the Bank set out 14 items or particulars of such breach. The Bank claimed[15] these particulars and other specified material constituted more than adequate grounds to warrant the claimant's dismissal. The Bank stated that as a member of the Board the claimant was fully aware of the Board's dissatisfaction with his performance.[16] The Bank also claimed "the relationship between the board and the Claimant began to deteriorate because of the poor quality of the Claimant's work and his failure and/or inability to comply with the suggestions instructions recommendations decisions or advice given by the Board."[17] Further, the Bank claimed that it warned the claimant "of his unsatisfactory performance and conduct on his part in the said office"[18] and that the respondent's performance was still unsatisfactory notwithstanding his assertion that he performed to the best of his ability.[19] The Bank also stated "that every member of the Board had the opportunity to and did independently observe and appraise the level of performance of the Claimant and individually became dissatisfied with his levels of performance."[20]

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[14] At paragraph 9 of the Defence.
[15] At paragraph 11 of the Defence
[16] At paragraph 12.
[17] At paragraph 15 of the Defence.
[18] At paragraph 19.
[19] At paragraph 20
[20] At paragraph 21.

[13] The Bank stated[21] that at a board meeting on 6th April 2001 at which the respondent was present the respondent was informed that it was the consensus of the Board that the respondent's performance was unsatisfactory and "in the light of the deteriorating relationship between the Board and [the respondent], it would be in the interest of all concerned that the relationship be amicably terminated."

[14] The concluding statement in the Defence[22] is that

> "the Claimant's employment was properly and lawfully terminated in accordance with clause 5 of his contract of employment and / or for breach of the several implied terms of the contract of employment. There was an abundance of evidence which shows that the Claimant neglected to perform and/or refused to perform and/or was incapable of performing his duties as Chief Executive Officer of [the Bank] competently and that he neglected to and/or refused to and/or was incapable of complying with several instructions directions, recommendations and advice of the Board of Directors."

## The issues that were fought

[15] The written submissions that the parties relied on in the High court proceedings show it was never disputed that the contract was terminable for failure and inability to satisfactorily perform and to comply with instructions and directions. The submissions of the respondent clearly revealed an appreciation that the case for the Bank was that the respondent "demonstrated a lack of reasonable care and skill and or competence in the performance of his duties … and that he regularly failed to comply with the instructions or directions of the Board."[23]

[16] The submissions that the Bank made in the court below (and expanded on appeal) were that the respondent failed to perform and comply with instructions and

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[21] At paragraph 23.
[22] At paragraph 29.
[23] Paragraph 18 of counsel's submissions on behalf of the claimant.

directions as well as that he was unable to perform as directed and hence incompetent. The respondent never disputed the Bank's case that competence was an implied term of the contract of employment and, in fact, the respondent joined issue on the fact of competence. That stance was confirmed in the submissions of the respondent on appeal.[24] Forensically, it did not seem to matter to the parties that competence was not stated in the minister's letter of termination[25] as a ground for termination. I agree with this common position of the parties that it made no practical difference whether the alleged failures, if they in fact occurred, resulted from incompetence or otherwise. As was stated long ago[26], "… there is no material difference between a servant who will not and a servant who cannot, perform the duty for which he was hired."

[17] The case for the respondent was that the evidence did not support the Bank's contention of non-performance. That was also the respondent's response to the Bank's contention that as a result of the respondent's unsatisfactory performance the operations of the Bank were negatively impacted and the Board began to lose and lost all confidence in the ability of the respondent to properly and satisfactorily manage the affairs of the Bank.[27]

[18] In the court below the principle of law upon which counsel for the respondent focussed was that for summary dismissal to be justified there had to be gross misconduct on the part of an employee such as to amount to a repudiation of the contract of employment. Alternatively, counsel for the respondent submitted the misconduct had to be seen as so undermining the trust and confidence that are the foundation of the contract of employment that the employer should no longer be required to retain the employee.[28] Counsel summarized the reasoning in a number of decisions that went to support his main proposition as to misconduct

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[24] At paragraphs 34, 35 and 40 of Submissions on behalf of the respondent.
[25] See paragraph [6], above.
[26] Per Willes J in Harmer v Cornelius (1858) 141 ER 93 at 94
[27] Paragraph 19 of counsel's submissions on behalf of the claimant.
[28] Paragraphs 49 to 52 of counsel's submissions on behalf of the claimant.

and reiterated that the matters of which the bank complained did not reach that level.

[19] I am constrained to observe at this juncture that the submission of the respondent on gross misconduct was so much smoke. Misconduct was not the reason that the minister gave for dismissal and the Bank did not seek to justify dismissal by reference to misconduct. The reason the minister gave for dismissal, to repeat, was failure to satisfactorily perform and failure to comply with instructions and directions. The respondent's submissions on misconduct were significantly irrelevant and may well have misled the judge in his identification of issues to determine.

## The rationale of the judge's decision

[20] Early in the judgment the judge referred to the "allegations and recommendations" contained in the letter of 18th April 2001 that the Board sent to the minister and purported to reproduce them verbatim in the judgment. In fact what the judge reproduced were the fourteen Particulars of the allegation of breach of contract by the respondent made by the Bank in paragraph 10 of its Defence. The letter and the Particulars were significantly different documents; as counsel for the Bank noted in their written submissions, the Particulars were two pages long whereas the letter was seven pages long. The former was a summary of facts while the latter was a detailed statement of facts with supporting evidence, arguments and conclusions. In the fourteenth Particular the Bank stated that it would rely on all particulars set out in "the Memorandum dated the 18th day of April 2001 sent to the Claimant by the second Defendant."[29] Totally confusing the Particulars of the Defence with the memorandum or the letter of 18th April 2001 the judge declared

> "It is beyond my understanding how item 14 became a ground for dismissal since it was obviously concocted after the action was filed; for,

[29] This was a memorandum that the chairman sent to all members of the Board of Directors. It was slightly modified to form the contents of the letter of 18th April 2001 that the Board sent to the minister.

at the time the recommendations were sent to the Minister, there could have been no Claimant and no defendants. This in itself raises much suspicion about the genuineness of the other grounds."

[21] It was a significant error that the judge made very early in his judgment because the effect of this error was to make him conclude that the Board had "*concocted"* one ground of dismissal and view with "*much suspicion*" the genuineness of the other grounds. It follows that the judge viewed, from the outset, the entire case for the Bank with much suspicion because the entire case for the Bank was the genuineness of its grounds for termination. This error clearly gave rise to the submissions of counsel for the Bank that the "judge did not read or properly read or consider or properly consider the documentary evidence", that he did not consider or properly consider the oral evidence and its relationship to the undisputed documentary evidence and that the judge "misdirected himself and/or prejudiced his mind against the evidence" for the Bank "and therefore deprived himself [of] the opportunity to judiciously consider the evidence properly before him." Counsel submitted that this error was fundamental, because it formed the primary basis upon which the judge considered the genuineness of the grounds for dismissal, and that to correct the error this court should set aside the judge's finding of wrongful dismissal. It is a submission to bear in mind in examining the judge's consideration of the grounds for termination. The response of counsel for the respondent was that the judge read the letter and memorandum and recognised that the Particulars represented "the core' of the Bank's case. This simply does not appear from anything the judge said but even if he did he certainly confused the Particulars for the letter.

[22] After reproducing the Particulars the judge reproduced in full the forty-seven or so paragraph letter of 23rd April 2001 that the respondent wrote in his own defence to the letter of 18th April 2001 that the Board had sent to the minister. The judge reviewed the evidence from the respondent that he had performed very well in

post and stated[30] that he "particularly note[d] that no factual evidence was called by the Defence to dispute the Claimant's evidence as to the performance of the Bank under his management." The judge repeated the observation that the respondent had not been contradicted on his evidence that he had performed well.

[23] The judge referred to the change of Government and the appointment of a new minister and a new chairman and traced the deterioration of the relationship between the respondent and the chairman. The judge examined a number of transactions on which the respondent relied, as part of his litigation strategy, to show the root of the differences between the respondent and the chairman and that what was really wrong at the Bank was that it had a chairman who was guilty of improper conduct in relation to the duties that the chairman owed to the Bank. The judge accepted that to be the case. Thus, in relation to one transaction the judge said, "I must confess that I find the actions of the Chairman to be quite unorthodox and even unethical and I do not fault the Claimant for expressing his resentment."[31] No other aspect of the case was given as much attention in the judgment as the judge's examination of the transactions (although the reproduction of the respondent's letter in defence of himself occupied more space).

[24] None of the three witnesses called for the Bank earned a favourable review from the judge. One of the three was the minister and the judge's brief review of the minister's evidence dealt solely with the complaints the respondent made to him about the chairman and the minister's dismissal of those complaints out of hand. The judge's verdict on the minister was:

> "[39] After considering the evidence of the Minister and his demeanour when he gave evidence, I concluded that he had no intention of giving favourable consideration to any complaint made to him by the General Manager. Throughout his evidence given under cross-examination he

[30] At paragraph [18] of the Judgment
[31] At paragraph [36] of the Judgment

either could not recall anything that the General manager told him or if he did remember, he had only a vague recollection of it. …

[40] The Board, in its recommendations to the Minister for the dismissal of the General Manager, engaged for the most part in broad generalizations. Whenever there were attempts at specific allegations, they were often biased and garbled. They were reproduced earlier and were all explained by the Claimant in his evidence and had the Minister paid attention to what the Claimant was trying to tell him this case might not have come before the Court."

[25] Nearing the conclusion of the judgment the judge described the respondent's performance as "nothing short of outstanding"[32] and said of the respondent:

> "He made valiant attempts to cure the ills he found when he assumed duty as General Manager such as low staff morale and the problems articulated by the Eastern Caribbean Central Bank (ECCB). He was confronted with a Board Chairman who, from the start, behaved as though he had a mandate to get rid of him and, over a period of time, compiled a list of what he thought amounted to enough transgressions that would give cause for dismissal. Here was a Board Chairman who clearly wielded great influence over his Board and in the words of Edmund Davies LJ in the case of Wilson v Racher … "would use every barrel in the gun he could find, or thought available, … who was provocative from the onset and dealt with the Claimant in a (sic) unseemly manner."[33]

[26] The judge rested his decision on the footing that

> "for the claimant to merit dismissal he would have to be so inefficient and his failure to carry out instructions would have to be such, as to amount to a repudiation of his contract of employment. A case in point is Pepper v Webb [1969] 1 WLR 514. In that case when the Plaintiff, who had a

[32] Judgment, paragraph [52]
[33] ibid

history of inefficiency was asked what arrangements he had made in relation to a greenhouse during his absence during the week-end. The Plaintiff replied: "I couldn't care less about your bloody greenhouse or your sodding garden" and walked away. The plaintiff's job was that of a gardener and Harman LJ at pg 517 said:

> "Now what will justify an instant dismissal? Something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract; and in my judgment if ever there was ever such a repudiation, this is it."[34]

[27] Returning to the respondent's performance the judge concluded his decision thus:

> "This is not the work of an inefficient employee or of someone whose behaviour constitutes a repudiation of his contract of employment. It is the work of a dedicated servant and the Court cannot allow him to suffer wrong. There is nothing, in my view, to merit dismissal. In the circumstances, I find that the dismissal of the Claimant was wrongful and amounted to a breach of contract." [35]

## Performance, compliance and competence

[28] Mr. Joffrey Harris S.C., counsel for the appellant, submitted that the judge went badly wrong on the issue of competence. Competence is to be determined according to the subjective judgment of the employer and not the judgment of the court, as is stated in the following passage from David Lashley & Partners Inc v Bayley[36]:

> "If an employee is dismissed because of his incapability, the correct test to apply is whether the employer honestly and reasonably held the belief that the employee was not competent, and whether there are reasonable grounds for that belief. It is not necessary for the employer to prove that

[34] At paragraph [53] of the Judgment
[35] At paragraph [54] of the Judgment
[36] (1992) XXX WIR 44 at pg 46 paragraph H

the employee was incompetent. … in other words, the test … is a subjective one… It is sufficient if the employer honestly believes on reasonable grounds that the employee is incompetent."

[29] In Cook v Thomas Linnell & Sons Ltd[37] it was stated:

"When responsible employers have genuinely come to the conclusion over a reasonable period of time that a manager is incompetent we think it is some evidence that he is incompetent. When one is dealing with routine operations which may be more precisely assessed there is no real problem. It is more difficult when one is dealing with such imponderables as the quality of management, which in the last resort can only be judged by those competent in the field. In such cases as this there may be two extremes. At one extreme is the case where it can be demonstrated, perhaps by reason of some calamitous performance, that the manager is incompetent. The other extreme is the case where no more can be said than that in the opinion of the employer the manager is incompetent, that opinion being expressed for the first time shortly before his dismissal. In between will be cases such as the present where it can be established that throughout the period of employment concerned the employers had progressively growing doubts about the ability of the manager to perform his task satisfactorily. If that can be shown, it is in our judgment some evidence of his incapacity."

[30] Mr. Harris also relied on the Australian case of Connolly v The Labour Daily Ltd[38] in which the appellate court decided that unsatisfactory performance was to be considered by reference to the subjective decision according to the mind of the employer and not the mind of the court or the jury or the reasonable man. The test, it was stated, was whether the employer had formed its view honestly or whether it

[37] [1977] ICR 770 at 774
[38] (1925) 25 SRNSW 398

had acted capriciously and in bad faith in dismissing the plaintiff. Reasonableness was said to be relevant only to the extent that

> "if it can be said that a reasonable man could not honestly have come to the conclusion then a ground for saying he came to the conclusion dishonestly is made out. But if you admit that a reasonable man could come to the conclusion, the only question is did he in fact, and the decision is for him and not for the jury."[39]

[31] Notwithstanding my earlier recognition that the minister did not rely on incompetence as a ground for termination, I have relied on cases dealing with competence because I see the principle that they state as fully applicable to a consideration of the grounds for termination stated in the instant contract: neglect, refusal or inability to perform or comply with instructions and directions. It seems to me, as a matter of reasoning, that if competence must be judged by the opinion of the decision maker – honestly and reasonably formed – then so must performance and compliance, both of which subsume the requirement of competence. This view is confirmed by the Connolly case in which the issue was 'satisfactory performance' and the court applied the same principle that is applied when the issue is competence: that it was for the employer to decide if performance was satisfactory. Satisfactory performance or compliance cannot be a matter for the court to judge because, as was stated in Re Ahmad and Appeal Board Established by the Public Services Commission[40], the law lays down no standards of performance or compliance by which a test can be applied; performance and compliance must be matters for the opinion of those under whom an employee works.

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[39] At p. 403 quoting from the judgment in Diggle v The Ogston Motor Company 112 L.T. 1029 at 1032.
[40] 51 DLR 470 at 472; see paragraph 45, below.

## The minister's decision making

[32] Having persuaded the court below that what was wrong at the Bank was the conduct of the chairman rather than the respondent, counsel for the respondent submitted to this court that the allegations and recommendation that emerged from the chairman were the product of the chairman's hostility and unfairness to the respondent so that any decision based on those allegations and recommendations was tainted by the chairman's unfairness and bias. The respondent and his counsel succeeded in persuading the judge that "the Chairman presided over a very weak Board of Directors that did not challenge his ethics or behaviour"[41] and therefore their number and individual opinions had no effect on what were in reality the chairman's allegations and recommendation. The respondent had submitted, and repeated the submission on appeal, that the minister was biased and relied exclusively on material coming from the chairman "while completely ignoring or dismissing" material coming from the respondent.[42] As noted earlier, the judge found the minister was totally unprepared to heed complaints about the chairman.[43]

[33] An examination of the judgment shows the judge did not mention and accordingly gave no weight to how the Minister dealt with the whole issue of terminating the respondent's engagement from the time the matter was raised with the minister in early April 2001 until the Minister made the decision on 29th May 2001. In fact the judge concluded, "The chairman clearly succeeded in getting the Board to see matters his way and it was only a short step to having the Minister sign the letter of dismissal."[44] The finding that the minister simply took the "short step" of signing the letter of dismissal ignored a significant body of evidence.

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[41] Paragraph [30] of the Judgment
[42] Paragraph 56. 2. of the Claimant's Submissions, record of Appeal, Bundle II, at p 199
[43] See paragraphs [39] and [40] of the Judgment.
[44] Paragraph [48] of the Judgment.

[34] Beginning with when the minister learned in early April 2001 that the Board was heading towards recommending that he terminate the employment of the respondent and continuing until well after he received the letter of 18th April from the Board, the minister took a number of steps to deal with the situation as it was unfolding and gave significant consideration to the decision he was being asked to take. Among other things, on 5th April 2001 the minister met with the respondent, at the latter's request, and the respondent informed the minister of the impending Board meeting of 6th April 2001 at which the respondent's termination would be discussed. The minister suggested to the respondent that the respondent should speak with the Prime Minister and gave the respondent the home and cellular telephone numbers of the Prime Minister. At 10:30 that night the minister called the respondent to tell the respondent that the minister had spoken to all the directors save one and that they all supported the respondent's termination and the minister suggested to the respondent that he should not attend the meeting the following day and that it would be better for him to resign.

[35] On 6th April, after the Board meeting, the respondent met with the minister at the minister's invitation to discuss the issues raised at the Board meeting. The respondent's evidence was that the minister told him that the minister "had received the Chairman's version but wanted to hear mine." The respondent was able to put the merits of his case to the minister.

[36] At the end of that meeting the minister agreed to meet with the respondent and his counsel after the respondent had the weekend to consider his position. The minister again met with the respondent on 10th April but without his counsel, who was out of state. The respondent told the minister he would not be resigning and repeated his position "explaining the Bank's strong performance, its reputation, standing in the community, my relationship with the staff and the community and

several other positive reasons why my contract should not be terminated or why I should not resign."[45]

[37] On 18th April after the Board had met and sent the letter of that date to the minister recommending the respondent's dismissal the minister called the respondent to forewarn him of a letter that he was then writing to the respondent and they agreed on the time for the respondent to respond.

[38] On 23rd April the minister met with the respondent and, according to the minister's testimony, "We discussed the letter of recommendation from the Board as well as his response and his options. We went through the allegations in detail. Similarly I went through his response in detail. It was a very open and cordial discussion."

[39] The minister also testified that he sought advice almost immediately after he received the letter of 18th April. He met with the Attorney General and got his written advice on how to proceed. The minister also relied on the opinion of senior counsel. In addition, the minister stated he discussed the matter of termination with his colleagues in the Cabinet of the government of the country and with the Prime Minister.

[40] It was not until nearly six weeks after the minister received the recommendation from the Board that he made his decision. Indeed, the respondent and his counsel have criticized the Minister for taking as long as he did to reach a decision. The judge simply ignored this material.

[41] More fundamental, perhaps, was the short shrift the judge gave to the material advanced by the Board in its letter of 18th April, upon which the minister was asked to act. In essence, these were the grounds for termination. An examination of the judgment shows that the only consideration that the judge gave to this material is

[45] Paragraph 49 claimant's witness statement, Record of Appeal, Bundle II, p. 280

contained in his paragraph [40] that formed part of the judge's three-paragraph treatment of the minister's evidence, earlier reproduced in this judgment.[46] In that paragraph the judge dismissed the allegations against the respondent as "broad generalisations" which, "whenever there were attempts at specific allegations, … were often biased and garbled." He made no other assessment of the allegations[47] and, it bears repeating, these allegations were the material upon which the minister acted and which formed the grounds for termination.

## Appreciation of the weight to be given to the minister's decision

[42] Had the judge considered the material that comprised the allegations against the respondent and the minister's consideration of this material perhaps he would have seen as irrelevant to the issue of the respondent's dismissal the manner in which the Minister responded to complaints that *the respondent made against the chairman* of the board. Perhaps the judge would have avoided the further irrelevancy of concluding that the Minister "had no intention of giving favourable consideration to any complaint made to him by the General manager"[48] and that "had the Minister paid attention to what the Claimant was trying to tell him this case might not have come before the Court."[49] The clear implication of that last statement by the judge is that the minister should have done something about the chairman rather than the respondent.

[43] The steps the minister took before arriving at his decision make untenable the suggestion that the minister simply rubber-stamped the decision of the chairman. Moreover, during the period between assuming the portfolio and receiving the Board's recommendation the minister had been reading board minutes and had been "in regular communication"[50] with the respondent in relation to the

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[46] At paragraph [24], above.
[47] The submission for the Bank is that the judge did not even look at the allegations but instead looked at the particulars; see paragraph [20], above
[48] Judgment, paragraph [40].
[49] Judgment, paragraph [41].
[50] Oral evidence of minister, Record of Appeal Bundle II, p 403

respondent's management of the Bank. In fact the Minister had reached the point, before the Board made its recommendation, of warning the respondent about his performance.

[44] This is what the minister said in his witness statement[51] and although the testimony was challenged in cross-examination[52] the respondent's closing submissions[53] seemed to have accepted the truth of the evidence:

> "In a number of meetings I had with the Claimant between mid 2000 and early 2001, I discussed the [memoranda, correspondence and minutes of the Board] and informed him of my concerns relating to his ability to properly manage the Bank and his deteriorating relationship with the Board of Directors of the [Bank]. *I also informed the Claimant that unless there was a significant improvement, I would have to consider whether or not he should remain as General Manager.* The Claimant clearly understood what I said to him and offered to work on his performance and relationship with the Board." (Emphasis added)

It is, therefore, distinctly not the case that the minister was simply a figurehead that the chairman managed if not manipulated. The minister was in a position to form and did form an independent opinion for himself of the performance and compliance of the respondent.

[45] In the course of the High Court proceedings the respondent withdrew the allegation he had made against the Minister of misfeasance in public office. The respondent also withdrew the allegation of bad faith on the part of the minister.[54] As a result, there was no allegation that the minister acted other than honestly. His opinion ought therefore to have been given the weight and value that the case law stipulates. I think there is more than slight force in the observation of Mr. Harris, based on the reasoning in the Canadian case of Re Ahmad and Appeal Board

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[51] At paragraph 10, record of Appeal, Bundle II, p 317
[52] At p. 413, Record of Appeal, Bundle II
[53] Paragraph 63, Record of Appeal, Bundle I, p 202
[54] See paragraph 39, Submissions on Behalf of Respondent, on appeal.

Established by the Public Services Commission[55], that absent bad faith the respondent cannot succeed in his claim of wrongful dismissal. In that case Jackett CJ stated:

> ”in the absence of arbitrary standards laid down by law, competence or incompetence is not something that can, or must , be determined, as a matter of law, by application of a rule. *Whether or not a person is competent or incompetent for a post is a matter of opinion*, and, in the absence of any special direction, all that the law can imply with regard thereto is that it must be honestly formed, and that it must, in the first instance at least, be based upon the observation, *by those under whom he works, of the manner in which the person whose competence is in question carries out his duties*. In particular circumstances, rough and ready rules of thumb may be adopted by such persons as an aid to the formation of the required opinion; but, in my view, in the absence of
>
> (a) some failure to apply properly some specific statutory or other legal direction, or
>
> (b) proof of bad faith on the part of those whose observations and judgments are in question,
>
> a board of review established under s. 31 would not be justified in deciding that a deputy head’s recommendation should not be acted upon unless it had before it material that satisfied it, as a matter of fact, that the deputy head was wrong in forming the opinion that the person in question was ‘incompetent in performing the duties of the position he occupies.” (Emphasis added).

[46] The judge’s exercise of determining whom to believe as between the respondent versus the chairman and the Board regarding the causes for the differences between them was the wrong exercise. It was also the wrong exercise for the judge to decide on the respondent’s performance. The judge’s views on those and on a number of other matters including the asserted stellar performance of the

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[55] 51 D.L.R. 470 at 472

Bank under the respondent's management, the conduct of the chairman in relation to the transactions that the judge examined, and the minister's response to complaints about the chairman are all substantially immaterial and do not even call for discussion. The correct exercise was the one the judge did not conduct, namely, to consider whether the minister honestly, and on reasonable grounds, formed the opinion that the respondent failed or neglected or was unable to perform his duties and comply with directions and instructions. By considering the wrong questions and failing to consider the correct question the judge misdirected himself in law and, in my view, his decision cannot stand but must be set aside.

## Reasonableness of the conclusion of non-performance and non-compliance

[47] I would not remit the case to the High Court, however, because this court is in a good enough position to make the decision that the judge was called upon to make. Since there was no challenge to the honesty of the minister's decision, the issue to decide is the reasonableness of the minister's decision. That is really a question of the sufficiency of the evidence and that evidence, it seems to me, was largely documentary.

[48] The allegations of non-performance and non-compliance, stated in the letter of 18th April 2001, find original and fuller expression in the various minutes and memoranda. I would adopt as fair the summary of this material contained in the submissions on behalf of the Bank.[56] In essence the Bank submitted that the respondent repeatedly failed to provide the Board with his own recommendations, which the Board required, on loan applications approved by the credit department and on which the Board had to decide; many of his reports were considered by the Board to be inadequate; demands by the Board and requests for information were often not met by the respondent; instructions or directions from the Board were not understood or were not followed by the Respondent and in instances these related to significant matters such as obtaining a legal opinion or releasing loan funds

[56] At paragraph192

before pre-conditions were satisfied; presenting loan documents to the Board in a misleading manner even after having been previously corrected; and failing to execute assignments such as the Government's debt restructuring.

[49] It does not matter whether this court would regard these as serious complaints. What matters is that the minister regarded them as serious complaints and, in my view, this court has no basis for saying that no reasonable man could have regarded the complaints as serious. It was not until the minister had fully considered the representations that he received from the respondent and had taken advice that the minister made his decision. The minister's decision is made all the more unassailable by the evidence of the minister, set out above, that he had separately formed the opinion that the respondent was not performing and was not complying with directions and instructions of the Board. Incidentally, that evidence proves that the respondent's assertion in his statement of claim[57] that he had never been told by anyone that his performance was unsatisfactory was simply not true.

## The counter notice

[50] The contention was advanced by way of counter notice that the respondent was prejudiced by the limited time in which the respondent was called upon to respond to the allegations and recommendations made against him. As noted, the respondent fully responded to the allegations in writing and he was able to do so with the assistance of counsel. Thereafter, the respondent was able to sit down with the minister and discuss both the allegations against him and his defence and according to the respondent's own evidence the respondent availed himself of the opportunity to expand on what he wrote.. Further, the respondent never complained of insufficiency of time after he got two extensions of time within which to respond. There was never any evidence of prejudice in fact, as opposed to the mere, belated argument of prejudice. Therefore, I do not accept the submission of

[57] See paragraph 7, above.

counsel for the respondent that the respondent was adversely affected by the limit on the time within which he was required to respond and I would dismiss the counter notice.

## Reasonableness of the decision to dismiss

[51] As is shown by the history of this matter, including the fact that the minister expressly warned the respondent that he needed to improve his performance if he was to retain his employment and the respondent promised to improve, this was not a case of precipitate termination. The respondent maintained to the end that there was no cause for terminating his engagement or for him to resign. It was a view to which, of course, he was entitled but it does not matter whether or not he was right in his view of the merits. At the point when the Board decided to recommend the respondent's termination on grounds that were at least capable of succeeding his engagement became untenable. It is a pity the respondent and the Bank failed to achieve termination by agreement.

[52] For the reasons given I would allow the appeal, set aside the judgment in the court below and enter judgment dismissing the respondent's claim against all defendants for damages for wrongful dismissal. I would award prescribed costs to the Bank and the minister in the court below and to the Bank in this court. There was no appeal by the Attorney General against the absence of an order for costs in his favour. I would calculate costs on the basis that the value of the respondent's claim is $665,800.00, the sum stated in the Particulars of Loss and Damage. I calculate those costs at $79,790.00 in the court below and $53,193.33 in this court.

[53] I would commend Mr. Astaphan S.C., counsel for the minister and the Attorney General, for his very proper conduct in not asking for costs consequent upon the respondent's concession that judgment ought not to have been entered against the minister since, as counsel stated, none of the parties had adverted to the point until this court directed attention to it. I would thank counsel for both parties to the appeal for their assistance and pay particular tribute to Mr. Harris S.C. and Ms. Harris for the very comprehensive written submissions with which they assisted the court.

Denys Barrow, SC
Justice of Appeal

I concur

Michael Gordon, QC
Justice of Appeal

I concur

Hugh A. Rawlins
Justice of Appeal