

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. S-430 OF 2003

BETWEEN

SEEBALACK SINGH

Applicant

AND

THE AGRICULTURAL DEVELOPMENT BANK

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE A. TIWARY-REDDY

Appearances:

A. Ramlogan led by Dr. F. Ramsahoye S.C. for the Applicant

E. Prescott and P. Lamont for the Respondent

K. Ramkissoon led by Dr. Denbow S.C. (Absent) for the Proposed Interveners

JUDGMENT

INTRODUCTION

1. By Notice of Motion filed on 24.3.03, pursuant to leave granted on 19.3.03 the Applicant sought the following:

- (a) A declaration that the termination by the Respondent Bank of the Applicant's employment contract by letter dated 23rd day of January, 2003 for alleged misconduct on the grounds set out therein is illegal and ultra vires the powers of the Respondent Bank established by

Parliament pursuant to the Agricultural Development Bank Act Chapter 79:07 of the Laws of Trinidad and Tobago.

- (b) An order of certiorari to remove into this Honourable Court and quash the decision of the Respondent Bank to terminate the Applicant's contract of employment for alleged misconduct on the grounds set out in a letter dated 23rd day of January, 2003;
- (c) Alternatively, an order setting aside the decision to exercise a power of termination and/or dismissal against the Applicant for misconduct;
- (d) Damages including aggravated and/or exemplary damages.

GROUND

2. The Applicant's employment as Chief Executive Officer (CEO) was terminated by letter dated 23.1.03 for neglect of duties in that he:

- (1) Failed to implement the decision of the Board to invest \$4.5m in CLICO Group Advanced Protection Contract;
- (2) Misrepresented (or caused to be misrepresented) the Bank's instructions when he sought a legal opinion by letter dated 23rd day of October, 2002;
- (3) Distributed private and confidential Bank information by letter dated 23rd day of October, 2002 and thereby seriously compromised the Bank.

3. The Applicant contended:

- 1. That the decision to terminate his employment was illegal and ultra vires the Respondent's powers under the Agricultural Development Bank Act as amended.
- 2. The Respondent had no authority to compel the Applicant to deal with funds under the control of the Respondent contrary to the

Respondent's powers under the Act or in a manner in conflict with the policy of the Act.

3. The Respondent had no authority to dismiss the Applicant for his failure or refusal to engage in illegal or ultra vires action or for his failure and/or refusal to commit a mis-demeanour.
4. The conduct of the Respondent was illegal and oppressive in the circumstances.
5. The Applicant was deprived of employment and the benefits incidental thereto without due process of law.
6. The decision to terminate the Applicant's employment was unreasonable, irregular and the result of an improper exercise of the Respondent's discretion.
7. The said decision of the Respondent was actuated by bad faith and/or for the improper purpose of placing an illegal and ultra vires investment of \$4.5million with Colonial Life Insurance Co. Ltd (CLICO).
8. The said decision to terminate the Applicant was the result of the exercise of a power in a manner that was so unreasonable that no reasonable Board could have so exercised that power.

INTERLOCUTORY APPLICATIONS

4. After hearing submissions from both sides, on 24.3.04 this Court refused the Respondent's application to set aside the grant of leave to file for judicial review. That decision is the subject of a separate judgment.

5. In that judgment this Court held that the Board was exercising functions of a public nature when it hired the Applicant and that the Board was exercising a public law

function when it terminated the Applicant's employment for failing to implement the Board's decision to place an investment with CLICO.

6. By Notice filed on 14.4.03 Messrs. Hubert Alleyne (Alleyne), Keith Paul (Paul), Jacqueline Rawlins (Rawlins) and Sati Jagmohan (Jagmohan) sought to be heard in opposition to the Applicant's Notice of Motion filed on 24.3.03. On 8.4.04 this Court dismissed the said Notice and subsequently gave written reasons for the decision. This decision was upheld by the Court of Appeal on 12.12.05.

EVIDENCE

7. The evidence consisted of two affidavits of the Applicant filed on 24.3.03 and 25.6.04 respectively and one of Alleyne, the Chairman of the Respondent's Board, filed on 25.6.04. Both deponents were cross-examined at length.

8. On 5.7.04 the Applicant withdrew his application to use the affidavit of Feona Lue Ping Wa (Lue Ping Wa), the Respondent's Corporate Manager, Finance filed on 25.6.04. On 15.10.04 the Court refused to permit the Respondent to use the affidavit of Jagmohan filed on 14.10.04.

9. Alleyne was the Chairman of the Respondent's Board for two periods, from 1998 to 2000 and from June 2002 to October 2003. It is to be noted that a new Board was appointed in June 2002.

10. The Applicant a national scholarship winner (1971), holds a BSc degree in agricultural economics and an MSc degree in agri-business management and economics from U.W.I. He was granted a special fellowship from the Dutch Government as well as the Cochran/USDA fellowship from the US government to pursue post graduate studies. He has held several professional positions both locally and abroad.

11. By letter dated 6.6.01 the Applicant was employed as the Respondent's CEO for one year with effect from 6.6.01. And by letter dated 11.11.2002 the Applicant's contract

was renewed for a period of two years commencing 2.7.02 with an option to renew at the Respondent's discretion.

12. Clause 12 of the letter of 11.11.02 provided that the Applicant's employment may be terminated by either party upon one month's notice in writing or:

“b. if the employee is found guilty of any mis-conduct or neglect of his duties or breach of the stipulations on his part, the Bank retains the right to terminate the service of the employee forthwith and without any notice or payment in lieu of notice.”

STATUTORY PROVISIONS

13. The Agricultural Development Bank Act Ch. 79:07 (the ADB Act) provides for the establishment and incorporation of an Agricultural Development Bank (the ADB) and defines the powers and duties of the ADB. And the ADB Act was itself amended by the Agricultural Development Bank (Amendment) Act 1995 (THE ACT).

THE ACT

Section 6

The objects of the Bank shall be to encourage and foster the development of agriculture and commercial fishing and industries connected therewith and to mobilize funds for the purpose of the development.

Section 9.

- (1) The Bank shall be managed by a Board comprising seven directors who shall be appointed by the Minister.**
- (2) At least four of the seven directors shall be selected from among persons who are qualified by reason of their experience and capacity in matters relating to agriculture, fisheries, finance, economics, accountancy, industry, commerce, law or administration.**

- (3) Subject to this Act, a director shall be appointed for a term not exceeding three years and shall be eligible for reappointment.

Section 14

- (1) There shall be a Managing Director who shall be the Chief Executive Officer of the Bank.
- (2) The Managing Director shall be an ex officio director of the Board.
- (3) The Managing Director shall attend Board Meetings but shall not vote.
- (4) The Managing Director shall be charged with the day-to-day administration and control of the business of the Bank and shall have authority to act in the conduct of the business of the Bank in all matters which are not by this Act or by any rules or regulations made hereunder specifically reserved to be done by the Board.
- (5) The Managing Director shall be answerable to the Board for his acts and decisions.
- (6) The Managing Director shall be appointed by the Board on such terms and conditions and for such period as may be designated in the instrument appointing him.
- (7) The person holding the office of General Manager shall, on the coming into operation of this Act be deemed to be appointed by the Board as Managing Director until his present term of office as General Manager expires.
- (8) No person who is a director of the Board, or is a member of Parliament or of a Municipal Corporation, or of the Tobago House of Assembly, shall be appointed Managing Director.

Section 16

- (1) **The Authority may terminate any appointment made by the Authority in pursuance to this Act to the office of Managing Director or director of the Bank, if the Managing Director or a director so appointed –**
- (a) **becomes of unsound mind or incapable of carrying out his duties;**
 - (b) **is convicted and sentenced to a term of imprisonment;**
 - (c) **becomes bankrupt or compounds with, or suspends payment to, his creditors;**
 - (d) **is convicted of any offence involving dishonesty;**
 - (e) **is guilty of misconduct in relation to his duties;**
 - (f) **is absent, except on leave granted by the Board, from two consecutive statutory quarterly meetings;**
 - (g) **fails to carry out any of the duties or functions conferred or imposed on him under this Act.**
- (2) **In this section the expression ‘Authority’ means the Minister or the Board, as the case may be.**

Section 18

- (1) **Any member of the Board, whose interest is likely to be affected whether directly or indirectly by a decision of the Board on any matter whatsoever, shall disclose the nature of the interest at the first meeting of the Board at which he is present after the relevant facts have come to his knowledge.**

- (2) A disclosure under subsection (1) shall be recorded in the minutes of the Board, and after the disclosures, the member making the disclosure shall, unless the Board otherwise directs, not be present, or take part in the deliberation or vote at any meeting during the time when the matter is being decided by the Board.
- (3) For the purpose of this section, where the interest of parents, spouse or children of any member of this Board is likely to be affected directly or indirectly by a decision of the Board on any matter whatsoever, such interest shall be deemed to be the interest of such members of the Board.

Section 25

The Bank shall, within a period of three years from the date of its establishment with the approval of the Minister, provide for the establishment and maintenance of a compulsory Pension Scheme for the benefit of the officers and servants of the Bank, and in every such Scheme different provisions may be made for different classes of officers and servants.

Section 27

The Board may, with the approval of the Minister, make Rules –

- (a) ...
- (b) ...
- (c) ...
- (d) generally for the proper carrying out of the objects, powers and duties of the Bank under this Part.

Section 32

- (1) The Bank may, on the recommendation of the Minister, borrow from the Government such sums as may be necessary.**
- (2) Loans made under this section shall be on such terms and conditions and for such periods as the Minister may determine but shall not in any event be made for a period in excess of thirty years and repayment shall commence not later than ten years from the date when the loan was made.**

Section 33

The Board with the approval of the Minister may make Rules, inter alia –

- (a) ...**
- (b) ...**
- (c) ...**
- (d) ...**
- (e) ...**
- (f) ...**
- (g) ...**
- (h) ...**
- (i) describing the manner of declaring dividends and of creating reserves;**
- (j) specifying the methods of keeping the accounts of the Bank and the mode of preparation of profit and loss accounts, balance sheet and reports and**

(k) . . .

Section 34

The Bank shall have the power to –

- (a) open accounts for and accept savings or time deposits from the public;**
- (b) grant or underwrite loans for the development of agriculture, commercial fishing and industries connected thereto to such persons,**
- (c) take any form of security for the repayment of money;**
- (d) undertake equity investments in companies;**
- (e) engage in joint ventures with other companies;**
- (f) raise money for the financing of its operations;**
- (g) borrow money in the manner prescribed under section 33;**
- (h) acquire, purchase, hold and enjoy personal and real property of every description;**
- (i) convey, assign, surrender and yield up, mortgage, devise, reassign, transfer or otherwise dispose of, or deal with, any personal or real property vested in the Bank;**
- (j) accept surrenders, assignments or re-conveyances, exchange any property, and enter into contracts;**
- (k) engage in the factoring of trade indebtedness and the discounting of negotiable instruments and deal in all forms of security;**

- (l) assist generally in the development of the agricultural co-operative movement;**
- (m) do such other things as are incidental to the attainment of its objects.**

AGRICULTURAL DEVELOPMENT BANK RULES

Rule 4

The Bank shall apply its funds for the following purposes:

- (a) the payment of salaries, fees, remuneration and other allowances of the officers and servants of the Bank;**
- (b) payment of interest on sums borrowed by the Bank or other credits and repayments of such sums;**
- (c) payment of interest on sums deposited under the terms of section 34(a) of the Act;**
- (d) the making of loans and advances under terms of the Act;**
- (e) the payment of rates, taxes, insurance premiums and other outgoings and of expenses of maintenance and disposal in connection with lands, buildings or other properties which become vested in the Bank;**
- (f) any overdraft at a commercial or other Bank at which the Bank may have an account;**
- (g) the payment of all other sums and expenses authorized by or incidental to operations under the Act.**

Rule 5

- (1) Every sum payable to the Bank shall be collected and received for and on account of the funds of the Bank and a receipt for any sum paid to the Bank may be signed by an officer of the Bank authorized by the Board generally or specially in that behalf.**
- (2) All payments out of the funds of the Bank shall be made by officers of the Bank authorized by Resolution of the Board generally or specially in that behalf.**

Rule 48

- (1) The Bank in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the Board.**
- (2) The Board may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the Bank.**
- (3) No dividend shall be paid otherwise than out of profits.**
- (4) The Board may, before recommending any dividend, set aside out of the profits of the Bank such sums as it thinks proper as a reserve or reserves which shall, at the discretion of the Board, be applicable for meeting any contingencies or for equalizing dividend or for any other purpose for which the profits of the Bank may be properly applied, and pending the application may, at the like discretion, either be employed in the business of the Bank or be invested in such investment (other than shares of the Bank) as the Board may from time to time think fit. The Board may also without placing the same to reserve carry forward any profits which it may determine not to divide.**
- (5) ...**

(6) ...

(7) ...

(8) ...

(9) ...

Rule 49

(1) **The Board shall cause proper books of account to be kept with respect to –**

(a) **all sums of money received and expended by the Bank and the matters in respect of which the receipt and expenditure takes place;**

(b) **all dealings and transactions by the Bank; and**

(c) **the assets and liabilities of the Bank.**

(2)...

(3)...

14. The ADB is exempted from the provisions of the Financial Institutions (Non-Banking) Act – section 37 (l). Thus its powers and duties are circumscribed by THE ACT.

15. The crux of this matter is the dismissal of the Applicant for his failure or refusal to place the sum of \$4.5 million with CLICO in accordance with the instructions of the Respondent’s Board. The Applicant and Alleyne have given different versions as to what actually transpired.

BACKGROUND

16. The National Poultry Company Limited (National Poultry) one of the Respondent's customers had been indebted to the Respondent for a number of years. In September, 2002 National Poultry tendered the sum of \$4.5 million to the Respondent. The Board directed the Applicant to place the said sum of \$4.5 million with CLICO in its Group Advanced Protection Contract (Group Contract) which would produce the sum of \$5.8 million in two years.

17. The Applicant protested to the Board that such a contract had been disapproved by the Auditor General on a prior occasion. Alleyne assured the Applicant that this was a different type of transaction and that the Auditor General's earlier objection had been satisfactorily resolved.

18. Lue Ping Wa felt that such a transaction was ultra vires the Respondent's powers and refused to co-sign the relevant application form. The Applicant suggested that Alleyne sign the subject form as he, Alleyne had signed such a form on a previous occasion. Alleyne declined to sign and said it was a matter for management. The Applicant referred this matter to the Respondent's Investments Committee which decided to seek a legal opinion from attorneys in private practice. The Applicant was the Chairman of this Committee. The other members were Rawlins, Lue Ping Wa and Jagmohan.

19. In the interim the Board sent the Applicant on leave and demanded an explanation for his having neglected to carry out the Board's instructions and for breaching the Respondent's confidentiality by disclosing the Bank's confidential documents to a third party. It is to be noted that the legal opinion was never tendered in evidence. In the result the Applicant's contract of employment was terminated by letter dated 23.1.03.

20. The Respondent has contended that that the legality of the \$4.5 million transaction is not to be determined in these proceedings. According to the Respondent this Court must only consider whether the process was fair and whether the Applicant neglected/refused to carry out the Board's instructions.

APPLICANT'S EVIDENCE

21. An extra-ordinary meeting of the Respondent's Board was held on 3.10.02. Among the persons present were the Applicant, Alleyne, Jagmohan and Paul who was then employed as a Sales Representative at CLICO. At the meeting Paul presented various product options sold by CLICO. The Board decided to place the sum of \$4.5 million received from National Poultry with CLICO which was then offering the highest rate of return with a 100% guarantee of principal and interest.

22. The Applicant pointed out that the previous Board had withdrawn a similar investment with CLICO because of objections and criticisms from officials of the Auditor General's department. Alleyne replied that this was a fresh transaction being undertaken by the new Board and that a decision had already been made. The Board instructed the Applicant to meet with Paul in order to implement the Board's said decision. The Applicant maintained that Paul participated at the meeting and failed to declare a conflict of interest. Alleyne denied the Applicant's aforesaid account.

23. To this end the Applicant met with Paul the next morning (4.10.02) when he expressed his concern to Paul since the Ministry of Finance had earlier criticized the Respondent for placing a similar investment in a CLICO life insurance product as a result of which the said investment was recalled or cancelled. Paul confirmed to the Applicant that the Supervisor of Insurance had given his consent and approval for state corporations to invest in this special investment product, that several state corporations had already invested in this new product and that the government had given its blessing to this investment product. Paul further promised to provide documentary evidence in support.

24. Immediately thereafter the Applicant sent a letter to Paul confirming their earlier discussions and listed the documents which Paul had agreed to provide. Later that very day Paul visited the Respondent and demanded from the Applicant payment by cheque of the sum of \$4.5 million to CLICO. The Applicant telephoned Alleyne and complained that Paul was demanding the cheque for \$4.5 million at a time when he (Paul) had failed to provide documentary evidence of his earlier assurances. Alleyne instructed the Applicant to have the cheque prepared and handed to Paul. The Applicant directed Lue

Ping Wa to prepare the cheque which Paul collected personally after signing the cheque voucher.

25. Later that day Paul delivered to the Applicant an envelope containing a letter from Nigel Salina, Financial Planner and Advisor at CLICO and a form entitled "Application for Group Advanced Protection Contract". The Applicant recognised this form as being identical to the one to which the Auditor General and the Ministry of Finance had objected. The Applicant telephoned Alleyne and pointed out that the forms were identical, reminded him of the earlier objections and requested that he Alleyne sign this form as he had done so on a previous occasion. Alleyne replied that this was the function of management; that it was the Applicant's job to ensure that the form was properly completed; that the Board had already taken its decision and further that the Auditor General's department did not know anything about financial investments.

26. The Applicant asked Lue Ping Wa to co-sign the CLICO application form but the latter raised several concerns. On 7.10.02 the Applicant wrote formally to Lue Ping Wa requesting that she sign the said form. Lue Ping Wa replied in writing the said day detailing her concerns and objections. The Applicant reported these developments to Alleyne who replied that he would discuss the matter at their next weekly meeting.

27. On the said day (7.10.02) the Applicant received a second letter from Lue Ping Wa addressed to the Corporate Secretary requesting Alleyne's signature and that the Respondent's seal be affixed to the CLICO application form. This letter was returned to the Applicant's office. On 18.10.02 the Applicant met with Alleyne and Jagmohan when Alleyne once more refused to sign the CLICO application form and repeated his earlier position that it was a matter for management.

28. The Applicant maintained that Paul was present at the Board meeting held on 3.10.02 when the decision was taken to place \$4.5 million with CLICO but that Paul did not declare a conflict of interest. The Applicant maintained further that in the Applicant's presence on or about 18.10.02 Alleyne had instructed Jagmohan to change her draft minutes of this meeting to reflect that Paul had been excused from the meeting when the actual decision to place the said investment had been made.

29. According to the Applicant Alleyne gave the direction to Ms. Jagmohan to change the minutes at a weekly meeting of the Applicant and Alleyne on or about 18.10.02 when Jagmohan, as was customary, had presented her draft minutes of the last Board meeting to Alleyne for his approval. After Jagmohan had left the meeting the Applicant told Alleyne of the former's concern because he, the Applicant clearly recalled Paul being present for the duration of the meeting of 3.10.02. Alleyne then told the Applicant that his decision was final and that he (Alleyne) wanted the said minutes altered as he had directed. Alleyne categorically denied these allegations. It is to be noted that neither Paul nor Jagmohan swore affidavits in respect of these allegations.

30. Meanwhile on 9.10.02 the Applicant wrote to Paul reminding him to provide the supporting documents and information further to their meeting of 4.10.02. The Applicant proceeded on vacation leave on 10.10.02 and resumed duty on 17.10.02. At their meeting on 18.10.02 Alleyne instructed the Applicant to refer the matter of the implementation of the Board's decision to the Respondent's Investments Committee which should deal with same as it saw fit.

31. At the first meeting of the Investments Committee on 23.10.02 the investment with CLICO's Group Advanced Protection Policy was tabled and discussed. Concerns were expressed that it would be improper for the Respondent to invest in such a product especially in the light of the criticisms and objections of the Auditor General and the Ministry of Finance. The Investments Committee unanimously agreed that an opinion be obtained from the law firm of Daltons as to whether this investment was lawful and permissible under the ADB Act. The firm of Daltons was chosen because in the past, this firm had provided legal advice to the Respondent on corporate matters. Later that day (23.10.02) the Applicant informed Alleyne by letter of the decision to seek a legal opinion and by separate letter to Daltons attached a **'Paper outlining the Issues on which Legal Advice is being sought'**.

32. On 19.11.02 (almost one month later) at an extra-ordinary meeting, the Board directed the Applicant and Lue Ping Wa to provide separate reports within 24 hours as to why legal advice had been sought. The reports from the Applicant and Lue Ping Wa

were handed to Alleyne at an emergency Board meeting held on 20.11.02. Thereafter the Applicant was asked to leave the meeting which he did. The Applicant is aware that Mrs. Lynette Maharaj, Senior Counsel prepared an opinion for the Respondent and that this opinion advised that the decision to invest \$4.5 million in CLICO's Group Advanced Protection Contract was ultra vires and illegal and that the Respondent's management was correct to question the Board's decision to make the said investment. The Applicant deposed further that he did not have a copy of this opinion. In his affidavit Alleyne made no reference to it and same was not produced in evidence by the Respondent.

33. Later that day (20.11.02) Alleyne sent a letter to the Applicant which stated that the Board had taken a decision that the Applicant should proceed on his annual vacation leave with immediate effect to facilitate an investigation into the Applicant's alleged failure to implement the Board's decision. Lue Ping Wa was also sent on leave with immediate effect.

34. The Applicant's annual leave expired on 27.12.02 and the Applicant was due to resume duty on 30.12.02. By letter dated 27.12.02 Alleyne informed the Applicant that the Board's investigation had revealed that he had neglected his duty as CEO, inter alia, when he failed to implement the Board's decision to invest the \$4.5 million. Further the Applicant was asked to state why disciplinary action should not be instituted against him.

35. On 6.1.03 the Applicant replied that he had implemented the investment decision and sought particulars with respect to the two other allegations. Alleyne supplied the following particulars on 14.1.03.

"Allegation #2

- 1. The specific instructions were that you should ensure the proper implementation of the Investment Committee's decision to seek a legal opinion on whether the ADB Act allowed for investment in the CLICO Group Advanced Protection Contract and if so how it could be implemented.**

2. **By your letter dated 23rd October, 2002 and attached internal memorandum you misrepresented the Board's instructions by seeking a legal opinion from Dalton's on matters other than the questions identified for an opinion in (1) above.**

“Allegation #3

2. **You provided confidential information to Daltons viz:**
 - (a) **CLICO's letter dated 08th October 2002 to the ADB (not contained in these proceedings).**
 - (b) **ADB's cheque #00126130 dated 04th October 2002 for \$4.5m**
 - (c) **page 2 of Auditor General's letter dated 12th July, 2001 on Audit of Year 2000**
 - (d) **ADB's Certificate and Contract for Group Advance Protection with CLICO**

36. The Applicant responded by letter dated 20.1.03 that the Investments Committee had noted the following:

- (a) The decision to seek a legal opinion was made by the Investments Committee and the Respondent's Board had given no specific instructions in relation to this issue.
- (b) The Applicant denied that there was any misrepresentation in the letter to the Daltons.
- (c) The Investments Committee observed that the two state organizations identified by Paul as having invested in CLICO's Group Advanced Protection Contract had not in fact invested as they considered the contract to be abnormal as an investment instrument.

- (d) Further Paul did not provide the specific information requested by the Applicant in letters dated October 4 and 9, 2002.
- (e) The concerns expressed by the Ministry of Finance at its meeting of 12.1.01 on the CLICO investments and the qualifications of the Auditor General in his letter of 12.7.01.
- (f) The desire of the Respondent's Executive Managers to safeguard the Respondent's integrity and their individual professional integrity.
- (g) All the circumstances of the CLICO investments of 1998 and 1999.

37. In his letter to Alleyne dated 20.1.03, the Applicant stated **“The CEO did not agree with the decision but was out voted on the basis of collective consensus.”** The draft letter to Daltons was prepared by Lue Ping Wa and circulated to the other members who gave their respective views on the said draft letter to Lue Ping Wa. In addition the Corporate Manager, Human Resources, Max Hector also commented on the draft letter. In the result the entire Executive Management Team provided views and comments on the draft letter. The Applicant signed the final version on 23.10.02. In the Applicant's opinion, the Respondent was never compromised as the relationship between itself and its attorneys is privileged.

38. By letter dated 23.1.03 the Applicant's employment was terminated with immediate effect for neglect of duties. When the Applicant was first sent on leave, this was widely reported in the print and electronic media. Since his employment was terminated the Applicant has been unable to secure employment elsewhere and has suffered inconvenience, distress, financial loss and damage to his professional reputation and his social and spiritual standing in the community.

RESPONDENT'S EVIDENCE

39. Alleyne swore the only affidavit on behalf of the Respondent and denied that Jagmohan presented draft minutes of the Board meeting of 3.10.02 for his approval or that he discussed same either with Jagmohan or in the Applicant's presence or that he

instructed her to alter the said minutes. According to Alleyne, Jagmohan presented the said minutes to the Board for correction and confirmation in the normal course of her duties. Further he concluded that the said minutes were confirmed at a meeting held on 13.11.02 since he saw his signature and that of Jagmohan followed by the date (“02.11.13”) at the foot of a copy of the said minutes. It was accepted that the minutes of one meeting would normally be confirmed at the following meeting. However no evidence was produced of the actual confirmation of the minutes of the meeting of 3.10.02 save for Alleyne’s saying so on seeing his signature.

40. National Poultry found itself unable to repay its full indebtedness to the Respondent and proffered the smaller sum of \$4.5 million in settlement. Prior to October 2002, Alleyne had suggested to the Board that it should release the mortgage being held over National Poultry’s property and replace it with a financial instrument in the amount of \$4.5 million that would earn a sum of money adequate to liquidate the said customer’s full indebtedness in a short period.

41. To this end in September, 2002 the Board instructed the Applicant to conduct a survey of rates currently being offered on the market. At the meeting of 3.10.02 the Applicant orally advised the Board of the results of his survey. CLICO was among the companies surveyed and was recommended. Thereupon the Board decided to place the funds temporarily in a CLICO guaranteed investment bond called a Group Advanced Protection Contract pending establishment of an Investments Committee and policies and procedures to guide the workings of such Committee. This investment bond offered a one hundred per cent guarantee on principal and interest and a healthy rate of growth calculated to compound interest within a short period. Alleyne referred to the Applicant’s Exhibit “SS8” in support.

42. Exhibit SS8 consisted of several documents. The first was a letter dated 3.10.02 (the Salina letter) from Nigel Salina, Financial Planner/Advisor of CLICO to the Applicant which stated:

“Please find attached the proposal for the E.F.P.A. investment instrument for the sum of \$4,500,000.00 for two years at 9.75%”

On scrutiny you will find that at the full term, the guaranteed value of your investment would be \$5,420,278.13.

I trust that the foregoing meets with your investment objectives.”

43. No evidence was led of the actual status of National Poultry’s indebtedness to the Respondent at the time it proffered the sum of \$4.5 million. In cross-examination Alleyne testified that the Board had directed the Applicant to carry out a survey and that **“The purpose of the survey was to find out from the market place who could take \$4.5 million and turn it into some \$5.6 million in a 2-year period ... I think this Company was owing the Bank about \$6 million when this money was paid”**. Later on Alleyne stated that the said investment was expected to yield \$5.8 million in two years. It should be noted that according to the Salina letter the \$4.5 million investment in CLICO would have yielded \$5.42 million in two years.

44. Alleyne stated further that in 1998 and 1999 when he was the Respondent’s Chairman, the Respondent had placed large sums similarly with CLICO, that the Auditor General had raised certain queries thereon as a result of which the Respondent withdrew from those transactions, that the new Board had since addressed those concerns and was satisfied that it was within the Board’s statutory power to take any form of security for the repayment of money.

45. Alleyne produced a letter dated 23.3.90 from the Supervisor of Insurance to CLICO giving approval to market CLICO’s Executive Flexible Premium Annuity Policy which he described as being attached as a Rider to the Group Contract. The letter also required CLICO to submit the final printed policy to the Supervisor. In his response the Applicant said this letter was not disclosed to him or tabled at the meeting of 3.10.02. Further the Applicant first saw this letter when it was exhibited to Alleyne’s affidavit.

46. Alleyne exhibited as “HA3” the minutes of the first meeting of the Investments Committee held on 23.10.02 at which the Applicant alleged that the meeting had unanimously agreed to seek an opinion on the legality of the proposed investment in the Group Contract. Alleyne deposed:

“ ... Contrary to the matters deposed to by the Applicant it is clear from those minutes that no opinion was required by the Investments Committee on the legal or other propriety of the investment nor of the Board’s decision on that investment nor on the power or authority of management to question such decision.”

47. It is significant that these minutes were neither signed nor dated and none of the other members of this Committee gave evidence. Further the Applicant insisted that Exhibit “HA3” was not the correct minutes of that meeting and was **“an amended version which clearly omits the discussion/decision about the need for independent legal advice”**. In any event the Applicant said this was the first time he was seeing these minutes.

48. Paragraph 2(e) of “HA3” under the sub-heading “DISCUSSION” stated

“e. Specific reference was made to the Group Advanced Protection Policy offered by Colonial Life Insurance Company Limited (CLICO). It was noted that several other organizations have invested in this type of policy and it was suggested that the Committee examine those other organizations which undertake this type of investment. It was noted that since the ADB was a Statutory Body it may be in the Bank’s interest to seek a legal opinion on whether the Act allowed investments in this type of policy and if yes, how it could be done. Since Daltons had already undertaken a review of the Bank’s Act, it was agreed that Daltons will be retained for corporate matters.”

49. Alleyne deposed that the Applicant had gone outside his remit from the Investments Committee and had misrepresented the Committee’s views to Daltons. Further, the Applicant had included in the brief to attorneys a number of documents which neither the Board nor the Committee had authorized to be disclosed. One of the documents which the Respondent alleged to have contained confidential information was

CLICO's letter dated 8.10.02 to the Respondent. No copy of this letter was located in these proceedings.

50. It is to be noted that by letter dated 23.10.02 to Alleyne (Exhibit SS12), the Applicant informed him of the decision of the Investments Committee to seek a legal opinion as follows:

“ ... Given your position that you will not sign the application forms and that was in fact management's job, the Bank's Investments Committee as its meeting today agreed to seek a legal opinion from the firm of Daltons. You may wish to discuss further with me ...”

51. This letter was written on the very day of the meeting of the Investments Committee. The letter to Daltons seeking a legal opinion from Daltons was also dated 23.10.02. Yet almost a month later (on 19.11.02) the Board asked the Applicant to explain why the opinion had been sought from Daltons. Further in his memorandum dated 20.11.02 the Applicant informed Alleyne that the matter had been withdrawn from Daltons at 1.00 p.m. on 19.11.02 and that the documents were to be returned to the Respondent under confidential cover by 1.00 p.m. on 20.11.02. At about 5.30 p.m. on 20.11.02 the Applicant received a letter directing him to proceed on his annual vacation leave immediately. The Applicant never resumed duty and was dismissed on 23.1.03.

52. This Court finds it passing strange that Alleyne waited almost a month after the Applicant had informed him of the decision of the Investments Committee to seek a legal opinion to question why the Applicant and Lue Ping Wa had sought legal advice. Surely if Alleyne considered that the Applicant or the Investments Committee had exceeded their remit or compromised the Respondent, Alleyne could have put the Applicant on notice much earlier.

53. In cross-examination Alleyne stated that during his tenure with the Respondent a decision was taken that the minutes of Board meetings would only reflect decisions. But he accepted that several matters recorded in the minutes of the meeting of 3.10.02 were discussions and not decisions. He also agreed that a dissent by the Applicant or any other

Board member, although not a decision, would be noted. Further if a director excused himself from a meeting that would be recorded in the minutes.

GROUP ADVANCED PROTECTION CONTRACT (GAP Contract)

54. The nature of this \$4.5 million transaction needs to be investigated. In the first place it will be useful to set out the relevant application form hereunder:

**COLONIAL LIFE INSURANCE COMPANY (TRINIDAD) LIMITED
(Hereinafter called Colonial Life)**

APPLICATION FOR GROUP ADVANCED PROTECTION CONTRACT

Applicant

(a) Name: **The Agricultural Development Bank**

including such Subsidiary, Affiliated or Associated Companies as may from time to time be designated in writing to Colonial Life.

(b) Address: **87 Henry Street, Port of Spain, Trinidad W.I.**

The Undersigned request Colonial Life to issue a Group Advanced Protection Contract to the above-named Applicant effective *October 4th 2002* for an initial Interest Term of *two (2) years*.

The Undersigned duly authorized, on behalf of the Named Applicant herewith make application to Colonial Life for a Group Advanced Protection Contract in accordance with the specifications of this application and agree that the policy shall be effective subject to the approval of Colonial Life of this application or as soon after as Colonial Life will have received payment of the first premium.

The sum of \$4,500,000.00 has been paid to Colonial Life as the initial premium under the Group Advanced Protection Contract for which application is made.

Dated at *PORT OF SPAIN* this 4th day of *OCTOBER*, 2002

Witnessed by

Applicant

...../s/ *Seebalack Singh*

.....

(SIGNATURE)

SIGNATURE

.....*SEEBALACKSINGH* ...

.....

(NAME PRINT)

(NAME PRINT)

Representative

.....*CHIEF EXEC. OFFICER*

.....

(TITLE OR POSITION)

(TITLE OR POSITION)

55. The name of this contract indicates that it is intended for the protection of a group of persons e.g. employees of the contract holder. Alleyne described this product in various ways – as a CLICO guaranteed investment bond, an investment instrument, a negotiable security and a collateral security. In cross-examination Alleyne insisted that the \$4.5 million was not the Respondent’s money but that of National Poultry and that the Respondent was holding that sum in trust for National Poultry. However Alleyne admitted that no trust instrument or document existed.

56. Nigel Salina described this product as an EFPA investment instrument for \$4.5 million for 2 years at 9.75%. The form is intituled “Application for Group Advanced Protection Contract” while in the body the product is described as a “policy” which shall be effective as soon as payment of the first premium is received. Further the initial premium of \$4.5 million had been paid to CLICO on 4.10.02.

57. One of the earlier transactions referred to by the Applicant and Alleyne was the placing of the sum of \$1.3 million with CLICO on 21.12.98 for 7 years. That Application for a GAP Contract was identical to the one dated 4.10.02 save that the amount paid was

\$1.3 million and the interest term was 7 years. This form was signed by Alleyne and the Respondent's then CEO, Patrick A. Musaib-Ali. The Certificate for this Group Contract which was issued by CLICO on 15.12.98 and sent to the Respondent on 13.1.99 gave the interest rate as 11% and was signed by CLICO's Managing – Director A.C. Musaib-Ali.

58. The 1998 Contract, which was contained in a bundle of documents together marked "SS8" and attached to the Applicant's first affidavit, had the following features:

1. It provided for a specific term and a specific interest rate which was subject to reduction if withdrawals were made within the first year.
2. CLICO agreed with the Respondent (Contract Holder) that the Respondent may pay premiums required to provide benefits as stated under the Plan.
3. The Respondent was required to furnish CLICO with such data as may effect the benefits under the contract.
4. The benefits to be attached to the contract had to be selected from the list of riders.
5. The Respondent was required to determine the persons qualified to benefit under the plan.
6. CLICO would only pay benefits at the direction of the Respondent upon receipt of a completed application.
7. It is envisaged that there would be an agreement or plan between the Respondent and the proposed beneficiaries and that CLICO must be provided with a copy of this agreement or plan within six months.
8. If no plan or agreement were provided to CLICO no benefit would be paid and CLICO could terminate the contract and make refunds.
9. The Contract would also be terminated upon written notice from the Respondent.

59. This 1998 GAP Contract-GAP #ADBL-0033 provided for the Applicant to elect the following Rider/s benefit to be attached to the Group Contract.

Executive Retirement Benefits and Options

Severance Liability

Executive Critical Illness Coverage

Disability Benefits and Income

Retirees Medical Insurance

Retirees Life Insurance

Income Rider

“Rider is defined as an insurance agreement attached to this contract and which provides specific benefits to covered persons.”

60. The following note on Interest Mode is instructive:

“If Income Rider is chosen in 2 above, select interest mode and complete payee information

? Monthly ? Quarterly ? Semi-Annually ? Annually”

61. In the 1998 GAP Contract the Respondent requested that the interest be paid annually. This Contract also provided that in the event that no Rider was chosen the automatic option will be the Executive Retirement Benefits and Options Rider. The Contract then listed annuity rates which will apply for persons named by the Contract Holder.

62. Alleyne exhibited a letter dated 23.3.90 from the Supervisor of Insurance to CLICO advising that the Executive Flexible Premium Annuity had been approved for marketing. However by letter dated 12.7.01 the Auditor General expressed reservations about several long term investments with CLICO. In particular the Auditor General noted that proper documentary evidence of certain long term investments including the

1998 Group Contract ADBL-0033 was not produced to enable the Auditor General to verify whether the Bank would be the beneficiary of a financial asset in the future.

63. The Auditor General commented on the 1998 GAP Contract thus:

“Ref # ADBL – 0033

\$1.3 m. payment was made directly from Phoenix Farms Limited. It was not deposited into ADB’s accounts

There is no receipt on file indicating that the sum was paid to CLICO on ADB’s behalf

This certificate makes reference to a policy contract document

A copy of the policy contract was seen, it indicated that the Contract Holder should attach a Rider to the policy

No such Rider was seen

The policy contract further indicates that in the absence of such a Rider, the automatic option will be an Executive Retirement Benefits and Options Rider

Provision eight (8) of the policy contract indicated that benefits will be paid to anyone who qualifies for such a benefit

Provision eight (8) also indicates that the beneficiaries of this policy would be persons employed by the Bank

64. The letter of 23.3.90 from the Supervisor of Insurance cannot be a response to the criticisms of the Auditor General of 12.7.01 (some 11 years later). And Alleyne accepted that he brushed aside the Applicant’s concerns about the said criticisms when the Board instructed the Applicant to invest \$4.5 million in similar fashion. Alleyne also agreed that he had signed the 1998 application form and could have signed the current application if he chose to do so. He added:

“I was a non-Executive Chairman and so refused to sign”.

65. It is significant that Alleyne has maintained that the sum of \$4.5 million which was received from National Poultry had not been deposited into the Respondent’s accounts as it was not the Respondent’s money but was put into the Respondent’s current

account “**temporarily on behalf of the client like it was held in trust**”. He denied that the \$4.5 million was received in full and final settlement of the monies owned by National Poultry to the Respondent. **‘I want to tell this court that the \$4.5 million replaced the property as security.’**”

66. While there was no trust deed Alleyne maintained that there was an agreement between the Respondent and the National Poultry which had been signed by the Applicant to the effect that National Poultry would continue to be obligated on that debt for 2 more years. However this agreement was not produced in evidence.

APPLICATION TO USE AFFIDAVIT OF SATI JAGMOHAN FILED 14.10.04

67. Pursuant to leave granted on 19.3.03 the Applicant’s Notice of Motion was filed herein on 24.3.03. Two interlocutory applications were heard and determined before this Court embarked on the hearing of the substantive application. Both the Applicant and Alleyne were cross-examined on several days in July 2004. At the end of the cross-examination both sides were directed to file written submissions by 28.7.04 and oral submissions were fixed for 14.10.04 and 15.10.04.

68. On 14.10.04 an affidavit of Jagmohan exhibiting three letters passing between the Applicant and National Poultry was filed on behalf of the Respondent. Leave was sought for the Respondent to use this affidavit to demonstrate that the Applicant had negotiated the terms of settlement with National Poultry. No explanation was advanced for the delay in seeking such leave.

69. Order 53 Rule 5(4) of the Supreme Court of Judicature (Judicial Review) (Amendment) Rules 2002 (Order 53 Rule 5(4)) provides that a Respondent who intends to use an affidavit at the hearing shall file it in the Registry and give notice thereof to the Applicant as soon as practicable.

70. The Applicant’s attorney objected to this affidavit being permitted into evidence at this late stage. All along the Respondent had maintained that whether the investment decision was legal was not an issue while the Applicant’s case was that his dismissal was prompted by the decision to invest. Further whether the Applicant had negotiated a

settlement of National Poultry's indebtedness did not advance the Respondent's case. Since these letters were always in the Respondent's possession, the Respondent should not benefit from its initial non-disclosure.

71. The Court considered the foregoing submissions and noted that if this affidavit were admitted into evidence the Applicant would be entitled to respond thereto and would need time to do so. Junior Counsel for the Applicant, Mr. Ramlogan indicated that he intended to file three further affidavits, one each by the Applicant, and by a representative and a lawyer for National Poultry. Further there would be cross-examination of Jagmohan and further cross-examination of Alleyne.

72. It should be pointed out that Jagmohan was present in court on most days. She was and continues to be the Respondent's Corporate Secretary. She was present at the Board Meeting of 3.10.02 and the Investments Committee Meeting on 23.10.02. Yet she swore no affidavit in the substantive proceedings save for that of 14.10.04.

73. In the exercise of the Court's discretion and having considered Order 53 Rule 5(4) this Court refused the Respondent's application to use the said affidavit of Jagmohan.

\$4.5 MILLION – TRUST FUNDS

74. The Applicant has maintained that National Poultry paid \$4.5 million to the Respondent in full settlement of its indebtedness and that the Respondent executed the Release confirming same and releasing National Poultry's property which had been held by the Respondent as security for its indebtedness.

75. The Respondent has contended that the sum of \$4.5 million was not paid to the Respondent but had been received by the Respondent and would be held in the trust for a period of two years. Further the said sum would be placed in a financial institution to yield \$5.4 million in two years. At the end of the two years the sum of \$5.4 million would liquidate National Poultry's indebtedness to the Respondent. National Poultry would remain the Respondent's debtor during the said two years. The said sum of \$4.5 million was intended to be a replacement security for the real property in the Release and

would be a negotiable instrument. It is to be noted that the Respondent has produced no documentary evidence of these matters.

76. In cross-examination Alleyne admitted there was no trust deed but maintained that there was an agreement between the Respondent and National Poultry signed by the Applicant. However no such agreement was produced in evidence. Further in paragraph 6 of his affidavit Alleyne deposed that **“what the Board had determined to do was to exchange securities, that is to say, replace a mortgage with a guarantee”**.

77. The Respondent has contended that the three certainties of a trust were met namely, the moneys, the intention to create a trust and the beneficiaries and cited **Re Kayford Limited 1975 1 AER 604** (Kayford) in support. In Kayford Megarry J. said at pp 606d and 607a-d

“The question for me is whether the money in the bank account ... is held on trust for those who paid it, or whether it forms part of the general assets of the company ... I feel no doubt that the intention was that there should be a trust. There are no formal difficulties. The property concerned is pure personality, and so writing, though desirable, is not an essential. There is no doubt about the so-called ‘three certainties’ of a trust. The subject-matter to be held on trust is clear, and so are the beneficial interests therein, as well as the beneficiaries. As for the requisite certainty of words, it is well settled that a trust can be created without using the words ‘trust’ or ‘confidence’ or the like: the question is whether in substance a sufficient intention to create a trust has been manifested.

In Re Nanwa Gold Mines Ltd 1955 AER 219 the money was sent on the faith of a promise to keep it in a separate account, but there is nothing in that case or in any other authority that I know of to suggest that this is essential. I feel no doubt that here a trust was created. From the outset the advice ... was to establish a trust account at the bank. The whole purpose of what was done was to ensure that the moneys remained in the beneficial ownership of those who sent them, and a trust is the obvious means of achieving this ...”

78. Alleyne stated further that National Poultry was owing approximately \$6 million when it paid the \$4.5 million which was not a deposit. And Alleyne's evidence is that the \$4.5 million was paid in September, 2002. Further the Lease executed on 20.9.02 expressly released the mortgaged property **"in consideration of all principal moneys and interest secured by the said Mortgage having been fully paid and satisfied by the Borrower to the Bank"**.

79. By Section 9 of the THE ACT the Board is empowered to manage the Respondent and by section 27 the Board may, with the approval of the Minister make rules for, inter alia, the proper carrying out of the objects, powers and duties of the Respondent. Further by section 33(k) the Board may make rules for the capitalization of profits. Rules were made by Legal Notice 105 of 1969 and amended by Legal Notice 60 of 1987 and Rule 4 of these Rules sets out the purposes for which the Bank's funds may be applied.

80. Rule 48 provides for the declaration and payment of dividends out of the Respondent's profits. In particular Rule 48(4) stipulates that before the Board recommends any dividend, it may set aside out of the profits such sums as it considers proper as a reserve for meeting any contingencies or for equalizing the dividend or for any other purpose for which the Respondent's profits may be properly applied. Pending the application of such reserves for the authorized purposes the Respondent may utilise the said reserves in the business of the Respondent or invest same in such investment as the Board may think fit. The Applicant has contended that by Rule 48(4) above the Respondent may only invest such of its funds as have been set aside as reserves out of its profits.

81. Rule 49(1) provides that the Respondent shall cause proper books of accounts to be kept with respect to all moneys received and expended by it; to all its dealings and transactions and to its assets and liabilities. In cross-examination Alleyne agreed that when money is repaid to the Respondent that money belongs to the Respondent. He also accepted that the sum of \$4.5 million did not come out of the Respondent's reserve fund set aside from profits.

82. It is significant that the Respondent has produced no documentary evidence either of its accounts or at all of its receipt of or dealings with the said sum. In the circumstances this Court is unable to accept that the said sum of \$4.5 million was not the Respondent's money but remained that of National Poultry.

ULTRA VIRES - ILLEGAL

83. By Section 25 of THE ACT the Respondent was required to establish a compulsory Pension Scheme for the benefit of its officers and servants within three years of its establishment. Alleyne confirmed that some thirty five years later no Pension Scheme had been established.

84. On the face of it the GAP Contract is not an insurance policy but a contractual arrangement between CLICO and the Respondent to facilitate the payment to executives of the Respondent of specified benefits over a set period of time. Money is then set aside in a Benefit Fund managed by CLICO at a fixed rate of interest and upon which the Respondent can draw when payment is due. In order for such a contract to be authorised the Respondent must have a liability to make payments to executives or other employees. However no such evidence has been produced.

85. The general rule of law is that employees or officers impliedly contract to obey lawful and reasonable orders of their employers within the scope of their employment. An employee is also required to serve the employer with fidelity and good faith and to preserve confidential information. Up to the time of the Applicant's dismissal the Applicant had disclosed the Respondent's confidential information, if any, at the direction of the members of the Investments Committee to attorneys who had a legal duty to preserve the Respondent's confidentiality.

86. A transaction which contravenes the powers of the Respondent is an ultra vires or illegal act and the illegality is not removed even though all members agree to it. This Court has already found that the sum of \$4.5 million was the Respondent's money and not that of National Poultry. And the Respondent had not established a Pension Scheme and therefore was under no obligation to make payments to its officers. Further, the

Respondent was only authorized to invest moneys which were set aside as reserves. And Alleyne confirmed that there were no reserves. It follows that the decision to invest \$4.5 million of the Respondent's money in CLICO was therefore ultra vires and illegal.

THE RELEASE

87. Towards the end of his cross-examination the Applicant's attorney sought to tender a copy of the Deed of Release (the Release) dated 20.9.02 registered on 1.10.02 and signed by Alleyne in favour of National Poultry. The Respondent's attorney – Mr. Prescott resisted this application vigorously. At first Alleyne could not recall signing the Release.

“I wouldn't think anyone else at the Bank had the authority to sign such a Release.”

88. This court over-ruled the objection and admitted the Release into evidence. On being shown the Release he said:

“It appears to be my signature on the last page.”

89. Alleyne accepted that according to the Release, National Poultry owed the Respondent \$7.8 million and:

“According to this document, it says all principal moneys and interest have been fully paid. I accept that according to this document the ADB released National Poultry Company's property which it held on mortgage because all outstanding monies had been paid ... By this document the Bank was releasing 57.7602 hectares of land in the Ward of Couva.”

90. Alleyne admitted that he did not know the value of the land which had been released but maintained that the security in the form of real property had been replaced by the \$4.5 million investment.

“If a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that

recital; it is unquestionably true that as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital. per Parke, B. in Carpenter v Buller (1841) 8 M + W/209 at p 212.'

It follows that a party to a deed is estopped from denying any recital in a deed in an action founded on the deed.

91. The Respondent has submitted that the Applicant is estopped from relying upon a recital in the Release to support his contention that all monies owing by National Poultry had been paid because the Applicant was not a party to the Release. For his part the Applicant has maintained that he is merely interpreting the Release to challenge Alleyne's credibility in the face of there being no trust document. This Court is of the view that the Applicant, who was not a party to the Release was not seeking to deny any recital in the Release.

92. **“Release of Debt or Security**

General - The whole or part of the debt or the security may be released, either before or after the date for repayment, upon the payment of the whole or part of the loan or without such payment.

Release of the debt - By releasing the debt the security for the debt is released. To be binding a release of a debt must generally be made for consideration, or, if not so made, under seal.” Fisher and Lightwood's Law of Mortgage 9th Edn. p. 580

93. In the instant case the Release was made both for a consideration and under seal. This Court therefore holds that upon the execution of the Release on 20.9.02 the mortgaged property was released absolutely and re-conveyed to National Poultry.

EXCHANGE OF SECURITY

94. The Respondent's case is that it exchanged the real property held as security for the loan to National Poultry with a negotiable instrument being the \$4.5 million placed with CLICO in its Group Contract. The Respondent contends that by section 34 (c) of THE ACT the Respondent had the power to take any form of security for the repayment

of money. Further by section 34 (k) the Respondent had the power to deal in all forms of security and by section 34 (m) the power to do such other things as are incidental to the attainment of its objects.

95. Alleyne described the \$4.5 million placed with CLICO as a guarantee or negotiable instrument. Save for the incomplete GAPC application form and the Respondent's cheque for \$4.5 million, no other document has been put in evidence in respect of this transaction.

“A negotiable instrument is a document which itself embodies a cause of action, title to which can be transferred by delivery, or by indorsement and delivery, in such a way that a holder for value without notice can obtain a good title notwithstanding defects in the title of his transfer or ” - Paget's Law of Banking 12th Edn. Para 31:18.

96. In simple language therefore, a negotiable instrument is an unconditional order to pay on account of money easily transferable from one person to another. The 1998 Contract clearly provided that the Benefit Fund was only payable to persons who qualified for benefits under a plan or agreement between the Contract Holder (the Respondent) and the named beneficiaries. It is to be noted that no beneficiaries had been named in the 1998 Contract. In the instant case the Contract was never concluded.

97. An example of a Guaranteed Investment Instrument is a contract between an insurance company and a corporate profit sharing or pension plan that guarantees a specific rate of return on the invested capital over the life of the contract. A negotiable instrument or a guaranteed investment instrument may be used as collateral security. However if the money invested in the GAP Contract is ear-marked for named beneficiaries payable over a period of time, the value of the contract to be used as collateral security would be compromised. Where employees are not to be beneficiaries, the Group Contract appears to be the placing of a fixed sum for a certain period at a specific rate of interest.

98. This Court has already found that upon execution of the Release National Poultry's real property held as security for its debt was released. Further this Court has also determined that the sum of \$4.5 million was not held by the Respondent on trust for National Poultry but was the Respondent's money which did not come out of its reserves. It follows that whether the said sum placed with CLICO was a negotiable instrument or represented an exchange of security does not fall for determination.

ALTERATION OF MINUTES

99. The Court of Appeal recently delivered a unanimous judgment in Cv. A. No. 55 of 2004 that is, the interlocutory appeal of Alleyne, Paul, Rawlins and Jagmohan against this Court's refusal to permit them to be heard in opposition to the Applicant's Notice of Motion. Madam Justice Warner JA stated at paragraph 13:

"13 Mr. Paul's case"

"This case is somewhat different. Mr. Paul, in addition to his post as director of the Board, was an employee of the Insurance Company involved. The allegation was that (at) a meeting of the Board held on the 3rd October 2002, Mr. Paul did not declare a conflict of interest; that despite the fact that Mr. Paul knew that the Auditor General had on a previous occasion expressed concerns about the investment, he had carried it to completion, even though a legal opinion had been obtained advising of its illegality. He had also visited the Bank demanding the cheque for \$4.5 million dollars for the investment.

As a Director of the Bank, he would have been involved in any decision to identify persons who would make affidavits in reply to Mr. Singh's, with the object of placing all the relevant information before the court. Having regard to the law's insistence that public bodies assist the court in the determination of public law matters it would be surprising if any decision was taken by the Bank in defending the matter which would have been inimical to Mr. Paul's interest or indeed, to any of the appellants. What is

more, there is nothing in the affidavit of Ms. Jagmohan which suggests, even remotely, that the interests of the Bank and Mr. Paul are in any conflict. The fact that no affidavit had been filed by Mr. Paul in the substantive matter must have been a result of a decision which Mr. Paul took together with the Bank's legal advisers. It is reasonable to draw the inference that there is nothing more that Mr. Paul wished to advance on his own behalf or to challenge as a result of the evidence adduced by Mr. Singh."

100. The Court of Appeal concluded inter alia, at page 12:

- "(4) the appellant Paul chose not to file an affidavit in the substantive proceeding and has not complained that he has suffered any prejudice.**
- (5) none of the appellants has demonstrated that the Bank has adopted a position which is in conflict with his or her own.**
- (6) the trial judge cannot be faulted when, in the exercise of her discretion, she refused the application."**

101. The Applicant maintained that Paul was present at the meeting of 3.10.02 and participated in and voted on the question of placing the investment with CLICO. The Applicant also insisted that Alleyne had instructed Jagmohan to alter the minutes of the said meeting to reflect that Paul was not present thereat. Alleyne strongly denied giving any such instructions to alter the minutes. In the result the said minutes appear not to have been altered. Further, there is no record in the said minutes of Paul having absented himself for any part of the meeting or having declared any interest, contrary to section 18 of THE ACT. In the circumstances this Court concludes that Paul was present for the duration of the meeting.

DECISION TO SEEK LEGAL OPINION

101. By Section 9 the Board of Directors is empowered to manage the Respondent and by section 14 the Managing Director who is the Chief Executive Officer is charged with

the day to day control of the business of the Respondent and has authority to act in the conduct of the Respondent's business in all matters which are not specifically reserved to be done by the Board. Further the Managing Director is answerable to the Board for his acts and decisions.

102. It follows that the Applicant was responsible for the day to day management of the Respondent and in this regard was authorized to do any acts which were not specifically reserved to the Board.

103. Alleyne knew that the Applicant and Lue Ping Wa were uncomfortable with the decision to place the \$4.5 million investment in CLICO's GAP Contract and was aware that the Auditor General had earlier criticized similar investments. Neither Paul nor any other CLICO representative provided documentary evidence of other state corporations having made similar investments.

104. Alleyne admitted that the Board did not seek independent legal advice on this transaction. He agreed that the Respondent did not have an in-house legal department and if legal advice were needed, it would have to be out-sourced with the Board's knowledge. According to Alleyne:

“If the CEO has doubts about the legality of a transaction that he is expected to carry out, if the transaction is approved by the Board and he is party to the decision he is not entitled to seek legal advice. If he was not party to a particular decision, he should refer the matter back to the Board saying he is unhappy with the decision and he is going to seek legal advice. That is protocol ... If legal advice was being sought on the legality of the transaction that the Board wanted management to implement, that would not be permissible, definitely not.”

105. On Alleyne's instructions the Applicant referred the implementation of the investment decision to the Investments Committee comprising the Applicant, Lue Ping Wa, Rawlins and Jagmohan. This Committee agreed to seek a legal opinion from the law firm of Daltons, which had provided legal advice to the Respondent in the past. Alleyne

was not a member of the Investments Committee. No other member of this Committee swore any affidavit . The minutes of the meeting this Committee were not signed by any of its members. Further the Applicant alleged that paragraph 2(e) of the said draft minutes were not accurate.

106. Jagmohan and Rawlins, two of the members of the Investments Committee who were refused leave to be heard in opposition to the Applicant's motion, challenged this refusal in the Court of Appeal which upheld the refusal. It is significant that these two persons who are still employed by the Respondent also failed to file affidavits in the substantive matter. And this decision not to file affidavits must have been taken in consultation with the Respondent and its legal advisers as the Court of Appeal noted in respect of Paul.. Further Rawlins acted as CEO after the Applicant was dismissed.

107. Throughout his cross-examination Alleyne was very testy. To many questions he answered "I can't say" even when the answer was obvious. This Court got the impression that he was being difficult and answers had to be extracted from him. Further he appeared to be autocratic. This Court concluded that Alleyne did not want the investment transaction reviewed by attorneys.

108. In the circumstances this Court prefers the Applicant's account of what transpired at the meeting of the Investments Committee. Further in seeking a legal opinion the said Committee, including the Applicant was trying to give effect to the Board's decision to place the investment. This Court therefore finds that the Applicant acted reasonably.

109. Section 35 of the Legal Profession Act stipulates that the rules contained in the Code of Ethics set out in the Third Schedule to the Act shall regulate the professional practice, etiquette, conduct and discipline of attorneys-at-law. Further breach of the rules in Part A may constitute professional misconduct Paragraph 23(2) of Part A provides:

'(2) An attorney at law shall scrupulously guard and never divulge his client's secrets and confidences.'

110. It follows that even if the Applicant gave out the Respondent's confidential information to Mrs. L. Maharaj S.C. which this Court does not accept, the said attorney at law was under a legal duty not to breach the Respondent's confidentiality.

111. If the Applicant was uncertain as to whether a transaction was illegal or not, it is not improper to seek legal advice before proceeding. Where management queries a Board decision, the Board should itself seek legal advice. It seems that Alleyne became annoyed when both Lue Ping Wa and the Applicant expressed concerns at the placing of the moneys with CLICO. Alleyne refused to sign the relevant application which he had done on more than prior occasion.

112. The Applicant referred the matter for a legal opinion in a letter which was vetted by all the members of the Investments Committee and by Max Hector, the Respondent's Corporate Manager, Human Resources. Although the Applicant did not stand up to the Board and openly challenge the decision to invest it appears to this Court that Alleyne considered that the Applicant was being obstructive and determined that he would have to go.

ABUSE OF PROCESS

113. In the interlocutory judgment on the Respondent's application to set aside the leave granted on 19.3.03 to apply for JR, this Court held:

1. That the Applicant was appointed pursuant to section 14 of THE ACT.
2. That the Board was exercising functions of a public nature when it hired the Applicant and that this is not a pure master and servant situation.
3. That the Board could only terminate the Applicant's employment for misconduct or neglect of duties or breach of stipulations or for any of the matters contained in section 16 of THE ACT.
4. That in the performance of his statutory duties i.e. the day to day administration and control of the Respondent's business, the Applicant was under a duty to ensure that the Respondent's funds were applied in

furtherance of the objects of the Respondent in accordance with the Respondent's powers under THE ACT.

5. That the Board was exercising a public law function when it terminated the Applicant's employment.
6. That whether or not the Board's instruction to the Applicant was ultra vires THE ACT can only be determined on the hearing of the substantive motion.

114. Further, this Court did not agree that the Applicant had an alternative procedure available to him as certiorari is only available in JR Proceedings.

115. Throughout this trial the Respondent has maintained that this Court had no jurisdiction to review the investment decision because the Applicant had not sought leave to review same. Neither should this Court review the decision to terminate the Applicant's employment because he had an alternative remedy by way of a common law action for damages for breach of contract.

116. This Court holds that the investment decision was so closely connected with the decision to terminate that the justice of the case required that the investment decision be investigated. Further, for the reasons set out in the interlocutory judgment and in the light of the above this Court finds there has been no abuse of process.

117. In the event that it is found that the Applicant has used the wrong process this Court considers that it would be appropriate to convert this motion to a writ action as there was extensive cross-examination and a large amount of documentary evidence had been put in evidence. In those circumstances the Court would have been in a position to make findings of fact and determine the matter. Support is found for converting these proceedings to a writ action from the following statements of Chief Justice Sharma in **Civil Appeal No. 84 of 2004 – Damien Belfonte v The Attorney General of Trinidad and Tobago** at paragraphs 24 and 25:

- “24 ... A trial judge in my view should make every effort to save the proceedings where it is just and reasonable to do so. Matters of procedure are to be kept flexible in order to do justice between the parties. This is clearly reflected in Order 2 of the Rules of the Supreme Court. Striking out for an abuse of process must be a last resort.**
- 25 The exercise of her discretion in that manner at such a late stage of the proceedings also defeated the objective of all the learning, which is to dispose of matters such as this in the most just and convenient manner and to avoid a multiplicity of actions. All the evidence had already been heard and she was in a position to make findings of fact. There was no point in requiring the applicant to file new proceedings and present the case all over again before a different judge.”**

ADDITIONAL FINDINGS

1. At all material times Alleyne well knew that Paul was a sales representative with CLICO. As such sales representative, Paul participated in and voted at a meeting of the Respondent’s Board on a matter involving the placing of \$4.5 million with his employer CLICO without declaring his interest in the said transaction.
2. The survey was carried out by the Respondent’s Corporate Manager, Finance and CLICO was not among the institutions surveyed. Neither was CLICO recommended by the Applicant.
3. The Auditor General’s reservations about the Respondent placing large sums of money in CLICO’s Group Advanced Protection Contract were never adequately addressed by the Respondent.
4. The Respondent's decision to terminate the Applicant's employment was unreasonable, irregular and the result of an improper exercise of the Respondent's discretion in the circumstances.

5. The Applicant is not guilty of statutory or other misconduct.

DECISION AND ORDERS

121. In the result, the Applicant succeeds in this action and this Court grants the following relief:

1. A declaration that the termination by the Respondent of the Applicant's contract of employment by letter dated 23rd day of January, 2003 for alleged misconduct on the grounds set out therein is illegal and ultra vires the powers of the Respondent under the Agricultural Development Bank Act as amended.
2. A declaration that the termination by the Respondent of the Applicant's contract of employment by letter dated 23rd day of January, 2003 for alleged misconduct on the grounds set out therein is unreasonable and/or the result of an improper exercise of the Respondent's discretion.
3. An order of certiorari to remove into this Honourable Court and quash the decision of the Respondent to terminate the Applicant's contract of employment by letter dated 23 January, 2003 for alleged misconduct on the grounds set out therein.
4. An order that damages be assessed by a Judge in Chambers.
5. An order that the Respondent pay the Applicant's costs of this action fit for one Senior and one Junior Counsel.
6. Stay of execution for six weeks.

NOTE:

By letter dated 22.3.05 Junior Counsel for the Applicant asked this Court on the direction of his Senior Counsel to consider referring this matter to the DPP for further investigation and/or action. Having considered the evidence and the contents of the said letter, this Court declines to make any referral.

Dated this 6th day of April, 2006.

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Amrika Tiwary-Reddy
Judge