REPUBLIC OF TRINIDAD AND TOBAGO

Civil Appeal No. 61 of 2006

IN THE COURT OF APPEAL

BETWEEN

AGRICULTURAL DEVELOPMENT BANK OF TRINIDAD AND TOBAGO

Appellant

AND

SEEBALACK SINGH

Respondent

PANEL: **I. Archie, C.J.**
M. Warner, J.A.
A. Mendonca, J.A.

APPEARANCES:

Mr. E. Prescott, S.C. and Mr. Lamont for the Appellant

Sir Fenton Ramsahoye, S.C. and Mr. A Ramlogan for the Respondent

DATE DELIVERED: **8th July, 2009**

Delivered by M. Warner, J.A.

I have read in draft the Judgment delivered by Warner, J.A. I agree with it and I have nothing to add.

I. Archie
Chief Justice

I also agree

A. Mendonca
Justice of Appeal

JUDGMENT

1. The core issue in this appeal concerns the public law – private law divide. It arises in the context of the respondent Seebalack Singh's employment with the Agricultural Development Bank and whether, as the judge held, judicial review was the appropriate means by which to challenge his dismissal from his employment with the Bank.

2. The Bank was established as a body corporate under the provisions of the Agricultural Development Bank Act Chapter 79:07 (the Act). The Respondent was appointed as Chief Executive Officer of the Bank.

3. The respondent's contract of employment was dated 11th November 2002. The contract provided for salary and various allowances, a company vehicle, leave and medical and life plans. It was clearly stated that under the agreement the respondent's employment may be terminated at any time before expiration of the contracted period in either of the following events:

> (a) If either party gives to the other one (1) month's notice in writing of intention to terminate.
>
> (b) If the employee is found guilty of any misconduct 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.

4. I cite, at the same time, section 16 of the Act which also imposes provisions for termination of appointment. It provides:

"*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 director so appointed—*

(a) become 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 absent, except on leave granted by the Board, from two consecutive statutory quarterly meetings;

(f) 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.

5. It is to be noted that the respondent was not appointed as Managing Director or director of the Bank. He was appointed as Chief Executive Officer.

6. The Respondent's employment as Chief Executive Officer (CEO) was terminated by the Board by letter dated 23rd January 2003, allegedly for neglect of duties. It was alleged that he had—

(1) Failed to implement the decision of the Board to invest $4.5m in a 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.

7. The respondent contended herein this court and in the court below as follows:

(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 Bank had no authority to compel him to deal with funds under the control of the Bank contrary to the Bank's powers under the Act or in a manner in conflict with the policy of the Act.

(3) The Bank had no authority to dismiss him for his failure or refusal to engage in illegal or ultra vires action or for his failure and/or refusal to commit a misdemeanour.

(4) The conduct of the Bank was illegal and oppressive in the circumstances.

(5) The respondent was deprived of employment and the benefits incidental thereto without due process of law.

(6) The decision to terminate his employment was unreasonable, irregular and the result of an improper exercise of the Bank's discretion.

(7) The said decision of the Bank was actuated by bad faith and/or for the improper purpose of placing an illegal and ultra vires investment of $4.5 million with Colonial Life Insurance Co. Ltd (CLICO).

(8) The said decision to terminate the Respondent was the result of the exercise of a power in a manner that was so unreasonable that no reasonable Board could have exercised that power.

8. The Judge granted the respondent the following relief.

(1) A declaration that the termination by the Respondent of the Applicant's contract of employment by letter dated 23rd 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 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.

The questions which arise for determination are:

(1) Whether the challenge is founded in private law and therefore not subject to judicial review;

(2) Whether there is available to the respondent an alternative remedy in private law for wrongful dismissal, or under the Industrial Relations Act, for reinstatement or compensation.

9. This court granted the appellant leave to amend its notice of appeal to argue the second question posed above. It had been unsuccessfully raised as a preliminary issue and though an interlocutory appeal had been filed, it had been discontinued. This court was satisfied that the intention had been to await the outcome of the substantive matter. In fact, implicit in the main challenge was the contention that an alternative remedy was available.

10. Sir Fenton argued that the case was founded entirely on statutory interpretation. He examined, in detail, the objects of the Act which were — to encourage and foster the development of agriculture, fishing and related industries and to mobilise funds for the purposes of development. Dismissal of the CEO, was only possible in terms of section 16. Section 14(6), he argued, provided for the appointment of the Managing Director by the board on such terms and conditions and for such period as may be designated in the instrument appointed him however, a contract of employment, counsel continued, could only provide for termination in conformity with the provisions of section 16.

11. As to the alternative remedy point, Sir Fenton argued that there was no alternative remedy, having regard to the provisions of section 16. I note however that in the written argument, it was submitted, that the respondent was acting within the remit of public law — There was a clear public interest in the finding of the legality of the appellant's decision to invest and the manner which the appellant, as Chief Executive Officer, was exercising his statutory functions. Such a question merited a declaration as to the legality of the public functions exercise.

12. Interestingly, the judge held that in the event that, it was found that the respondent had used the wrong process then, it would be appropriate to convert the motion to a writ action under section 12 of the Judicial Review Act.

Background

13. I now set out a very brief summary of the facts as provided in the affidavits filed on behalf of the appellant and the respondent. For present purposes, I think that more detail is not necessary.

14. I have already indicated the manner in which the respondent was appointed CEO of the Bank. In the second year of the respondent's term, the Board took a decision to invest in an instrument that the Colonial Life Insurance Company (CLICO) had been offering for sale and accordingly, instructed the respondent to place the investment. When the respondent sought to implement the decision, he was not able to obtain the signature of the Corporate Manager of Finance, who expressed some doubt about the transaction and refused to sign the application.

15. The respondent raised the matter with the Chairman of the Board. The respondent expressed his concerns to the Chairman that he was not able to get the application completed. His uncertainty arose because of statements which had been made in the past by the Auditor General about a transaction of a similar nature. The Chairman took the view that the respondent ought to proceed with the transaction. The Board had set up an Investments Committee of senior officials which included the Corporate Manager, Finance and the respondent. The matter was put before the

Investments Committee for a determination whether this was a matter which came within Board's remit.

16. The Investments Committee took a decision that a legal opinion be sought as to whether the law permitted an investment of that nature. The Board subsequently asserted that, in setting out the brief for Attorneys, the respondent went beyond the decisions of the Investments Committee and that he had challenged the authority of the Board, substantially, a position which was apparent from the questions he referred to Attorneys.

17. The trial judge set out the factual background, in detail allowed cross examination and discussed at length, the nature of the security and its legal effect.

18. Before I examine the public law private law question, I ought to refer to an important question which was not argued in the court below or advanced before this court, but which is relevant to the issue at hand. It is clear from the terms of the respondent's contact that he was not employed as the Managing Director or Director of the Bank. The provisions of sections 14 and 16 of the Act do not therefore apply to the respondent. The parties are bound by the terms of the contract dated 11th November 2002.

19. The Respondent's argument that this matter sounded in public law rested essentially on sections 14 and 16 of the Act. As these sections do not apply, the basis on which the Respondent contended that the challenge was founded in public law is not

a viable argument. However, as the application of the sections to this matter was not argued before this Court, I do not propose to rest my decision on that basis.

20. I now go on to deal with the public law private law question.

21. There are some pivotal cases to which I shall refer in order to determine whether the challenge is founded on public or private law and whether judicial review is appropriate. In the early stages of the development of the test Lloyd L.J. **in R v Panel on Takeovers and Megers exp Datafin plc** [1987] 1 QB 815 at 847 posited:

> *'I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation under statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of the power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: See Reg. v. National Joint Council for the Craft of Denial technicians (Disputes Committee), Ex parte Neate [1953] 1 Q.B. 704. But in between these extremes there is an area in which it is helpful to look not just at the source of the power by at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public consequences, then that may as Mr Lever submitted, be sufficient to bring the body within the reach of judicial review. It may be said that to refer to "public law" in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. Thus in Reg. v. Criminal Injuries Compensation Board, Ex party Lain '[1967] 2 Q.B. 864 Lord Parker C.J. after tracing the development of certiorari from its earliest days, said at p 882:*
>
> > *"The only constant limits throughout were that [the tribunal] was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned."*
>
> *To the same effect is a passage from a speech of Lord Parker C.J. in an earlier case, to which we were not, I think, referred,* ***Reg. v. Industrial Court, Ex parte A.S.S.E.T [1965] 1 Q.B. 377, 389:***
>
> > *"It has been urged on us that really this arbitral tribunal is not a private arbitral tribunal but that in effect it is undertaking a public duty or a quasi-public duty and as such is amenable to an order of mandamus. I am quite unable to come to that conclusion. It is abundantly clear that they had no duty to undertake the reference. They are clearly doing something which*

> *they are not under any public duty to do and, in some circumstances, I see no jurisdiction in this court to issue an order of mandamus to the industrial court."'*

22. Although there are several authorities distinguishing matters of public from private law, sometimes the distinction is difficult to make. Dillon L.J recognised this in **Mc Claren v. Home Office 1990 ICR 824 at 829.** He said, "Unfortunately there are some cases where it is not immediately clear." The result is time and costs spent in determining whether the proceedings have been properly brought. In **Lonrho plc v Tebbit [1992]** 4 All ER 280 Kerr LJ expressed the view that the law had suffered too much from "the undesirable complexities of this over legalistic dichotomy".

23. One of the earlier cases which ruled on the scope of public law actions was **R.V. East Berkshire Health Authority ex parte Walsh [1984] 3 All ER 425**. A nursing officer had been employed with the Authority under contract of employment which incorporated terms and conditions negotiated by a recognised body and approved by the Secretary of State. The district nursing officer suspended the officer and terminated his employment. The Court of Appeal reversed the judge's order by which he held that the applicant's rights were of a sufficiently public nature to entitle him to seek public law remedies.

24. Sir John Donaldson said at page 430:

> *'Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a higher grade or is an 'officer'. This only makes it more likely that there will be special statutory restrictions on dismissal, or other underpinning of his employment (see per Lord Reid in Mallock v. Aberdeen Cooperation, at p 158). It will be this underpinning and not the seniority which injects the element of public. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient.'*

And later, Purchas LJ at 443:

'At the end of the day I find myself returning to the basic question:, did the remedies sought by Mr. Walsh arise solely out of a private right in contract between him and the authority or on some breach of the public duty placed on that authority which related to the exercise of the powers granted by statute to them to engage and dismiss him in the course of providing a national service to the public? In my judgment there is no arguable case which can be mounted upon the facts disclosed even if they are all assumed in favour of Mr Walsh to the effect that the remedies sought by him stem from a breach which can be related to any right arising out of the public rights and duties enjoyed by or imposed upon the health authority. The only remedies sought by Mr. Walsh arise solely out of his contract of employment with it, as opposed to any public duty imposed upon the health authority.'

25. In **R v. Derbyshire Council ex P Noble [1990] I.C.R 808**, a case in which a police surgeon was engaged by a county council to provide services to detained persons if required, at 819 Woolf L J put the matter somewhat differently. He stated:

'As I understand the approach which the courts now adopt, and which has been made clear in a series of cases it is to look at the subject matter of the decision in which it is suggested should be subject to judicial review and by looking at that subject matter then come to a decision as to whether judicial review is appropriate...

That approach is an approach which can be found for example in Reg. V. Secretary of State for Foreign Affairs and Commonwealth Affairs, Ex parte Everett [1989] Q.B 811, in which this court had to decide whether or not the issue of or refusal to issue a new passport to the applicant was a matter which was appropriate for judicial review. Having referred to the speeches in Council of Civil Service Unions v Minister for the Civil Service [1985] I.C.R. 14 O'Connor L.J. in giving the judgment of the court, said [1989] Q.B. 811 817:

> *"Three of their Lordships, Lord Diplock, Lord Scarman and Lord Roskill unequivocally held that judicial review did lie of decisions taken under the prerogative. Lord Scarman in his speech said that it was not the origin of the administrative power, but it was the actual factual application which had to be considered".*

Emphasis Added

26. What was important was the actual factual application. It was held in **Noble**, that although the applicant's engagement involved the carrying out by him of certain functions of a public nature, his complaint was directed to the circumstances surrounding his dismissal, and adjudication on that would be concerned not with any breach by the council, but solely with such private rights as the applicant might be entitled to by virtue of his private contract of employment with the council; that,

therefore, there did not exist the element of public law which was necessary to enable the applicant to proceed by judicial review.

27. A useful case is that of **Evans v. University of Cambridge [2002] EWHC 1382** (Admin) 5th July 2002. Dr Evans a lecturer at the University of Cambridge complained about her failure to obtain promotion. She challenged the University by way of Judicial Review. Scott Baker J examined the relevant authorities and concluded:

> *'The indisputable fact is that Dr. Evans is an employee of the University. She has a contract of employment with the University, one that incorporates the University's own rules made through ordinances. If the University is in breach of contract through failing to comply with its own rules, her remedy is to claim breach of contract.'*

28. The following case demonstrates the assertion of a private law right, involving the examination of public law issues. In **Roy v Kensington and Chelsea Family Practitioner Committee [1992] 1 All ER 705,** Dr. Roy ,a general practitioner brought an action claiming breach of contract in which he alleged that the Family Practitioner Committee had wrongfully abated his basic allowance. The terms of his contract were provided for by statutory instrument. The Committee applied to strike out the action on the ground of abuse of process. It was granted on the ground that the Committee's exercised a public law duty in making a decision to abate.

29. The Court of Appeal allowed Dr Roy's appeal. The House of Lords dismissed the Committee's appeal. Lord Lowry at page 725 simplified the issue thus:

> *'It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him...'*

Emphasis Added

30. This statement is particularly relevant to the issue at hand in this case. The question which the court asks is, what was the "actual factual application" in which the decision maker was engaged? There can be no doubt that the appellant was exercising what it determined, was an employment function and that the respondent considered that he was wrongfully dismissed.

31. The appellant and the respondent must, however, operate in accordance with contract and the provisions of the Act and any regulations made thereunder. If either party alleges that the other is in breach, there are available private law remedies.

32. I conclude therefore that what is at issue is a matter of private law, breach of the contract of employment. I express no view however whether the respondent was, in fact, guilty of any breach.

The remedy

33. One of the most significant developments in this area of the law is the move towards a more flexible procedure. Section 12 of the Judicial Review Act provides:

> *'Where the court is of the opinion that an inferior Court, tribunal, public body or public authority against which or a person against whom an application for judicial review is made is not subject to judicial review, the Court may allow the proceedings to continue, with necessary amendments, as proceedings not governed by this Act and not seeking any remedy by way of orders of mandamus, prohibition or certiorari and subject to such terms and conditions as the Court thinks fit.'*

34. The issues of concern to the parties have always been transparent. A large volume of evidence has been adduced and there has already been cross-examination. With the assistance of case management, I am of the view that the outstanding issues can be resolved.

35. I would therefore allow the appeal, set aside the order of the judge and order that:

(1) the matter be remitted to the judge to be continued as if begun by writ, for the determination whether the respondent was wrongfully dismissed, and if so his entitlement to damages, if any;

(2) the parties be at liberty to file and serve witness statements, if they so desire within four weeks hereof;

(3) that all the evidence adduced previously and exhibits admitted in evidence, including all affidavits filed before the trial judge be admitted in evidence on the hearing of this matter;

(4) a case management conference be fixed, upon consultation with the judge; and

(5) costs, including the costs of this appeal, be costs in the cause.

Margot Warner
Justice of Appeal