IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 59 of 2011

BETWEEN

WINSTON BARROW

Appellant

AND

THE NATIONAL INSURANCE BOARD OF TRINIDAD AND TOBAGO

Respondent

PANEL: **Mendonça, J.A.**
Bereaux, J.A.
Moosai, J.A.

Appearances: **The Appellant appeared in person.**
For the Respondents Mr. C. Siewchand and Ms. M. Livan

Date of delivery: November 18th, 2014

I agree with the judgment of Mendonca J.A. and have nothing to add.

N. Bereaux,
Justice of Appeal

I too agree.

P. Moosai,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. The Appellant in this appeal is Mr. Barrow. He was represented by Counsel in the Court below but represented himself at the hearing of the Appeal. The Respondent is the National Insurance Board of Trinidad and Tobago (the Board) and is a body corporate established by the National Insurance Act Chap. 32:01. Under section 3(2) of the Act the Board consists of eleven members designated Directors.

2. The Appellant contends that he was employed by the Board as the Comptroller of Finance and Accounts (the Comptroller) from February 1st, 1996 to August 17th, 1998 when he says the Respondent wrongfully terminated his contract of employment. In this claim the Appellant claimed, inter alia, a declaration that there existed between him and the Board a contract of employment whereby he was employed in the post of Comptroller with effect from February 1996, and damages for wrongful dismissal. The Appellant also raised in his submissions that he should be compensated on a quantum meruit basis or paid arrears of salary.

3. The trial Judge dismissed the Appellant's claim. The Appellant claims that the Judge was wrong to do so. He contends that the Judge should have ordered that he be paid compensation or arrears of salary to the date he was unlawfully dismissed by the Respondent and damages for wrongful termination.

4. Before the trial Judge there was the evidence in chief of the Appellant in the form of a witness statement on which he was cross-examined. There was also an agreed bundle of documents. The Board, however, filed no witness statements and did not call any witnesses on its behalf.

5. The material facts before the Judge were in summary these. The Appellant was employed as Chief Accountant with effect from June 1st, 1992. The parties signed a written contract dated June 7th, 1993 outlining the terms and conditions of the Appellant's employment as Chief Accountant. The contract was for a period of three years expiring on May 31st, 1995.

6. On June 9th, 1993 the Appellant was appointed to act in the capacity of the higher position of Comptroller during the period June 23rd to July 14th, 1993 because the then Comptroller, Ms.

Harewood, was away on special leave. On January 21st, 1994 the Board again decided to appoint the Appellant to act as Comptroller. On this occasion the acting appointment was from January 26th to March 31st, 1994. The acting appointment was again occasioned by the fact that Ms. Harewood was on leave. The parties signed a written agreement appointing the Respondent as Comptroller for the period. They agreed, inter alia, to suspend their respective rights and obligations under the contract of June 7th, 1993 with respect to the employment of the Appellant as Chief Accountant pending the duration of the acting appointment *"so as to enable the employee to assume the position of [Comptroller] temporarily. Provided that the period of suspension shall not affect the termination date of the principal agreement [i.e. the June 7th 1993 agreement]".*

7. By letter dated March 2nd, 1994 the Appellant was again notified that *"a decision had been taken for [his] continued acting as [Comptroller] for the period April 5th to April 8th, 1994"* in the absence of Ms. Harewood.

8. By letter dated May 4th, 1994 the Appellant was notified that the Board had *"agreed that you should act as Comptroller with effect from May 2nd, 1994 until further notice, consequent upon the decision for Ms. Harewood to act as Deputy Executive Director".*

9. Ms. Harewood, it would appear continued to act as Deputy Executive Director until her retirement in January 1996 and the Appellant continued to act as Comptroller.

10. Consequent on the Appellant being appointed to act as Comptroller, Mr. Phillip Maharaj, Investment Analyst, was appointed as acting Chief Accountant.

11. In 1995 the Appellant was appointed to a committee of three persons to restructure the Board. In February 1996 the Appellant alleged that the Chief Executive Officer advised him that the reorganisation proposed by the Committee had been approved and that *"we should commence implementation of the plan as submitted"*. He further said that in the plan he was designated as Comptroller. He therefore recommended that Mr. Phillip Maharaj, who had been appointed to act as Chief Accountant on the Appellant's appointment to act as Comptroller, fill the vacancy created by him taking up the position of Comptroller. By letter dated March 8th, 1998 Mr. Maharaj was informed that the Board had promoted him to the position of Financial Accountant with effect from March 1st, 1996.

12. By letter dated April 4th, 1996 the Appellant wrote to the Executive Director of the Board. He stated that the retirement of Ms. Harewood as Comptroller had cleared the way for an appointment to the position to be made pursuant to section 14 of the National Insurance Act. He said that apart from *"three short stints"* he had acted continuously in the position for the past twenty-one months and that together with his qualification, made him well qualified to fill the void. The Appellant therefore offered his services on terms which *"approximated"* a draft contract he enclosed with the letter. There was no response from the Board to this letter.

13. Section 14 at all times material to this appeal and so far as is material to it, provided at section 14(1) that the Board may, subject to the approval of the President, appoint on such terms and conditions as it thinks fit, inter alia, a Financial Comptroller and such other officers and employees as may be necessary for the due and efficient performance by the Board of its duties under the Act. Section 14(2) provided that an annual salary of $18,000 or such greater amount as the Minister may determine shall not be assigned to any post without the prior approval of the Minister.

14. Sections 14(1) and 14(2) were amended by the National Insurance (Amendment) Act, 1999. The sections as amended by that Act remain as they are today. The amendments dispensed with the need for the President's approval contained in section 14(1) and for the Minister's approval in respect of annual salaries of $18,000 or greater contained in Section 14(2). Section 14(2) as amended, however, requires the Minister's approval in respect of the salary and allowances for the post of Executive Director and provides that no other officer or employee of the Board shall receive salary or allowance higher than that of the Executive Director.

15. Of course sections 14 (1) and 14 (2) as they existed before the 1999 amendment are the provisions that are relevant to this appeal. It should be noted that there is no evidence of the President's approval pursuant to section 14(1). However, it has not been contended by either party that the absence of such approval renders the terms and conditions of the Comptroller's contract of employment unenforceable.

16. In or around September of 1996 a report was prepared by Mr. Lopez, the Human Resources Comptroller of the Board. The report was *entitled "Report on Investigation into the Conditions and Events Surrounding the Nature of Mr. Barrow's Employment with The National Insurance Board at Inception and Throughout His Tenure to Date"*, Mr. Lopez identified the

Appellant among the sources of information he relied on for the preparation of the report. He described the Appellant as *"Ag. Incumbent (Comptroller Finance and Accounts)".* At paragraph B (xii) of the report it was noted that during the Appellant's tenure he had acted in the post of Comptroller on certain occasions which included *"May 25th, 1994 to the present".*

17. The report contained certain recommendations in relation to the Appellant. These were, (i) that the contract by which the Appellant was appointed Chief Accountant be terminated by mutual agreement with effect from January 24th, 1994; (ii) that the contract by which he was appointed to act as a Comptroller be amended so that the period of acting would be from January 26th, 1994 to January 31st, 1996; and (iii) that his request as per letter dated April 4th, 1996 "*and proposed contract attached*" be considered by the Board.

18. There is no evidence that the Board considered and acted on the recommendations contained in the Lopez Report.

19. By letter dated October 3rd, 1996 from the secretary/legal advisor of the Board the General Manager of National Insurance Property Development Company Limited (NIPDEC) a subsidiary of the Board, was advised that the Appellant is the Comptroller *"at the Board and as such in accordance with the Articles of Association of NIPDEC is entitled to sit on the Board of NIPDEC as a Director"*. Consistent with that according to the annual return filed under the Companies Ordinance Ch. 31 No. 1on behalf of NIPDEC for the year 1996, the Appellant's name is listed among the names of directors in the annual return and his business occupation is stated as *"Comptroller of Finance and Accounts - National Insurance Board"*.

20. By letter dated November 19th 1997 the Appellant wrote to the Chairman of the Human Resources Committee of the Board seeking *"some feedback as to [his] contractual and compensation arrangement having served with credit for three and a half continuous years in the position of Comptroller of Finance and Accounts".* He stated, "*note that I performed in the position and <u>not acted</u> in the position"*. The letter continued as follows:

> *"I joined the Board on June 01, 1992 on a three year contract with the option to convert at my discretion to a service contract when the promised salary increases take effect, plus very specific duties and responsibilities. After two years, new specific duties (i.e. the Comptroller, Finance and Accounts) were assigned and these have subsequently grown with the coming into being of Cheque Centre. The consideration is yet to be settled.*

Over time I have raised the issue with the former Executive Director and formally communicated my offer to serve by letter and draft contract during February, 1996. The only verbal communication I got was that salary was not an issue but the pension matters had to be looked at and that one or two Officers were to discuss the matter with me. This is yet to happen

In the interim I have carried on fully expecting that the matter would be resolved. In this time, salaries for two positions below that of the Comptroller, Finance and Accounts have been agreed at levels above that paid to me. Further, for the past year I have undertaken the major functioning of the vacant Financial Accountant in addition to my assigned functions - a clear reflection of dedication and sense of responsibility; I have superintended over a period where efficiencies and higher yields have accrued to the Board at a cost less than any other Comptroller, an anomaly (Note my salary is that of the Controller $8,000 plus the Board's share of pensions to the Financial Accountant not of a Controller thus $1,287 or $153 short per month) that has to be addressed, and as proposed below market.

*Whereas I am normally patient in matters such as this, the recent advertising of the position followed by the advice that once "**good salaries**" are had the job would be given to "**someone we are looking at**" apparently without regard to the legal position or good industrial practice, then one could understand my anxiety. This is a pressure job already therefore further build up should be avoided.*

Clearly my situation is distinctive being defined as the same job currently and content wise as per advertisement nor is it likely to be made redundant unless by change of legislation. Moreover, I have performed same competently. Restructuring nor approval of new salaries is not sufficient a ground to delay justice or suspend good industrial practice.

Thank you

Without Prejudice
Yours respectfully

Winston Barrow

cc. Executive Director"

21. On or about June 4th, 1998 the Respondent caused to be published in a daily newspaper an advertisement inviting applications for the position of Corporate Controller Finance and Business. As I have mentioned below the evidence suggests that this is the same position as the Comptroller.

22. By letter dated June 15th, 1998 the Appellant wrote to the Executive Director in the following terms:

"Dear Sir,

RE: ADVERTISED POSITION FOR COMPTROLLER FINANCE & ACCOUNTS

On the afternoon of Friday 12th June, 1998 at about 2:30 p.m. on your request I appeared before you and was advised of two (2) decisions of the Board:

- *for the period December, 1996 to February, 1998 an Ex-Gratia payment was agreed for me in the sum of twenty thousand, five hundred dollars ($20,500.00)*

- *that the position of Comptroller, Finance and Accounts and that of Insurance Administration – vacant with the proposed move of the incumbent to the post of Deputy Executive Director - "would be advertised and if you wish you may apply."*

On Sunday 14th June, 1998 the advertisement appeared in the Sunday Express before a formal notification could reach me.

The Board's stance as conveyed by your good self appears strange on the basis of:

1) *My strong contribution and expertise applied in bringing around the operations of the Accounts and Investment functions including computerisation of the operations, integration and a near doubling of the investment returns of the Board over the last five (5) years.*

2) *A display of equity since three (3) positions were not advertised two (2) of which represent substantial changes in job content.*

3) *The Executive Director's position was in the hands of three (3) persons within the last two (2) years - yourself occupying ten (10) months at the time of the decision.*

4) *The failure of Mr. Urquhart and the Board's Personnel Committee to secure a written contract despite their efforts and Board representation to me to take up work at NIPDEC.*

I have had no disciplinary matters nor questions on my performance or competency pending nor raised over the six (6) years I have spent at the Board while marked improvements have accrued to the Division and the NIB. For these reasons I would think that I deserve a formal statement for the action taken; for the Board cannot be oblivious of the distress caused to my family and myself and the common law position of the incumbent.

I therefore request that the reasons for this action be lucidly conveyed to me as is my right under industrial relations law.

Respectfully

Winston Barrow
COMPTROLLER, FINANCE & ACCOUNTS"

23. On June 25th 1998 the Appellant applied for the advertised position. On August 17th, 1998, the Appellant was notified that his application was unsuccessful. By letter of the same date from the Executive Director of the Board the Appellant's services were terminated by the payment of three month's salary in lieu of notice. The letter was as follows:

> *"Dear Mr Barrow*
>
> *We hereby give you three (3) months notice of termination of your employment effective November 16, 1998. You will not be required to report for work during the period of notice and should therefore cease reporting immediately. You may collect a cheque which represents three (3) months pay and all termination allowances from the Board on the 21st day of August, 1998 from the Executive Director.*
>
> *We have been advised that grounds may also exist for summary termination of your employment and we reserve our position in this regard.*
>
> *Yours sincerely*
> *FOR AND ON BEHALF OF THE*
> *BOARD OF MANAGEMENT*
>
> *Trevor Romano*
> *EXECUTIVE DIRECTOR"*

24. The Judge in his judgment stated that the nub of the Appellant's case is that having made an offer to the Board to continue in the position of Comptroller by the Board's conduct he became the Comptroller. The question, he said, was whether by extending his acting appointment from time to time the Board in effect promoted the Respondent to the position. The answer to this question turned on what was the intention of the parties. He concluded that:

> *"Given the available evidence there is nothing to suggest that the [Appellant] was ever appointed to the substantive position either expressly or by conduct. He himself acknowledges that impliedly by applying for the position when it was advertised."*

25. The Judge seemed to be of the view that the Appellant continued to be employed by the Board as Chief Accountant when he came to consider whether the Appellant had been given reasonable notice of termination, he stated:

"The question also arose about the adequacy of the notice given to the claimant. He was given three (3) months notice. Given his position as an accountant, such a period of notice cannot be seen to be unreasonable".

26. Before this Court the Appellant in essence argued that the contract whereby he was employed as Chief Accountant came to an end and that with effect from February 1st, 1996 he was employed in the higher post of Comptroller. The Appellant further maintained that prior to his termination salaries attributable to the post of Comptroller were increased but he was not paid the increased salary. He says that he should be paid the increased salaries that were not paid to him. Alternatively, he contends that he is entitled to recover on a quantum merit for the value of the services he performed as Comptroller. The Appellant further says that his contract was wrongly terminated in that, (i) it was terminated by the Executive Director of the Board who did not have the power to do so, or (ii) alternatively, the three-month notice by which the Respondent purported to terminate the contract was not reasonable.

27. There are therefore four issues that arise in this appeal and these are, (1) was the Appellant at the time of his dismissal in August 1998 employed as the Chief Accountant, (2) if not in what position was he employed and, what were the terms of the Appellant's employment at the time he was dismissed, (iii) was his contract wrongfully terminated and, (iv) was he owed arrears of salary or should he be paid compensation on a quantum meruit.

28. With respect to the first issue, as I mentioned earlier the trial Judge was of the opinion that at the time the Appellant was dismissed he held the position as Chief Accountant. The Appellant was initially employed with the Board as the Chief Accountant. There was a written contract dated June 17th, 1993 that governed his employment as Chief Accountant. According to that contract the Appellant was employed for a period of three years, which ended on May 31st,1995. It was not expressly renewed and I find it difficult to come to the conclusion that after the contract expired by effluxion of time the Appellant continued to be the Chief Accountant on the same terms and conditions as the expired contract. The fact of the matter is that long before the contract expired the Appellant ceased to perform the functions of Chief Accountant. The parties themselves had preferred to suspend their respective rights and obligations under the contract of June 17th, 1993 when the Appellant was appointed to act as Comptroller on one occasion. There is nothing in the evidence to suggest that the parties' intention was any different when on other occasions the Appellant performed the functions of Comptroller. It seems to me that when the Chief

Accountant's contract expired by effluxion of time on May 31st, 1995 the Appellant ceased to be Chief Accountant. However, even if I am wrong in so saying I do not think that it can reasonably be advanced that after February 28th, 1996 at the latest, the Appellant continued as Chief Accountant.

29. According to the Appellant's evidence he was part of a committee that was appointed in August 1995 to undertake the task of restructuring the Board. The Appellant's evidence was that that task was completed sometime thereafter and in February 1996 the reorganisation was approved by the Board. As part of that reorganisation Mr. Phillip Maharaj, who had been appointed to act as Chief Accountant while the Appellant performed the functions of Comptroller, was appointed on March 8th, 1996 to fill the vacancy created by the Appellant taking up the position of Comptroller. The letter appointing Mr. Maharaj in fact referred to him as being appointed to the position of Financial Accountant and not Chief Accountant. But I do not think that there is any doubt that the effect of the Appellant's evidence is that the position of Chief Accountant, as a consequence of the reorganisation, was replaced with the post of Financial Accountant and that Mr. Maharaj was appointed to the new post. In those circumstances it is untenable to maintain that the Appellant was the Chief Accountant after March 1st 1996.

30. As the Appellant did not occupy the position of Chief Accountant after February 28th, 1996 what position did he occupy and on what terms?

31. It is the Appellant's contention that he was the Comptroller under an implied contract with a salary of $18,000 and other perquisites. He says this contract is to be implied from the conduct of the Board including things said.

32. The figure of $18,000 is derived by the Appellant on the basis that in 1998 the Minister approved certain salaries for top managerial positions on the Board. This approval was no doubt given by the Minister pursuant to section 14(2) of the National Insurance Act referred to earlier, which prohibited the Board from assigning to any post a salary greater than $18,000 without the prior approval of the Minister. The Appellant on the basis of that argument was in effect submitting that he was appointed to the substantive permanent position of Comptroller and entitled to the salary that was attached to the post. That in essence would be the salary offered for the post by the Minister. The substantive holder of the post would also be entitled to other perquisites which included a pension.

33. It is not in dispute that the Appellant performed the functions of Comptroller for approximately four years. Ms. Harewood was the appointed Comptroller until January 1996 and it is accepted by the Appellant that as she occupied the substantive position he could not. He however contends that after she retired in January 1996, he became the substantive holder of the position from February 1st, 1996. Of course it does not follow that once Ms. Harewood retired anyone acting in the post would automatically succeed to it. Nor does it follow that if someone were employed by the Board to act as Comptroller that after the retirement of Ms. Harewood such employment would necessarily be on the terms and conditions attached to the post. I think this is demonstrated by two events. The first was that when the Appellant was employed as Chief Accountant he negotiated special terms. These included a short-term contract of three years, a payment to him of a sum of money that would have normally been set aside as the employer's contribution to pension and a provision that on the conclusion of the negotiations for review of salaries for members of top management of the Board, the terms and conditions of the contract would be reviewed. Secondly, when the Appellant offered his services as Comptroller in April 1996 he did so on special terms which included a higher salary than what was previously paid to the substantive holder with special provisions as to pension entitlement and the same provision that the proposed contract would be reviewed on the conclusion of the salary negotiations. I will discuss subsequently whether the Appellant's offer of April 6th, 1996 was accepted, but it seems that the low salaries offered by the Board caused the Appellant not to accept the terms and conditions attaching to the post but instead seek to negotiate special terms.

34. The question nevertheless arising from the Appellant's contention is whether he was appointed to the substantive post. The Appellant in support of this contention relies on the conduct of the Board, including things said to him.

35. It is of course trite law that if there is to be a binding contract there must be *consensus ad idem*; that is to say a sufficient correlation between the offer and acceptance. A contract will not be concluded unless the parties have agreed to its material terms. An offer may be made by conduct and may be accepted by conduct unless there is a prescribed method of acceptance that excludes it, which is not the case here. Whether the offer has been accepted by conduct requires an objective test to be adopted. The test has been explained in this way in **Chitty on Contracts** Vol. 1 (31st Ed.) at para 2-002:

"Under this test, once the parties have to all outward appearances agreed in the same terms on the subject matter, they neither can, generally, rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party therefore do not prevent the formation of a contract."

This has been applied in decided cases see for example **Maple Leaf Macro Volatility Master Fund v Rouvroy** [2009] EWCA Civ. 1334 and **States of Guernsey v Jacob UK Ltd.** [2011] EWHC 918.

36. In **Chitty on Contract, supra,** it is also noted at para. 2-030:

"But conduct will amount to acceptance only if it is clear that the offeree did the act of alleged acceptance with the intention (ascertained in accordance with the objective principle) of accepting the offer."

37. As I mentioned the Appellant relies on evidence of conduct, including things said, to establish that there was a contract appointing him to the substantive post of Comptroller.

38. So far as what was said to him the Appellant relies essentially on what is contained in paragraph 12 of his witness statement. There he stated *"that he was told that the plan for the reorganisation of the Board was approved. He was told that in February 1996 and that plan, he said, designated him as Comptroller."* The Appellant is therefore saying, that insofar as he was told that the plan designated him as Comptroller was approved he was in effect told that he was the Comptroller. That statement on which the Appellant relies is, however, inconsistent with other evidence and in my judgment ought not to be relied upon.

39. First there is the statement that also appears in paragraph 12 of the witness statement. There the Appellant states that in March 1996 the Board approved *"both his recommendations."* The reference to both recommendations appears from the context to be a reference to the appointment of Mr. Maharaj as Financial Accountant and to the Appellant as Comptroller. If the restructuring showing the Appellant's designation as Comptroller were approved in February 1996 when he was so informed by the Chief Executive Officer, then there would be no need for a further approval in March. This second statement on its face is inconsistent with the first statement and required an explanation but there was none.

40. Secondly, the Appellant wrote a letter dated April 4th 1996 in which he noted that the retirement of Ms. Harewood had cleared the way for the appointment of Comptroller and in which he offered his services. If the Appellant were informed that he was already appointed to the post of Comptroller there was no need for him to offer his services by that letter. In his witness statement the Appellant stated that the letter was to *"formally document [his] conversion to pensionable service"*. But if the letter was in fact written to formalize an already approved position, I believe it would have taken a very different tone. There would have been no need for the Appellant to set out his credentials and his services rendered to the Board and *"offered his services"*. Notably in the letter there is no mention that he had been appointed to the post of Comptroller. Further on a perusal of the contract accompanying the letter on which the Appellant offered his services it is clear that it is more than merely to formally document a conversion to pensionable service. The Appellant is attempting to negotiate the terms of his appointment to the position of Comptroller and they do not touch only on pension. I will discuss below whether the offer of April 4th, 1996 was accepted by the Board, but in any event, if the Appellant were appointed to the post at the salary attaching to it there would be no need for proposals as to salary and pension arrangements as contained in the draft contract.

41. Thirdly, by letter dated November 19th, 1997 the Appellant wrote a letter to the Chairman and members of the Human Resources Committee seeking *"some feedback as [his] contractual and compensation arrangements"*. The Appellant made mention in that letter to the earlier offer of April 4th 1996 (which he erroneously referred to as made in February 1996) and noted that the only response he had gotten was an oral communication that the *"pension matters"* had to be looked at and that one or two officers would discuss the matter with him but this was yet to happen. But the letter does not state that he was told that he was appointed to the post, which in my view it would have done if that were the case, especially as he had mentioned in the letter that recently he was advised that once *"good salaries"* were approved for the position it would be given to someone the Board was looking at. Further if the Appellant were indeed appointed to the post at the remuneration attached to the post it would not be necessary to seek clarification of his contractual and compensation arrangements.

42. Fourthly, there is a letter dated June 15th, 1998. This letter was written after the Appellant was informed that the post would be advertised and he may apply for it. The Appellant thought the Board's stance to be strange and set out his reasons for so saying. It would indeed be strange for

the Board to have informed the Appellant that the post would be advertised and that he may apply, if he had already been appointed to the post. But in the letter the Appellant makes no mention of having been told that he was appointed to the post. The gist of the June 15th 1998 letter seems to be a complaint by the Appellant that he was not an automatic choice for the position having regard to his contribution to the Board.

43. Lastly, there is the letter of June 25th, 1998 whereby the Appellant applied for the position. The Appellant says that he applied without prejudice but it is not stated anywhere in the letter. In this regard it is relevant to not that in the letter of November 19th 1997 the words *"without prejudice"* appear at the bottom of that letter. This indicates that the Appellant was aware of the use of the term and that he knew to put it in a letter where he felt the need to do so. But he did not do so in respect of the June 25th letter and that does not support the Appellant's position that it was written without prejudice. There is also no denying that the Appellant was aware of his legal rights and that he could seek legal redress. It is very peculiar that the Appellant would apply for a position he thought he occupied rather than seek legal redress. The letter seems to be an open letter of an application for the post simply because the Appellant could not say with any degree of persuasion that he was appointed to it.

44. The Judge was of the view that by applying for the position the Appellant impliedly acknowledged that he was not appointed to the position. The trial Judge in my view was entitled to draw that inference.

45. In the circumstances I am not prepared to accept the Appellant's evidence that he was told that he was appointed to the position. The Appellant must therefore rely on things done rather than what was said.

46. The Appellant relies on correspondence written in 1996 by the Respondent to him in which he is addressed as the Comptroller, as opposed to Acting Comptroller. He relies also on the letter written by the Board to NIPDEC on October 3rd, 1996 notifying the latter that the Appellant is the Comptroller. He further refers to the appointment of Mr. Maharaj to the post of Chief Accountant and to the annual return for the year 1996 filed on behalf of NIPDEC under the Companies Ordinance where in the particulars of directors his post is described as the Comptroller of the Board.

47. I do not regard the appointment of Mr. Maharaj as probative. This shows that the Appellant's contract as Chief Accountant came to an end, but does not address the contractual arrangements between the Appellant and the Board that succeeded it. In other words it does not answer the question whether the Appellant was appointed to the substantive post as Comptroller or on what other terms he may have been employed. I also do not think that the annual return filed by NIPDEC helps the Appellant's case. Although NIPDEC is a subsidiary of the Board, it is not the Board and the filing of the return is therefore not the act of the Board and I cannot regard that act of NIPDEC as evidence of the Respondent's intention to have appointed the Appellant to the substantive post. The 1996 letters are more probative, particularly when compared to the letters written by the Board in 1994 when Ms. Harewood was still in office. In those letters the Appellant was referred to as Acting Comptroller.

48. But that has to be looked at along with the other evidence. Firstly, there was the letter of April 4th, 1996. If the Appellant had been appointed to the substantive post there would be no need for the Appellant to offer his services as Comptroller on special terms. Indeed there would no need for the Appellant to write offering his services if he was already appointed to the post. Secondly, the Board appointed Mr. Lopez to investigate the conditions and events surrounding the nature of the Appellant's employment with it. That investigation would not have been necessary if the Appellant were appointed to the post. The investigation concluded with the recommendation that the Board consider the Appellant's offer of April 4th, 1996. That certainly does not support the contention that the Appellant was appointed to the substantive post. Further, the Board advertised the position while the Appellant was performing the functions of Comptroller. The Appellant did not respond by saying he was the Comptroller and indeed applied for the position. Also the Appellant continued to be paid the same salary and other allowances he was paid after February 28th, 1996 as before. These included an acting allowance and the Board's contribution to pension. Both are inconsistent with the Appellant's assertion that he was appointed to the substantive post.

49. In my judgment when all the evidence is considered it leads inexorably to the conclusion that the Appellant was not appointed to the permanent and substantive post of Comptroller. I therefore do not differ from the trial Judge's conclusion on this issue.

50. The Appellant in his statement of case also advances the position that his offer of April 4th, 1996 was accepted. But there is no evidence that the Appellant's employment, after the offer was

made, was continued on the terms as contained in the draft contract that accompanied the letter of April 4th, and on which the Appellant offered his services as Comptroller. Indeed according to the Appellant's case the Board did not agree *on "pension matters"* and the Board was yet to discuss the matter with him. There was therefore no *consensus ad idem* on material matters. Further the Lopez Report itself invited the Board to consider the offer. That does not support the contention that the offer was accepted. There is no evidence that the Board accepted Mr. Lopez's recommendation. Indeed the subsequent letters of the Appellant indicate clearly that it did not and he was still seeking the Board's response as to his contractual position within the Board.

51. In what position then was the Appellant employed with the Board and on what terms?

52. There is no doubt that the Appellant performed the functions as Comptroller. He was appointed to act in that position in May 1994 and continued to so act until his dismissal in August 1998, long after his contract as Chief Accountant expired by effluxion of time. He was employed to perform the functions but his employment was not that of the substantive holder of the post. He was employed on an acting basis until the Board could fill the position. On the evidence disclosed in this matter that would probably not have been before better salaries were approved by the Minister for the post of Comptroller. The Appellant was employed in that acting position for an indeterminate period of time. In other words there was no specific duration for which the Appellant was employed. He was employed at the remuneration that he was in fact paid.

53. There is no express agreement as to a provision dealing with the termination of the employment contract. But I do not think that there could be any doubt that there would be implied in the contract a term that it could have been terminated by either party giving to the other reasonable notice. There was in fact no disagreement that whatever the contract that existed, it would contain such a provision. Where there was disagreement was as to the length of notice that would constitute reasonable notice.

54. The Board paid the Appellant three months notice and in effect gave the Appellant three months notice of termination. The Board submits that this was reasonable. The Judge, as noted earlier, agreed that three months notice was indeed reasonable and the Board supports this position. The Appellant however submits a period of twelve to fifteen months would constitute reasonable notice in this case.

55. The length of notice required will depend on the intention of the parties in each case. Such intention may be inferred from all the relevant circumstances of the case. In **Rogan-Gardiner v Woolworths Ltd.** [2012] WASCA 31, the Court made reference with approval to the fourth edition of **Macken, McCarry and Sappideen, the Law of Employment** (1997) 116-168, where the authors set out the factors that may be relevant for the determination of the period of reasonable notice. The Court stated:

> *"In the fourth edition of Macken, McCarry and Sappideen, the Law of Employment, (1997) 116-168, the authors state that the considerations which may be relevant to the determination of the period of reasonable notice include the 'high grade' and importance of the position; the size of the salary; the nature of the employment; the employee's length of service; the professional standing, age, qualifications, experience, and job mobility of the employee; the expected period of time it would take the employee to find alternative employment; and the period that, apart from the dismissal, the employee would have continued in the employment. The authors note that the factors which are relevant in any particular case must, of course, depend upon the particular facts of the case."*

56. In **Didier v Geest Industries (WI) Ltd.** DM 1999 CA 5, the Court of Appeal of the Eastern Caribbean Supreme Court of Justice made similar observations as to the relevant considerations in determining what may constitute a reasonable period of notice. The Court stated:

> *"The determination of the issue of a valid termination of a contract, revolves around the issue of what constitutes reasonable notice, and this always depends on the particular facts of each case. In deliberating on this concept, in the context of this case, I have to consider, inter alia, the character of the employment, the appellant's qualifications, his stature in the position he held, his age, the availability of similar employment within a reasonable time... his experience, his skill, his training, the length or duration of his employment and the responsibilities that attended themselves to that position"*

(See also **Dominica Agricultural and Industrial Development Bank v Mavis Williams** [2007] ECSCJ No. 16 and **Clark v Fahrenheit 451(Communications) Ltd.** (2000) ALL ER (D) 849, where the Court referred to features of status and seniority as material considerations and which I think are included in a specific list of considerations referred to in the quotation from the **Rogan-Gardiner** case).

57. In this matter at the time of the determination of the Appellant's employment he was employed in the acting position of Comptroller. That is a top management position of the Board and required the Appellant to report directly to the Executive Director. The position entailed responsibility for overall management of the accounts investment and budget departments of the Board. It required the Appellant to review the work of the Financial Accountant, Investment Manager, Manager Accountant and Mortgage Officer. Training and development of personnel were under his direct supervision.

58. The Appellant was well qualified being a certified accountant since 1979. He had over ten years experience in Financial Management in senior positions at three companies prior to his employment at the Board. The duration of the Appellant's employment at the Board was a little over six years, having been employed from June 1st, 1992 to August 17th, 1998. He first started as the Chief Accountant and continued as the Acting Comptroller. According to the Appellant he did not find suitable employment after his dismissal but as he puts it, he got a *"little something"* about seven months after the termination of his employment. I think, it is fair to say, that given the high grade and importance of his employment that similar employment positions would not be readily available.

59. In the circumstances of this case it is also relevant to bear in mind that the Appellant offered his services as Comptroller in April 1996 under a contract that was terminable by three months notice. This offer was not accepted and is therefore not conclusive. However insofar as it may provide some evidence of the Appellant's intention it is a factor that ought to be taken into account. Also relevant is the nature of the Appellant's employment itself. He was not appointed in the substantive position and it was an acting position.

60. The Judge was of the view as I mentioned earlier that three months notice was adequate. This was however, on the erroneous basis that the Appellant was the Chief Accountant. If that were reasonable for the position of Chief Accountant, I cannot accept that in the circumstances of this case that it will also be reasonable notice to determine the employment of the Appellant in the higher position even though he was the acting Comptroller. In all the circumstances in my judgment a reasonable period of notice for the termination of the contract in this case would be six months. As the Appellant was given only three months notice, his contract was wrongfully determined and he is entitled to an award of damages. The general rule is that the employee is entitled by way of damages to the amount that he would have earned during the period of

reasonable notice. As the Appellant in this case was given three months pay in lieu of notice he is in effect entitled to a further three months pay by way of damages

61. I had mentioned earlier that the Appellant had relied on an alternative ground for contending that the contract was unlawfully determined. He contended that the power to dismiss was exercised by the Executive Director of the Board acting on his own, whereas the decision to dismiss under the National Insurance Act is that of the Board. In other words the decision should have been the collective decision of the Directors and not that of the Executive Director. The Court, however, did not permit the point to be pursued. Even if the interpretation of the Act proffered by the Appellant is correct the point was grounded on an allegation of fact that the decision to dismiss was that of the Executive Director alone. This was not pleaded and it should have been if it were the Appellant's case. Further nothing of the kind was mentioned in the Appellants witness statement. The Appellant attempted to draw an inference of fact from certain documents that were in evidence. But in the circumstances where the matter was not pleaded or contained in the witness statement it would not have been fair to the Board to permit the Appellant to have pursued that issue at this stage.

62. I now refer to the Appellant's claim in quantum meruit. The Appellant submits that under section 14(1) of the National Insurance Act, the Board was under a duty to provide its employees with reasonable terms of employment, which included reasonable remuneration for services rendered. He argued that the Board approved a consultant's report in October 1995 for new salaries with effect from July 1st, 1995. The Board sought the Minister's approval for the implementation of the recommended salaries pursuant to section 14(2). It took the Minister two and a quarter years to respond and when he did, he unilaterally changed the effective date from which the new salaries were to be paid to January 1st, 1998. The effect of that, the Appellant maintains, is that the Minister has valued the job of Comptroller before January 1st 1998 at $8,000 per month, which was at that time the salary approved for the post of Comptroller. This, he said, is absurd and should not have been accepted by the Board. He contends that the decision of the Minister was ultra vires, without justification, in denial of natural justice and should have been disregarded. As the Board failed to do so it meant that it enriched itself at the expense of the Appellant and he was accordingly entitled to recover on a quantum meriut reasonable remuneration for his services.

63. These issues now raised by the Appellant, and which are not pleaded in the claim, should have been set out in a public law claim in which the Minister was made to answer as the gist of the complaint is against the decision of the Minister and the delay of the Minister in coming to that decision. The fact of the matter is that the Board in view of section 14(2) of the National Insurance Act (as it existed at the relevant time) could not as a matter of law have increased the salary of the Comptroller as it was above $18,000 per annum, without the approval of the Minister. The Board had no discretion in the matter without the Minister's approval. It cannot therefore be liable on a quantum meruit claim for unjust enrichment based as it is on the failure to ignore the Minister's approval and pay higher salaries when it did not have the authority to do so. The relationship between the Appellant and the Board was governed by their contract of employment and it is to that contract that parties must look to ascertain the parties' rights and responsibilities. The Appellant's claim is contractual in nature and a claim in quantum meruit is misconceived.

64. The Appellant also claims arrears of salary. As I understand the Appellant's claim it is based on the fact that the Minister approved salaries for members of top management of the Board with effect from January 1st, 1998 and as the Appellant was Comptroller he was entitled to the increased salaries from then but was not paid.

65. There is some doubt as to whether the Minister in fact approved increased salaries for the post of Comptroller. In the letter from the Permanent Secretary to the Board notifying it of the Minister's approval for the salaries recommended by the Board the post is referred to as Corporate Controller Finance and Business. There is however some evidence that suggests that the post of Corporate Controller Finance and Business was regarded by the parties as the same position as Comptroller.

66. According to the Appellant in his letter of June 15th, 1998 he was told that the position of Comptroller would be advertised and if he wished he may apply for the position. When the advertisement appeared, it, in fact, referred to the position as Corporate Controller Finance and Business. There is nothing from the Board to suggest that contrary to what the Appellant was told, the advertisement did not relate to the position of Comptroller. Further, when the Appellant applied for the advertised post his application was assessed by a firm of accountants employed by the Board for that purpose. In the assessment it was noted that the Appellant was *"currently acting in the position"*. In the circumstances I think that any doubt that the post of Comptroller is the same as Corporate Controller Finance and Business should be resolved in favour of the Appellant.

67. However as the basis of the Appellant's claim for arrears of salary was that he was appointed to the post and so entitled to the increased salary as and when it was increased, his claim cannot succeed as I have held that he was not so appointed but rather was employed in an acting capacity on the terms as mentioned above.

68. I have considered whether a term may be implied in the contract of employment of the Appellant, whereby in the event that the Minister should approve the salary recommended by the Board for the post of Comptroller, it would be paid to anyone acting in the position.

69. In **The Attorney General of Belize v Belize Telecom** [2009] UKPC 10 Lord Hoffman noted that the question of the implication of a term arises when the contract does not expressly provide for what is to happen when some event occurs. But the Court does not make the contract for the parties. The Court, therefore, will not imply a term simply because it is desirable to do so or because it may improve upon the contract. The role of the court is to find the true meaning of the agreement and a term will only be implied if taking the agreement as a whole the implied term reflects what the agreement would reasonably be understood to mean. A term, therefore, would only be implied if the parties intended it to form part of the agreement. He stated (at para 21):

> *"In every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express terms what the instrument read against the relevant background, would reasonably be understood to mean."*

70. Lord Hoffman referred to the case of **BP Refinery (Westernport) Pty Ltd. v Shire of Hastings** (1977) 180 CLR 266, which set out the following conditions which it was said must be satisfied before a term can be implied:

> *"(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expressions; (5) it must not contradict any express term of the contract."*

He stated (at para 27) that this list of requirements is best regarded *"not as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges*

have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did think that it did so."

71. Although Lord Hoffman was referring to the implication of a term in a written contract the same considerations apply where the contract is not written. The question here therefore is whether the implied term would spell out in express terms, what the contract set against the relevant background would reasonably be understood to mean.

72. The relevant background is the background knowledge which would be reasonably available to the audience to which the instrument is addressed.

73. In this case the Appellant was employed as the acting Comptroller. In that position his salary did not mimic that of the Comptroller. He received an acting allowance and an additional sum by way of the Board's contribution to pensions that would have been applicable to the Chief Accountant. These are special terms applicable to the Appellant as acting Comptroller. Similarly when the Appellant was employed as Chief Accountant he negotiated special terms. He accepted a short term contract with increased remuneration rather than the permanent pensionable employment as Chief Accountant. The parties however agreed that the terms and condition shall be reviewed upon the conclusion of the negotiations for the review of salaries for members of top management. They did not agree that the salary increases would apply automatically. The parties seemed to wish an opportunity to assess and negotiate their positions in the light of the increases. This might have informed that fact that although the Board may recommend increases they may not have been approved by the Minister.

74. I think against that background the contract between the parties could not be reasonably understood to contain a provision, that any increase in the salaries for the post of Comptroller that may be approved by the Minister will be paid automatically to someone in the position of acting Comptroller.

75. In the circumstances I would allow the appeal and order that the Board pay to the Appellant as damages for wrongful dismissal salary and other contractual entitlements for a period of six months, less of course what has already been paid to him. What is the exact sum the Appellant would have earned monthly, inclusive of salary and other contractual entitlements is not entirely clear. If the parties are unable to agree to the amount, I shall refer the matter to the Judge

for the assessment of damages. The Board shall pay to the Appellant interest on the outstanding amount at the rate of 6% per annum from August 17th, 1998 to the date hereof. The Board shall pay to the Appellant costs in the Court below on the prescribed costs scale. The value of the claim for the calculation of the prescribed costs shall be the damages and the interest thereon. (See **Leriche v Maurice** [2008] UK PC 8).

76. With respect to the costs of the appeal, prior to the Civil Proceedings Rules, 1998 (the CPR) an unrepresented litigant, as was the Appellant before this Court, would have been entitled to only out of pocket expenses (see **Buckland v Watts** [1969] 2 ALL ER 985. It seems however that under the CPR the position is different.

77. In **Horsford v Bird** [2006] UKPC 3 (an appeal from the Court of Appeal of Antigua and Barbuda) the appellant appeared in person before the Privy Council and in the courts below. He succeeded before the Privy Council and it was ordered that the "*costs in the lower courts will be the appellant's costs at the prescribed rate*". The respondent was also ordered to pay the appellant's costs before the Privy Council.

78. The determination of the quantum of the costs payable to the appellant in the **Horsford** case was remitted to the lower courts. There was no issue there as to the payment of costs to the Appellant on the scale of prescribed costs pursuant to the order of the Privy Council. However, certain questions arose as to the quantum of costs and came before the Court of Appeal (see **Horsford v Bird** HCVAP 2008/005). One such question was whether the appellant was entitled to costs of an application to examine a witness before trial. The Court noted:

> *"10. Part 65.7(2) of CPR states that prescribed costs exclude 'the making or opposing of any application except at a case management conference or pre-trial review'. The appellant's claim for costs for this latter application is an allowable claim. The only issue that remains, therefore, is quantum.*
>
> *11. The appellant is a lay person, that is to say, he is a person who does not possess a practising certificate as an attorney-at-law. Implicit in the Privy Council Order is an acknowledgment, that notwithstanding the status of the appellant as a lay person he is entitled to prescribed costs. I have no doubt that their Lordships considered the language of Part 65.5 of the CPR which speaks to 'a party' being entitled to*

costs of any proceedings and the language of part 65.7 which states that prescribed costs include 'attendance and advocacy at the trial...'...".

The Court went on to allow to the appellant the filing expenses incurred by him in respect of the application, which therefore represented the appellant's out of pocket expenses. It however allowed a further sum of $500 for the preparation and presentation of the application. With respect to the latter amount the Court relied on rule 65.2(1) which is as follows:

"If the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is-

"(a) the amount that the court deems to be reasonable were the work to be carried out by a legal practitioner of reasonable competence."

The Court commented that that rule *"sets a standard to be used in determining such costs, whether a legal practitioner of reasonable competence is used or not"*.

79. Rule 65.2(1) is similar to this jurisdiction's CPR at rule 67.2(1) which provides that:

"Where the court has any discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount that the court deems to be reasonable were the work to be carried out by any attorney-at-law of reasonable competence and which appears to the court to be fair both to the person paying and the person receiving such costs."

It should also be noted that rules 65.5 and 65.7 referred to by the Court are, for all intents and purposes, the same as rules 67.5 and 67.7 of the CPR.

80. In view of the decisions of the Privy Council and of that of the Court of Appeal in the **Horsford** case, with which I agree, the position is that an unrepresented litigant is not limited to the recovery of only his out of pocket expenses. An order for prescribed costs may be made in his favour and where the application or work in respect of which costs are claimed is not covered by the prescribed costs regime (see rule 67.7), the Court may award a sum that it deems reasonable as if the work had been carried out by a legal practitioner of reasonable competence and which appears to the Court to be fair, both to the person paying and the person receiving such costs.

81. Rule 67.14 of the CPR is relevant to the costs of proceedings in the Court of Appeal. This rule provides that unless an order for budgeted costs is made, the costs of an appeal must be determined in accordance with rules applicable to prescribed costs, namely rules 67.5, 67.6 and 65.7 and appendix B, but the costs must be determined at two thirds of the amount that would otherwise be allowed under appendix B. In the circumstances the Appellant shall have his costs of the appeal and it is ordered that the Board shall pay to the Appellant the costs of the appeal determined at two thirds of the prescribed costs in the Court below.

Mendonça, J.A.