[2012] UKPC 41
Privy Council Appeal No 0027 of 2011

JUDGMENT

Marie Joseph Charles Robert Lesage (Appellant) *v* The Mauritius Commercial Bank Ltd (Respondent)

From the Supreme Court of Mauritius

before

Lord Walker
Lady Hale
Lord Mance
Lord Kerr
Lord Sumption

JUDGMENT DELIVERED BY LORD KERR ON

20 December 2012

Heard on 9-10 October 2012

Appellant
James Guthrie QC
Rowan Pennington-Benton

(Instructed by M A Law (Solicitors) LLP)

Respondent
Eric Ribot SC
P Maxime Sauzier SC
Louis Eric Ribot

(Instructed by Blake Lapthorn Solicitors)

LORD KERR:

1. On 9 May 2003 the Mauritius Commercial Bank launched legal proceedings against one of its former employees, Robert Lesage. The proceedings alleged fraud on his part which, it was claimed, had resulted in huge losses to the bank. No fewer than 37 other defendants were parties to the action originally. Many of these were dismissed from the suit before the trial of the action. Those who remained as defendants (apart from Mr Lesage) either did not participate in the trial at all or were represented but did not give evidence.

2. The trial of the action took place before a two-judge court (Lam Shang Leen J and Devat J) appointed for that purpose by the Chief Justice. Judgment was given on 30 June 2010 in favour of the Bank against Mr Lesage jointly and in solido with other defendants for 436,297,598.69 Mauritian rupees (MUR) and for a further sum of MUR 245,406,115.10, on his sole account, including MUR 1,000,000 'moral damages'. The Bank was also awarded interest and costs.

3. Mr Lesage's defence was that he had not been guilty of fraud. On the contrary, he claimed that at all times in the course of the dealings that had formed the case against him, he had acted on the instructions and under the supervision of the bank's senior management. As well as disputing the bank's claim, he also took proceedings against them for salary and bonuses that he alleged were due to him. The bank denied that these were owing to him. Mr Lesage's claim was consolidated with the bank's claim against him. It was dismissed.

The trial

4. The bank's claim against Mr Lesage was assigned to the commercial division of the Supreme Court of Mauritius. It appears that this division has no statutory underpinning and there is ongoing litigation as to whether its decisions comply with the Constitution of Mauritius but that is not a matter which is in issue on this appeal.

5. As a matter of practice, cases assigned to the commercial division are tried either by a judge sitting alone or, where it is so ordered by the Chief Justice, by two-judges. The power to make such an order is contained in section 36 of the Courts Act 1945, as amended by the Courts (Amendment) Ordinance 1963 (Ordinance No.9 of 1963), which provides that the Chief Justice may, either proprio motu or on application by any party, direct that any case shall be heard by two or more judges, "having regard to the magnitude of the interests at stake or the importance or intricacy of the questions of fact or law involved". In this instance, neither party had applied for the case to be assigned to a two-judge court. It appears that the Chief Justice, acting on his own initiative, decided in August 2009 that this was the appropriate

mode of trial but the appellant did not become aware of that decision until 2 September 2009 when the hearing of the case was due to begin.

6. Mr Lesage complains that he was not given the opportunity to make representations on whether his trial should have been held before two-judges. This was particularly important, it is claimed, because, in effect, it removed any right of appeal to a domestic Court of Appeal. Under section 3 of the Court of Civil Appeal Act 1963 "any party aggrieved by any judgment or order of a judge sitting alone in the exercise in Court of his original civil jurisdiction may appeal from such judgment or order to the Court of Civil Appeal." There is no provision for appeal from a decision of a two-judge court.

7. The hearing of Mr Lesage's trial took place between September and November 2009. Evidence was heard over 21 days. Although it had been intimated that the Bank would have a number of witnesses, in the event, only one was called. He was Pierre Guy Noel, who was in 2003, when the fraud alleged against Mr Lesage was uncovered, the general manager of the bank. Mr Noel denied that the bank was aware of Mr Lesage's activities or that any of the allegedly fraudulent dealings in which he had engaged were authorised by the bank. Mr Lesage gave evidence on his own behalf and a number of witnesses were called by his defence team.

8. Judgment was delivered on 30 June 2010. The bank's case was described in the following passage:

> "[The bank alleged] a mega fraud ... (the largest) that has allegedly been orchestrated and perpetrated in its history over a span of some 14 years by one of its top personnel, Mr Robert Lesage ... The [bank] asserts that a huge amount of funds has been siphoned off and/or misappropriated via complex schemes of financial transactions using shell companies for the benefit of one person, Mr Teeren Appasamy .... Unauthorised loans, discounting of bills of exchange and ploughing into the fixed deposits of some of the [bank's] important customers were allegedly the three methods resorted to by Mr Lesage in order to perpetrate the fraud. An intricate system of splitting/layering/integrating of funds belonging to the [bank] designed to foil its internal and external audit trail was used."

9. The essence of Mr Lesage's defence was summarised in the judgment in this way:

> "[He] has strenuously denied all the allegations of fraudulent transactions made against him by the [bank]. He has maintained that he had been acting under instructions since he first joined the [bank]. He has stated that he had never committed any acts of larceny or fraudulent abstraction of funds and that what he did was at all material times within the knowledge of his superior officers and in particular the General Manager. He has stated that the management of the [bank] from 1989 to 1996 was aware of the transactions which were instituted at their request. He has disagreed with the prayer made against him and he maintained that he is not liable in any amount whatsoever."

10. The competing cases having been expressed in those terms, it is clear that the court's resolution of the dispute between the parties was bound to turn critically on the question of credibility. And the court duly described its approach to its conclusions in the following passages:

> "In the first place, we shall consider the allegation of Mr Lesage that whatever he had been doing at the bank was in the course of his employment and with the authorisation and knowledge of the bank. If we reach the conclusion that the contention of Mr Lesage is correct, then the claim of the [bank] must fail..."

and:

> "In considering whether the version of Mr Lesage is correct, it stands to reason that it is really an issue of credibility which calls to be determined. We have to consider the version of Mr Lesage against that of Mr P G Noel, having regard to all the documents which had been put before us by both parties and the lengthy submissions of all learned counsel."

11. In deciding that Mr Lesage was liable and in rejecting his defence, the court again made clear that this was, if not uniquely at least principally, founded on its assessment of whether he could be believed, and that this was in turn based on its judgment of his performance as a witness. It said this about him:

> "After anxious consideration, we have reached the conclusion that the version of Mr Lesage cannot be retained. We say so because we find that he has been fabulating in more than one instances (*sic*) losing his poise when cornered and he was not only shutting his eyes to the obvious but he was also glossing over certain events and putting the blame on others, forgetting that he was the person responsible for the department concerned. He has also shown himself to be very selective in his recollection of events. He has come up with answers which are contradictory and demonstrates his gift of painting a different picture thereby distorting facts which are obvious especially when confronted with documents the contents of which are clear and unambiguous. We have certainly not been impressed by his ad nauseam mantra of having done all those acts in the course of his employment under instructions when, admittedly as it was said, being a man of notes, he has been incapable to bring up any instructions in writing from Mr PG Noel or from any other former General Manager during that long period under consideration. We simply do not believe Mr Lesage and we need only to highlight some of the evidence and major contradictions to support our conclusion."

12. The court then identified what it described as the "most damning piece of evidence" against Mr Lesage's case that he had at all times acted with the full knowledge and consent of the bank's senior management. On that subject the judgment contained the following passage:

> "The most damning piece of evidence is in relation to the answer given by Mr Lesage to the pertinent question … under cross-examination as to whether he had ever said that what he had done was not under instructions. In chief, he stated on every possible occasion that everything that he had done was under the instructions of Mr PG Noel and with the knowledge of the Top Management of the bank. Without batting an eyelid and with much assurance, he stated that he acted under instructions. But, when he was confronted with the statement he had given to the ICAC under oath and in the presence of his counsel at the time when he was granted immunity, he had to concede having said in his statement of 9 September 2003 that he had not acted under instructions when he took funds from the NPF/NSF deposit accounts and that he did so on his own initiative. He has agreed that what he had stated was the truth.

> He again had to admit that without being prompted, he had replied to the ICAC that the idea of siphoning off funds of the NPF/NSF occurred to him, when around that time (meaning August 1996), he had received a phone call from late Mr Dipnarain Manna who was the then Financial Secretary and the Chairman of the NPF Investment Committee requesting him to make a transfer of Rs50m from the deposit account for investment abroad through the SBM. He had admitted that the second time he made use of the funds of the NPF/NSF, it was without instructions and was done on his own initiative. He needed the funds to plug the holes which he had dug after Mr T Appasamy failed to return moneys to him."

13. The body referred to in this passage as 'ICAC' was the Independent Commission against Corruption which had carried out investigations into alleged fraudulent activity at the bank and had interviewed Mr Lesage in the course of those investigations. The NPF/NSF accounts refer to the accounts of the National Pensions Fund and the National Savings Fund from which, it was alleged, Mr Lesage had unlawfully transferred substantial sums of money to the benefit of other defendants.

The proceedings on 2 September 2009

14. The trial of the action was due to begin on 2 September 2009. On that date, Mr Rex Stephen, who had until then been acting for Mr Lesage, applied to be permitted to withdraw from the case. In making that application he referred to a letter that Mr Lesage had sent to the court. His stated reason for wishing to withdraw from the case was that "his client [was] not following his advice".

15. Mr Stephen's application was not granted immediately. Lam Shang Leen J is recorded as having said:

> "You take instructions from your client. You may advise him because (*sic*) when he doesn't follow that's his problem. Isn't it? Then, at this stage of the proceeding which we have tried since the month of March to put in shape, has been dragging on since the year 2004, maybe your motion to withdraw might not even be considered. Like I have done in other cases where you also you have appeared, I may refuse you to withdraw from the case."

16. The following exchange then took place between Mr Stephen and the court:

"MR STEPHEN: My Lord, if I may. I received, obviously, instructions from my instructing Attorney..... (interrupted).

THE COURT: Unless, your client come and say that he doesn't want you anymore, then the other issue will [be], who will appear for him because these matters are far back when I read the letter. The problem started in mid-August. So, mid-August to today, a little more than two weeks. Your client could have retained another Counsel. The Attorney still remains there, isn't it? Right? So? I will give you time to think about it and I'll come back to you. If your client says that he doesn't want you that's a different matter now. You see what I mean.

MR STEPHEN: Yes, but from my point of view, he is not following my advice and Your Lordships, I am bound by professional secrets, confidentiality but Your Lordship is aware and my client has, in fact, put up (*sic*) the Court into the picture and for these reasons I am unable to, professionally, continue appearing in the case. I am afraid. I will be doing disservice to my client where I should not continue appearing and my client is aware of this and the reasons for which I have intimated to him that I will be stepping down from the case.

THE COURT: Yes, but then your decision could have been taken to (inaudible) so that he is [in] a clear position. I understand from the letter he stated that if ever you withdraw, he will ask for a postponement and whether the Court will grant a postponement that's another matter now, right."

17. Following a short adjournment, Mr Lesage confirmed that he did not object to Mr Stephen withdrawing from the case. He was then asked whether he could defend himself and he said that he could not because of "the magnitude" of the case. He asked that the case be adjourned so that he could engage counsel. Lam Shang Leen J pointed out that Devat J had come into the case just a few weeks before and had been able to assimilate the papers and issues; that Mr Stephen would presumably remain able to assist any new counsel who was engaged; that the case had been fixed for some time to begin in September; and that, because a number of other defendants had been dismissed from the suit, the issues had narrowed considerably. He indicated that only a very short adjournment of one week would be granted and, when asked by counsel for the plaintiff if the case would begin the following Wednesday, he said, "Of course. I don't know who will be the counsel. I am not interested to know. The case will re-start in one week."

18. The Board is concerned that Mr Stephen should have thought that his professional obligation was to withdraw merely because his advice about settlement was rejected. This approach would in many cases unreasonably deprive a party of his right to be represented when he had greater confidence in his case on the facts than his counsel did. It is a not uncommon experience that counsel's advice is not accepted and the client's position in refusing to accept it is later vindicated by the outcome of the trial. The circumstances in which it would be appropriate for counsel to withdraw from the case because his advice has been rejected should be confined to those where a client's rejection of advice and insistence that the case proceed would amount to an abuse of the court's process.

The letter sent by Mr Lesage to the court

19. Before the hearing on 2 September 2009 Mr Lesage had written to Lam Shang Leen J on 28 August 2009. The letter was copied to the Chief Justice. Because the Board is ordering a re-trial it is not appropriate to quote from the letter. It is sufficient to say that it contained privileged information which, in the Board's view, required the court to address directly the question whether it was possible for the judges to continue to hear the case without creating the appearance of unfairness or bias.

The grounds of appeal

20. In the section of the Notice of Appeal in which the appellant was invited to specify the grounds of appeal, reference was made to a document entitled "Application for Permission to Appeal" which was annexed to the Notice. The annexed document contained a long, discursive recital of facts and legal argument running to some 8,500 words. The Board deprecates the practice of attaching such a document to the Notice of Appeal. Grounds of appeal should be succinctly stated. They should not rehearse facts nor should they contain legal argument.

21. In an effort to ascertain precisely which were the grounds on which the appellant wished to pursue his appeal, the Registrar of the Judicial Committee of the Privy Council wrote to the appellant's solicitors on 29 July 2011 informing them that permission to appeal had been granted and directing that they should provide a statement within 28 days specifying the grounds on which the appellant proposed to pursue the appeal. This elicited a further letter with an attachment.

The latter document was merely an amended version of the "Application for Permission to Appeal" document which had been annexed to the original Notice of Appeal. It remained verbose and long-winded and contained factual assertion and argument rather than stating concisely the actual grounds of appeal.

22. Having considered the further letter and the attachment the Registrar wrote again to the appellant on 13 October 2011. That letter contained the following passage

> "In the absence of a clear and concise statement of the grounds of appeal, the Board has examined your letter and the amended document carefully and, as best it can judge, there is a single ground of appeal *viz* that the appellant was denied a fair hearing.
>
> The arguments on which this ground appears to be based are these:
>
> 1. The trial judge should have recused himself;
>
> 2. An adjournment of the trial should have been granted;
>
> 3. The trial judge was hostile to the appellant and his counsel;
>
> 4. The appellant had no right of appeal to the Court of Appeal in Mauritius.
>
> The Board will permit argument on these issues only."

23. In his written case and in the oral submissions of his counsel, Mr Guthrie QC, the appellant suggested that the Board had restricted "the subject matter" of his appeal. That is not correct. The Board had been obliged to distil from the documents that the appellant had submitted with the Notice of Appeal and in reply to the Registrar's letter what it considered to be the ground of appeal and the arguments on which that ground was to be advanced. If there was any other ground of appeal or any further arguments that the appellant wished to put forward, it was open to him to alert the Board to that wish. In the event, the Board is satisfied that the appellant was able through his written case and by the oral arguments of his counsel to canvass fully all the issues that properly arose on the appeal.

It is further satisfied that the ground identified in the Registrar's letter of 13 October 2011 and the arguments which were stated to support that ground represent the correct basis on which the appeal could be appropriately pursued.

The absence of a right of appeal to a Court of Appeal in Mauritius

24. It is convenient to deal with this argument first since it was presented as the principal submission for the appellant and occupied centre stage in the presentation of the appeal. It was argued that the absence of a right of appeal from the decision of a first instance tribunal of the Supreme Court comprising two-judge was unconstitutional. The appellant contended, in particular, that this offended section 10(8) of the Constitution which provides:

> "Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

25. Inherent in this right, the appellant claimed, was the right to appeal against the decision of a first instance court. Drawing on the analogy of article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) which, the appellant suggested, was mirrored by section 10(8), he submitted that where an appeal process was available from other species of first instance decision (such as where a judge sat alone), it should be available for all such decisions, including those where the decision was reached by a two-judge court. To make the right available for one type of decision but not the other was irrational and arbitrary.

26. The Board does not accept these submissions. It is clear from the jurisprudence of the European Court of Human Rights (ECtHR) that article 6(1) does not require of states that they create courts of appeal where none had previously existed (*Delcourt v Belgium* [1970] 1 EHRR 355, para 25, *Levages Prestations Services v France* (1996) 24 EHRR 351, para 44*).* Indeed, article 6(1) does not guarantee a right of appeal at all (*Tolstoy Miloslavsky v United Kingdom (*1995) 20 EHRR 442, para 59). Where states have systems of appeal, however, the fair trial guarantees of article 6 apply at every stage of the process. The key principles, frequently repeated in judgments of the ECtHR concerning issues relating to rights of appeal, are set out in *Miloslavsky* (at para 59):

> "59. The Court reiterates that the right of access to the courts secured by Article 6(1) may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.
>
> It follows from established case law that Article 6(1) does not guarantee a right of appeal. Nevertheless, a Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees in Article 6. However, the manner of application of Article 6 to proceedings before such courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein."

27. Contrary to the appellant's claim, these passages do not support the proposition that if a right of appeal is provided for one species of first instance decision, it must be afforded to all. Access to a right of appeal may be restricted by contracting states. It is only where such restriction impairs "the very essence" of the right of access to a court that violation of article 6 arises. In *Brualla Gomez de la Torre v Spain* (Application No 26737/95) 19 December 1997, para 33, ECtHR said:

> "The Court reiterates that the 'right to a court', of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard."

28. Where an applicant has had the benefit of a full first instance hearing, ECtHR has shown itself notably reluctant to intervene, particularly in a civil case - see the *Levages* case at para 46.

29. If the jurisprudence on article 6 of ECHR is considered to provide guidance on the application of section 10(8) of the Constitution, it does not support the contention that there is implicit in that provision a requirement that there be a right of appeal from a decision of a two-judge court. The judges of the Court of Appeal in Mauritius are (currently) those of the Supreme Court. An appellant to the Court of Appeal will have his case decided by judges who are members of the same tier of the judiciary as Lam Shang Leen J and Devat J. Section 70 of the Courts Act 1945 provides that appeals to the Court of Appeal must be heard by at least two-judge. If the appellant's case had been dealt with at first instance by a single judge, his appeal could have been dealt with, therefore, by two-judge such as Lam Shang Leen J and Devat J.

30. There is also the consideration that the appellant did enjoy a right of appeal to the Board. Mr Guthrie suggested that the opportunity to develop a challenge to the factual conclusions reached by the Supreme Court was more restricted in an appeal to the Judicial Committee of the Privy Council than it would have been to a Court of Appeal in Mauritius. But it was not apparent from his argument why this should be so. When appropriate, the Board has conducted quite lengthy reviews of factual findings of courts whose decisions have been the subject of appeal to the Privy Council. And indeed in the present case many aspects of the proceedings were considered in detail during the hearing of the appeal before the Board and at times meticulous examination of sections of the transcript took place.

31. The appellant presented an alternative argument on the claimed denial of his constitutional right to an appeal from the decision of the Supreme Court. It was suggested that, although section 3 of the 1963 Act does not contain a provision allowing an appeal from a two-judge court, it should be "read down" under section 3 of the Constitution, which provides a fundamental right to protection of the law, so as to allow for such an appeal.

32. This argument must be dismissed for essentially the same reasons as that founded on the avowed analogy between the claimed constitutional right and the rights under article 6 of ECHR. There is no reason to suppose that protection of the law in section 3 of the Constitution, which declares, in its material part, that the protection of the law is one of the extant human rights and fundamental freedoms of the citizens of Mauritius, requires that there be an appeal from the decision of a two judge court, other than to the Judicial Committee of the Privy Council.

33. Moreover, the adequacy of such constitutional protection of the law as is afforded by the availability of an appeal, albeit with leave, to the Privy Council, has been, at least implicitly, endorsed by the courts in Mauritius. In *Domah v The Judicial and Legal Service Commission* [2001] SCJ 175 the applicant challenged a decision to allocate two-judge to the hearing of a judicial review application. The Supreme Court dealt directly with the argument that such a decision would deny the appellant a right of appeal and referred to the fact that it has always been the practice in Mauritius for judicial review applications to be heard by two-judge. The court then said:

> "It is true that upon the case being heard by a two-judge, appeal will only lie to the Judicial Committee of the Privy Council on leave being granted (vide Section 81(1) of the Constitution and Section 69 of the Courts Act). However, apart from the fact that this would cut both ways and potentially affect not only the applicant but also any other party to this case, there is the overwhelming consideration that the applicant cannot be considered as having a right of appeal as such to the Court of Civil Appeal. Having regard to the well-established practice to which we have referred earlier, no such right of appeal has ever existed."

34. The Board agrees with this conclusion. The appellant's constitutional right of protection of the law is sufficiently safeguarded by the thoroughness of the examination of the issues available in the first instance procedure and by the existence of a right to apply for permission to appeal to the Board. There is nothing about the nature of an appeal to the Board (as opposed to an appeal to an intermediate court of appeal) that makes it any less suitable to a review of relevant factual findings. Of course, no appellate court will embark lightly on an extensive review of the facts found by the first instance tribunal. This will normally not be the function of an appellate court unless it is shown that the first instance court has made findings of fact that are wholly unsupported by the evidence or has drawn inferences from the facts that are plainly wrong. But where it can be demonstrated that a review of the factual findings is necessary, the Board will be no less willing than would a domestic court of appeal to embark on such an exercise. It is to be observed, however, that the cost and difficulty associated with an appeal to the Board are not insignificant considerations. The Board was informed that the possibility of introducing a right of appeal to a court in Mauritius in this type of case was being examined. No doubt these aspects will be carefully weighed in the course of that examination.

35. The final argument advanced by the appellant on this issue was that he ought to have been given an opportunity to make representations on the decision to allocate the hearing of this action to a two judge court. There is nothing in this argument. The appellant accepts that he could have made representations on the matter as soon as he discovered that his case was to be tried by two judges. Indeed it was accepted that an application could have been made to have the order of the Chief Justice revoked. In fact, Mr Lesage had sought an adjournment because of the "magnitude" of the case, ironically a strikingly similar consideration to one of the statutory bases on which the Chief Justice was empowered to act under section 36 of the 1945 Act. The only basis on which objection could have been taken to the decision was that it unwarrantably deprived the appellant of a right of appeal to an intermediate court of appeal and, for the reasons that the Board has given earlier, this argument could not succeed.

Should an adjournment of the trial have been granted?

36. From the account of the proceedings on 2 September 2009 given at paras 14 to 17 above, it is abundantly clear that Lam Shang Leen J was determined that the action would proceed within a very short time of that date. The Board can readily understand the reasons for that resolve. The trial had been fixed to begin on 2 September several months before that date. The case had been in progress for a number of years. It is perhaps unfortunate, however, that the impression may have been created by what Lam Shang Leen J said, that a pre-emptive decision had been taken that, whatever the difficulties Mr Lesage's new counsel might have encountered, no application for a further postponement of the start of the trial would be entertained. The statement that the case would re-start in one week, taken with the judge's expressed lack of interest about who the new counsel might be, had a "come what may" finality about it. One can sympathise with feelings of frustration that the judge may have felt in expressing himself so forcefully but it would not have been right to exclude entirely the possibility that yet another delay would have to be accepted in order to ensure that Mr Lesage was properly represented.

37. It has not been suggested on behalf of Mr Lesage, however, that counsel engaged by him, Mr Ashley Hurhangee, felt inhibited from asking for a further adjournment when the hearing resumed on 9 September 2009. And, in any event, because of the duration of examination-in-chief and the fact that the case was adjourned for several days to allow the judges to attend a judicial conference, Mr Hurhangee was not required to begin his cross examination of the bank's only witness, P G Noel, until 1 October 2009. This allowed, by any standard, sufficient time to prepare the case.

38. It is claimed, however, that when the bank's case was unexpectedly closed by Mr Ribot, counsel for the bank, at 3 pm on 8 October 2009, Mr Noel having just completed his evidence, Lam Shang Leen J's peremptory insistence that Mr Hurhangee would have to continue with the case at 10 am the following morning was unfair. It is clear that Mr Hurhangee had fully expected that several more witnesses would give evidence for the bank before he would have to open the case for the defence. It is also clear that he was under considerable pressure as the following exchange with the court illustrates:

> "MR HURHANGEE: Well My Lord, I need time ...
>
> COURT: So tomorrow morning ten o'clock.
>
> MR HURHANGEE: No. My Lord I was concentrating on the witnesses on the list of witnesses of my friend and I've already been communicated and quite extensively. And to be honest, My Lord, I need time.
>
> COURT [addressing Mr Ribot]: But then I think earlier you should have told them that you might be closing your case ...
>
> MR HURHANGEE: Exactly.
>
> MR RlBOT: It's OK, My Lord. I don't want to press my learned friend with anything. I'm saying I don't want to press my learned friend with anything. It is three o'clock. We can meet tomorrow at ten. There is no problem for that.
>
> COURT: No, I'm just telling him that tomorrow morning ten o'clock he must be ready.
>
> MR RIBOT: Yes.
>
> COURT: And that he does not come up with a motion that he has burnt the midnight oil again and that he is tired. So tomorrow morning we are starting with defendant no 1.

MR HURHANGEE: Well My Lord, I need at least …

COURT: At least what?

MR HURHANGEE: I have to have a bit of time to breathe at least, My Lord.

COURT: Until tomorrow morning you've got 20 hours before you.

MR HURHANGEE: Yeah but...

COURT: 20 hours is very long, you know.

MR HURHANGEE: My Lord, I do understand but for the 15 past days it was 20 hours on each day.

COURT: Mr Hurhangee, if you step in a case late, that's your problem. Isn't it?

MR HURHANGEE: I do understand, My Lord.

COURT: Right?

MR HURHANGEE: But at least for ...

COURT: We have been trying to accommodate with you. We have been very patient with you.

MR HURHANGEE: I appreciate, My Lord.

COURT: We have given you time. We also help you to put questions when you were not so clear in your mind.

MR HURHANGEE: Exactly. I really appreciate, My Lord.

COURT: You've got your junior with you, you should work.

MR HURHANGEE: OK.

COURT: Tomorrow morning ten o'clock. It's examination in chief. It will be very easy. All right."

39. This section of the transcript does not make comfortable reading. Counsel was not given an opportunity to develop his reasons for needing more time to prepare. One has the distinct impression that the court had lost patience with Mr Hurhangee and that he was rather dragooned into accepting that he must proceed the following morning. Again, one can have some sympathy with the court. Having read the entire transcript, it appears that Mr Hurhangee may not have always had a clear idea of the case that he was making in cross examination. In consequence, his conduct of his client's case at times lacked focus and sowed confusion. On occasions his questioning was repetitive and not directly on point. But at this stage of the hearing he was seeking to explain why he needed more time to prepare what was going to be a crucial part of the case for his client. He ought at least to have been given the chance to express his reasons for needing more time than the court was prepared to allow.

40. The comment that if Mr Hurhangee had stepped into the case late it was his problem was unfortunate. The issue at this stage was not Mr Hurhangee's personal predicament but whether the defendant's case could be fairly and properly put if he was not given more time to prepare.

41. Despite the Board's misgivings about the way in which the request for more time was handled, this is alone unlikely to have provided a sufficient basis for concluding that an appearance of unfairness or bias on the part of the court existed. It must be weighed with the other matters canvassed on behalf of the appellant, however, in order to decide whether such an appearance of unfairness or bias arises from their cumulative effect.

42. As it happens, Mr Hurhangee did not open the defence on the following day. He was taken to the intensive care unit of the cardiac department that morning. Junior counsel, Mr Valaydon, asked for an adjournment. The court made it clear that it expected junior counsel to take over the conduct of the case on behalf of Mr Lesage. After some rather tense exchanges with the court, Mr Valaydon confirmed that, if necessary, he would take over conduct of the defence as from Monday 12 October 2009. In the event, however, Mr Hurhangee had recovered sufficiently by that time to call Mr Lesage and to examine him in chief.

The court's hostility to Mr Lesage and his counsel

43. Mr Guthrie took the Board to several passages in the record of proceedings in which, he claimed, the court displayed obvious hostility to Mr Lesage and Mr Hurhangee. It would not be helpful to set out those passages. The Board has considered all of them. There were undoubtedly occasions when Lam Shang Leen J was highly critical of Mr Hurhangee and appeared to be abrupt in dealing with pleas for time or understanding of the difficulties that counsel faced. It appears that Mr Hurhangee was, from time to time, so fearful of "displeasing" the court that he did not ask for adjournments. Sometimes, when he did make an application, he withdrew the request because of what he saw as the court's annoyance. The court instructed him to rephrase questions and in one instance he was told to "Come on". He was berated for turning his back to the court in order to seek his client's instructions and was accused of asking questions which he did not understand. His reaction to much of this criticism was to proffer profound and repeated apologies. This did not mollify the court. Mr Hurhangee was told not to waste the time of the court and that if he had nothing to say he was to "just sit down". When he told the court that he was worn out, Lam Shang Leen J retorted, "We are also worn out, do you know that?" He was told that he had not paid heed to warnings that the court had given him.

44. Taken in isolation and out of context, these exchanges between Mr Hurhangee and the court appear unseemly and somewhat demeaning to counsel. But the Board recognises that, in the course of a long trial, especially where there has been repetition and an apparent loss of direction in cross examination, counsel may require to be corrected firmly. It would not be difficult to misjudge the tone of the instructions given by the bench from a consideration of the transcript, without actually hearing how the court addressed counsel. The Board is not prepared to hold, on the basis of these exchanges alone, that what passed between Mr Hurhangee and the court would inevitably produce the appearance of unfairness or bias. Once again, however, they must be considered in combination with other matters in an overall assessment of whether such an appearance was created.

The appearance of bias or unfairness

45. Despite having received a letter from Mr Lesage containing details of the advice that his counsel had given him to settle the case, the judges did not raise with counsel the question of whether it was proper that they should continue to conduct the trial. There are two possible explanations for this. The first is that it never occurred to the judges that the possibility of the appearance of prejudice or unfairness arose. The second possibility is that they were alert to the fact that the information that they had received gave rise to a situation of possible apparent bias or unfairness but decided not to raise it. The Board considers that the first of these is inherently more likely.

46. In *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, the test for the presence of apparent bias was simply expressed by Lord Hope of Craighead in para 103 of his speech where he said:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

47. This formulation has been followed by the Board in, for instance, *Attorney General of the Cayman Islands v Tibbetts* [2010] UKPC 8, para 3, *Prince Jefri Bolkiah v The State of Brunei Darussalam* [2007] UKPC 62, para 15 and *Belize Bank Ltd v The Attorney General of Belize* [2011] UKPC 36, paras 34 and 35. The notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker would be biased.

48. In considering how the notional observer would approach this task, one should recall Lord Steyn's approval in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187 of Kirby J's comment in *Johnson v Johnson* (2000) 201 CLR 488, 509 that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

49. On the question of the state of knowledge that the fair-minded observer should be presumed to have, Lord Hope said in *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] UKHL 2, [2006] 1 All ER 731, para 17:

> "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."

50. The appellant's claim that receipt of the letter from Mr Lesage creates an inevitable appearance of prejudice rests on the fact that the judges had been informed of material which was privileged and which was obviously adverse to his defence of the action. The possibility of prejudice that this gives rise to, it is claimed, is that the judges would be consciously or sub-consciously disposed to scepticism of the defendant's case.

51. Whether, in the mind of the informed observer, the failure to consider the propriety of their continuing to hear the case creates a possibility of bias is to be judged both prospectively and retrospectively. The actual conduct of the judges during the trial is to be examined therefore to see whether it supports or detracts from the suggestion that there was the appearance of possible prejudice.

52. Taking the matter in its prospective dimension first, the Board finds it impossible to say that there was not the appearance of possible bias or unfairness. It is difficult to suppose that an informed observer would not conclude that there was at least the possibility that a trial judge, on considering the material in Mr Lesage's letter to the court, is bound to be more doubtful and sceptical of the defence. This does not mean that the observer would fail to acknowledge that a judge, conscious of the possible effect that receiving the letter would have, would strive conscientiously to disregard the information. In this case, however, the judges did not even raise with the parties or their counsel what effect the letter might have. How would an informed observer react to that circumstance? In the Board's view, it is inevitable that he or she would conclude that the court was not alert to the need for vigilance to ensure that this information did not have an unintended effect on its view of the credibility of the appellant's case. It follows that the possibility that the judges would be influenced to a sub-conscious disposition against the appellant's case was inescapable.

53. That conclusion is reinforced by consideration of the way in which the trial was conducted and the manner in which, in its judgment, the court dismissed the appellant's defence as unworthy of belief. The Board has already observed that the refusal to adjourn the trial and the exchanges between counsel and the court would not, of themselves, necessarily give rise to the appearance of bias and unfairness. But when they are considered against the background that the court was dealing with a defendant who, as the court knew, had refused to accept counsel's strong advice, a different picture emerges. Knowing that the court had been told, of this and that the judges had not even considered whether it was appropriate for them to continue to hear the case, the informed observer could not avoid the conclusion that the way in which the case was conducted was at least indicative of a possible lack of complete impartiality on the part of the court. That conclusion would have been rendered even more unavoidable by a consideration of the court's view about what it described as "the most damning piece of evidence" against Mr Lesage.

54. The passage from the judgment which dealt with this issue is quoted at para 12 above. Mr Lesage's answer to a question concerning funds taken from an account referred to as the "NPF account" was considered to be supremely relevant because it was deemed to run counter to the central plank of his defence *viz* that he had at all times acted on instructions from his superiors. The judgment relied heavily on what it described as Mr Lesage's concession that on this occasion he had acted on his own initiative. This was seen as destructive of his defence.

55. It is necessary to consider carefully the record of proceedings where this evidence was given in order to examine whether the way in which the "concession" was made and the conclusion reached on it in the judgment gives rise to the appearance of bias or unfairness. The evidence was given on 14 October 2009 during cross examination of Mr Lesage by Mr Sauzier, one of the counsel for the bank. The following is the relevant extract from the record of proceedings:

> "Q. When you say, Mr Lesage, that funds were taken from the Bank out of the NPF account to replenish the whole of Air Mauritius. This is the purport of my first question. I put it to you that these were taken out of your own initiative?
>
> A. No, the source was my own initiative. The instructions came from my superiors.
>
> Q. I put it to you that in the statement that you gave to ICAC, you accepted that it was out of your own initiative?
>
> A. No.
>
> Q. No?
>
> A. The initiative..... (interrupted)
>
> Q. I put the question and you'll answer?
>
> A. Yes.
>
> Q. The question which was put to you concerning the NPF/NSF account is as follows:-
>
> 'Were you acting under instructions when you first took funds from NPF/NSF fixed deposit account?'
>
> and your answer is:-

> ‘No. I did it on my own initiative. The idea to use the NPF/NSF fixed deposit accounts occurred to me when around that time I received the phone call from late Mr Deepnarain Manna who was the Financial Secretary and also Chairman of the NPF Investment Committee requesting me to make a transfer of Rs. 15 million.’
>
> Did you say that to the ICAC?
>
> A. I said it to the ICAC, again putting it in proper perspective. It was the source which was my initiative. Otherwise, the pattern was a Financing scheme.... (interrupted).
>
> COURT: Mr Lesage, the question put to you is:
>
> ‘Did you say that to the ICAC?’
>
> The answer if ‘yes’ that's the end of the matter. Right? You cannot go on telling this and this and that. If this is not found in your statement, let Mr Hurhangee, in re-examination, try to put it clear. The question is put to you, you answer to that question.”

56. It seems from these exchanges that Mr Lesage was attempting to distinguish between acting on his own initiative in identifying the source of the funds but that in taking the funds from the account he was acting on instructions. But he was not permitted to develop his answer in order to make that point. This was critical. The judgment concludes that Mr Lesage acted throughout the transaction on his own initiative and that there was no input whatever from his superiors. The case that he wished to make was that this did not represent a proper understanding of the true position. The Board is satisfied that the appellant should have been allowed to elaborate his answer and that he should not have been confined to a “yes or no” response. In refusing to permit him to do so, the court created the appearance of unfairness and bias.

A re-trial?

57. It might be said that the creation of an appearance of unfairness or bias owed much to the actions of Mr Lesage himself in sending the letter to the court in advance of the trial. It is also to be observed that he did not ask the judges to recuse themselves at any stage of the proceedings.

In consequence a re-trial, if ordered now, will involve considerable inconvenience to the parties and witnesses and will involve a substantial demand on court resources. Should these matters have any part to play in the Board's decision as to whether there should be a re-trial?

58. It is clear that there can be no question of waiver on the part of the appellant by reason of his failure to ask the judges to recuse themselves. This would require a voluntary election on his part not to raise an objection to the judges hearing the case. That election would also have to be informed and unequivocal – see *Millar v Dickson* [2001] UKPC D4, [2002] 1 WLR 1615, para 31 per Lord Bingham. It cannot be assumed that the possibility of the appearance of unfairness and bias, although it existed even before the trial began, was present to the mind of Mr Lesage at that stage. Moreover, the reinforcing of that appearance during the conduct of the trial and in the way in which the judgment condemned Mr Lesage's evidence could not reasonably have been anticipated. It is indeed unfortunate that the appellant sent the letter to the court but it has not been suggested that he had any ulterior motive in doing so. Ultimately, the determining factor for the Board on this issue must be whether the appearance of unfairness and bias which it has found to exist can only be cured by a re-trial. The Board does not consider that the failure of the appellant to seek the recusal of the court or the fact that he sent the letter which was significantly instrumental in bringing about the appearance of unfairness and bias can affect the question of whether a re-trial should be ordered.

59. It is inevitable and it is to be regretted that ordering a re-trial will involve substantial administrative difficulties. In a case where it has been concluded that there is the appearance of bias and unfairness, however, these are consequences which simply have to be accepted. They cannot outweigh the unanswerable need to ensure that a trial which is free from even the appearance of unfairness is the indispensable right of all parties and is fundamental to the proper administration of justice. In *AWG Group Ltd v Morrison* [2006] 1 WLR 1163, para 6 Mummery LJ dealt with this issue thus:

> "Inconvenience, costs and delay do not, however, count in a case where the principle of judicial impartiality is properly invoked. This is because it is *the* fundamental principle of justice, both at common law and under article 6 of the Convention for the Protection of Human Rights. If, on an assessment of all the relevant circumstances, the conclusion is that the principle either has been, or will be, breached, the judge is automatically disqualified from hearing the case. It is not a discretionary case management decision reached by weighing various relevant factors in the balance."

60. The Board endorses this approach. Where the appearance of unfairness or bias has been established, ordering a new trial free from the taint of that manifestation is unavoidable. The Board will therefore allow the appeal, quash the decision of the Supreme Court and direct that a re-trial take place before a differently constituted court.