Michaelmas Term
[2023] UKPC 39
Privy Council Appeal No 0013 of 2021

JUDGMENT

Renraw Investments Limited and others (Respondents) v Real Time Systems Limited (Appellant) (Trinidad & Tobago)

From the Court of Appeal of Trinidad and Tobago

before

Lord Hodge
Lord Lloyd-Jones
Lord Kitchin
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON
13 November 2023

Heard on 15 May 2023

Appellant
Robert Strang
Kiel Taklalsingh
(Instructed by BDB Pitmans LLP (London))

Respondents
John Jeremie SC
Richard Thomas KC
Jacqueline Chang
(Instructed by Simons Muirhead & Burton LLP)

LORD STEPHENS:

1. Introduction

1. This appeal arises in the context of proceedings brought by Real Time Systems Ltd ("the claimant") against Renraw Investments Ltd, CCAM and Co Ltd and Mr Jack Austin Warner ("the defendants") in which proceedings the claimant seeks to recover a debt of TT$1,505,493 from the defendants. The defendants admitted they had received the money from the claimant. The issue at trial was whether, as the claimant alleged, the money was paid by way of a loan to the defendants repayable on 28 February 2008, or whether as the defendants alleged, the money was a gift by the claimant to the defendants, in the form of a donation to finance a political party, the United National Congress ("the UNC"), in respect of its 2007 general election campaign.

2. The trial judge, Seepersad J ("the judge") in his judgment dated 15 May 2018 made several factual findings based on which he found that the payment of the money was a loan to the defendants. Accordingly, the judge ordered the defendants to repay to the claimant the sum of TT$1,505,493 together with interest at the statutory rate from 15 May 2018 until repayment, and costs.

3. The defendants appealed to the Court of Appeal against the judge's order. The defendants made two submissions in the Court of Appeal. First, that the judge had made material errors in his analysis of the evidence. Second, that remarks made by the judge in his judgment and subsequent remarks made by him in a speech on 28 March 2019 to the Trinidad and Tobago Transparency Institute met the test for apparent bias so that his order should be set aside on that alternative ground.

4. The Court of Appeal (Smith, Jones, and Pemberton JJA) unanimously allowed the appeal on the ground that the trial judge had made material errors in his analysis of the evidence. The Court of Appeal substituted its own assessment of the evidence which was that the payment of the money by the claimant to the defendants had been a gift in the form of a political donation. Accordingly, the Court of Appeal set aside the orders of the judge and dismissed the claimant's claim. The Court of Appeal also ordered the claimant to pay the defendants' prescribed costs quantified on the sum of TT$1,505,493 plus the costs of the appeal determined at two-thirds of the amount of the quantified prescribed costs.

5. If the Court of Appeal had not allowed the appeal on the basis that the trial judge had made material errors in his analysis of the evidence, then Smith and Pemberton JJA (Jones JA dissenting on this issue) would have allowed the appeal and remitted the proceedings for rehearing based on a finding that the judge had given the appearance of bias.

6. The claimant now appeals to the Judicial Committee of the Privy Council contending that the judge was entitled to make his findings on the evidence and that the test for establishing apparent bias on the part of the judge has not been satisfied.

2. The factual background and an outline of the issues in dispute

7. Mr Krishna Lalla is "well known in the business and political landscape of Trinidad and Tobago": see para 1 of Smith JA's judgment in the Court of Appeal. In 1982 Mr Lalla incorporated Super Industrial Services Ltd ("SISL"), a general contracting and construction company. Mr Lalla states that he passed control of SISL to his sons in 1999 but was retained as a consultant.

8. The claimant is a company involved in the business of providing information technology services. The claimant shares premises with SISL. For the purposes of these proceedings the parties and the courts below proceeded on the basis that Mr Lalla was the controlling mind of the claimant and that he was the claimant's agent.

9. Romila Marajh was at all material times the general manager of the claimant. She was responsible for the claimant's finances and had control of the claimant's financial records, including its bank records, and returned negotiated cheques.

10. Mr Einool Hosein is a former employee of Mr Lalla who at the trial was called as a witness by the defendants.

11. Mr Jack Austin Warner is a Trinidadian and Tobagonian politician, businessman, and football executive. He was a Vice President of the Fédération Internationale de Football Association ("FIFA") and President of the Confederation of North, Central America and Caribbean Association Football ("CONCACAF"). He is also "well known in the business and political landscape of Trinidad and Tobago": see para 1 of Smith JA's judgment in the Court of Appeal.

12. Mr Kenny Rampersad is Mr Warner's accountant. Mr Warner forwarded to Mr Lalla email correspondence between Mr Warner and Mr Rampersad.

13. For the purposes of these proceedings the parties and the courts below proceeded on the basis that Mr Warner was the controlling mind of the first defendant, Renraw Investments Ltd, and of the second defendant, CCAM and Co Ltd, and that he was the first and second defendants' agent.

14. It was also common ground between the parties that all three defendants traded as the Dr João Havelange Centre of Excellence ("the Centre"). The Centre is a football academy named after João Havelange, the former President of FIFA. Again, for the purposes of these proceedings the parties and the courts below proceeded on the basis that if money was paid to the Centre, it was in effect being paid jointly to all three defendants. Furthermore, the parties and the courts below proceeded on the basis that if the payment of TT$1,505,493 to the Centre was a loan then all three defendants are jointly liable to repay the loan.

15. The UNC is one of the major political parties in Trinidad and Tobago. It was founded in 1989 by Basdeo Panday. From 1995 until 2001 the UNC formed the government, initially in coalition with the National Alliance for Reconstruction but later on its own. From 2001 until 2010 the UNC was once again the Parliamentary Opposition party. It failed to obtain a parliamentary majority in the 2007 election but in May 2010, the UNC returned to government as the majority party in the People's Partnership, a political coalition involving five political parties. The UNC remained in government until 2015.

16. Mr Chandresh Sharma was a member and treasurer of the UNC in 2007. At trial he was called as a witness by the claimant.

17. In October and November 2007, the claimant paid all three defendants sums totalling TT$1,505,493 by a series of five cheques made out to the Centre. The dates and the amounts of the five cheques were: (a) 9 October 2007 in the amount of TT$278,185; (b) 16 October 2007 in the amount of TT$294,258; (c) 22 October 2007 in the amount of TT$395,280; (d) 31 October 2007 in the amount of $250,230; and (e) 1 November 2007 in the amount of TT$287,540 ("the five cheques"). The defendants admit that all the five cheques were presented for payment and that payment was received by them. No security was provided by the defendants for repayment.

18. By a letter before action dated 17 March 2010 the claimant wrote to the Centre demanding repayment of the total sum of TT$1,505,493 within 28 days. The Centre through its attorneys wrote on 1 April 2010 requesting particulars of the loan, namely (i) whether the agreement was oral or in writing, (ii) when it was made and who were the parties and (iii) if it was oral what were its specific terms and conditions.

19. The claimant's response on 15 April 2010 was to issue proceedings against the defendants, by a claim form and statement of case claiming repayment of a debt of TT$1,505,493. The claim form confusingly refers to the monies having been paid to the "defendant", rather than to the defendants. The statement of case also pleads that the payment was made to "the defendant" rather than to the defendants and then identifies the defendant as the Centre. However, it is common ground between the parties that all

three defendants traded as the Centre. Accordingly, the Board will proceed on the same basis as the courts below, so that if the money was paid to the Centre as a loan, it was in effect a loan to all three defendants and all three defendants would be jointly liable to repay the loan.

20. On 10 August 2010, the defendants applied to have the proceedings struck out as an abuse of the process for, inter alia, failure to identify proper particulars of the alleged loans and non-compliance with the Civil Proceedings Rules Part 8.6. In a judgment given on 8 November 2011 Rampersad J struck out the claim. The claimant appealed, and in a judgment given on 20 December 2011 the Court of Appeal (Jamadar, Yorke Soo-Hon and Bereaux JJA) set aside Rampersad J's order, finding that the judge was wrong to consider that he had no power, at that stage of proceedings, to order further and better particulars. Upon appeal to the Judicial Committee, the Board upheld the decision of the Court of Appeal in a judgment, under citation [2014] UKPC 6, handed down on 3 March 2014.

21. The case was remitted to Rampersad J who by order dated 22 July 2014 directed the claimant to provide further and better particulars of claim.

22. In further and better particulars filed on 20 October 2014, the claimant claimed that the agreement for the loan was made orally in or around August 2007 between Mr Lalla, acting as agent or intermediary for the claimant, and the third defendant, Mr Warner, acting on his own behalf and as agent or intermediary of the first and second defendants. The claimant further alleged that the defendants agreed to repay the loan by 28 February 2008 out of the sum of US$10m which Mr Warner said the Centre was to be paid in February 2008 by FIFA. The claimant also alleged that the defendants would secure the repayment of all sums loaned by the claimant by executing a charge over the defendants' property known as the Centre of Excellence.

23. One of the particulars which Rampersad J directed the claimant to provide was "[what] was the purpose of the loan". In reply the claimant stated:

> "Mr Jack Warner represented to Mr Krishna Lalla that the defendant was experiencing difficulties in meeting its financial obligations including the payment of salaries, loan payments and other expenses. The purpose of the loan was to assist and/or enable the defendant to meet these financial obligations until the defendant received the USD 10,000,000.00 which Mr Warner indicated it would receive from FIFA in February 2008."

24. In a defence filed on 8 December 2014 the defendants admitted that the claimant had paid them the total sum of TT$1,505,493 by way of the five cheques, and that this was pursuant to an oral arrangement between Mr Lalla and Mr Warner but denied that the payment was made by way of a loan. The defendants pleaded that the payment related to an arrangement between Mr Lalla and Mr Warner for financing the campaign of the UNC in the general election which took place on 5 November 2007. The defendants also pleaded that Mr Lalla had offered to finance the campaign to the tune of TT$20m, along with Mr Warner, who was said to be a financier of the UNC in which he was a co-political leader.

25. In para 3(f) of the defence the defendants addressed the issue as to why the payments were made to the Centre rather than to the UNC if the claimant's intention was to finance the UNC. The defendants pleaded that:

> "It was at Mr Lalla's specific request that the cheques were made out to the defendant to give the appearance of mere business transactions."

26. In para 3(g) of the defence the defendants pleaded that the arrangement was that if the UNC had won the election and succeeded to power, "subsequent benefits would accrue to [Mr Lalla]". The defendants pursued this allegation at trial by putting to Mr Lalla in cross-examination that he and/or his companies benefitted significantly from government contracts during the period 2010-2015 when the UNC was in government. Mr Lalla's response at trial was that there had been a due tender procedure in relation to all contracts awarded during that period. The questioning of Mr Lalla at trial by counsel on behalf of the defendants to the effect that as a consequence of making a gift by way of a political donation in 2007 "he and/or his companies benefitted substantially from contracts between 2010-2015 … instilled a sense of disquiet" in the judge's mind: see para 47 of the judge's judgment.

27. In relation to the allegation in the claimant's particulars that the defendant (by which was meant the Centre) was experiencing financial difficulties the defendants responded by pleading in para 11 of their defence that:

> "The defendant … further avers that it was not in any financial difficulties at the material time and required no financial or other assistance from the claimant. Additionally, the defendant avers that it was in a stable financial position at the material time and was at that time in receipt of funds from CONCACAF as well as one of its constituents was the then Vice President of FIFA and funding was not a difficulty for the Centre of Excellence. Given the defendant's stable

> financial position and in good standing with its financial institutions of choice at the material time, even if there was a need for funding, the defendant was in a position to access same from its bank."

28. In a reply filed on 12 February 2015 the claimant admitted that Mr Lalla was a supporter of the UNC but denied that it or Mr Lalla had agreed to finance the UNC's election campaign.

29. On 4 August 2015, the claimant filed two bundles of documents. First, an agreed bundle which contained the five cheques. Second, an unagreed bundle which contained several emails passing between Mr Lalla and Mr Warner. At trial the defendants took the position that they did not accept that these emails were authentic, but they did not advance a positive case about them. They did not put to Mr Lalla that he had concocted or altered them. The judge held, at para 34 of his judgment, that the emails were authentic.

30. On 28 September 2016 the parties exchanged and filed witness statements.

31. In his witness statement Mr Lalla stated that in 1989 he became a supporter of the UNC and that at some point he was introduced to Mr Warner, who eventually became a very senior member of the party. Mr Lalla stated that he developed a friendship with Mr Warner and that he grew to trust him. In paras 9 to 16 Mr Lalla stated:

> "(9) Sometime in August 2007, Mr Warner visited me at my office …. Mr Warner indicated that he needed to raise a loan of approximately $20,000,000.00 to assist the defendant in its business as it was having liquidity problems at the time. He explained that the defendant was having problems with the payment of salaries, loan payments and other expenses. He pleaded with me to assist. Although I trusted Mr Warner at the time, given the amount of money involved and the fact that I would have to raise the money from third parties, I enquired as to what form of security he had available and how he proposed to repay this sum.
>
> (10) Mr Warner indicated that he was a highly successful businessman and that he was prepared to execute a promissory note and provide a charge over the property known as the Centre of Excellence. He said that he would re-pay the money

by February 2008 from a payment of US$10,000,000.00 that he was expecting from FIFA.

(11) Based on the agreement by Mr Warner to repay the sums loaned by February, 2008 and to provide the promissory note and charge over the Centre of Excellence, I agreed to assist him to obtain the loan.

(12) Later on by an email dated 15th September, 2007 from Mr Warner to myself, Mr Warner forwarded a draft promissory note for my approval. Although I approved the promissory note, Mr Warner failed to sign it, however I still saw no reason to mistrust him and I proceeded as agreed. ….

(13) …, based on my discussions with Mr Warner, I approached a number of business colleagues during August/September 2007. One of the persons that I approached was Romila Maharaj, who was the general manager of the claimant. I told her what Mr Warner had explained to me and inquired as to whether the claimant would lend part of the money as requested by the defendant. I further indicated that Mr Warner would pay the money back by the end of February 2008 from the monies he expected to receive from FIFA and that he promised to provide security for the loan. The claimant eventually got back to me and said they would be able to lend to the defendant approximately $1,500,000.00 to be repaid by February 28, 2008.

(14) As requested by Mr Warner I asked that the cheques be made payable to the Centre of Excellence/Indoor Facility and I arranged to collect the cheques and pass them on to Mr Warner.

(15) I collected 5 cheques from the claimant, all made payable to Centre of Excellence/ Indoor Facility from 9th October, 2007 to 1st November, 2007, totalling $1,505,493.00. I gave these cheques personally to Mr Warner.

(16) Although I was able to raise the financing requested, Mr Warner never provided the promissory note or executed the charge over the Centre of Excellence as promised despite repeated promises to do so. He always used the excuse of

> being very busy but kept promising that he would do so once he got the time."

32. A matter addressed at paras 11 and 16 of Mr Lalla's witness statement and at trial was, if the payments were a loan, why did the claimant advance and continue to advance the sums even though no security for the loan was forthcoming. Mr Lalla's explanation, at para 12 of his witness statement was that he "saw no reason to mistrust" Mr Warner and at para 16 of his witness statement that Mr Warner "would do so once he got the time".

33. Another matter addressed in Mr Lalla's statement was whether there was any connection between the loan and financing of the UNC. At para 22 of his witness statement Mr Lalla stated:

> "The money loaned by the claimant had nothing to do with any agreement or arrangement for the financing of the UNC election campaign in 2007. This was a purely commercial transaction based upon Mr Warner's request for financial assistance by way of a loan due to financial problems that the defendant was having. This is what he represented and agreed."

34. A different picture emerges from the witness statement of Mr Warner which, in so far as relevant, stated:

> "1. In or around early 2007, I was approached by both Mr Chandresh Sharma and Mr Einool Hosein to attend a meeting with Mr Krishna Lalla. …
>
> 3. I did indeed have the meeting with Mr Lalla in or around February 2007, and he spelt out a series of initiatives in which he had embarked upon and were seemingly failing miserably.
>
> 4. I had a firm conversation with him concerning my plans to remove Basdeo Panday from the leadership position of the [UNC] and my intention to revive the UNC to its former glory.
>
> 5. Mr Lalla enjoyed the conversation and informed me that he wanted to assist the party in any way possible.

6. I informed Mr Lalla that the greatest challenge was obtaining financiers for the party. At that time because of Basdeo Panday's unwillingness to step-down as leader, many of the UNC's financiers had moved away from the party and now started to support the [Congress of the People or 'COP'].

7. Mr Lalla insisted that he would assist the UNC as a financier, however he wanted me to be its political leader, and he wanted Mr Sharma to be Minister of Works and Transport and a host of other things. He spoke passionately about Mr Panday not being leader and the transforming of 'his' party.

8. We spoke at length about the way forward and I opened up to him about my plans to reposition the party and out-maneuver [sic] the COP and the PNM [People's National Movement].

9. He was quite pleased and excited about my initiatives and insisted that we have nothing to worry about because he is there to assist in the campaign financing as well.

10. From our discussions, Mr Lalla was most concerned about what would come out of his efforts to assist the party and in fact, he openly asked me, "What is in it for me ..."

11. Several businesses were selected to receive campaign financing from Mr Lalla to then donate and have readily available to the party and to assist the party in the 2007 General Election. At no time did I enter into any contract or made any utterances that would indicate or lead Mr Lalla or anyone to believe that Mr Lalla was giving me or any of my companies a loan. I do indeed acknowledge the fact that five cheques were given to my company for the amounts on the cheques which sums were to be made available to the party (UNC) for the 2007 General Election and as such this was done.

12. As was discussed between Mr Lalla and myself, several companies including the Centre of Excellence (Renraw Investments Ltd) received monies from Mr Lalla during the period leading up to the 2007 General Election to finance the

party. I also donated much of my personal finance towards this cause as well."

35. From the pleadings and the witness statements a summary of some of the factual differences between the claimant and the defendants is as follows:

(a) The fundamental difference between Mr Lalla and Mr Warner was whether the payment of TT$1,505,493 was a loan to be repaid by 28 February 2008 or a gift by way of a political donation.

(b) Mr Lalla's position was not only that this was a loan, but it was also completely unconnected to financing the UNC. It was purely a loan made in response to Mr Warner's request for financial assistance due to financial problems being experienced by him. In contrast, Mr Warner's position was that the money was paid to finance the UNC in the period leading up to the 2007 general election.

(c) Mr Warner's position was that at the time he and his companies were not in financial difficulties and that even if there was a need for funding the defendants were in a position to access a loan from the banks. Mr Lalla's position was that he was repeatedly told by Mr Warner that he was in a dire financial position but expected a payment from FIFA of US$10,000,000 in February 2008 so that he would then be able to repay the loan.

(d) Mr Warner's explanation as to why the payment of TT$1,505,493 was made to the Centre rather than to the UNC, if it was a political donation to the UNC, was that Mr Lalla requested this to "give the appearance of mere business transactions". Mr Lalla stated that the payment was made to the Centre at the request of Mr Warner.

36. The trial was heard before Seepersad J on 7 and 8 May 2018.

3. Contemporaneous emails

37. At trial the claimant relied on contemporaneous emails to establish that: (a) Mr Warner and his companies were in financial difficulties; (b) Mr Warner and his companies lacked standing with at least one bank; (c) Mr Warner and his companies were having difficulties securing finance from any source; (d) Mr Warner was offering a promissory note as security; (e) the monies were a loan to the defendants; (f) Mr Warner was offering to pay money to Mr Lalla which offer was inconsistent with the payment

of TT$1,505,493 being a gift; and (g) Mr Warner did not challenge or deny that he was obliged to make a repayment. It is not necessary for the Board to set out all the emails. Rather, the Board will illustrate by reference to some of them.

38. To demonstrate that Mr Warner was under financial pressure the claimant relied on an email sent to Mr Lalla by Mr Warner on 6 September 2007. In the email Mr Warner stated:

> "Raj, I need your help … temporarily. The 2.5m USD I paid off was short by about $100,000 when I requested the wire transfer. Can you be so kind and transfer that sum to my USD account until my return next week?
>
> Pls treat this matter as confidential … as you have always done."

39. The claimant relied on an email dated 15 September 2007 from Mr Warner to Mr Lalla to demonstrate that Mr Warner was prepared to provide security for a loan, that there were discussions of a loan from Mr Lalla to Mr Warner and that the amount discussed was TT$20 million. Attached to that email was a draft promissory note for Mr Lalla's approval. The draft promissory note was in the following terms:

> "The Republic of Trinidad and Tobago
>
> PROMISSORY NOTE
>
> FOR VALUE RECEIVED I the undersigned Jack Warner of Howell Settlement, in the island of Trinidad and Tobago, do promise to pay to Krishna Lalla of XXXXXXXXXXXXXXXX the principal sum of Twenty Million Dollars($20,000,000) plus interest on the unpaid balance at the rate of xx % per annum by monthly installments [sic] of $XX:XX commencing February 15th, 2008 until principal and interest have been repaid in full.
>
> DATED THIS 15th DAY OF SEPTEMBER, 2007
>
> Signed .....

Jack Warner

Witnessed by .....

Occupation ....."

The claimant also relied on a subsequent email exchange in relation to the draft promissory note. In an email dated 26 September 2007, Mr Warner enquired as to whether there was any progress on the promissory note, to which Mr Lalla replied "yes" and Mr Warner responded by saying "will talk on arrival tomorrow". The point being made by the claimant was that if the payment was a gift by way of a political donation, then there was no need for Mr Warner to have sent a draft promissory note to Mr Lalla nor would there have been any need for Mr Warner to have followed up by email as to whether there was any progress on the draft promissory note.

40. The claimant contends that Mr Warner also revealed his financial difficulties together with his lack of standing with the Republic Bank by forwarding to Mr Lalla an email dated 28 November 2007 which Mr Warner had sent to his accountant, Kenny Rampersad. In the email Mr Warner stated:

> "Kenny, Republic Bank has just bounced the salary of a staff member for $2,306.08 - Rochelle Smith.
>
> This has never happened to Jamad Ltd in its history. Pls arrange to meet with me soonest so as to bring closure to our dealings with Republic Bank at the earliest opportunity."

41. The claimant also relied on the explanation provided by Mr Warner for his difficulties with the Republic Bank in an email which he sent to Mr Lalla on 28 November 2007. In that email Mr Warner stated:

> "I know that you are not responding to my phone calls or emails but I felt compelled to relate you an experience and humiliation I suffered today. I was rushing out of the office when I sent you this mail and could not explain to you my predicament. But here goes. Before I left for South Africa, I asked my Accountant, Kenny Rampersad, to go back to Republic Bank to try and get my accounts reactivated at least for one month (pending some mortgages I am trying to raise) since the Manager was off on holidays. The Ag. Manager

> advised Kenny that I can go ahead and make cheques not exceeding $50,000.00 for one month only. The Manager returned from holiday on Monday and bounced the very first salary cheque I made to a member of staff for less than $3000.00
>
> I have never been so ashamed in my life .... But I remain convinced that both you and I shall overcome these present situations. Trust me."

42. The claimant further relied on an email to Mr Lalla from Mr Warner dated 7 December 2007 as demonstrating Mr Warner's dire financial position. In that email Mr Warner stated:

> "I am swamped with debts now and am being harassed every day re the payment of outstanding bills. My family and staff lives have been threatened and for the first time in my life, I am afraid but you are the only one I have told that to and do beg you not to disclose it to anyone.
>
> I am in Tokyo at the moment, on FIFA business, but all where I go, very discreetly, I am looking for loans. I am looking for help."

43. The claimant also relied on a further email dated 7 December 2007 from Mr Warner to Mr Lalla as evidence of Mr Warner's dire financial position. In that email Mr Warner stated:

> "I just cannot make anymore … I have borrowed from every conceivable source and yet there are still so many persons to be paid."

44. The claimant relied on an email dated 7 February 2008 from Mr Lalla to Mr Warner as evidence that in February 2008 Mr Lalla sought payment from Mr Warner. In the email Mr Lalla stated:

> "I tried contacting you on your phone with no luck. At the meeting on Saturday 26th January 2008 you mentioned I would receive 1,000,000.00 on the 6th February, 2008.

You did not give me any reply to my email attach (sic) hereunder.

JACK THIS MATTER IS URGENT!
I await your reply."

45. The claimant relied on an email from Mr Warner to Mr Lalla dated 21 February 2008 to demonstrate that Mr Warner did not deny that money was owed, provided an explanation as to why payment had not yet been made and promised to pay TT$1 million. In the email Mr Warner stated:

"Raj, I am awaiting the transfer of the money from Zurich, I don't recall giving you a date of February 6, knowing Zurich quite well but if I did I am sorry, I did say however that the money is due in February, two million dollars, of which I shall give you one. I also wish to advise you as well that besides my having to find the money to pay for the airline (who has now accused me of having lied and tricked them, an unfair accusation with which I will have to live with for the rest of my life) additional bills have come in for payment amounting to $1.56 million TTD. Where I will get all this money for payment, only God alone knows at this time!!!

When you called me on Wednesday, I was in a meeting and was not able to speak but I could have listened, finally, Raj, as you know and I know my means do not allow me the possibility to assist with any monthly payments of the magnitude you are suggesting at this time. I have shown you all the facts and have even explained to you the position with my own home at the moment.

Please be guided accordingly.

Regards"

4. The judgment of the High Court, the comments in the judgment as to the need to regulate campaign financing and the judge's subsequent speech to the Trinidad and Tobago transparency institute

(a) The judgment of Seepersad J

46. The judge, between paras 4 and 18, set out the evidence of the claimant's witnesses.

47. The judge, between paras 4 and 16, under the sub-heading "Krishna Lalla", set out Mr Lalla's evidence. The judge stated, at para 4, that Mr Lalla's oral evidence and his responses during cross-examination were generally consistent with the claimant's case as pleaded and with the terms of his witness statement. However, the judge identified one inconsistency being that Mr Lalla in his oral evidence stated that he did not approve the promissory note but in his witness statement he stated that he had approved it.

48. The judge then, between paras 5 and 15, set out in considerable detail the contemporaneous emails between Mr Lalla and Mr Warner together with the emails exchanged between Mr Warner and his accountant Kenny Rampersad which had been forwarded by Mr Warner to Mr Lalla. The judge did not identify any inconsistency between those emails and Mr Lalla's evidence.

49. At para 16 the judge stated that Mr Lalla's evidence was:

> "… that all the sum in this case was advanced to Mr Warner were by way a of loan and that the money advanced by the claimant was made payable to the defendant upon Mr Warner's instructions."

50. Subject to one significant flaw, the judge held, at para 33, that:

> "Mr Lalla was a generally consistent witness and his responses in cross-examination did not materially contradict his evidence in chief. Mr Lalla' s position that he constantly liaised with Mr Warner as to repayment after Mr Warner failed to execute a promissory note or to advance the Centre of Excellence as security, appeared to be reasonable."

51. The significant flaw was that the judge rejected Mr Lalla's evidence that he did not provide funds to be used in the 2007 election campaign. At para 41, the judge, relying on emails in the trial bundle, found on the balance of probabilities that the payment of TT$1,505,493 by the claimant to the Centre was, as Mr Warner had alleged, part of an arrangement between Mr Lalla and Mr Warner for the financing of the UNC's election campaign.

52. The judge, at para 17, under the sub-heading "Romila Marajh", reviewed her evidence. The judge recounted her evidence as being that: (a) in August 2007 Mr Lalla informed her that he had been approached by Mr Warner for a loan of approximately TT$20 million on behalf of the Centre as Mr Warner was having some liquidity problems; (b) Mr Lalla then inquired as to whether the claimant would lend a part of the money requested to the Centre and indicated that Mr Warner said that the sums would be repaid by the end of February 2008 from monies that Mr Warner expected to receive from FIFA; and (c) Mr Lalla stated that Mr Warner indicated that security would be given for the monies loaned. The judge stated that in cross-examination she admitted that no security was ever provided, and she accepted that she was not present at any of the meetings between Mr Lalla and Mr Warner so that her evidence as to what had been said between Mr Lalla and Mr Warner was hearsay evidence. She further accepted that there were no company Board minutes in relation to the monies paid to the Centre.

53. The judge held, at para 31, "that Mrs Marajh was a credible witness".

54. The judge, at para 18, under the sub-heading "Chandresh Sharma", set out his evidence. Mr Sharma was the UNC's treasurer in 2007. Amongst other matters, he testified that he had knowledge of all monetary donations and contributions made to the UNC and no money was ever received from Mr Lalla or the claimant.

55. The judge held, at para 32, that:

> "The court had some difficulty with aspects of Mr Sharma's evidence. It [is] difficult to accept that he could accurately recall who all the financial contributors were without having sight of the UNC's internal documents for the 2007 campaign. Accordingly the Court disregarded his evidence on the issue as to whom the UNC's financiers were."

56. The judge, between paras 19 and 24, set out the evidence of the defendants' witnesses.

57. The judge, at para 19, set out Mr Warner's evidence by reference to his witness statement, see para 34 above, and then noted, at para 20, that Mr Warner had not been cross-examined extensively. Ultimately, the judge, at para 45, rejected Mr Warner's evidence that the payment of TT$1,505,493 was a gift and not a loan.

58. The judge, at para 21, set out the evidence of Mr Ronald Phillip, by reference to his witness statement which detailed how he was informed by Mr Warner that he was financing the election campaign and he wanted to have some control of the disbursement of the money. Mr Phillip also stated that: (a) he understood that Mr Lalla was the UNC financier for the 2007 general election campaign; (b) he was engaged to run the UNC 2007 election campaign from Mr Lalla's office; and (c) he was to talk to no one except Mr Lalla or Mr Lalla's son, Terrance Lalla, about that campaign; and (d) that Mr Lalla took direct control of the campaign. The judge then noted, at para 22, that Mr Phillip was not cross-examined extensively.

59. The judge, at para 23, set out the evidence of Mr Einool Hosein, by reference to his witness statement which detailed how he was a top-level employee of Mr Lalla and that he had been requested by Mr Lalla to make contact with Mr Warner in order to discuss the possibility of Mr Warner becoming the political leader of the UNC and transforming the party into a viable option for government. Mr Hosein stated that he attended a meeting between Mr Lalla, Mr Warner and Mr Sharma early in 2007 during which it was determined that the objective was two-fold: (i) to remove Mr Basdeo Panday as political leader; and (ii) to restructure the brand of the UNC and the UNC itself. Mr Hosein also recounted how at a further meeting Mr Lalla said words to the effect, "I spending my money, and I am prepared to spend more, what is in it for me?" and that Mr Warner responded by stating words to the effect "whatever you invest in the party now will be returned ten-fold". The judge then noted, at para 24, that Mr Hosein was not cross-examined extensively.

60. The judge noted, at para 32, that neither Mr Phillip nor Mr Hosein gave evidence as to the five cheques nor did they give any evidence as to any payments made either directly or facilitated by Mr Lalla to Mr Warner. In relation to their assertions about their involvement in the 2007 general election, the judge stated that as their testimony was not tested there was no basis upon which the court could conclude that their evidence was contrived.

61. Under the heading "Resolution of the matter" the judge between paras 31 and 45 resolved the factual issues.

62. At para 31 the judge addressed the issue that the claimant had no internal documents to establish the purpose for which the payments were made. He concluded

that he was "not prepared to draw any inference that the lack of documentation suggests that the sums were advanced as gift[s] for campaign financing".

63. The judge held, at para 34, that the contemporaneous emails were authentic. He then analysed those emails in three categories, namely (i) emails before the funds were advanced; (ii) emails after the funds were advanced between November 2007 to December 2007; and (iii) emails exchanged in February 2008. The judge held, at para 39, that:

> "The correspondence demonstrated that the financial arrangement between the two men was not gratuitous but was one characterised by an expectation of repayment and representations as to part payment were in fact made by Mr Warner."

The judge also noted, at para 41, that:

> "none of the communication between Mr Lalla and Mr Warner reflected any challenge or denial by Mr Warner of the existence of any loan arrangement"

64. The judge, at para 43, addressed the suggestion that the payment of TT$1,505,493 was a gift, in the form of a political donation, in return for which Mr Lalla would obtain and in fact did obtain, financial benefits in the form of contracts if the UNC returned to government. The judge rejected this suggestion, reasoning that Mr Lalla would be unlikely to have "undertaken any act to undermine his relationship with the government of the day" when the UNC returned to government in 2010 by filing the "instant action" in April 2010 and then actively pursuing it. In essence the judge considered that to seek to recover TT$1,505,493 in 2010 meant that it was unlikely that the payment in 2007 was a gift in return for which Mr Lalla could expect to receive financial benefits from a government which included the UNC.

65. The judge's overall conclusion is found at para 45. The judge found as a fact that:

> "… there was an agreement in August 2007 for Mr Lalla to provide or source loans for Mr Warner to finance their political objective and it was agreed that the said loans would have been repaid by February, 2008. The Court further finds that the claimant, acting in reliance on the representations made to it by Mr Lalla, loaned to the defendant, the sum of

> $1,505,493.00 on the basis that the said sum was to be repaid by February, 2008."
>
> Based on that factual finding the judge ordered the defendants to repay the amount of TT$1,505,493 together with interest on that amount at the statutory rate from the date of the judgment (15 May 2018) until repayment.

(b) The comments in the judgment as to the need to regulate campaign financing

66. The judge, after finding in favour of the claimant, went on in his judgment to address the evidence that he had heard about campaign finance. He noted, at paras 46 and 47, that Mr Warner's evidence was that Mr Lalla had asked what was in it for him, and that the defendants' counsel, on the instructions of Mr Warner, had put to Mr Lalla that he and his companies had benefited substantially from state contracts between 2010 and 2015. The judge said, at para 47, that this caused him disquiet. He said, at para 48, that there was an entrenched public perception that money paid by way of campaign finance was the functional equivalent of bribes to ensure that favourable treatment was given by government to those providing the funds. The evidence he had heard suggested this was the reality. In the absence of campaign finance regulations, financiers could purchase goodwill and exercise undue influence over political parties. This had led to a culture of kickbacks and corruption. There was a dire need for regulatory reform.

(c) The judge's subsequent speech to the Trinidad and Tobago Transparency Institute

67. Some ten months after the delivery of his judgment, in a speech made on 28 March 2019 to the Trinidad and Tobago Transparency Institute, the judge referred to his judgment and in particular to the evidence he had heard concerning the expected quid pro quo for campaign finance. He drew attention to the position taken by Mr Warner in the proceedings, namely that Mr Lalla had been repaid for his donations by the award of contracts. He described this position as "unfathomable" and said the fact that it had been intrepidly advanced by counsel on behalf of Mr Warner had caused him to feel compelled to address the issue in his judgment. He reiterated his call for reform of campaign finance regulation.

5. The judgments in the Court of Appeal

68. The lead judgment, delivered by Smith JA, addressed whether the judge had made material errors in his assessment of the evidence and whether the judge's order should be set aside based on apparent bias. Pemberton JA agreed with Smith JA's judgment. Jones JA delivered a concurring judgment in relation to whether the judge

made material errors but dissented from the majority in relation to the question of apparent bias.

(a) The judgments as to whether the judge made material errors

69. In relation to the test to be applied before an appellate court can interfere with a trial judge's factual findings Smith JA directed himself, at para 17, by reference to *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21; [2014] 4 All ER 418, at paras 11-17 and *Paymaster (Jamaica) Ltd v Grace Kennedy Remittance Services Ltd* [2017] UKPC 40; [2018] Bus LR 492 at para 29. Smith JA then set out what Lord Reed stated in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 at para 67, namely:

> "…, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

70. Smith JA then proceeded to find that the judge made four errors and Jones JA, in her concurring judgment on this issue, held that there were two additional errors. The Court of Appeal then substituted its own assessment of the evidence which was that the payment of TT$1,505,493 had been a gift in the form of a political donation.

71. Before the Board, the claimant contends that none of the matters identified by Smith JA or by Jones JA amounted to errors. In the part of its judgment considering that ground of appeal the Board will set out and then analyse each of the four errors identified by the majority in the Court of Appeal and the two additional errors identified by Jones JA.

(b) The judgments in relation to apparent bias

72. Concerning the test to be applied in relation to apparent bias Smith JA, at para 42, directed himself by reference to the well-known test in *Porter v Magill* [2001] UKHL 67; [2002] AC 357 ("*Porter v Magill*") at para 103, namely:

> "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."

Smith JA also directed himself, by reference to the *Attorney General of Trinidad and Tobago v Dr. Wayne Kublalsingh* Civ App No P018 of 2014 ("*Kublalsingh*") at para 9, that the application of this test involves two stages. First, one must ascertain the relevant facts which have a bearing on the suggestion that the decision-maker has the appearance of bias. Second, one must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker is biased.

73. In relation to the first stage, based on the remarks in the judge's judgment and on his speech, Smith JA found that the judge had a very strong antipathy to campaign financing which was not regulated by some form of statutory framework: see para 48. Furthermore, that the judge had expressed "a strong antipathy against persons who eventually hold public office and who participate in this unregulated campaign financing (like Mr Warner)": see para 49.

74. In relation to the second stage, Smith JA determined, at para 49, that the judge's statements:

> "in their entirety would lead to a real possibility in the mind of a fair-minded observer that the trial judge's personal views on the morality or ethics behind unregulated campaign financing coloured his views against a public official (like Mr. Warner) who accepted unregulated campaign financing".

On that basis, had the appeal not been allowed for the reasons already given, Smith JA would have remitted the trial to be heard by another judge.

75. Jones JA delivered a dissenting judgment on the question of bias. She found that the fair-minded observer would appreciate that the judge's comments on the issue of campaign finance arose directly out of the case that was advanced by the defendants, and that it was not inappropriate for the judge to express his disquiet: see paras 85 to 86. There was nothing to indicate the judge had prejudged the issues he had to determine, and he criticised the behaviour of both sides: see para 87. Further, his statements on campaign finance were made after he had expressed his findings on the case in issue and set out his reasoning: see para 88. Furthermore, he had not spoken out because of a predisposition to regulate campaign finance. Rather, his comments were triggered by the evidence and the case advanced by the defendants: see para 89. Accordingly, she was not satisfied that the defendants could demonstrate a real possibility that the judge's

finding that the payment of TT$1,505,493 was a loan and not a gift was influenced by his aversion to unregulated campaign finance: see para 90.

6. Grounds of appeal to the Judicial Committee of the Privy Council

76. Before the Board, the claimant submits that the Court of Appeal was not entitled to interfere with the judge's factual findings and that the test for establishing apparent bias on the part of the judge has not been satisfied.

(a) Was the Court of Appeal entitled to interfere with the judge's factual findings?

77. Before the Board there was no issue in relation to the test before an appellate court can interfere with a judge's factual findings. The test is that adumbrated by Lord Reed in *Henderson v Foxworth Investments Ltd*: see para 69 above. The issue before the Board was whether the Court of Appeal correctly applied the test when the majority identified four errors and Jones JA identified two further errors on the part of the judge. The Board will summarise and consider in turn each of the errors identified by the Court of Appeal to determine whether any of them meet the test set out in *Henderson v Foxworth Investments Ltd*.

78. The first error identified by the Court of Appeal, at paras 19-20, was that the judge made a critical finding of fact that Mr Warner may have wanted to portray an image to the UNC that he was its main financier. Smith JA concluded that there was no evidence to support this finding. The Board considers that the finding was not critical and that the inference that Mr Warner may have wanted to portray an image to the UNC that he was its main financier can be both explained and justified on the evidence.

79. The Board considers that the judge's critical factual finding was not based on the image which Mr Warner wished to portray. Rather, what was critical to the judge's reasoning were the contemporaneous emails. The judge held, at para 41, that "none of the communication between Mr Lalla and Mr Warner reflected any challenge or denial by Mr Warner of the existence of any loan arrangement". This remained the position at trial as Mr Warner did not give any evidence to address or explain any of the contemporaneous emails so that they remained uncontested evidence against him. Based on those contemporaneous emails, it was open to the judge to find they established all the matters set out in para 37 above at (a) to (g). The judge's critical finding, at para 39, was that "[t]he correspondence demonstrated that the financial arrangement between the two men was not gratuitous but was one characterised by an expectation of repayment and representations as to part payment were in fact made by Mr Warner". The judge's finding as to the image which Mr Warner wished to portray explained why the money was not paid directly to the UNC. It was an explanatory rather than a critical factual finding.

80. In addition, the Board considers that there was evidence from which the judge could draw the inference that Mr Warner may have wanted to portray an image to the UNC that he was its main financier. The Board summarises that evidence as follows:

(a) Mr Warner was at the time a very important political figure in the UNC and portrayed himself as such. At para 3(b) of the defence, he averred that he was "then financier and co-political leader of the UNC". At para 12 of his witness statement, he said that he had donated "much of [his] personal finance" towards the UNC's 2007 election campaign.

(b) In Mr Warner's witness statement, he explained, at paras 11 and 12, that the large payments made by the claimant towards the financing of the election campaign were not paid directly to the UNC but were paid to several of Mr Warner's businesses and were then distributed to the UNC by Mr Warner. To anyone who was not familiar with these arrangements, therefore, the funds would appear to be given to the UNC by Mr Warner and his businesses, and not by the claimant, Mr Lalla or his affiliates.

(c) Portraying himself as the financier of the UNC would assist Mr Warner in his aims of removing Basdeo Panday from leadership of the UNC and of reviving the UNC to its former glory.

(d) The contemporaneous emails showed that at the time of the election Mr Warner was struggling to find money. When Mr Warner wrote to Mr Lalla on 6 September 2007 requesting a loan, he asked Mr Lalla to "treat [the] matter as confidential". A permissible inference is that Mr Warner wanted to maintain the impression that he was the financier of the UNC who had donated "much of [his] personal finance" to the party, whereas in reality the money was provided by the claimant.

(e) The evidence of Mr Phillip was that the shadow election campaign was to be kept secret. Again, a permissible inference from this fact is that it facilitated Mr Warner's desire to portray an image to the UNC that he was its main financier.

81. The Board concludes that the judge did not fall into the first error identified by the Court of Appeal.

82. The second error identified by the Court of Appeal, at paras 21-27, was that the judge failed to address properly the evidence of two of Mr Warner's witnesses, namely, Mr Hosein and Mr Phillip. Smith JA referred, at para 22, to Mr Hosein's evidence that

during a meeting "several companies belonging to Mr Warner were identified to receive campaign financing from Mr Lalla" and that "these companies were identified to be given money to pay for campaign financing" including the Centre. Smith JA referred, at para 23, to Mr Phillip's evidence that he was hired to run a shadow election campaign for Mr Warner from the offices of Mr Lalla and that Mr Lalla was the financier for this project. Smith JA held, at para 23, that the evidence of these witness not only lent credence to Mr Warner's assertions that the payment of TT$1,505,493 to the defendants was part of an arrangement between Mr Lalla and Mr Warner for the financing of the UNC's election campaign, but also that the money was not advanced by way of a loan.

83. The Board finds that the judge did consider the evidence of both witnesses and that he accepted, at para 44, their evidence that the money paid by the claimant to the defendants was part of an arrangement for the financing of the UNC's election campaign. However, the fact that Mr Warner was believed (and Mr Lalla disbelieved) on the question of campaign finance would not inevitably lead to the conclusion that Mr Warner should be believed on the question whether the amount of TT$1,505,493 was a gift rather than a loan. Based on the significant flaw in the evidence of Mr Lalla, it was open to the judge to have rejected all of Mr Lalla's evidence. However, it was also open to the judge to accept neither side's case in full. On the evidence, including the contents of the contemporaneous emails, it was also open to the judge to find that the payment of TT$1,505,493 was a loan to the defendants in relation to campaign financing. There was ample evidence in the contemporaneous emails and in the evidence of Mr Lalla which justified and explained that factual finding. Indeed, as the judge pointed out at para 32, neither Mr Philip nor Mr Hosein gave direct evidence as to the arrangements between Mr Lalla and Mr Warner in respect of the five cheques in question. Furthermore, it was accepted by counsel on behalf of the defendants, in closing submissions to the judge, that the precise oral arrangements between Mr Lalla and Mr Warner were known only to them and that Mr Philip and Mr Hosein could only give evidence as to the "surrounding circumstances".

84. The Board concludes that the judge did not fall into the second error identified by the Court of Appeal.

85. The third error identified by the Court of Appeal, at paras 28-32, was that while the judge was entitled to have regard to the evidence contained in the contemporaneous emails, the judge failed to take into consideration that in cross-examination Mr Lalla himself discounted the effect and meaning of these emails by admitting that none of them showed that Mr Warner or his affiliates admitted to this specific loan or any loan between the parties.

86. The Board considers that there was no identifiable error in the judge's approach to the reasonable oral concession made by Mr Lalla in cross-examination as to the contents of the contemporaneous emails. Mr Lalla was doing no more than recognising

that none of the contemporaneous emails expressly related to or admitted the specific sum of TT$1,505,493 as being a loan from the claimant to the defendants. Indeed, the claimant never contended that the contemporaneous emails should be construed in that way. The concession in cross-examination did not alter the true construction of the emails and was of no evidential significance. Rather, the evidential significance of the contemporaneous emails is summarised at para 37 above.

87. The Board concludes that the judge did not fall into the third error identified by the Court of Appeal.

88. The fourth error identified by the Court of Appeal, at paras 33-35, related to the judge's view that it was unlikely that, if the payment had been a gift in return for financial benefits from a government formed by the UNC, Mr Lalla would have jeopardised his relationship with the government in 2010 by going back on his deal and insisting on repayment. The Court of Appeal, at para 33, found that the judge "may have misunderstood the evidence as it was presented". The Court of Appeal did not go on to say in what way the judge had misunderstood the evidence. Rather, the Court of Appeal, at para 35, made two criticisms of the judge. First, the Court of Appeal stated that the judge's view as to the inherent improbability of the claimant initiating the proceedings in 2010 if the payment of TT$1,505,493 had been a gift, had not been put to Mr Warner in cross-examination, and in particular therefore the judge had not tested whether the relationship between the parties was the same after 2010 as at the time of payment. Second, that the judge did not balance his assumptions against Mr Warner's case. Thereafter, the Court of Appeal, at para 35, referring to the totality of the evidence, but without identifying the specific evidence, found that it "was more probable that the money paid to Mr Warner and his affiliates in 2007 was by way of donation or gift rather than a loan".

89. The Board considers that these criticisms of the judge are misplaced. The case that this was a gift, in return for benefits if the UNC formed a government, was a case being made by the defendants. The judge was under a duty to and did consider whether that case was or was not established on the balance of probabilities. The judge could have been assisted by cross-examination. However, where, as here, there was no extensive cross-examination, the judge remained under a duty to, and he did consider whether this aspect of the defendants' case was probable. He concluded, at para 43, that it was not probable. The Board considers that he was entitled to make that finding. Furthermore, the Board notes that in performing his duty to assess the defendants' case the judge tested his thinking by asking questions of the defendants' counsel during closing submissions.

90. The Board also considers that the doubt raised by the Court of Appeal, that the relationship between the parties had changed by 2010, was unrealistic. Rather, the case put by the defendants to Mr Lalla and the defendants' case which the judge was under a

duty to assess, was that the relationship, between 2010 and 2015, was working just as intended.

91. In relation to the criticism that the judge did not balance his view of the inherent probabilities against the case advanced by Mr Warner, the Board understands the Court of Appeal to mean that the judge should have considered the probabilities arguing in favour of Mr Warner's account. However, the judge plainly understood the case that was put on behalf of Mr Warner, and he tested it in oral submissions. The Board considers that there is no ground for thinking that the judge did not consider the probabilities in favour of Mr Warner's account.

92. The Board considers that this fourth error identified by the Court of Appeal on analysis amounts to an impermissible preference by the Court of Appeal of its own view of the probabilities which is plainly an insufficient basis upon which to interfere with the judge's findings of fact.

93. The Board concludes that the judge did not fall into the fourth error identified by the Court of Appeal.

94. The fifth error identified in the Court of Appeal by Jones JA, at para 63, was that the judge "refused to take into consideration the fact that the [claimant] created no internal documents with respect to the payment of the money". Jones JA stated, at para 64, that "the lack of documentation with respect to the loan was an important factor to be considered by the judge in his assessment of the nature of the transaction" and that "[the] lack of documentation pointed more to an off-record transaction, such as a gift to a political party, rather than a loan given in the normal course of business".

95. The Board considers that this criticism of the judge is misplaced.

96. The proposition that the lack of documentation pointed to an off-record gift was put to the judge by the defendants in oral submissions. The judge understood the proposition but, at para 31 of his judgment, declined to draw any inference that the lack of documentation suggested that the sums were advanced as gift for campaign financing: see para 62 above. In support of the judge's rejection of any adverse inference from the claimant's lack of documentation, the appellant submitted before the Board, and the Board agrees, that it is not right to say that the lack of documentation points more to a gift than a loan. A company does not ordinarily require a board decision to make a loan, whether formal or informal because a company making a loan does not thereby lose an asset, rather a debt owed by way of informal loan is just as much an asset as a debt owed pursuant to a written agreement. However, a gift is another thing entirely because a company thereby gives away an asset so that it would

be unusual for a company to make large donations by way of gift without specific board resolution or shareholder approval.

97. The Board concludes that the judge did not fall into the fifth error identified by Jones JA in the Court of Appeal.

98. The sixth error identified in the Court of Appeal by Jones JA, at para 65, was that the judge "failed to take into consideration the evidence that the money was advanced in tranches and that sums continued to be advanced even though no security for the loan was forthcoming and that, despite cross-examination in this regard, [Mr Lalla] could provide no reason for continuing to make the payments in those circumstances".

99. Again, the Board considers that this criticism of the judge is misplaced. The judge did consider the fact that the defendants failed to provide any security for the loan. Furthermore, Mr Lalla had given reasons as to why the claimant made further payments to the defendants despite the failure to provide the promissory note or a charge over the Centre: see paras 31 and 32 above. The judge, who saw Mr Lalla giving his evidence, found (at para 31) that "the arrangement between the claimant and Mr Lalla with respect to the sums advanced was premised primarily on the good will the claimant and Romila Marajh had for Mr Lalla". The judge found, at para 33, that Mr Lalla was "a generally consistent witness". Furthermore, the judge found, at para 33, that "Mr Lalla's position that he constantly liaised with Mr Warner as to repayment after Mr Warner failed to execute a promissory note or to advance the Centre of Excellence as security, appeared to be reasonable". In short, the judge accepted the reasons given by Mr Lalla as to why sums continued to be advanced even though no security for the loan was forthcoming. In addition, at para 31, the judge accepted the evidence of Mrs Marajh. She gave evidence that the reason why the claimant did not stop the second cheque until security was given was "because of the relationship [the claimant had] with Mr Lalla [who] promised to get it".

100. The Board concludes that the judge did not fall into the sixth error identified by Jones JA in the Court of Appeal.

101. In conclusion, the Board allows the claimant's first ground of appeal.

(b) Did the judge demonstrate the appearance of bias?

102. Before the Board there was no issue in relation to the *Porter v Magill* test to be applied in relation to apparent bias (see para 72 above) and the following propositions: (a) the application of the test involves two stages (see *Kublalsingh* at para 9); (b) the second stage is objective (see *Porter v Magill* at para 104); (c) the second stage is

objective (see *Porter v Magill* at para 104); (d) the fair-minded and informed observer is not unduly sensitive or suspicious (see *Kublalsingh* at para 8); and (e) extra-curricular comments by a judge on matters of legal concern will not ordinarily give rise to a reasonable apprehension of bias (see *Locabail (UK) Ltd v Bayfield Properties Ltd and another* [2000] QB 451 ("*Locabail*") at para 25). However, extra-curricular comments may give rise to a reasonable apprehension of bias where a judge has made comments on an issue in such trenchant or unqualified terms as to suggest that he could not bring an open mind to bear on a case in which such an issue arose, see *Locabail* at para 85, and *Lieuwe Hoekstra v Her Majesty's Advocate* 2000 SCCR 367 at paras 22 and 23.

103. The issue before the Board was whether the majority in the Court of Appeal correctly applied the test by finding that there was a real possibility of bias by the judge against Mr Warner.

104. In relation to the first stage—that is, ascertaining all the circumstances which have a bearing on the suggestion that the judge is or would be biased—the Board considers that the circumstances include several relevant matters.

105. First, the judge did not come to the trial with preconceived and partisan views. He had not expressed any particular views on the subject of unregulated campaign financing prior to the trial. Rather, the judge was reacting to the case which was made by the defendants in their pleading and during cross-examination of Mr Lalla: see para 26 above.

106. Second, there was no complaint about the way the judge conducted the trial. Rather, the judge carefully heard and then analysed all the evidence having had the benefit of and engaged with detailed closing submissions.

107. Third, the judge's antipathy to unregulated campaign financing, at para 48, was not only directed at politicians who accepted campaign financing but was also directed at those who financed campaigns in order to "purchase goodwill and exercise undue influence over politicians and political parties". The Board considers that the majority in the Court of Appeal wrongly characterised the judge's antipathy as being directed solely at Mr Warner. It was not.

108. Fourth, the defendants' notice of appeal to the Court of Appeal dated 27 June 2018 did not contain a ground of appeal based on a reasonable apprehension of bias on the part of the judge. The contention that there was an appearance of bias emerged in the defendants' written submissions to the Court of Appeal dated 5 April 2019. The Board considers that the delay in making the contention of an appearance of bias reflects the fact that those who were present and understood the dynamics of the trial did not consider the comments made in the judgment raised a real possibility of bias.

109. Fifth, the comments made in the judge's speech to the Trinidad and Tobago Transparency Institute did no more than repeat what was contained in paras 47 and 48 of his judgment.

110. In relation to the second stage the Board, essentially in agreement with the reasons given by Jones JA, considers that a fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that the judge was biased.

111. As Jones JA held, a fair-minded and informed observer would: (a) appreciate that "the case made out by the [defendants] was directly relevant to the issue of campaign financing and as such it was not inappropriate for the judge to … express his views on the issue", see para 85 of her judgment; (b) "there was nothing in the findings made by the judge or the language used which would point to the fact that the judge's views on campaign financing caused him to prejudge any of the issues in the case", see para 87 of her judgment; and (c) "the comments made by the judge was a criticism of the behaviour of both sides", see para 87 of her judgment. In relation to the last factor, the Board agrees that the judge's comments captured both Mr Lalla and Mr Warner equally so that there was no predisposition to decide the case for one side or the other.

112. In conclusion, the Board allows the claimant's second ground of appeal.

7. Overall conclusion

113. The Board allows the claimant's appeal and orders the defendants to repay to the claimant the sum of TT$1,505,493 together with interest on that amount at the statutory rate from 15 May 2018 until repayment.