In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 400

BETWEEN

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF A BOARD OF INQUIRY APPOINTED

UNDER THE HUMAN RIGHTS ACT 1981

BETWEEN:

HAROLD JOSEPH DARRELL

Applicant

-and-

(1) A BOARD OF INQUIRY APPOINTED UNDER THE HUMAN RIGHTS

ACT 1981

(2) THE MINISTER OF CULTURE AND SOCIAL REHABILITATION

Respondents

-and-

HSBC BANK OF BERMUDA LIMITED (formerly the Bank of Bermuda Limited)

And the Directors (including the former Directors) of the Bank of Bermuda Limited

Interested Third Parties

Dates of hearing; 16th – 18th January 2012

Mr. J Durham of Amicus for the Applicant

Lord Pannick QC and Mr. J Pachai of Wakefield Quin for the 1st Respondents

M. Douglas for the 2nd Respondents

Lord Lester QC and Mr..J. Elkinson of Conyers Dill and Pearman for the Interested Third Parties

DECISION

1. This matter concerns a judicial review application brought by Mr. Harold Darrell (hereinafter referred to as 'the Applicant'). In it he seeks a review of a decision of the Board of Inquiry (the Board) constituted under the Human Rights Act 1981 dismissing his complaint of racial discrimination against various persons associated with the Bank of Bermuda Limited (the Bank). Said dismissal was made orally on the 23rd October 2006 and as a decision in writing on the 17th April 2007.

2. The Applicant bases his challenge to the legality of the Board's decision on allegations of apparent bias on the part of the Chairman of the above referred Board, Mr. Paul King arising from non-disclosure of the commercial relationship between the Chairman and the Bank.

The Applicant seeks the following relief:

a) A declaration that the decision was unlawful;
b) An order of certiorari quashing the decision;
c) An order of mandamus requiring the second defendant to convene a new Board of Inquiry
d) Such further or other relief as is necessary to give effect to the judgment of the court; and
e) Costs

BACKGROUND

3. The history of this matter is compendiously set out in the parties' outline submissions from which the following undisputed fact are taken.

4. The Applicant is a business man. He had cause to approach the Bank concerning financing of his business arrangements. In or about 1999/2000 he became concerned that the Bank had disclosed confidential information about his finances to a third party with whom the Applicant planned to do business. The Applicant alleged that the disclosure

caused him financial loss. The Applicant complained to the Bank; however he became dissatisfied with the Bank for failing to properly address his complaint. He believed that their failure arose from reasons connected to his race.

5. On 30th October 2000 the Applicant lodged a complaint of racial discrimination with the Human Rights Commission ("the Commission") pursuant to the Human Rights Act 1981 ("the Act"). Unable to resolve the complaint the Commission referred the matter to the Minister of Community Affairs, the then Minister responsible for Human Rights. On or about the 24th June the Minister drew up the terms of reference citing the Chief Executive Officer and Board of Directors of the Bank as the party complained against, and referred the matter to the Board which he had appointed pursuant to Section 18 of the Act.

6. Mr. Paul King, the principal barrister and attorney of King and Associates, was appointed Chairman of the Board. The Applicant was informed by letter of the 18th July 2005 sent by the Director of the Department of Human Affairs on behalf of the Chairman of the following:

> "*The Department has been instructed by the chair of the above mentioned board of inquiry, Mr. Paul King, to disclose to the parties that his firm is a customer of the Bank of Bermuda and does business with the Bank of Bermuda*".

7. Some time passed during which the Bank filed a judicial review application challenging the appointment of the Board of Inquiry. That challenge was not successful. Ultimately the Board commenced its inquiry on 21st September 2005 with Mr. King as Chairman.

8. Finding the terms of reference defined by the Minister to be narrowly subscribed, the Applicant sought a ruling from the Board that the terms of reference included the Bank as a party to the complaint. The Board ruled that it was confined to the terms of reference as expressly drawn up by the Minister and declined to include the Bank as a party to the complaint. The Applicant, aware of his right of appeal, did not appeal the decision of the Board; hence the Bank was not joined as a party to the complaint.

9. Upon completion of the hearing the Board dismissed the complaint on the 23rd of October 2006. In the written reasons for the decision dated the 17th April 2007, the Board noted that the preponderance of the evidence of the Applicant related to institutional racism. Having reiterated that it had no jurisdiction to include the Bank as a party, and having decided that it could go no further, the Board dismissed the complaint on the basis that it had been made against the Chief Executive Officer and the Board of Directors of the Bank, rather than the Bank itself.

10. The Applicant failed to file an appeal of the decision of the Board in time pursuant to section 21 of the Act. On 16th January 2008 the Applicant sought an extension of time within which to appeal the decision of the Board, and leave to appeal to the Supreme Court by Notice of Motion. Leave to appeal was refused on the basis that there had been substantial and unreasonable delay.

11. The Applicant sought the leave of the Supreme Court to bring judicial review, which application was refused on the papers by Greaves J. on 10 December 2009 on the basis of unreasonable delay. A renewed application was brought before Ground CJ, who on 13th July 2010 dismissed the application for various reasons involving delay, including a rejection of the contention that the public interest justified an extension of time.

12. The Applicant appealed to the Court of Appeal against the refusal by the Chief Justice to grant leave to bring judicial review proceedings. The Court of Appeal determined that there was a public interest in the court reviewing whether there had been the requisite impartial administration of justice by the Board.

13. In so far as the current application is concerned, the undisputed facts reveal that prior to the hearing of the complaint by the Board, and as a result of the Chairman's disclosure the Applicant was informed that the Chairman was a customer of the Bank and did business with the Bank. The Applicant raised no objection.

14. Subsequent to the dismissal of the complaint by the Board and the refusal of his subsequent application for leave to appeal, certain information came to the Applicant's

attention which caused him to question the nature and extent of the commercial relationship between the Chairman of the Board and the Bank.

15. The nature of that relationship forms the basis upon which the Applicant brought this judicial review proceeding on the 3rd December 2009. The substance of the complaint is comprehensively set out in counsel for the Applicant's skeletal outline. It is that:

(1) Mr. Paul King, the Chairman of the Board, was a barrister and attorney whose firm did a substantial amount of paid work for the Bank involving residential mortgages.
(2) This paid work was not disclosed at the inquiry.
(3) The amount of work carried out by the Chairman's firm for the Bank increased after the Board was convened and decreased after the conclusion of the proceedings before the Board.
(4) The decision of the Board was thereby tainted by apparent bias which denied Mr. Darrell an independent and impartial determination of his civil rights.
(5) The judicial review proceedings were brought once the relevant facts became known to the Applicant.

16. As to paragraph (1) - (3) above, research carried out by the Applicant, referred to in his affidavit filed herein and relied on in his counsel's outline as founding the "undisclosed commercial relationship between the Chairman and the Bank" reveals the following:

(1) Between January 2000 and May 2002, before confirmation of the convening of the Board, the Chairman's firm King and Associates undertook 15 transactions in mortgage and conveyance work with the Bank to an estimated value of $3,621,944.37.
(2) Between June 2002 and July 2005, after the Board was appointed but prior to the commencement of proceedings, King and Associates undertook 65 transactions in mortgage and conveyance work with the Bank to the value of $25, 874.894.19.
(3) Between July 2005 and the 17th April 2007, the date of the decision of the Board King and Associates King and Associates undertook 95 transactions in mortgage and conveyance work with the Bank to an estimated value of $52,692,843.10.

(4) Following the conclusion of the proceedings before the Board, up until the end of March 2009, King and Associates undertook 30 transactions in mortgage and conveyance work with the Bank to an estimated value of $12,366.92.

17. A similar line of research was carried out by Mr. J D Massa for the Bank and appears in his affidavit filed herein. There were minor discrepancies between the two accounts regarding King and Associates. The Chairman also produced evidence in which he comments on the amount of mortgage work carried out by his firm. Save for one reservation, the Chairman, and the other parties take no issue with the result of the Applicant's research as the discrepancies are not germane to the issues to be resolved.

THE APPLICANT'S CASE

18. The Applicant argues his case on the basis that the following issues are to be resolved, namely:

(1) Whether by reason of the commercial relationship between the Chairman and the Board, the decision was unlawful as:

a. Tainted by apparent bias, since a fair minded and informed observer having considered the facts would conclude that there was a real possibility that the Board was biased; and /or

b. Taken in breach of the Applicant's right, under section 6(8) of the Constitution of Bermuda, to the determination of the existence or extent of his civil rights by an independent and impartial adjudicating authority and to a fair hearing.

(2) Whether the Chairman made sufficient disclosure of his relationship with the Bank in the letter of 18th July 2005, so that the Applicant's continued participation in the inquiry amounted to a waiver of his right to claim that the decision was unlawful by reason of the Chairman's apparent bias.

(3) If the Applicant succeeds on the aforementioned issues, what, if any relief the Applicant should be granted.

THE BIAS ISSUES

19. It is the Applicant's position that on the facts as presented a fair minded and informed observer would have concluded that there was a real possibility of bias on the part of the Chairman based on the commercial relationship between the Chairman's firm and the Bank. That the Chairman knew or ought to have known from the outset of the Board of Inquiry proceedings that the Bank was in a position to influence the amount of residential mortgage work undertaken by his firm and thereby influence his profit margin.

20. The Applicant further contends that the Chairman's firm was in fact working directly for the benefit of the Bank and paid directly by them; a matter he states, that the Chairman has not disputed in his evidence. It is his position that as a matter of common knowledge the Chairman would have been aware that the Bank would have been in a position to exercise significant influence of a law firm that it instructs to draft a mortgage. That Banks in Bermuda had historically expressly barred certain law firms/practitioners from drafting mortgages. Further that all banks in Bermuda including the Bank were at liberty to direct its mortgage clients to a specified law firm.

21. The Applicant relies on evidence filed herein in the first affidavit of the Bank's legal counsel J D Massa to show that the Bank was in a position to exercise influence over the choice of law firms carrying out mortgages, and can exercise veto power over law firms selected by mortgagors. Mr. Durham relies especially on the fact that the Bank admits that it selects the law firms it instructs to do commercial mortgages (as distinct from residential mortgages). He further relies on the affidavit of Ms. Trina Roberts filed herein to assert that in the majority of cases the Banks' lending officers assist the client in selecting a law firm for the drawing up of residential mortgages.

22. It is the Applicant's case that the Chairman ought reasonably to have been aware that by his mere presence in the proceedings as Chairman of the Board there was a possibility that the Bank could have positively influenced the amount and value of residential mortgage work provided to his firm which emanated from the Bank.

23. Mr. Durham goes further however, and makes plain his case, by asserting that the Chairman should have been aware that the commencement of the proceedings before the

Board led (his word) to the increase in value and amount of residential mortgage work undertaken by the Chairman's firm.

24. To underscore this point the Applicant relies on the results of the research referred to above as demonstrative of the conflict of interest between the Chairman and the Bank. He argues that the trend in the research indicates that in the five years prior to the proceedings before the Board, the Chairman's firm carried out residential mortgage work for the Bank to the value of $30 million; while during the course of the proceedings from appointment of the Board to the Inquiry's conclusion the Chairman's firm carried out residential mortgage work to the value of some $53 million.

25. It is the Applicant's contention that there is an appearance of bias arising from the conflict of interest between the Chairman and the Bank due to the direct financial benefit to the Chairman of his relationship with the Bank. That the benefit implicit in the commercial relationship, including the increasing business throughout the duration of the proceedings endangered the Chairman's impartiality.

26. Mr. Durham points out that the Bar's recommended scale of fees is not aimed at capping an upper limit of fees charged by a firm; thus, he argues the Bar scale was and is inadequate to diminish the danger to impartiality. It is the Applicant's contention that the risk to impartiality imposed by a direct financial benefit to Mr. King was a continuing risk throughout the course of the proceedings. Mr. Durham relies therefore on ***R-v-Hammond*** *(1863) 9 LT (N. S.) 423* as authority for the proposition that an adjudicator must not derive a direct financial interest in the case he/she is deciding.

27. The crux of the issue of the conflict, the Applicant argues, arose at the inception of the hearing as a preliminary point. The Board was asked to determine whether the scope of the inquiry was broad enough to include the Bank as a party, and if not, whether the Board had the authority to widen the scope to join the Bank as a party. Mr. Durham's case is that the Applicant's interest was so closely proximate to the issues that given the risks outlined above concerning the Chairman's relationship with the Bank, including the increasing mortgage work being offered to the Chairman, there was a real risk, a real possibility that the Chairman's judgment would or could reasonably have been affected.

28. Hence it is the Applicant's case that the defence proffered by the Chairman to the existence of actual bias is a non sequitor. The Applicant also decries other explanations contained in the evidence filed by or on behalf of the Chairman and the parties. He contends that the evidence adduced by the Bank tending to show similar increases in the amount and value of residential mortgage work carried out for the Bank by a sampling of other law firms by comparison to the Chairman's firm is irrelevant as it does not answer the contention that the relationship complained of is what gives rise to the appearance of bias.

29. In any event Mr. Durham regards as specious at best, the explanation by the Chairman, (in his third affidavit), that the sharp decline in residential mortgage work by the Chairman's firm after the Board rendered its Judgment was as a result of a merger of his firm's conveyance department with that of one of the comparable law firms (referred to in J D Massa's evidence) to form a new entity "Terra Services Ltd".

30. In regard to the mere relationship existing between the Bank and the Chairman as regards residential mortgage work, Mr. Durham complains that the Chairman (and presumably one or more of the other parties) has failed to provide any evidence that the residential mortgage work was client driven, notwithstanding numerous requests being made to the Chairman. He also describes as discreditable the Chairman's failure to explain how it is that the Bank would not have exercised any influence over the choice of law firm of prospective mortgagors for residential mortgages from the Bank.

NON-DISCLOSURE

31. The Applicant's case on the issue of non-disclosure arises as a result of the information that came to his knowledge after the Board had reached its decision. The Applicant impugns the disclosure made by the Chairman by way of letter to the Applicant dated the 18th July 2005 from the Director of the Department of Human Affairs, Mrs. Brenda Dale. In that letter Mrs. Dale wrote:

> "The Department has been instructed by the chair of the above mentioned board of inquiry, Mr. Paul King, to disclose to the parties that his firm is a customer of the Bank of Bermuda *and does business with the Bank of Bermuda*". (Emphasis added).

32. The record of the preliminary hearing before the Board of the 21st of July indicates that Mr. Elkinson counsel for the Chief Executive Officer and Board of Directors of the Bank raised the question of whether any possible conflict of interest in the matter arose with any of the Board members. The specific contents of the letter were not mentioned at the hearing. The Chairman however engaged Mr. Elkinson by making a reference to "my situation".

33. In answer to this inquiry, Mr. Duncan, counsel for the Applicant, stated that the Applicant took no issue with the contents of the above referred letter concerning the disclosure made by the Chairman. It is the Applicant's case that he took the contents of the above referred letter to mean that the Chairman's firm used the banking facilities offered by the Bank.

34. In his affidavit of the 21st March filed herein, the Chairman states that in a conversation prior to the letter being written, and which no doubt prompted the letter, he informed Mrs. Dale that his firm did mortgage work with the Bank. The Applicant's position is that he was not aware of the commercial relationship between the Chairman and the Bank and only discovered it when informed by an associate on the 25th February 2009. The Applicant's position is that the undisclosed commercial relationship between the Chairman and the Bank existed from the time the Board was empanelled, and expanded during the course of the proceedings before the Board.

35. In consequence of the information received, the Applicant carried out the research into King and Associates' residential mortgage work referred to above. The research revealed that between January 2000 and May 2002 prior to the Board being empanelled, the Chairman's firm undertook 15 mortgage and conveyance transactions involving his clients and the Bank; between June 2002 and July 2005, prior to the commencement of proceedings, the firm carried out 65 such transactions; between July 2005 and the date of

the decision that work increased to 95 transactions and that after the conclusion of the proceedings the transactions decreased to 30.

36. It is the Applicant's primary contention on this point that the Chairman did not comply with his duty of disclosure. He contends that the Chairman's disclosure of a potential interest in the proceedings conveyed by the letter of the 18th of July 2005 was misleading in that it only revealed a banking relationship with the Bank. Further and or alternatively that it was ambiguous by its terms and not of an exacting nature such as would reveal the commercial relationship related to the residential mortgage work. He relies on dicta by the Court of Appeal in England in ***Jones-v-Das Legal Expenses Insurance Co Ltd*** *[2004] IRLR 218* that disclosure of a potential interest is highly exacting.

37. In furtherance of this complaint the Applicant also states that the Chairman's duty of disclosure ought reasonably to have been in his contemplation throughout the progress of the proceedings because, had it been so, he would have been aware of the increase in the mortgage work undertaken by his firm. He submits that non-disclosure is a matter that should be taken inevitably to colour the thinking of a fair-minded observer. For this Mr. Durham relies on ***Davidson-v-Scottish Ministers*** *(No 2) [2005] 1 SC (HL) 7).*

38. For these reasons, Mr. Durham submits that there can be no credible argument that the Applicant waived his right to object to the appointment or presence of the Chairman because being unaware of the material facts he had no effective opportunity to make such an objection. It is the Applicant's position that this, in and of itself, constitutes an instance of apparent bias that vitiates the Boards decision. He relies on ***Smith-v-Kvaener Cementation Foundations Ltd*** *[2007] 1 WLR 370]* for this proposition.

39. In the hearing, as in his supplemental written submissions counsel for the applicant supported his contentions on the appearance of bias by arguing that the court should have no regard to the correctness of the decision of the Board; correctness being irrelevant to the issue of appearance of bias. For this Mr. Durham relied on dicta of Ground CJ in ***Re Hall*** *[2008] Bda L.R. 30.*

THE DEFENDANTS AND INTERESTED PARTIES SUBMISSIONS

40. Lord Pannick Q.C. advanced the Board's submissions which were wholly endorsed and supported by Lord Lester Q.C. for the interested third parties. He refutes the Applicant's allegations as unfounded. In his submissions he places reliance on the affidavits of key personnel within the Bank's legal and personal lending divisions, as well as the affidavit evidence of the Chairman pertaining to how the Bank dealt with mortgage clients.

41. It is the Board's contention that the Bank's policy during the period 2005 to 2006 was that the Bank allowed the mortgage customer to decide which law firm would undertake the preparation of the mortgage document. He does not dispute that the Bank did bar one particular law firm from drafting mortgages for potential mortgagors; but for reasons that are not germane to this case. He admits that in 2007 the Bank's policy was varied effectively to exclude any law firm from preparing mortgage documents that was not properly insured.

42. The Board's position, taken directly from senior counsel's written submissions, is that:

> "*there is no material to suggest that the Chairman's firm acted in any manner different from any other law firm in representing clients seeking mortgages from the Bank in relation to residential property. Such work was "entirely client driven", as Mr. King says at paragraph 23 of his second affidavit. It was not dependent on recommendations from the Bank, since the Bank made no such recommendations*."

43. By way of contrast to evidence filed in the case concerning how the Bank's residential mortgages were handled, counsel for the Board highlights the Bank's affidavit evidence in relation to mortgages for commercial properties. Counsel relies on the fact that the Bank took a different position in relation to commercial property mortgage transactions in that the Bank dealt only with an approved list of law firms on a contractual basis. The Bank's policy included a prohibition against adding to that list any law firm that took legal action against the Bank. It is the Board's contention that the Chairman's firm has never been on the Bank's list of approved law firms for commercial mortgages.

44. The Boards position is that, not only does no special commercial relationship exist between the Chairman's firm and the Bank, but that the Chairman's firm is one of many firms that have no special relationship with the Bank because the customer (the Bank's potential mortgagor) chooses and instructs the law firm, not the Bank. The Board asserts that all law firms undertaking residential mortgage work would be in the same position; a position that admits of no special relationship with the Bank.

45. In keeping with this view, the Board disputes the relevance of the provenance of the mortgage precedents used by a law firm, or the issuing of a certificate guaranteeing good title by a law firm after a conveyance and mortgage is drawn. Likewise, the Board's position is that the origin of the payment received by a law firm, including the Chairman's firm, for residential mortgage work undertaken for its customer is irrelevant to the issue of appearance of bias.

46. It is the Board's assertion that the Applicant's charge, that the Chairman's firm's mortgage fortunes increased and decreased in proportion to the involvement of the Chairman in the Board of Enquiry procedure, is contrary to crucial facts established by the affidavit evidence and is based on a false assumption.

47. For this (and much of their submissions) the Board relies on the affidavit evidence of the Chairman Mr. King; Ms. Trina Roberts of the Bank's personal lending department; J D Massa, Senior Legal Counsel of the Bank; and the independent affidavit evidence of Susan Thompson, Agency Manager in charge of sales at Coldwell Banker Bermuda Realty. The Board's position is that the crucial fact established by this evidence is that conveyance work increased generally from 2003 to 2007.

48. Lord Pannick argues that the false assumption underlying the Applicant's case, that the increase in work for the Chairman's firm was related to his role as Chairman and the Bank directing residential mortgage work to law firms, is an assumption that is simply unsustainable on the evidence filed herein. Lord Pannick submits that the fair minded observer would regard it as quite fanciful to suggest, as Mr. Durham has, that - Mr. King would think that if he favoured the Bank he would get more residential mortgage work

or, if he did not, he would get less. He urges the court to view Mr. Durham's position as amounting to mere speculation which is contrary to the facts.

49. Lord Lester, for the Interested Parties, admits to adopting a more forceful approach to Mr. Durham's submissions. He submits that Mr. Durham, although expressly denying that his client's claim is based on actual bias, nonetheless raises a suspicion of bribery or undue influence on the part of the Bank designed to achieve a decision by the Board favourable to the Bank. This he contends is a clear reliance on actual as opposed to apparent bias.

50. He argues that Mr. Darrell's case in essence is that Mr. King must have concluded that the Bank was seeking to influence the amount of profit made by his law firm with the objective of securing a favourable decision of the Board. This allegation he contends is more than unfortunate, it is, in his words, an outrageous attempt to wrap up a serious allegation of actual bias in a cloak of apparent bias.

51. Lord Lester further submits that Mr. Darrell's argument relies on only a partial picture of the facts. He contends that the position adopted by Mr. Durham amounts to no more than a hypothetical in principle possibility of the Bank exerting influence on Mr. King which, he submits, is contrary to the evidence and to the test for bias as established in ***Porter v Magill*** *[2002] 2 AC 357.*

52. The parties on the other side argue that Mr. Durham is completely off point in relying on the principle established in **R-v-Hammond**. They distinguish that case, submitting that it is very old having been decided in 1863, and the principle highlighted therein is not relevant to recent developments in the law on apparent bias. Lord Pannick points out that the principle in **Hammond** concerns an adjudicator having a direct financial interest in a case such as being a shareholder in a company which is a party to the case.

53. Lork Pannick argues that the instant case in so far as it concerns an allegation of apparent bias is inconsistent with a claim that Mr. King benefited directly from payments made to him by the Bank. Both counsel pray in aid affidavit evidence as to the Bank's normal policies and procedures for distributing mortgage work and argue that, contrary to Mr.

Durham's position, this evidence is plainly relevant to how a reasonable observer would interpret the relationship between Mr. King and the Bank and any potential for influencing the Board.

54. They argue that the court should reject Mr. Durham's assertion that Mr. King's evidence should not be accepted at face value. Lord Lester argues that Mr. King's evidence of his understanding of his relationship with the Bank and his knowledge that his firm's mortgage work was entirely client driven would be relevant to the above considerations. He describes Mr. Durham's contention as a serious attack on the credibility of Mr. King.

55. Lord Lester joined in Lord Pannick's argument that no application for discovery or for cross-examination of Mr. King has been made in the proceedings by Mr. Durham as would be expected if it were seriously to be suggested that Mr. King should not be believed. They submit therefore, based on the authority of ***R v Secretary of State for the Home Department, ex p Oladehinde*** *[1991] HL 254 @302,* that the proper approach for the court is to disallow the challenge to Mr. King's credibility, on the basis that it is simply asserted in a written outline and in an oral submission made at the hearing by Mr. Durham. They submit that the court should apply the same principle to Mr. Durham's attempt to discredit Mr. Massa's evidence.

NON-DISCLOSURE

56. The Board's position on non-disclosure, somewhat oblique in its written outline, is that the Chairman's firm, like many other firms, obtained residential mortgage work by being instructed by their clients. As such it would have been irrelevant for the Chairman to declare that fact. The position that they advance therefore is that no adverse inference should be drawn from his not declaring an irrelevant matter.

57. Lord Pannick for the Board, further clarifying the Board's case, submits that the court should conclude that Mrs. Dale's letter of 18th July 2005 did not make reference to mortgage work because in the context given it was irrelevant. Further that there is no challenge to Mr. King's evidence that he informed Mrs Dale that he carried out mortgage

work for the Bank. Further that at no time before, at the case management stage or especially during the proceedings once the issue was brought up by Mr. Elkinson, did Mr. Darrell or his counsel take objection to Mr. King sitting as Chairman of the Board.

58. Lord Pannick asserts that it is clear, from Mr. Darrell's affidavit that Mr. Darrell, having asked himself whether, from what had been disclosed, Mr. King had a special relationship with the Bank, concluded that Mr. King did not. This Lord Pannick submits was the correct conclusion because Mr. King did not have a special relationship with the Bank. He contends that Mr. King's only relationship with the Bank other than as customer, was consistent with all other conveyance lawyers in Bermuda. He had clients that chose him to draw up their mortgages after having arranged for a mortgage with the Bank.

59. In these circumstances, he submits, far from concealing that information, Mr. King specifically drew it to the attention of Mrs Dale. On the facts it did not amount to a special commercial relationship, and no real possibility of bias existed, as the clients, not the Bank, chose Mr. King's firm to draw up the mortgages.

60. Lord Lester for the Interested Parties was far more frank in his submission on Mr. Darrell's claim on non-disclosure. He describes as preposterous Mr. Darrell's claim that Mrs. Dale's letter of the 18th of July was misleading because it only suggested that the Chairman's firm used the Bank's facilities. He submits that, far from misleading, the letter was clear and expressly disclosed the fact of a commercial relationship between the Chairman and the Bank.

61. He submits that this is an extraordinary allegation in which Mr. Durham seeks to persuade the court, by way of inference, that Mr. King, a Barrister and Attorney of more than 30 years standing would deliberately set out to hide the nature of his relationship with the Bank. He argues that such an inference would amount to a wholly unjustified finding of bad faith on Mr. King's part. Counsel submit that what Mr. Darrell relies on as newly discovered evidence of increasing and then decreasing mortgage business provides only a partial picture. When seen in its proper context it does not support the inferences the Applicant urges on the court.

THE AUTHORITIES

62. A considerable number of authorities were provided to the court many of which were cited in argument. Of the relevant legal principles, there is no dispute that the leading authority on the modern legal test applicable when determining the issue of bias is the House of Lords decision in ***Porter-v-Magill*** *[2002] 2 AC*. The test is whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased.

The reason for the test is clearly explained by Ground J in *Re Hall Bda [2008] L. R. 30 @ 2*:

> *"the test is framed in that way partly to avoid the difficult task of ascertaining whether the judge was in fact biased, and partly because appearances can matter as much as substance, and justice must not only be done but must be seen to be done. As a result it does not avail that the court was not in fact biased, or otherwise approached the matter in a fair and balanced way."*

63. The court is guided by ***Helow-v-Secretary of State for the Home Department*** *[2009] 2 All ER* where the attributes of the fair-minded and informed observer were described by Lord Hope as follows:

> "*The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para. 53. Her approach must not be confused with that of a person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be,*

unbiased. She knows that judges, like anybody else, have their weakness. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially."

Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

64. *In* ***Locabail (UK) Ltd-v-Bayfield Properties Ltd*** *[2000] QB 451* the English Court of Appeal held that the court, on considering the issue, must take into account the actual facts as disclosed by the evidence and in particular what it was that the Judge knew at the time the case was being heard. The court went on to say that it is appropriate to inquire whether the Judge knew of the matter relied on as appearing to undermine his impartiality. If it is shown that the Judge did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled.

65. The Court of Appeal in ***Snelling-v-Bolton*** *[2004] Bda L.R. 30* at 3 found useful the following expression of principle from an Australian authority on the point of a professional association, which, being a general statement of principle provides some guidance to this case of commercial relationship:

"…the decision in the cases dealing with professional association between adjudicator and litigant demonstrates that the courts do not take a hypothetical or unrealistic view of an association relied upon in a disqualification application….Although the test is one of appearance, it is an appearance that requires a cogent and rational link between the association and its capacity to

influence the decision to be made in the particular case. In the absence of such a link, it is difficult to see how the test for disqualification …can be satisfied."

66. In ***National Assembly for Wales-v-Condron*** *[2005] EWHC 3007* the English Court of Appeal stated that a reviewing court must look at all the circumstances as they appear from the material before it.

THE FACTS

67. Having considered the basic legal principles I must now determine the relevant facts to be gleaned from the evidence that has been made available to the court and such other material circumstances as may suggest an appearance of bias.

68. One of the main points that the Applicant makes is that the appearance of bias arises from the fact that the Bank was in a position to exercise significant influence over law firms instructed to prepare mortgages. Mr. King in his second affidavit filed herein states that it is the client of his firm that applies to the Bank and the client who chooses his or some other law firm to prepare the conveyance and Mortgage documents.

69. This is verified in the affidavit of Ms. Trina Roberts, mentioned above, who at the relevant time managed the personal lending department of the Bank. She managed the lending officers who came into contact with the clients seeking financing of property purchases by way of mortgage. Her evidence is that in one third of the cases the clients knew which firm they wished to instruct to draw their mortgage.

70. In one third of the cases the client had received a referral from someone outside of the Bank. In such cases the client was told whether or not that firm had done mortgage work involving the Bank before. The final third of customers knew of no lawyer or firm. In such cases the practice of the lending officers was to show the customer a list of lawyers who had prepared mortgages for the Bank before. From the list the customer chose the law firm.

71. It is Ms. Robert's evidence that in every case the client was told that the Bank did not select the law firm or recommend lawyers but was prepared to work with any lawyers

who used the Bank's precedents and knew of their requirements. She indicated that she was aware that a change of practice took place in 2007, after she had left the department, when the Bank drew up a formal list of approved law firms for residential mortgages. Inclusion in the list depended on the firm having an appropriate level of insurance.

72. She could only conjecture about what individual officers did, but she relied on the Bank's policies as expressed above, as their guide. She also informs that the Bank had a Business Development Manager who explained to law firms what the Bank's requirements were for doing business with the Bank.

73. The foregoing evidence was supported by the evidence of Ms. Sherry Moore, a team leader in the Financial Services Department of the Bank. She added that on some occasions it was the realtor who made a suggestion to the client about which law firm to use. Ms. Moore reiterated that she did not make any recommendations and was unaware of anyone else in the department who made such a recommendation.

74. The evidence of each of these Bank officers is supported on the point regarding selection of law firm by the client, by the Affidavit of JD Massa Senior Legal Counsel for the Bank.

75. I accept all the above evidence as relevant to the issue of how law firms were selected to carry out mortgage work involving the Bank. Applying the test referred to in the **Porter** case I do not believe that the Chairman, whose firm regularly took on clients involved in mortgage transactions with the Bank, simply by doing so, risked impartiality in the Board proceedings.

76. There is no reason on the evidence to impute to Mr. King any hope of advantage to his mortgage practice of receiving residential mortgage work based on the outcome of the proceedings. Nor does the evidence lead to any reasonable inference that suggests that Mr. King would fear loss of custom for a decision unfavourable to the Bank. His firm's history with the Bank had been established; it related to residential mortgage work brought into his firm by clients who in an independent exercise of choice selected his

firm. Mr. King's firm 'King and Associates' was in the same position as all other law firms that did residential mortgage work for the Bank's customers.

77. The evidence of J D Massa is clear that the Bank had a select few law firms that it instructed to carry out commercial mortgage work. Mr. King was aware that his firm was not included in the list of approved law firms carrying out commercial mortgage work. Indeed Mr. King was aware at the relevant time that despite his firm being able to carry out commercial mortgage work, his firm was not and had never been included in the Bank's exclusive list of such firms. Accordingly, Mr. King's firm was excluded by the Bank from having a special relationship with him.

78. The evidence that Mr. Durham relies on to sustain an appearance of bias on this point has in my view been skewed. There is no evidence capable of suggesting that Mr. King had hope of advantage in securing commercial mortgage work from the Bank by making a favourable decision for the Bank. Mr. Durham has sought to elevate to the level of risk improbabilities and conjecture.

79. The evidence shows Mr. King knew at the relevant time that he and most other conveyance firms were categorically excluded from commercial mortgage work by the Bank. The Bank was in control of that, as Mr. Durham points out, however it does not follow that Mr. King had reason to hope or believe that his presence on the Board could or would effect a change to the Bank's policy. In my estimation nothing other than speculation born of unwarranted suspicion could place such hope in Mr. King or pose a real risk of bias on his part.

80. Mr. Durham seeks to bolster his case by relying on past practices of (unspecified) banks, which, he argues, historically restricted certain law firms from drafting mortgages. This is an allusion to restriction based on race, if I am not mistaken. There can be no doubt, and I take judicial notice, that in Bermuda's not so distant history discreditable practices across a broad spectrum of businesses have been exposed as having had a basis in racial prejudice. However the test to be applied in this case alleging apparent bias permits me to consider the state of Mr. King's knowledge of the Bank's practices at the material time. Mr. King has expressed his state of knowledge in his affidavit evidence.

81. Mr. King's statement of his knowledge of the Bank's policy is believable for several reasons. Such knowledge would have been common for any lawyer representing a client in residential mortgage work concerning the Bank. The evidence of the witnesses referred to above on the point provides cogent support for Mr. King's evidence. The facts show that all but a select few law firms were restricted from commercial mortgage work. Only one law firm had been restricted from carrying out residential mortgages. I am satisfied on the facts that the Bank based the latter decision on quality control issues. The facts of the case as I have found them to be do not admit of any real possibility of bias on this score.

82. The Applicant's submission regarding apparent bias and risk of impartiality on Mr. King's part arises from Mr. Darrell's own research the result of which has been set out above. This research revealed that there was a substantial increase in residential mortgage work experienced by Mr. King's firm during the relevant time from the convening of the Board until the decision of the Board. This material the court accepts as factual.

83. Critical to the Applicant's submission is the assumption that by reason of the increase in residential mortgage work, firstly, the Bank sought to influence Mr. King. And secondly, that Mr. King was aware of that and shared the Bank's intention. I am reminded therefore in examining this that the hypothetical fair-minded informed observer would proceed on an assumption only if there exists an objective basis for doing so (**Helow**).

84. The hypothetical fair-minded observer, in whose shoes I stand, would have to consider if this increase in mortgage business over the period would have so affected the mind of Mr. King, that his impartiality as an adjudicator would have been impossible. As Lord Mance stated, in the **Helow** case this is a question of law, to be answered in the light of the relevant facts.

85. Mr. Durham submits that the increase in mortgage work should be seen in isolation. I am unable to agree as that would be contrary to authority as well as good sense. Counsel on the other side make the point that the material that Mr. Durham relies on presents a one sided and incomplete picture for failing to accommodate evidence of the increased

mortgage work by comparable law firms such as those indicated in Mr. J D Massa's research.

86. Mr. Durham may have fallen into error on the law because he has conflated the two principles referred to in the **Hammond** case. Mr. Darrell may unwittingly have fallen into error as well; in his case it was error of fact. I have no doubt that Mr. Darrell's suspicion was initially driven in good part by his failure to appreciate the role that market forces played in the substantial increases seen in King and Associates mortgage work over the relevant period.

87. There is other material relevant to this issue is the form of the affidavit provided by Ms. Susan Thompson, referred to above. She is experienced in the property market. Her evidence is that there were increased residential property transactions and property prices between years 2004 and 2008. She characterises the activity of the property market in 2004 and 2005 as "hot". She indicates that in 2006 a shift can be seen so that by 2007 there was some softening of property sales with further decreases in 2008.

88. The associated increases and decreases in residential mortgage work during the comparable periods as indicated above is supported by the research carried out by J D Massa of 4 comparable law firms all of which carried out residential mortgage transactions. Mr. Massa's comparisons are structured into three periods; before the directions hearing; between the directions hearing and the final ruling, and finally, the period post ruling. He helpfully included charts to illustrate the comparisons made.

89. The upshot of Mr. Massa's research is that while the year on year increases in the amount and value of residential mortgage work for King and Associates are very large, they are not unusual or out of line with that of the comparable law firms. He makes the point that King and Associates' increases only appear unusual if seen in isolation. Mr. Massa is of the belief that the increases in mortgage transaction over the relevant periods appears to be a part of a general trend affecting King and Associates as well as the 4 comparable law firms. This is consistent with Ms. Thompson's evidence.

90. Mr. Durham castigates Mr. King's suggestion that the marked decrease in residential mortgage transactions experienced by King and Associates after the Board had rendered its decision is as a result of the amalgamation of King and Associates' and Christopher Francis and Forrest's (one of the firms included in Mr. Massa's comparison) conveyance departments into Terra Services. Mr. Durham makes one further (revealing) point: Christopher Francis and Forrest and King and Associates each discontinued mortgage work but for a low level of residual work. Mr. Durham invites the court to disregard these explanations.

91. It is true, both as a matter of law and fact, that the court does not have to accept the evidence of Mr. King on this (or any) point. I am also mindful of senior counsel's submissions that criticisms of Mr. King's creditworthiness have been made without evidential foundation and late in the day therefore should not be allowed (**Oladehinde)**. However I have placed reliance on the value in Mr. Massa's helpful research. The research supports Mr. King's evidence that, in the period shortly after the Board rendered it decision residential mortgage transactions fell off sharply for both King and Associates and Francis and Forrest yet increased exponentially for Terra Services.

92. This point is well illustrated in Mr. Massa's comparison chart. In 2008, 2 of the comparable law firms experienced modest fall off in revenues from residential mortgage work; 1 experienced an inverse increase in transactions. The actual annual revenue for the 3 was for all practical purposes equivalent. In that same year both Christopher Francis and Forrest and King and Associates' mortgage revenues were drastically reduced. Terra Services on the other hand experienced a massive increase in revenue over its previous 2003 – 2007 annual revenue picture.

93. Terra Services' total 2008 revenue is not out of proportion to the revenue of each of the 3 remaining firms used in the comparison. Further it reflects the sum of the revenue of Christopher Francis and Francis and King and Associates for the previous year plus what clearly represents the increase in revenue enjoyed by the other 3 firms in 2008. Mr. Durham ignores this analysis to his detriment.

94. This analysis demonstrates that focusing on the facts can prevent undue suspicion and misleading false assumptions. The analysis is capable of and does inform the court of the context in which to view the issues surrounding the increases and decreases in mortgage work carried out by the Chairman's firm. I have not heard nor can I find an objective basis for rejecting this critically relevant evidence.

95. Having made this finding, it is clear that the Applicant's complaint that the Bank sought to influence Mr. King by increasing residential mortgage work is unsustainable, baseless, and, to use Lord Lester's less colourful language, is an unfortunate indictment (my word) on the reputation of the Bank.

96. Mr. Durham's imputation that the Chairman had knowledge (actual bias), or should be fixed with knowledge (apparent bias) of the Bank's intention to influence the outcome of the proceedings is in my view fallacious and an equally unfortunate imputation on the character of Mr. King. To borrow a quotation made in **Bolton** appropriately adapted, there is on these facts no appearance of a cogent and rational link between the mortgage relationship and its capacity to influence the Board's decision in my estimation.

NON-DISCLOSURE

97. I am guided by the principles reflected in the authorities on the subject of disclosure. Mr. Durham is correct in pointing out that guiding principle reflected in ***Taylor-v-Lawrence*** *[2002] 3 WLR* is that full disclosure must be made.

98. Mr. King's evidence is that he told Ms. Dale that he did banking with the Bank and carried out mortgage work for the Bank. This evidence is unchallenged. I accept this evidence as demonstrating the Mr. King did not attempt to hide the nature of his relationship with the Bank; it was a relationship in common with all other conveyance lawyers.

99. To my mind the letter on its face declared not one but two distinct disclosures. One disclosure was that the Chairman is a customer of the Bank. The other was that he does business with the Bank. While there was certainly no reluctance on the part of Mr. King

to make full disclosure to Mrs. Dale, to be fair to the Applicant, he was unaware of the specificity of the disclosure regarding doing business with the Bank.

100. The exchange that was prompted by Mr. Elkinson's query at the preliminary hearing was brief; and it was nonetheless an opportunity for Mr. Darrell through his counsel to make further inquiry or to refer to the letter of the 18th July 2005 for clarification on its disclosure. It is difficult to understand why Mr. Duncan, a well known attorney of many years of call and practice as the principal of a law firm, and Mr. Darrell, a well known business man, would not have appreciated that the conjunction "and" in the letter indicated that a distinction was being made between being a customer of the bank and doing business with the Bank. The second phrase would otherwise be redundant.

101. One must also consider that this was just the preliminary hearing. The actual hearing did not take place until the 21st of September. There was ample time for the Applicant and his counsel to reconsider their position on the issue of disclosure.

102. Even if I assume for the moment that the letter amounted to only partial disclosure, the **Taylor** case demonstrates that that does not entitle the Applicant to make a case of apparent bias. The court must not lose sight of the other relevant facts that it has accepted and, hopefully, has set out clearly above to which the test for bias was applied. My finding on the issue of disclosure is consistent with those of my other findings.

CONCLUSION

103. The material referred to throughout and the many facts accepted and analyses made above are a powerful demonstration that a fair-minded and informed observer reviewing this case objectively and dispassionately would be, as I am, satisfied that there is no real appearance of bias on the part of the Chairman, or more inclusively, on the part of the Board against the Applicant, Mr. Darrell.

104. Having reached this conclusion it is not necessary for me to consider the rigorous submissions made by counsel on the issue of waiver; on the fundamental rights issue of a

fair hearing pursuant to section 6(8) of the Constitution of Bermuda and on the validity of the claim of racial discrimination.

105. I should like to acknowledge the able submissions of Mr. Douglas made on behalf of the Second Defendant. He came in at the tail end of the submissions by the other counsel; however any analogy to the cricketing term begins and ends there. The necessity to refer to his submissions has been over taken by the conclusion reached in this judgment on the issues that he deferred to counsel for the Board to make.

106. Accordingly I dismiss the Applicant's claim in this Judicial Review application and refuse all the relief sought. I see no reason why costs should not follow the event, taxed or agreed. However, I will hear from Counsel if they so desire.

Dated this day of August 2012.

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Charles-Etta Simmons
Puisne Judge