

**IN THE COURT OF APPEAL OF BELIZE A.D. 2025
CIVIL APPEAL NO. 3 of 2023**

BETWEEN:

BELIZE TOURISM BOARD

Appellant

And

MISTY MICHAEL

Respondent

Before:

The Hon Madam Justice Hafiz Bertram
The Hon Mr. Justice I Foster
The Hon Dr Justice Bulkan

President
Justice of Appeal
Justice of Appeal

Appearances:

Mr. E. Andrew Marshalleck SC for the Appellant

Mr. Rt. Hon. Dean Barrow SC along with Darinka Munoz for the Respondent

.....
2025: 14 March
2025: 27 May
.....

JUDGMENT

- [1] **HAFIZ BERTRAM P:** The appellant, the Belize Tourism Board ('BTB'), a statutory corporation which is governed by the Belize Tourism Board Act, Chapter 275 of the laws of Belize, Revised Edition 2020 ('the BTB Act'), was the Employer of the respondent, Misty Michael ('Ms. Michael'). She was employed as Head of Department/ Director of Marketing and Industry Relations by the BTB for a period of three years by a written contract of employment dated 1 April 2020 (the Employment Contract'), and terminated on 13 May 2021. Ms. Michael initiated legal action for wrongful termination against the BTB. Shoman J ('trial judge') determined that Ms. Michael's termination was without cause under Clause 7.1.1. of the employment contract and awarded her damages for the remaining period of the contract. Clause 7.1.1 of the employment contract provides:

“If the BTB terminates this contract of employment without cause before the expiration of the full term of this contract the BTB shall be liable for and shall pay to the HOD upon termination the sums equal to all salaries and all other remuneration, and confer on the HOD all other benefits, that would have been due to the HOD for the full remaining term of this contract.”

- [2] The BTB appealed the decision of the trial judge and questions the validity and enforceability of Ms Michael's employment contract on several bases including that it did not comply with the statutory provisions of the BTB Act.
- [3] This Court heard the appeal on 14 March 2025 and reserved its decision. The appeal is now dismissed, though with some reasons which differ from those given by the trial judge in relation to the appointment process.

Background

- [4] On 19 August 2019, Ms. Michael was hired by the BTB as the Head of Department /Director of Marketing and Industry Relations ('HOD') on a probationary basis and was confirmed to the post on 11 December 2019, on a permanent basis. On 1 April 2020, she was given an employment contract with the same responsibilities for a duration of *“three (3) years or until terminated under the provisions set out in clause 7 of this agreement.”*
- [5] The employment contract was signed and executed by Einer Gomez, Chairman, Board of Directors ('Chairman'), and Glen Eiley, Vice Chairman, Board of Directors ('Vice Chairman'), of BTB. The then Director of Tourism, Ms Karen Bevans witnessed the execution of the employment contract. The BTB's seal was also affixed to the employment contract.
- [6] On 13 May 2021, Ms Michael received a termination letter from the Acting Director of Tourism, dismissing her with immediate effect *“...pursuant to Clause 7.1.3 of your employment contract dated 1st April 2019.”* (See letter exhibited as MM9 to the Witness Statement of Misty Michael). On termination, the BTB paid Ms. Michael \$5,835.64 as Separation benefits pursuant to Clause 7.1.3. (See letter exhibited as MM10 to the Witness Statement of Misty Michael dated 4 February 2022. This resulted in a claim brought by Ms Michael for the sum of \$217,822.18 as damages for her wrongful termination based on Clause 7.1.1 of the employment contract. In the amended claim, Ms. Michael claimed interest, in accordance with section 166 of the Supreme Court of Judicature Act, at the rate of 12% for the period 13th May 2021 until judgment; post-judgment interest in

accordance with section 167 of the Supreme Court of Judicature Act, and costs. Clause 7.1.3 of the employment contract provides for termination for material change of circumstances:

“The BTB may terminate this contract of employment immediately if there is a material change in circumstances attributed to an event not caused by the BTB (i.e. an outbreak of disease, hurricane, war or civil strife, or other similar event) that so substantially alters the financial position of the BTB that the BTB is unable to pay the HOD. If the BTB terminates this contract under this clause the BTB shall be liable for and shall pay to the HOD upon termination all salaries due to the date of termination, any notice pay, any outstanding vacation, and pension benefits due to the HOD as at the date of termination.”

- [7] The BTB in its amended defence denied the claim and asserted that Ms. Michael was terminated pursuant to clause 7.1.3 of the Employment Contract following the shutdown of the tourism industry. Further, she was entitled only to wages up to the date of termination, notice pay, vacation and pension benefits as provided by Clause 7.1.3. The BTB denied Ms. Michael was entitled to interest at 12 percent. The BTB filed a counterclaim and repeated its Amended Defence (paragraphs 1 – 42). It claimed that the written contract of 1 April 2020 was invalid and unenforceable because it was knowingly entered into by Ms. Michael in violation of section 14(2) of the Act. That the Minister did not approve her appointment as Director and Head of Department of Marketing and Industry Relations nor did the Minister approve her remuneration which exceeded \$8,000.00 per annum as required by section 14(2) of the Act. Section 14(2) of the Act provides that:

“(2) Subject to subsection (1) of this section, the Board may appoint and employ, at such remuneration and on such terms and conditions as it thinks fit, such other officers, agents and servants as it deems necessary for the proper carrying into effect of this Act,

Provided that,

(a) no salary in excess of the rate of eight thousand dollars per annum shall be assigned to any post without the prior approval of the Minister;

(b) no appointment shall be made to any post to which a salary in excess of the rate of eight thousand dollars per annum is assigned without the prior approval of the Minister;”

- [8] Further, or in the alternative the BTB claimed that Clause 7.1.1 of the employment contract requires payment of a sum that was well in excess of the total value of the normal payments required to be made at law on termination of employment without cause. As such it provides for the payment of a penalty and was unenforceable at law. Even further or in the alternative the BTB says the

employment contract and in particular clause 7.1.1 was ultra vires the legal capacity of the BTB, a statutory body since it was not in the best interests of the BTB, was excessively generous to Ms. Michael, Wednesday unreasonable and disproportionate to the aim of securing the services of Ms. Michael on arm's length commercial basis.

[9] The BTB counterclaimed for:

1. A declaration that the written contract of employment dated 1 April 2020 made between Ms. Michael and the BTB is invalid and unenforceable as neither her appointment as Director and Head of Department of Marketing and Industry Relations nor her remuneration was approved by the Minister in violation of section 14(2) of the Act.
2. Further, or in the alternative, a declaration that clause 7.1.1 of the employment contract dated 1st April 2020, is a penalty, and so is invalid and unenforceable.
3. Further, or in the alternative, a declaration that the contract of employment dated 1 April 2020 is invalid and unenforceable being ultra vires and beyond the legal capacity of the BTB as a statutory corporation.

[10] Ms. Michael denied that the BTB is entitled to the reliefs sought and prayed for its dismissal.

The decision of the trial judge

[11] The trial judge found that Ms. Misty was wrongfully terminated and was entitled to damages in the sum of BZ\$217,822.18; The Counterclaim of the BTB for the declarations sought was dismissed with costs; together with Interest in the amount of 6% per annum to be paid from the date of termination of Ms. Michael to the date of the judgment (2 December 2022); Interest at the rate of 6% per annum after the date of judgment until satisfied; and Costs in the Claim and Counterclaim to the Claimant (to be discussed by Parties).

The grounds of appeal

[12] The BTB appealed on 9 grounds:

1. The learned trial judge erred in law and misdirected herself in determining that section 14(2) of the Belize Tourism Board Act ("the BTB Act"), which empowers the Board to appoint officers, does not impliedly require the prior approval of the Minister of the terms of appointment to be made or signified in writing in the face of the clear provisions of section 9(6) of the BTB Act mandating that all decisions of the Board be minuted in proper form and confirmed and signed by the Chairman or Vice-Chairman and given that the prior approval of the Minister is a necessary pre-condition of the exercise of the statutory power of the Board to decide to make an appointment pursuant to section 14(2).

2. The learned trial judge erred in law and misdirected herself in determining that the Board as a statutory body is bound by the acts of the Chairman and Vice-Chairman in signing the contract of appointment of the Respondent in reliance on the finding of Madam Justice Chabot in *Karen Bevan v Belize Tourism Board and Ors* that section 8(3) of the BTB Act allows all documents and decisions of the Board to be signed by the Chairman or Vice-Chairman by failing to consider the scope of the statutory authority of the Chairman and Vice-Chairman to bind the Board, the statutory requirement for decisions of the Board to be evidenced by a resolution duly minuted in the records of the Board, and/or that the statutory authority of the Chairperson and Vice Chairperson under section 8(3) of the BTB Act to sign a document or decision must be predicated on the Board's prior approval of the document or decision.
3. The learned trial judge erred in law and misdirected herself in deciding that the Board acquiesced in the terms and conditions of the Written Contract of Employment dated April 1, 2020, ("the Written Employment Contract") by failing to consider that the Board could not be found to have acquiesced to terms and conditions of which there was no evidence that the Board had any knowledge.
4. The learned trial judge erred in law and misdirected herself in determining that the Board was estopped from denying the validity of the Written Employment Contract by:
 - (a) failing to consider that the Respondent was in fact employed as a permanent employee of the Board at the date of execution of the Written Employment Contract on similar terms but under an oral contract of indefinite duration terminable on notice in accordance with the Labour Act so that the Board and the Respondent were both always well aware of the Respondent's employment by the Board and behaved accordingly; and
 - (b) failing to take account of the fact that estoppel was not pleaded by the Respondent, there had been no evidence of inducement to enter the Written Employment Contract, and no evidence of detriment in doing so to ground any estoppel.
5. The learned trial judge erred in law and/or misdirected herself in deciding that clause 7.1.1 of the Written Employment Contract does not provide for payment of an unenforceable penalty by:
 - (a) determining that section 39(1) merely sets out a statutory minimum which could be supplemented by more generous terms;
 - (b) relying on findings of fact by Madam Justice Chabot in *Karen Bevan v Belize Tourism Board and Ors*, concerning contracts and matters that were not in evidence before the learned trial judge and so were not open to be considered by her;
 - (c) failing to give due consideration to the Board's argument that clause 7.1.1 was not proportionate, and in fact was unconscionable and extravagant, because it required payment of a sum which was 76% more than the wages she would be awarded under the Labour Act;

- (d) by failing to consider and determine the commercial justification for changing the Respondent's permanent employment to employment on a fixed term in an election year including the pay-out provisions set forth in clause 7.1.1., which it was incumbent upon the Respondent to prove.
6. The learned trial judge erred in law and misdirected herself in determining that the Board failed to provide evidence of irrational generosity by failing to give due consideration to the evidence gleaned from the contract itself that:
- (a) whereas the Respondent was given a right to terminate the Employment contract on three (3) months' notice, no such right was afforded the Appellant; and
- (b) clause 7.1.1 sought to compensate the Respondent over and above the compensation contemplated by the Labour Act, without any obligation on the part of the Respondent to mitigate her damages.
7. The learned trial judge erred in law and misdirected herself in finding that the Board and/or Minister had approved of the Written Employment Contract simply by reference to the presence of the signatures of the Chairman and Vice-Chairman on the written contract in the face of clear uncontroverted evidence that there was no minuted approval of the contract by the Board and/or the Minister or that the contract was ever put before the Board, as distinct from the persons of the Chairman and/or Vice Chairman.
8. The learned trial judge erred in law and misdirected herself in failing to determine that the Written Employment Contract was ultra vires the legal powers and capacity of the BTB as a statutory body because the Written Employment Contract was not approved by the Minister and/or by the Board as required by section 14(2) of the BTB Act.
9. The learned trial judge erred in law and misdirected herself in determining that the Respondent was wrongfully dismissed by:
- (a) rejecting and/or failing to give proper consideration to the evidence that the Board's finances had been significantly eroded due to the Covid 19 pandemic, so that it was required to include additional austerity measures in the form of the restructure of the BTB and a revised budget for the 2021 - 2022 fiscal year which included a reduction in wages for the heads of department, including the Respondent.
- (b) rejecting the Appellant's evidence that it continued to operate at a deficit, even under its revised budget for the 2021 - 2022 fiscal year, so that it was not prudent to continue to pay the heads of the department, including the Appellant, the wages and benefits under the Written Employment Contract or the oral contract of indefinite duration under which she had served prior to the pandemic.
- (c) rejecting the Board's argument that it was not required to go broke before it could invoke clause 7.1.3 of the Employment Contract; and
- (d) determining that the true reason for the Respondent's termination was her refusal to accept a 20% wage cut, and for having the temerity "putting pen to paper" to point out that she was under contract so the Board's decision to deduct an amount from her compensation would be a breach of contract and failing to recognise that the Board's

right to invoke clause 7.1.3 of the Written Employment Contract was not predicated on the Respondents consent so that the refusal to accept the wage cut was not a reason for termination, but was instead the reason why the Board did not offer to the Respondent a new contract at the reduced salary.

Ground 1: *Whether implied requirement for prior approval of the Minister to be made in writing*

- [13] The BTB argued that the trial judge erred in her decision at paragraphs 22 and 23, that there was no requirement for the Minister's approval of the terms of the employment contract to be evidenced in writing and therefore she accepted the evidence of Ms. Bevans that the Minister gave his approval. The trial judge at paragraphs 22 and 23 stated:

“22. Mrs. Bevans also testified that the contract of Ms. Michael was put to the Minister for approval and that it was put to the Chairman of the BTB. She testified that she told the Minister what the terms were and that his approval was given to proceed. According to her, the **Minister's approval was verbal of the Claimant's appointment and contract**. I found Mrs. Bevans' testimony on a whole to be clear, measured and convincing.

23. Importantly, the Defendant provided no evidence to this Court, that the Minister did not give his approval, and rely instead on arguing that such Ministerial approval was not given in writing. In point of fact, the Belize Tourism Board Act does not contain any requirement for the approval of the Minister to be obtained or to be signified in writing.”

- [14] The question to be determined is whether the oral approval by the Minister was permitted under the BTB Act as determined by the trial judge. Section 14(a) and (b) provides: “(a) *no salary in excess of the rate of **eight thousand dollars per annum** shall be assigned to any post **without the prior approval of the Minister***; and “(b) ***no appointment shall be made** to any post to which a salary in excess of the rate of eight thousand dollars per annum is assigned **without the prior approval of the Minister***.” There is no express language in section 14(2) (a) and (b) for the Minister to record his approval in writing and this requirement in my view, cannot be implied into section 14. It would be prudent to make an amendment to the legislation to require the approval of the Minister to be given in writing on such important decisions in relation to staffing of the BTB. The trial judge at paragraph 16, line 3, stated that “There is no requirement that the Minister's approval is to be made or signified in writing.” I agree to the extent that it refers only to section 14(2). Taking in that context the trial judge was correct in her finding in relation to section 14(2).

[15] The BTB has however taken this ground further than the verbal approval of the Minister under section 14(2) and has linked it to section 9(6) which provides that “*Minutes in proper form of each meeting shall be kept by such officer as the Board may appoint and shall be confirmed by the Board at the next meeting and signed by the Chairman or the Deputy Chairman, as the case may be.*” As I understand the argument by the BTB, it is contending that the prior approval of the Minister should have been recorded in the Board Minutes. To properly address this argument, this Court would have to consider the appointment process, bearing in mind that the BTB did not plead Board approval. The BTB argued that it is implied under section 14(2) that Board approval is necessary. I find it necessary to address the appointment process for future guidance as it seems that the Board as a whole body was not engaged in the process. It was the Minister, the Chairman and the Vice Charman. I say this cautiously since the then Board members were not called to give evidence in the matter before the trial judge. I recognise also that the Chairman and Vice Chairman are members of the Board.

The appointment process under section 14(2)

[16] Section 14 in its entirety provides:

“14. -(1) The Board shall, with the approval of the Minister, appoint a chief executive officer to be called the “Director of Tourism”, and a secretary to the Board, at such remuneration and on such terms and conditions as the Minister may approve.

(2) Subject to subsection (1) of this section, **the Board may appoint and employ, at such remuneration and on such terms and conditions as it thinks fit, such other officers**, agents and servants as it deems necessary for the proper carrying into effect of this Act, Provided that,

(a) no salary in excess of the rate of eight thousand dollars per annum shall be assigned to any post without the prior approval of the Minister;

(b) no appointment shall be made to any post to which a salary in excess of the rate of eight thousand dollars per annum is assigned without the prior approval of the Minister; and

(c) no provision shall be made for the payment of any pensions, gratuities or other like benefits to any officers, agents or servants, or to others by reference to their service, without the prior approval of the Minister.”

[17] Section 14(2) (a) and (b) are applicable to Ms. Michael as she falls under ‘such other officer’ and this is not disputed. It is also not disputed that her salary is in excess of eight thousand dollars per annum and that the prior approval of the Minister was required for the Board to appoint her

to the post as HOD. The plain meaning of section 14(2) is that the Board makes the appointment at such remuneration and terms and conditions as it thinks fit. It has the legal capacity to do so pursuant to section 14(2). Therefore, a decision may be taken by the Board to select a suitable candidate and decide on the remuneration and terms and conditions. (Though there is nothing preventing the Minister from selecting a suitable candidate himself). In this case, Ms. Michael was already working with the BTB and therefore a decision had to be taken by the Board to give her the new employment contract. This is the first step in the process.

Prior approval of the Minister

- [18] However, in cases where the salary of any post exceeds eight thousand dollars per annum, the Minister must give his approval in advance, in accordance with section 14(2) (a) and (b). The Board cannot make the appointment without his approval. There was no evidence before the trial judge that the Board made a decision to appoint Ms. Michael and sought the Minister's approval in relation to her salary. The then Board members were not called to give evidence. Further, there is no documented evidence by the Board that the Minister gave his approval to the Board so that the Board can make the appointment. The evidence of Mr Tillett, present Chairman for BTB is that there is no recorded approval by the Board or the Minister, documented in the Minutes of the Board or e-mail from the Minister. In my view, the Board has a responsibility pursuant to section 9(6) to record all decisions made by the Board. Further, before an appointment is made, the approval of the Minister had to be communicated to the Board and it is the responsibility of the Board to record the approval. I accept the BTB's position that the Board's decision to appoint Ms. Michael on the terms set out in the employment contract must have been minuted, confirmed and signed in accordance with section 9(6). Further, that the minute should have also recorded or evidenced, whether by recital or otherwise, the approval of the Minister in accordance with section 14(2) of the BTB Act.

Approval of Minister not conveyed to the Board

- [19] The evidence of the former Director of Tourism, Ms Bevens, witness for Ms. Micheal was that the Minister had orally approved the appointment. The contract was put to him and he approved it verbally. The contract was also put to the Chairman of the Board. It is obvious that the Minister himself made the decision to appoint Ms. Michael and approved the terms and conditions of the employment which included her salary. Therefore, the Minister's prior approval could not have been recorded in the Minutes of the Board as the Board itself which has the power to appoint did not make the decision to appoint and did not receive an approval from the Minister prior to the

appointment. It is the Board that is empowered pursuant to section 14(2) of the BTB Act to employ officers with the “prior approval” of the Minister if the salary is in excess of \$8,000.00 per annum. That procedure was not followed. The BTB should consider making regulations so that the process is clear to the Board.

What is the consequence of not appointing Ms. Michael in accordance with section 14(2)?

- [20] The BTB argued that the trial judge erred in accepting the evidence of Ms. Bevans as proof of Ministerial approval and satisfaction of the statutory requirement because she failed to consider the probative value of the absence of any written record whatsoever of the approval. In my view, the trial judge did not err in accepting the evidence of oral approval from the Minister as the approval was required pursuant to section 14(2) of the Act. However, the trial judge should have considered that section 14(2) of the Act required that the Minister's approval should have been conveyed to the Board and not Ms. Bevans since it is the Board that makes the appointment and not the Minister. I recognise the importance of the Minister's role which is administrative and supervisory. Nevertheless, it is the Board that has the power to appoint and not the Minister. Therefore, the Minister's prior approval of the salary should have been communicated to the Board. The Board pursuant to section 9(6) is required to record that approval before formally appointing Ms. Michael.

Grounds 2 and 7 – Scope of Statutory Authority of the Chairman and Vice Chairman

- [21] The BTB submitted that the trial judge erred in determining that the BTB is bound by the Acts of the Chairman and Vice Chairman in signing the employment contract. Further, the trial judge relied solely on the signatures of the Chairman and Vice Chairman in determining that the Board had approved the employment contract. Ms. Michael argued that this ground of appeal on the statutory authority of the signatories for the BTB, and its contention that Board approval is required should not be considered because these issues were not raised in the defence or counterclaim. Nevertheless, it was contended by Ms. Michael that the Chairman and Vice Chairman were authorised to execute the employment contract pursuant to section 8(3) of the BTB Act and their signature binds the Board provided the Board has not opposed the action.
- [22] The trial judge addressed Board appointment at paragraph 36 of the judgment but not specifically the requirements under section 8(3). She stated,

“36. The Chairman and the Vice Chairman of the BTB executed the Claimant’s Employment Contract, and there is no evidence provided to the Court by the Defendant to show that the Board did not approve the appointment of Ms. Michael who, in any event, served the BTB as an HOD and the Director of Marketing and Industry Relation for more than a year after the said contract was executed.”

At paragraph 10, she stated:

“The Employment Contract dated April 1, 2020 is valid and it is enforceable. The statutory requirements under Section 14(2) of the BTB Act were met – and the Contract was lawfully executed by the Chairman and Vice Chairman of the Board of Directors, the Minister gave his verbal approval, and the contract was signed by the Claimant.”

[23] The Board approval under section 8(3) was not considered by the trial judge and for obvious reasons. The Minister approved the appointment and communicated to Ms Bevans. There is no evidence that the Board received the approval from the Minister as already discussed under ground 1. Therefore, the Board did not give the authorisation to the Chairman and Vice Chairman to execute the employment contract. As such, despite there were no pleadings on statutory authority of the Chairman and Vice Chairman and the Board approval for them to do so, it is prudent to interpret section 8(3) of the Act. In my view, the formality of making the appointment is also that of the Board through the Chairman and Vice Chairman pursuant to section 8(3) of the Act which states:

“(3) All documents, other than those required by law to be under seal, made by, and all decisions of, the Board, may be signified under the hand of the Chairperson or Deputy Chairperson.”

[24] It is the Board that has to **authorize** the Chairman or Vice Chairman to execute documents and decisions of the Board. This would include the employment contract for Ms Michael after the Minister approves the salary. There is no evidence that such authorization to execute came from the Board. From the evidence before the trial judge, that authorisation was from the Minister. This in my view, was a procedural irregularity. The BTB argued that it was not within the actual or ostensible authority of the Chairman and Vice-Chairman to do so, which I will now consider.

Actual authority

[25] The evidence before the trial judge was that the contract was executed by the Chairman and the Vice Chairman after the approval of the Minister. The BTB acts through the Chairman and

Vice Chairman to execute documents as provided by section 8(3) but only after it is authorised by the Board to do so and that authority minuted. The employment contract entered into by the Chairman and Vice Chairman with Ms. Michaels was within the legal capacity of BTB pursuant to section 14(2) but there was no **actual authority** given by the Board to the Chairman and Vice Chairman to execute the contract. In my view, this was an **internal procedural irregularity and lack of actual authority** from the Board to execute the employment contract prior to its execution. The Board did not make the decision to appoint and did not give the authority to the Chairman and Vice Chairman to execute the employment contract. The Minister communicated his approval to Ms. Bevans and the Chairman.

[26] Therefore, I agree with the BTB that there was no actual authority given to the Chairman and Vice Chairman by the Board to execute the employment contract. The Board acts as a collective body in making decisions either by formal resolution or by decisions which does not require any formality. In this case, a decision was required by the Board to appoint and after approval given by the Minister, the Board would have to give the authorisation to formally execute the contract.

[27] The evidence of Ms. Bevans was that the employment contract was shared with the Chairman. She did not know whether the employment contract had been presented to the Board. The evidence of Mr Tillett for the BTB was that he reviewed all the Board minutes and there was no documentation that there was approval of the employment contract by the Board or the Minister. In my view, this is so because the Minister approved the contract without the input of the Board. As such the Board did not give the authorisation to the Chairman and Vice Chairman to execute the employment contract. There was no actual authority given to them.

[28] The BTB argued that the Chairman and Vice Chairman signed the employment contract without the consideration or sanction of the BTB as required by section 14(2) of the BTB Act. As such they exceeded their actual authority and the employment contract is a nullity. The BTB relied on the case of **Charles Terence Estates Ltd. v Cornwall Council** [2012] EWCA Civ 1439 which concerns breach of fiduciary duties. There were issues raised about the relationship between public and private law concepts of ultra vires. Etherton LJ said,

“[44] [T]here was much debate before us, however, on the wider point of principle about the relationship between private law and public law concepts of ultra vires (beyond the powers).

[45] In my view, the principled approach to that issue is clear. If a transaction is beyond the capacity of a statutory corporation, it is void: that is, it was always a nullity.

[46] A corporation can only act by its agents. If its agent enters into a transaction with a third party which is beyond the agent's actual or apparent authority, the transaction is a nullity since the act of the agent was never binding on the corporation. Apparent authority depends upon whether the principal made a representation to the third party about the agent's authority and whether the third party had knowledge of any limitation on the existence or scope of that authority.

[47] If the transaction with the third party was within the capacity of the statutory corporation and was within the actual or apparent authority of its agent, then, even if the transaction was a breach of duty by the corporation or by its agent, the transaction is not void. Depending on the facts, the corporation may have legal or equitable rights against the third party, such as for mistake, unjust enrichment or as a constructive trustee, but the transaction itself is not a nullity."

[48] In the private law context of a company the point was explained by Browne-Wilkinson LJ in his classic exposition in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246, 302 to 303 and 304, [1985] 3 All ER 52, [1984] BCLC 466 as follows:

"The judge drew a distinction between two meanings of ultra vires which he called the 'narrow sense' and the 'wider sense'. As I understand his judgment, he treated ultra vires in the narrow sense as covering any transaction outside the express or implied powers of a company stated in its memorandum of association and ultra vires in the wider sense as covering a transaction which, although within such powers, is entered into in furtherance of 'some purpose which is not an authorised purpose': [1982] 1 Ch 478, 497. Although it is not entirely clear, he appears to have treated transactions which are ultra vires in his narrow sense as being wholly void as opposed to those which are ultra vires in the wider sense, which are capable of conferring rights on third parties who have no notice of the invalidity: see p 499. He then apparently held that the guarantee by the Plaintiff was ultra vires in the wider sense and, since British Steel Corporation had notice of that fact, it was unenforceable by British Steel Corporation.

In my judgment, much of the confusion that has crept into the law flows from the use of the phrase 'ultra vires' in different senses in different contexts. The reconciliation of the authorities can only be achieved if one first defines the sense in which one is using the words 'ultra vires'. Because the literal translation of the words is 'beyond the powers', there are many cases in which the words have been applied to transactions which, although within the capacity of the company, are carried out otherwise than through the correct exercise of the powers of the company by its officers: indeed, that is the sense in which the judge seems to have used the words in this case. For reasons which will appear, in my judgment, the use of the phrase 'ultra vires' should be restricted to those cases where the transaction is beyond the capacity of the company and therefore wholly void.

[29] Under the ultra vires doctrine, the BTB has the power to do those things as expressly authorised by the BTB Act. It is within the legal capacity of the Board to enter into employment contracts pursuant to section 14 and it exercises that power through the Chairman and Vice Chairman as provided by section 8(3) of the Act. In my view, the validity of the execution of the employment

contract by the Chairman and Vice Chairman cannot be impugned on the ground of lack of capacity by reason that it was not authorised by the Board to do so. This is so because the execution of the employment contract by the Chairman and Vice Chairman was not beyond the legal capacity of the BTB.

- [30] The Chairman and Vice Chairman are also Board members and act as agents for the BTB when executing documents. The BTB is liable for acts done within the Chairman and Vice Chairman usual or apparent authority (what the agent is impliedly authorised to do) as well as what is within their actual or express authority. It was not beyond the Chairman and Vice Chairman usual authority to sign employment contracts as shown by the evidence. Therefore, although there was no actual or express authority from the Board to execute Ms. Michael's employment contract, it was not a nullity. The Chairman and Vice Chairman were not acting outside of their usual authority and the Minister gave his prior approval as required under section 14(2) for the new employment contract. It was clear that they were doing so on behalf of the BTB, but only on the authority from the Minister and not the BTB Board.

Ostensible authority of the Chairman and Vice Chairman

- [31] The BTB argued that the Chairman and Vice Chairman did not have the ostensible or apparent authority to bind the Board when it signed the employment contract. Further, since the BTB is a statutory corporation, it was incumbent on Ms. Michael to enquire and ensure that there had been compliance with the BTB Act in entering into the employment contract. The evidence was that the Minister verbally approved the continued employment and the terms and conditions of Ms. Michael's contract. The Board as stated before did not exercise its statutory duty and the Chairman and Vice Chairman acted on the approval of the Minister. They are members of the Board and usually sign employment contracts pursuant to section 8(3) of the Act on behalf of the BTB. The Seal of the BTB was placed on the contract though it was not necessary to do so. In my view, this is representation by conduct that the Chairman and Vice Chairman had the authority to execute employment contracts on behalf of the BTB. As discussed above, they had "actual" statutory authority pursuant to section 8(3) to execute documents for the BTB. However, BTB must first authorise the execution of any document.
- [32] Ms. Michael, a third party, is entitled to rely on this representation by conduct in continuing her employment. There is no obligation or duty on the part of Ms. Michael (or any third party) to have

gone behind the ostensible authority of the Chairman or Vice Chairman to ensure the statutory duties of the BTB were followed. There is no evidence that the Board objected to her new employment contract. Though no actual authority from the Board, (only approval from the Minister) the ostensible authority of the Chairman and Vice Chairman binds the BTB. It was irrelevant whether the Chairman and Vice Chairman had actual authority to enter into the employment contract. It was within the ambit of their authority pursuant to section 8(3) to execute the employment contract. In my view, Ms. Michael, an employee and not being a Board member had no duty to enquire if the Chairman and Vice Chairman were authorised by the Board and especially since the prior approval had been given by the Minister.

- [33] Ms. Michael relied on the ostensible or implied authority of the Chairman and the Vice Chairman to execute her contract which had been approved by the Minister. The Board by its conduct (representation by conduct) accepted the ostensible authority of the Chairman and Vice Chairman. Ms. Bevans, witness for Ms Michael discussed the contract with the Minister and he gave his approval for its execution. She also spoke to the Chairman. In my view, the Chair and the Vice Chair who usually sign employment contracts and other documents for the Board as provided by section 8(3) had the ostensible authority or implied authority to execute Ms. Michael's employment contract and therefore it is valid and enforceable. Further, the representation, when acted upon by Ms. Michael's by entering into a contract with the Chair and Vice Chair, operates as an estoppel, preventing the BTB from asserting that it is not bound by the employment contract. Any breach of the authority of the Chairman and Vice Chairman or officers of the Board in the execution of their duties would be an internal matter for resolution.

[34] Indoor Management rule

The BTB relied on the rule in, **The Royal British Bank v Turquand (1856) 6 E & B 327 Enf. Esch Ch (Turquand's case)** also known as the Indoor Management Rule and argued that it is intended to benefit persons who are dealing with the company externally and so would not be aware of internal irregularities. The BTB also relied on **Mahony v East Holyford Mining Co. (1875) LR 7 HL 869 Eng HL**; **Balfour v Ernest (1859) 141 ER 42**; and **Pacific Coast Mines Limited v Arbutnot and Others [1917] AC 607 PC**, to bolster its argument and **Halsbury's Laws of England, Companies (Volume 14 (2016))**, at paragraph 266. I will consider each one of these authorities.

Turquand's case

- [35] In **Turquand's case**, the Royal British Bank sued Turquand as a liquidator of a mining and railway company for the repayment of money borrowed on a bond from the Royal British Bank. The bond was signed by two Company directors and secretary, and bore the company seal. Under the registered deed of settlement, the board of directors were authorised to borrow on bond on such terms as from time to time were authorised by a resolution of the company in general meeting. The resolution which was required to authorise the borrowing had not been passed. It was held that notwithstanding the fact that no resolution was passed by the company, it was nevertheless bound. The reason for this was stated in the judgment of Jervis CJ at p.332,

“We may now take for granted that the dealings with these companies are not like dealings with partnerships and that parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority may be made complete by a resolution, he would be right to infer the fact of a resolution authorising that on the face of the document appeared to be legitimately done.”

- [36] In the present case, it would appear to Ms. Michael that the employment contract was legitimately done as it was executed by the Chairman and the Vice Chairman and witnessed by the then Director. Moreso, the BTB seal was placed on the contract. In my view, the rule in **Turquand's case** (also known as the indoor management rule) should favourably apply to Ms Michael as she would not have been aware of the procedural irregularities in the internal management of the BTB. It seems that the BTB Board was content with the Minister's prior approval.

- [37] The BTB further relied on **Halsbury's Laws of England, Companies (Volume 14 (2016))**, at paragraph 266, which explained the Indoor Management Rule, and where **Pacific Coast** was relied upon in the highlighted portion below:

“Persons contracting with a company and dealing in good faith have always been entitled to assume that acts within its constitution and powers have been properly and duly performed, and were never bound to inquire whether acts of internal management have been regular. This rule does not, however, apply to a director, or de facto director, who contracts with the company, as he should know the true position. In any case, persons contracting with the company must take the articles of association in force to be those registered, and they are not entitled to assume that a special resolution has been passed pursuant to the articles, for that would have to be registered, **and where the act is within the company's power only on the fulfilment of a statutory condition, persons**

dealing with the company are bound to ascertain whether the condition has been fulfilled. (**Pacific Coast Coal Mines Ltd v Arbuthnot [1917] AC 607 PC**). An irregularity may be cured by a special article validating certain acts of the officers notwithstanding any irregularity; but the particular act to be protected must on the face of it comply with the articles."

- [38] The BTB further relied on the following passage in **Pacific Coast** where Viscount Haldane at page 616 said, (the highlighted portion):

"But the case stands quite otherwise when the act is one which has not, by the constitution of the corporation, been put within its power excepting on the fulfilment of a condition. In that event the persons dealing with the corporation are bound to ascertain whether the condition has been fulfilled.... The question which alternative applies is of course one of construction of the statute authorizing the act. Their Lordships are compelled to dissent from the view taken by the judges of the Court of Appeal on this point, and to hold, with Clement J., who tried the action, that **unless the condition prescribed by the words cited from the private Act was literally and in reality fulfilled the agreement remained, what it undoubtedly was apart from the Act, ... ultra vires of the appellants company.**"

- [39] The case of **Pacific Coast** is distinguishable from the instant case **in relation to the indoor management rule**. An agreement made between the Directors and certain shareholders and the Company were **ultra vires the powers of the Company**. The Company in pursuance of the agreement obtained a private Act whereby the agreement was "validated, ratified, and confirmed, subject to the same being adopted by a resolution passed by 75 per cent of the shareholders present, personally or by proxy, at any meeting of the shareholders called for that purpose." A resolution was passed but the notices did not state the effect of the agreement. Four years later the company and two shareholders, suing on behalf of all, brought an action to set aside the trust deed creating the debentures, and the debentures issued thereunder. It was held that: **the Act made the adoption of the agreement in the manner thereby prescribed a condition to its validity; that the resolution was ineffective owing to the absence of notice of the contents of the agreement; and that the agreement and the acts done in pursuance of it were consequently ultra vires the company and incapable of being made valid by acquiescence on the part of the shareholders.**

- [40] In the instant case, the BTB had the legal capacity to enter into the employment contract and therefore it was not ultra vires the BTB Act. Further, no private Act had to be passed to validate the employment agreement for Ms. Michael, and which was subject to a resolution being passed

as in **Pacific Coast Coal Mines**. As such, she did not have to enquire on the fulfilment of a statutory condition. The issue of ratification or validation by an Act did not arise. Further, Ms. Michaels was not bound to enquire if the internal management had been regular. She is a third party, private person, who entered into the employment contract with the BTB as Head of Department of BTB. There were procedural irregularities as the Board did not give the authorisation to the Chairman and Vice Chairman to execute the employment contract. It is the Minister who approved the contract and that was the authorisation to execute. Ms Michael would not have been aware of the procedural irregularities in the internal management of the BTB. It seems that the BTB Board was content with the Minister's prior approval.

Balfour's case

[41] The BTB also relied on **Balfour** where Crowder J stated at page 252 that,

"It is, therefore, competent to every person dealing with such a company to ascertain the objects of the company, for the deed must specify them, and also who the directors are: and any person may find in the deed the duties of the directors and their powers between them and the company. Therefore, every person seeking to bind the company by contract with the directors, must give some proof of their authority."

[42] In the present case, the Chairman and the Vice Chairman had the authority to execute documents for the BTB.

Mahony v East Holyford Mining Co.

[43] In the case of **Mahony v East Holyford Mining Co.** (1875) LR 7 HL 869 Eng HL, the BTB relied on the following at pages 894-895 where Lord Hatherley discussed the indoor management principle,

"After that, the company entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which, by its articles of association and by its deed, it appears to possess; and all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them and known to them only; subject to this observation, that no person dealing with them has the right to suppose that anything has been or can be done that is not permitted by the articles of association or by deed .. This being the case, a banker dealing with a company must be taken to be acquainted with the manner in which, under the articles of association, the monies of the company may be drawn out of his bank for the purposes of the company.. And the bankers must also be taken to have had knowledge, from the articles, of the duties of the directors, and the mode in which the directors were to be appointed. But, after that, **when there are persons conducting**

the affairs of the company in a manner which appears to be perfectly consonant with articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done, when those external acts purport to be performed in the mode in which they ought to be performed”

[44] The above authority should also be construed in Ms. Michael’s favour. She was an employee but that does not automatically mean she is an insider. Who is an insider and who is an outsider are not so simple. The circumstances of each case must be considered. Ms. Michael was not a Director nor a Board member. She could not have known of the procedural irregularities within the internal management of BTB which the BTB itself seems unclear about. Under such circumstances, she could not have been considered as an insider. Ms. Michael was entitled to rely on the ostensible authority of the Chairman and Vice Chairman to execute her employment contract and more so the Minister had approved her employment contract as required by section 14(2). She should not be affected by any internal irregularities.

Ground 3 - Acquiescence by the BTB

[45] The BTB contended that the trial judge erred in determining that there had been acquiescence by the Board in the terms and conditions on the employment contract dated April 1, 2020, by failing to consider that the Board could not be found to have acquiesced to terms and conditions of which there was no evidence that the Board had any knowledge. The BTB accepted that they were aware of Ms. Michael’s employment but argued that this is not synonymous with knowledge of the specific terms and conditions of the employment contract. Its position is that the Board did not consider, approve or ratify the terms and conditions of the employment contract.

[46] Further, the BTB argued that it cannot be bound by acquiescence to the terms of which it had no knowledge, such as the fixed term of 5 years and/or clause 7.1.1 which provides for payment of all wages and benefits for the remaining period of the employment contract if it was terminated without cause. It relied on **Halsbury’s Laws of England** 4th Edition Reissue, Vol. 1(2) at paragraph 81 that: “*The act, or acts of adoption or acquiescence must be accompanied by full knowledge of all essential facts and must relate to a transaction to which effect can be given.....*”

[47] The BTB also relied on **Pacific Coast Coal Mines** (discussed above in relation to the indoor management rule), to support its argument that there was no acquiescence by the Board. The agreement in *Pacific Coast* was ultra vires, beyond its powers, had to be validated, ratified, and confirmed subject to a resolution. In the present case, the execution of Ms. Michael's employment contract was not ultra vires the BTB Board. There was an internal procedural irregularity where the Minister gave his approval and the employment contract was executed on that basis. Therefore, acquiescence by conduct of the BTB is applicable based on their knowledge of the employment contract. The BTB's argument that the Board did not know of the specific terms and conditions had not been proven nor pleaded. The then Board members were not called to give evidence. They certainly knew of the appointment and this cannot be regarded as trivial. Two Board members executed the contract for the Board. The Minister approved the salary and other terms and conditions and the Chair and Vice Chair executed the contract. The knowledge of the Chair and the Vice Chair and that of the Minister can be regarded as knowledge of the Board. The Board's conduct shows that it had no difficulty with the Minister exercising his statutory power under section 14(2) without any input from them except for the Chair and the Vice Chair who are Board members and executed the contract. Further, the Board could have asked to see a copy of the contract so that they could have full knowledge of the terms and conditions. It is not a secret employment contract only for the eyes of the Chairman, Vice Chairman, Ms. Michael and her witness, Ms. Bevans. Therefore, in my view the BTB Board acquiesced in the employment contract including the terms and conditions.

Ground 4: BTB estopped from denying the validity of the contract

[48] The trial judge stated that Ms Michael was carrying out the functions of the office as Head of Department and was being paid according to the terms of her employment contract and the BTB was fully aware of this. As such, she was satisfied that the BTB acquiesced to the terms and conditions of Ms. Michael's Employment Contract by its conduct and therefore BTB is estopped from denying the validity of the Contract.

[49] The BTB argued that estoppel was not pleaded, there had been no evidence of inducement to enter into the written employment contract and no evidence of inducement or detriment. Further, Ms. Michael was employed as a permanent employee of the Board at the date of execution of the written contract on similar terms but under an oral contract of indefinite duration terminable on

notice in accordance with the Labour Act, so that the Board and Ms Michael were well aware of Ms. Michael's employment by the Board and behaved accordingly.

[50] I accept that estoppel was not pleaded but finds it necessary to address the issue. In my view, since there was acquiescence by the Board of the employment contract including the terms and conditions, estoppel arises.

[51] The terms of the previous oral contract were replaced by the terms in the written contract by mutual consent as shown at Clause 9 which states:

“ This agreement is in substitution for all previous contracts, express or implied between the BTB and the HOD, which shall be terminated by mutual consent from the date of execution of this agreement.”

[52] Ms. Michael's employment by the BTB is therefore governed by the new employment contract and not the oral contract. As such, termination under the Labour Act does not arise. She was induced to sign the employment contract by its very terms and conditions. The detriment to her was that she accepted the terms and conditions included the fixed term of five years. Ms Michael continued to work for the BTB for over a year under the contract and the BTB benefitted from her performance before she was terminated pursuant to Clause 7.1.3. of her employment contract. The BTB accepted the employment contract and had knowledge of its terms and conditions. It is unconscionable to deny the validity of the employment contract. As such, I agree with the trial judge that the Board is estopped from denying the validity of the employment contract.

Ground 5 – Whether Clause 7.1.1 is an unenforceable penalty

[53] The BTB contended that the trial judge erred in law in deciding that clause 7.1.1 of the Written Employment Contract does not provide for payment of an unenforceable penalty by:

(a) determining that section 39(1) merely sets out a statutory minimum which could be supplemented by more generous terms;

(b) relying on findings of fact by Madam Justice Chabot in *Karen Bevan v Belize Tourism Board and Ors*, concerning contracts and matters that were not in evidence before the learned trial judge and so were not open to be considered by her;

(c) failing to give due consideration to the Board's argument that clause 7.1.1 was not proportionate, and in fact was unconscionable and extravagant, because it required payment of a sum which was 76% more than the wages she would be awarded under the Labour Act;

(d) by failing to consider and determine the commercial justification for changing the Respondent's permanent employment to employment on a fixed term in an election year including the pay-out provisions set forth in clause 7.1.1., which it was incumbent upon the Respondent to prove.

[54] Clause 7 of the Employment contract provides for termination as follows:

7.1.1 Termination without cause

"If the BTB terminates this contract of employment without cause before the expiration of the full term of this contract the BTB shall be liable for and shall pay to the HOD upon termination the sums equal to all salaries and all other remuneration, and confer on the HOD all other benefits, that would have been due to the HOD for the full remaining term of this contract."

[55] Clause 7.1.1 is a liquidated damages provision in a fixed-term employment contract. It guaranteed Ms. Michael full compensation for the remaining contract period in the event of termination without cause. Ms. Michael was terminated by the BTB citing Clause 7.1.3. As a result of that termination, she claimed under Clause 7.1.1 of the Employment Contract, the total salaries, allowances, and emoluments due to her up until the end of her contract in accordance with Clause 7.1.1. The trial judge awarded her \$217,822.18. She found that Clause 7.1.1 of the Employment Contract does not constitute an unenforceable penalty and is justified, proportionate and reasonable.

[56] In my view, the trial judge having read the Bevens judgment can rely on the interpretation of the clause by Justice Chabot, if she agrees with the interpretation and there is evidence before her (the trial judge) that the clause is the same in Ms. Michael's contract. The trial judge agreed with the interpretation at para 58 of her judgment,

"58. I **concur** with the views of Madam Justice Chabot in Bevens who in considering the argument of the Defendant Board that "7.1.1 does not stipulate a sum that is a genuine pre-estimate of the loss but is in the nature of a penalty intended to secure the performance of the Agreement. The Defendant relies on the Labour Act in support of its argument that payment under Clause 7.1.1 is exorbitant because the amount is well in excess of the amount contemplated by the statutory regime."; said that

"While section 39(1) of the Labour Act only provides for the payment of "wages" upon the wrongful termination of an employment contract, the Labour Act constitutes a statutory minimum which the parties to an employment agreement can supplement. The parties to an employment agreement are at liberty to negotiate terms which are more generous than the statutory minimum, from salary and other benefits to the rights of the employee upon termination. The fact that the

Labour Act does not provide for the payment of any allowances or benefits upon wrongful termination is therefore not sufficient to support a finding that Clause 7.1.1, which so provides, constitutes an unenforceable penalty.”

[57] The evidence before the trial judge in relation to clause 7.1.1 of Ms. Michael’s contract was at para 64 of the judgment,

“64. Under cross-examination, Mrs. Bevans also testified that Ms. Michael’s contract was not in fact the only such Employment contract to contain the contested clause, and that there were a total of five similar contracts for Heads of Department which were signed including for Finance, Business Development (the Registrar of Hotels), the Cruise Department, the IT Department and for the Head of Marketing. She was clear in stating that not only did those contracts contain a similar clause, but stated also that that particular format of contract had been used by the BTB before.”

[58] The question for this Court is whether the finding of the trial judge was correct in relation to Clause 7.1.1, the liquidated damages clause, that it is not a penalty clause and therefore valid and enforceable. The authorities relied upon was **Cavendish Square Holding BV v Makdessi; ParkingEye Ltd. Beavis** [2015] UKSC 67 and Harvey on Industrial Relations and Employment Law at paragraph 537.04.

[59] In the older authorities, before the **Cavendish** decision, the rule against penalties was mainly from **Dunlop Pneumatic Tyre Co Ltd v New Garage Co Ltd [1915] AC 79 HL**. “in which it was established that if a clause went beyond a mere liquidated damages provision, so as to be unconscionable and calculated more to discourage breach than facilitate compensation, it was invalid as a ‘penalty’. The essence of a penalty, said Lord Dunedin, was a payment stipulated in terrorem of the offending party, or ‘extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach’, rather than a ‘genuine covenanted pre-estimate of damage.’” (para 553 of **Halsbury’s Laws of England on Damages** (Volume 29 (2024))).

[60] The modern position is stated by the Supreme Court in **Cavendish** which reviewed the penalty rule. The court held that the penalties rule should be retained, but rejected the traditional test in **Dunlop** of distinguishing between a genuine pre-estimate of loss (which was compensatory) and a deterrent (which was penal). In **Cavendish** (heard together with **ParkingEye**) the court held that the true test of a penalty is whether the impugned provision is a secondary obligation which

imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. At para 35 of the judgment, the court opined that in a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.

Harvey on Industrial Relations and Employment Law

- [61] Harvey at [537.03] considered the **Cavendish** approach in relation to penalty clauses where a more flexible and nuanced approach is now to be adopted:

"The real question when a contractual provision is challenged as a penalty is **whether it is penal, not whether it is a pre-estimate of loss**. These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both. The fact that the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal. To describe it as a deterrent (or, to use the Latin equivalent, in terrorem) does not add anything. A deterrent provision in a contract is simply one species of provision designed to influence the conduct of the party potentially affected. It is no different in this respect from a contractual inducement. Neither is it inherently penal or contrary to the policy of the law. **The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are "unconscionable" or (which will usually amount to the same thing) "extravagant" by reference to some norm.**' (per Lord Neuberger at [31])

- [62] At [537.04], Harvey discussed three key points,

"The three key points in the judgment for the purposes of application of the doctrine now in employment contract cases are:

- (1) The advantaged party (here, the employer) must be able to show that **there was commercial justification for the inclusion of the clause**; this is not necessarily negated by the fact that the clause has (and indeed is intended to have) a deterrent effect on that employee, if that can be justified in the circumstances but on the other hand the employer does not have a valid interest in merely punishing the employee.
- (2) If there is such a **commercial justification** for including a clause, the question becomes whether this clause was in all the circumstances **extravagant, exorbitant or unconscionable**; to put it another way (in a manner readily recognisable from EU law and discrimination law in particular), **was the clause used out of all proportion to the legitimate interest concerned?** In relation to this crucial question, the issue of whether the clause contained a genuine pre-estimate of potential loss, while no longer determinative, may be evidence.

- (3) A court or tribunal may be more willing to uphold the clause if it was subject to arm's length negotiation between parties of equal bargaining power and/or with legal advice. That may be the case in some high-worth employment cases, but in more typical employment cases (involving the use of standard contracts on a take-it-or-leave-it basis) it will be the opposite principle that will apply, namely that here a court or tribunal may need more convincing that it was not an unenforceable penalty."

Was there commercial justification for Clause 7.1.1 ?

- [63] The advantaged party in this case is the employee, Ms. Michaels. The evidence before the trial judge was that Clause 7.1.1 was commercially justified as it aimed at ensuring stability within the BTB for senior officers during a critical period. There is no evidence that it was done to ensure financial security in favour of Ms. Michael in uncertain times such as Covid or termination in an election year if Government changes.

Was the remedy (clause 7.1.1) exorbitant (extravagant) or unconscionable?

- [64] In my view, the clause was generous since it included more than wages but there was no evidence that it was exorbitant or unconscionable. The evidence before the trial judge was that the BTB usually have an early termination clause in the contracts of senior executives with the aim of securing certain services of the BTB. This was evidence before the trial judge as mentioned at para 64 of the judgment. She relied on the evidence of Ms. Bevans, witness for Ms. Michaels. Though the trial judge had not seen the five contracts referred to, she could have taken judicial notice of the norm established by the BTB in the early termination remedy clause. It was not used out of all proportion to Ms. Michael's legitimate interest. Therefore, Clause 7.1.1 cannot be considered as a penalty in this case and is enforceable.

- [65] *Arm's length negotiation between parties of equal bargaining power*

The BTB is a statutory body and is not weak and disadvantaged. Ms. Michael was a Head of Department and not easily replaceable. I view the parties as having equal bargaining power. The terms of the employment contract were negotiated with the Minister who by section 14(2) had to approve the salary. The negotiation for Ms. Michael was done by Ms. Bevans who was the CEO for the BTB. Ms. Michael in return for her wages and benefits provided a service as Head of Department. She did so for over a year without any complaints from the BTB that it was not an arm's length negotiation.

[66] Further, Section 39(1) of the Labour Act, which sets a statutory minimum does not preclude parties from negotiating more favourable terms. However, it should be noted that the courts generally cannot save a party from a bad bargain. In my view, the trial judge therefore, did not err in her finding that Clause 7.1.1 was not an unenforceable penalty.

Ground 6: Was Clause 7.1.1 Wednesbury unreasonable and irrationally generous?

[67] The BTB contended that the trial judge erred in law in determining that the Board failed to provide evidence of irrational generosity by failing to give due consideration to the evidence gleaned from the contract itself that (a) Ms. Michael was given a right to terminate the Employment contract on three (3) months' notice, but no such right was afforded the BTB; and (b) clause 7.1.1 sought to compensate Ms. Michael over and above the compensation contemplated by the Labour Act, without any obligation on her part to mitigate her damages.

[68] The BTB further contended that the employment contract, in particular Clause 7.1.1 is also ultra vires because it is excessively generous to Ms. Michael, Wednesbury unreasonable and disproportionate to the aim of securing her services on arm's length commercial basis.

[69] The terms of the employment contract were negotiated with the Minister and Ms. Michael accepted those terms. In my view, the BTB disadvantaged itself by not putting a clause to terminate the employment contract with the same notice period of three months. The freedom of the BTB to contract over and above the compensation of the Labour Act without any obligation for Ms. Michael to mitigate loss was also the doing of the BTB. It changed the permanent employment into a fixed term contract for Ms. Michael and agreed to give such compensation as a remedy.

[70] Further, the terms of the employment contract, in particular Clause 7.1.1 was not excessively generous, Wednesbury unreasonable and disproportionate to the aim of securing Ms. Michael's services on arm's length commercial basis. The wages and benefits given to Ms. Michael were in relation to her responsibilities as Head of Department. It seems that the BTB is challenging the Minister as to the reasonableness of the salaries and benefits of the Head of Department which the Minister approved and for which Ms. Michael was being paid until termination.

[71] The case of **Roberts v Hopwood and others** [1925] AC 578 is distinguishable from the instant matter. The District Auditor appointed by the Local Government Board to audit accounts of the council, had the power to disallow every item of account contrary to law pursuant to the **Public**

Health Act, 1875. He surcharged the respondents for rates of wages which was excessive. The District Auditor took the pre-war rate of wages and increased it by cost of living and added a sum of 20s a week by way of margin. That decision was challenged by the Council and the appeal was allowed in favour of the Auditor who appealed the decision of the Court of Appeal. The House of Lords determined the limit of discretionary power given to the district council pursuant to section 62 of the *Metropolis Management Act, 1855*, with regard to payment of wages. That section provides that:

“Section 62: The Metropolitan Board of Works, and (subject to the provisions herein contained) the board of works for every district under this Act, and the vestry of every parish mentioned in Sched A to this Act, shall respectively appoint or employ, or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers and servants respectively such salaries and wages as the board or vestry **may think fit.**”

- [72] The BTB referred to Atkinson LJ's opinion at page 595-596, where he discussed funds contributed by rate payers and were used for wages by the Council:

“A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner, with reasonable care, skill, and caution, and with a due and alert regard to the interest of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others. This duty is, I think, a legal duty as well as a moral one, and acts done in flagrant violation of it should, in my view, be properly held to have been **done “contrary to law” within the meaning of s 247(7) of the Public Health Act, 1875.** To make an act contrary to law it is not necessary that it should be prohibited by some legal enactment such as a statute or a by-law or the like. Many things are contrary to law, though not prohibited by any statute, such for instance as the purchase by a trustee from his cestui que trust of part of the trust property, or the purchase by an agent from his principal of the latter's property without full disclosure of who the purchaser really is and what are the particulars of the purchase. The torts which are at law covered by the legal maxim *sic utere tuo ut alienum non laedas*, are in many instances not prohibited by statutes, yet they are illegal and actionable at law.”

- [73] Lord Atkinson went on to compare different statutes which included the word “reasonable” in the statute. He said, “ For instance, if one takes the Baths and Washhouses Act, 1846, the paying body must now only pay such salaries as they may think fit, but the authority under the Baths and Washhouses Act, 1878, the duties of their employees being somewhat similar, must pay to these latter reasonable salaries, wages and allowances.”

[74] In the present case, there is no evidence before the Court to draw a comparison of wages and benefits of senior employees such as Ms. Michael who was the Head of Department with other employees who held the same post. Further, there is no evidence to decide on the reasonableness of the wages and benefits given to her as was done in **Roberts** where there was a comparison of wages of other councils. Ms. Michaels was a senior executive and was not being paid minimum wage as in lower grade of workers. Also, there was no challenge to the reasonableness of the decision of the Minister to approve her salary and benefits. It is for the BTB to consider making rules and regulations in relation to salaries and benefits for its employees, where the Labour Act does not apply. Further, the parties freely negotiated salaries and benefits. I am unable to say that the salary was 'irrationally generous' and beyond the power of the BTB or unreasonable in the Wednesbury sense as discussed in **Gibb v Maidstone and Tunbridge Wells NHS Trust** [2010] EWCA Civ 678 and **School Facility Management Ltd and others v Governing Body of Christ the King College and another** [2020] EWHC 1118. The ground therefore cannot succeed.

Ground 8: Employment Contract is ultra vires

[75] It has been determined above that the employment contract was not ultra vires the legal powers and capacity of the BTB.

Ground 9: Whether the judge erred in finding that the Respondent was wrongfully dismissed.

[76] The BTB contended that the trial judge erred in determining that Ms. Michael was wrongfully dismissed. That she failed to properly consider the erosion of the BTB's finances, and to properly construe clause 7.1.3 so that the BTB was not required to go broke before it could terminate Ms. Michael. Clause 7.1.3 states as follows:

"Termination for material change of circumstances

The BTB may terminate this contract of employment immediately if there is a material change in circumstances attributed to an event not caused by the BTB (i.e. an outbreak of disease, hurricane, war or civil strife, or other similar event) that so substantially alters the financial position of the BTB that the BTB is unable to pay the HOD. If the BTB terminates this contract under this clause the BTB shall be liable for and shall pay to the HOD upon termination all salaries due to the date of termination, any notice pay, any outstanding vacation, and pension benefits due to the HOD as at the date of termination."

[77] That clause speaks about a material change in circumstances not caused by the BTB that substantially alters the financial position of the BTB so that it is unable to pay the Head of

Department, Ms. Michael. The termination letter dated 13 May 2021, signed by Mr. Tillett shows the reason for the immediate termination pursuant to clause 7.1.3, at paragraph 2:

“As you are aware due to the downturn in tourism caused by the Covid-19 Pandemic, the BTB operated at a deficit for the 2020-2021 fiscal year and is expected to continue to operate at a deficit for the 2021- 2022 fiscal year unless steps are taken by the BTB to cut its wage bill and operational expenses. The BTB's financial position has been altered significantly and as a result, the BTB is unable to continue to pay your wages.

[78] The trial judge carefully reviewed the evidence of Ms. Michael, and her witnesses Ms. Bevans and Ms. Sherlene Julien, the former Director of Finance at the BTB. She also considered the evidence of Mr. Tillett who testified for the BTB. Mr. Tillett's evidence showed that there was substantial change in the BTB's finances during the Covid-19 pandemic in 2020 – 2021. This cannot be refuted as the International Airport was closed. However, in his cross-examination he accepted that it was not impossible to pay Ms Michael, but said it was not prudent to do so. The BTB contended that it did not have to wait until they are bankrupt.

[79] However, the evidence of Ms. Sherlene Julian, the former Director of Finance from May 2020 to July 2021 showed that the BTB was not going bankrupt. Ms. Julien's evidence was that she received a Board approved budget on March 30, 2021, and that it contained provisions for the remuneration of Directors and staff at the BTB including the Director of Marketing which is Ms. Michael. She also testified that the cash on hand at the BTB in April 2021 was between 10 to 12 million dollars. Further, that the replacement for Ms. Michael, was given a base salary of about \$80,000.

[80] The evidence which the trial judge accepted is that when the Covid-19 pandemic impacted Belize in March 2020, measures were taken to deal with the situation including cutting staff by 33% in March 2020 and by October 2020, the Phillip Goldson International Airport had re-opened and tourists began returning to Belize. As a consequence the BTB resumed collection of hotel tax and its financial position began to improve and this continued throughout 2020 to 2021. When Ms. Michael was terminated there was significant improvement in comparison to the when the International Airport was on lockdown. I see no reason to interfere with the assessment of the evidence and the findings of the trial judge in relation to Clause 7.1.3 that Ms Michael “was not dismissed because there was such a substantial alteration in the financial position of the BTB that

the BTB was unable to pay the Claimant. Rather, the Claimant was wrongfully terminated, and that she was terminated without cause.”

Conclusion

[81] The appeal is dismissed but for reasons other than those given by the trial judge in relation to the appointment process. The provisions of the BTB Act were not followed during the appointment process, as the Minister approved the appointment without input from the entire Board. It is possible that the Board and the Minister may not have fully comprehended their authority as stipulated under the Act. Ultimately, the ostensible authority of the Chairman and Vice Chairman was sufficient to enforce the employment contract.

Order

[82] The appeal is dismissed with costs to the Respondent to be taxed if not agreed.

MINNET HAFIZ BERTRAM
President

[83] I concur.

PETER I. FOSTER KC
Justice of Appeal

[84] I concur.

ARIF BULKAN JA
Justice of Appeal