JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 38 OF 2009

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN	WILLIAM E. CLARKE	APPELLANT
AND	BANK OF NOVA SCOTIA JAMAICA LIMITED	RESPONDENT

Dr. Lloyd Barnett, Keith Bishop and Ms. Kerry-Ann Ebanks instructed by Bishop and Fullerton for the Appellant.

John Vassell Q.C., Mrs. Julianne Mais-Cox and Ms. Cindy Lightbourne instructed by DunnCox for the Respondent.

June 30, July 1, 2, 6 and October 2, 2009

SMITH, J.A.

1. This is an appeal against the order of Marsh J. made on March 19, 2009 whereby he dismissed the appellant's claim for, among other things, a declaration that the appellant and the respondent are bound by agreement to submit to arbitration the existing dispute between them as to what is a fair and equitable retirement plan for the appellant, having regard to all the circumstances.

Background

2. The appellant was employed by the respondent from April 16, 1968 until his early retirement on November 1, 2008. He served the respondent for the last thirteen (13) years as its President and Chief Executive Officer. He was appointed to that position by the respondent's Board of Directors.

3. The respondent is a commercial bank incorporated under the laws of Jamaica. Its parent company is the Bank of Nova Scotia Limited, Canada (BNS Canada).

4. On July 8, 2008 the appellant was called to a meeting at BNS Canada as a consequence of allegations of misconduct against him. Present at this meeting were Mr. Robert Pitfield – Chairman of the respondent and Vice President of International Banking of BNS Canada, the Honourable Mayer Matalon – Vice Chairman of the respondent and, of course Mr. Clarke – the appellant. The decision was taken that the appellant should go on early retirement and a compensation package was offered to the appellant. The appellant denied the allegations and rejected the offer.

5. On July 16, 2008 a special meeting of the Board of Directors was held with a view to discussing the pending retirement of the appellant. The appellant addressed the Board and submitted a document regarding

his proposal of the terms and conditions for his retirement package, following which the appellant rescued himself.

6. A lengthy discussion ensued primarily around ensuring that the reputation of the appellant would not be tarnished as a result of how information was being communicated.

7. The Board agreed on the following:

(a) The Chairman to revisit the proposal from the appellant including the effective retirement date of October 31, 2008.

(b) The appellant, Mr. Clarke, to announce to staff on August 15 his retirement, subject to satisfactory negotiations being concluded on July 28, 2008.

(c) Dr. Herbert Thompson will be the liaison director between the Board and Mr. Clarke.

(d) A reasonable compromise to be arrived at between Mr. Clarke and BNS on the terms of and timing of his retirement.

(e) That a further meeting be convened on Monday, July 28, 2008 at 7:30 a.m. at the Jamaica Pegasus Hotel, Kingston.

8. On July 18, 2008 another special meeting was held. The appellant was absent. At this meeting Dr. Thompson updated the Board on the discussions held with Mr. Clarke. The Board agreed that a meeting be held on July 28 to review the following:

"[a] A suitable retirement plan for Mr. Clarke.

[b] Revisit the retirement date if the matters are not finalized.

[c] The date that a successor will be in place.

[d] ..."

The Board also approved the contents of Press Releases (see pages 109-112 of Record).

9. At the July 28th meeting the Board was provided with details of the negotiations between the parties. There was clearly no agreement. It was resolved that Mr. Bruce Bowen be appointed President and CEO consequent on Mr. Clarke's retirement. The Board requested an update of negotiations by August 1, 2008.

10. Up to October, 2008 there was no agreement. The appellant's attorneys-at-law by e-mail dated October 11, 2008 proposed that the matter be submitted to arbitration with a view to resolving the deadlock. By email dated October 12, 2008 Mr. Clarke wrote to his fellow directors requesting that they "give favourable consideration to the proposal that I will demit office as President and CEO on October 31, 2008 on condition that the dispute be referred to an Arbitration Tribunal of eminent persons".

11. On October 21, 2008 the appellant's arbitration proposal was presented to the Board of Directors by Professor Stephen Vasciannie, a director of the respondent bank and an attorney-at-law. Mr. Robert

Armstrong, a Canadian attorney-at-law acting on behalf of the respondent, made a representation to the Board regarding the proposal sent to the appellant. He also submitted a proposed Arbitration Agreement.

The Board discussed the proposals and made the following resolution:

"(a) The retirement package be restated with the value of the supplemental pension foreign exchange protection and car along with a total value of CDN $3.7M or

(b) The parties proceed to Arbitration.

(c) The Arbitration panel be constituted by a panel of three arbitrators selected in the following manner:

- Each party to select an arbitrator of his/its own choice.

- The two arbitrators shall select a Chairman. In the event that the two elected arbitrators are unable to agree upon the selection of the Chairman, the Chairman shall be selected under the London Court of Arbitration (LCIA) Rules.

- The Chairman will decide the location of the Arbitration and the rules to govern the Arbitration.

- The Agreement to be governed by Jamaican Law.

(d) The question to be referred to the Arbitration Panel for determination is:

What is fair and equitable retirement plan for Mr. Clarke having regard to all the circumstances."

12. On October 22, 2008 Mr. Robert Armstrong, wrote to the appellant's attorney-at-law, Mr. R.N.A. Henriques, Q.C. proposing what Dr. Barnett described as "a new and revised offer to settle". This new proposal sought to enlarge the scope of the arbitration as follows:

> "The scope of the dispute will be to determine what if any obligations the parties may have to each other, whether they have breached any obligations and what amount may be due to Mr. Clarke in all the circumstances. All of the circumstances will include, but not be limited to, evidence about the events leading to his retirement."

13. On October 29, 2008 the appellant's attorneys-at-law wrote to Mr. Robert Armstrong, stating among other things that:

> "With respect to the offer to refer the matter to arbitration, the acceptance of which we now confirm, we enclose a draft agreement which we are instructed conform (sic) with the decision of the Board."

14. On November 3, 2008 the appellant in an attempt to clarify the position, wrote to the Board of Directors via e-mail stating among other things that:

> "At a meeting of the Board on October 21 2008, I proposed a resolution which not only indicated my desire to have the matter arbitrated, but set out the basic terms of the arbitration. My understanding is that the Board accepted my proposal as a result of our common understanding that the dispute relating to my

> early retirement package would be referred to arbitration."

The appellant indicated in this letter that an agreement to proceed to arbitration came into existence at the October 21st meeting and he repeated the terms of the agreement – see page 144 of the Record.

15. On November 27, 2008 the respondent's Board met. The appellant was absent. The appellant was subsequently advised that the Board amended the Resolution to read: "That it is a condition of arbitration that conduct must be taken into account".

16. On December 24, 2008 the appellant filed a Fixed Date Claim Form by which he sought, inter alia a declaration that he and the respondent are bound by agreement to submit to arbitration the existing dispute between them as to what is a fair and equitable retirement plan for the appellant/claimant having regard to all the circumstances.

17. On February 10, 2009 the respondent filed an Ancillary Claim Form by way of counter claim. By this ancillary claim the respondent sought orders that the appellant vacate and deliver up possession of premises situated at 12 Hyperion Avenue, that the respondent deliver up possession of two (2) automobiles namely BMW 750 and Audi Q7 and that the respondent pay mesne profits.

18. The matter was heard by Marsh J. who held that there was no binding arbitration agreement between the parties and accordingly dismissed the appellant's claim as stated at the outset. As regards the respondent's ancillary claim by way of counter claim, the learned trial judge found for the respondent and ordered that the appellant (the ancillary defendant) vacate and deliver up possession of the premises in question and deliver up possession of the automobiles on or before the 31st of May 2009.

The Appeal

19. The appellant filed fifteen (15) grounds of appeal. Both parties are at one that the primary issue in this appeal is whether the learned trial judge erred in holding that there was no arbitration agreement between the parties. The appellant, through his attorneys-at-law, is saying that there is a binding agreement to proceed to arbitration and that, critical to the determination of this issue is the resolution of the respondent's Board of Directors at the meeting held on the 21st October, 2008. The respondent's attorneys-at-law contend that there is no such agreement because no consensus ad idem exists as to all the material elements of the alleged contract, within a juristic context which recognizes the absolute freedom of parties to enter, or not, the contracts they want.

Summary of Submissions on behalf of Appellant

20. Dr. Barnett for the appellant submitted that there are only two (2) essential terms of an arbitration agreement: first, consent to submit a dispute to arbitration and second, an identification or formula for identification of the dispute. He referred to Form 1, **The Encyclopedia of Forms and Precedents,** Vol. 2 (4th Ed.) page 388 and submitted that in many commercial agreements the arbitration clause only provides that disputes arising out of the agreement shall be referred to arbitration. Learned counsel for the appellant also referred to s. 2 of the Arbitration Act which defines "submission" as a written agreement to submit differences to arbitration and to s.3 thereof which provides that "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of the Court". It is his contention that the two (2) essentials, namely, an agreement in writing to submit a difference or dispute to arbitration and the identification or description of the differences or dispute are present in the instant case.

21. Dr. Barnett argued that the existence of an agreement may be determined by the traditional method of identifying (1) a specific offer and (2) the communication of a specific acceptance in response to the

offer. However, he stated, the existence of an agreement may also be determined by looking at the circumstances as a whole to ascertain whether there was a consensus ad idem. Counsel for the appellant referred to the affidavits, correspondence, minutes of Board meetings, in particular, the minutes of the special meeting of the respondent's Board of Directors held on October 21, 2008 and submitted that whichever approach is adopted, the evidence is overwhelming that an agreement has been arrived at between the appellant and the respondent.

22. Dr. Barnett contended that the learned judge erred in finding that there was no binding agreement because of the following:

(i) He excluded from his examination of the facts relative to arbitration, the appellant's attorneys' letter of October 29, 2008 and the appellant's own letter of November 3, 2008.

(ii) He treated the Armstrong letter of October 22, as authorized by the Board and as mirroring the terms of the Board's resolution and as constituting an accurate statement of the Board's offer.

(iii) The judge concluded that the Board had decided to include the phrase "including all matters leading to Mr. Clarke's separation including his conduct". Whereas the Board had specifically considered the matter and decided how the reference should be phrased.

(iv) The judge erred when he found that the appellant's letter of the 29th October was a counter offer to Robert Armstrong's letter of the 22nd October, 2008.

(v) The judge incorrectly held that the selection of the applicable rules was an issue between the parties. In

> fact there was no difference between what was in the resolution of the Board and what was stated in the appellant's draft agreement.

The Respondent's Submissions

23. Mr. Vassell Q.C. for the respondent submitted that for the appellant to prove the agreement for which he contends, he must show either that an offer, which he accepted, came to him or that he made an offer which was accepted which did not have his 'conduct' as part of the question to be referred to the arbitrators. He submitted that although Professor Vasciannie's proposal could be regarded as an offer made by the appellant, it was rejected by the respondent bank which opposed limiting the arbitration to not including conduct of the appellant. The respondent's Board's resolution of the 21st October, 2008 is not a contract between the respondent and anyone, he contended. The decision of the Board, was not in and of itself an acceptance, or, for that matter, an offer.

24. Learned Queen's Counsel for the respondent stated that the respondent's position is that the resolution only indicates a willingness to enter into some future arbitration agreement subject to the decision of the meeting at which it was passed, and it would be for the lawyers to take the necessary steps to bring into existence a contract consistent with that resolution.

25. The true position, Mr. Vassell contended, is that the respondent's offer of arbitration to the appellant was contained not in the resolution at the meeting or in the minutes, but in the respondent's attorney's letter dated October 22, 2008 (p.67 of the Record). In this letter, he said, the respondent through its attorney put a proposal to the appellant's attorney which, if accepted, would ensure that the arbitrators would be bound to consider the appellant's conduct, good and bad, in making their award. The appellant and his attorney, he argued, vehemently rejected any terms of reference which include a consideration of the appellant's conduct. Accordingly, he submitted, there was no binding agreement between the parties.

26. Mr. Vassell further submitted that there is no written agreement to refer present differences to arbitration within the meaning and requirement of the Arbitration Act. To come within the Arbitration Act, there must be a written contract (signed or unsigned) to which the respondent is a party. For this submission, he relied on **Beattie v Beattie Ltd.** [1938] 3 All ER 214. No written contract was produced by the appellant, he emphasized.

27. It was Mr. Vassell's contention that the Minutes of the Meeting of the Board of the respondent are merely a record of a unilateral decision of the Board as to some proposed transaction or matter or decision. They

are not a contract to which the appellant is a party. The minutes are a private document which is available to the directors but cannot be demanded by third parties, not even shareholders, he submitted. They confer no rights on third parties and impose no obligation on the company.

Analysis

28. As I have already stated, and the parties are at one on this, the main issue in this appeal is whether or not the appellant and the respondent had come to a binding agreement that the dispute between them as to what is a fair and equitable retirement plan for the appellant should be submitted to arbitration. Questions concerning certain ancillary claims and applications and perquisites are dependent on the resolution of the main issue.

29. Many attempts were made to negotiate a settlement for the early retirement of the appellant. When a negotiated settlement appeared unattainable prior to the projected date for his retirement, the appellant suggested that the dispute between the respondent and himself as to what amounted to a fair and equitable retirement plan, be referred to arbitration for determination - see paragraph 8 of the appellant's affidavit filed December 24, 2008 which refers to the appellant's e-mail letter dated October 12, 2008.

30. At the Board meeting of October 21, 2008 the appellant's proposal for arbitration was presented on his behalf by Professor Vasciannie. In addition, Dr. Herbert Thompson who was present at the meeting represented the appellant's interest on the Board. Did the appellant's proposal amount to an offer? If so, was it accepted?

31. An offer has been defined as "an expression of willingness to contract made with the intention (actual or apparent) that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed" – see **Chitty on Contracts**, 25th Ed., Vol. 1 page 26. Marsh J did not specifically make a finding as to whether or not the appellant's proposal amounted to an offer. However, it seems that the learned judge was of the view that the proposal did not constitute an offer in that he found that the offer was made by the respondent. I agree with counsel for the appellant that there is overwhelming evidence that an initial or opening offer was made by the appellant to the respondent at the October 21st, meeting of the Board.

32. Was the offer accepted? Acceptance, of course, is an important element of a contract. It has been said, correctly in my view, that to establish a contract, there has to be shown a meeting of the minds of the parties, with a definition of the contractual terms reasonably clearly made out, and with an intention to affect the legal relationship. An acceptance

has been defined as "a final and unqualified expression of assent to the terms of an offer" – **Chitty on Contracts** at page 33. The negotiations between the parties, with a view to arriving at what is a fair and equitable retirement plan for the appellant had been going on for a long time. In such a case, it may be difficult to say when an offer had been made and accepted.

In this regard, Edwin Peel, the learned author of **The Law of Contract**, 12th Ed, at page 19 paragraphs 2-016 has this to say:

> "When parties carry on lengthy negotiations, it may be hard to say exactly when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demands and the parties may in the end disagree as to whether they had ever agreed at all. The court must then look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms".

33. It is agreed by both sides that the Board meeting of October 21, 2008 and the resolution passed thereat are critical in determining whether or not the parties reached an agreement. As stated before, it is the contention of the respondent that if the appellant's proposal was an offer, it was rejected by the Board. It is important, I think, not to confuse the offer in respect of the retirement package with the agreement to proceed to arbitration. It is not in dispute that up to October 2008 the

parties could not agree to the terms of a 'fair and equitable' retirement plan, hence the proposal for arbitration. The negotiations were deadlocked. At the meeting Professor Vasciannie presented the appellant's proposed arbitration agreement and a proposed resolution. Professor Vasciannie proposed that the appellant "would select an arbitrator from a list of names set out in proposed Resolution and the Bank would select an arbitrator in the same manner. The Chairman of the arbitration panel would be selected by joint agreement by the two (2) arbitrators from the list".

34. Mr. Armstrong in his presentation referred to the negotiations that had taken place and advised the Board that it was the view of the applicant's attorneys that there was a deadlock. He advised of following options:

> "(a) that the Bank resubmit the offer with the car and if the offer is not accepted
>
> (b) that both parties proceed to Arbitration."

Mr. Armstrong indicated what he thought were the main benefits of arbitration proceedings and submitted a proposed Arbitration Agreement.

35. Professor Vasciannie in response to Mr. Armstrong's proposed Arbitration Agreement argued that if there were a sole arbitrator neither

side would be comfortable. He repeated his suggestion as to how the arbitration panel should be selected.

36. The Board then proceeded to discuss the issues relating to (1) the resubmission of the offer and (2) the option to proceed with arbitration. I should state here that the power of the Board to contract and bind the respondent Bank is not in issue.

37. The meeting reviewed and discussed extensively the recommendations by Professor Vasciannie and Mr. Armstrong. During the discussions, Mr. Mark Golding, a director of the respondent, suggested that "the question for the tribunal should be objective and proposed a reformulation of (sic) question for the tribunal presented by Professor Vasciannie to state what is the '*fair and equitable*' retirement plan." The minutes disclose that (page 46 of Record):

> "The Board discussed extensively the question of the scope of the Arbitration and felt it is appropriate to include all matters leading to Mr. Clarke's separation from the Bank including his conduct. It was felt that the words 'having regard to all the circumstances' met this objective."

38. It is in the context of the fact that the parties had failed to reach a negotiated settlement and the presentations of Professor Vasciannie on behalf of the appellant and Mr. Armstrong on behalf of the respondent

that the Board made the resolution set out at paragraph 11 hereof. It seems to me that in the circumstances of what took place at the October 21st meeting, it is difficult to define the transaction in terms of a traditional offer and acceptance. The learned authors of **Cheshire, Fifoot and Furmston's Law of Contract** 15th Ed. address such a situation in the statement at page 39:

> "...that there are cases where the courts will certainly hold that there is a contract even though it is difficult or impossible to analyse the transaction in terms of offer and acceptance".

39. As Dr. Barnett submitted, it is clear that the persons present at the October 21st meeting including, of course, Professor Vasciannie who presented the appellant's proposal and Dr. Herbert Thompson, the Liaison Director between the Board and the appellant, accepted that a consensus had been arrived at in respect of an arbitration agreement, hence, the Board's decision that "the parties proceed to arbitration" if the restated retirement package is not accepted.

40. After addressing the constitution and selection of the Arbitration Panel, the location of the Arbitration Panel and the rules to govern it, the Board before setting out the question to be referred to the arbitrators stated that "The Agreement to be governed by Jamaican law". It seems to me that the use of the words "The Agreement" in those circumstances indicates that there had been a meeting of the minds of the parties

resulting in an agreement to go to arbitration. There can be no doubt that the dispute was identified. Thus, in my opinion, there is an enforceable agreement to refer the dispute to arbitration.

41. I cannot accept Mr. Vassell's contention that Professor Vasciannie's offer (the proposal) on behalf of the appellant was rejected by the respondent who insisted that the scope of the arbitration must include the conduct of the appellant. It is true that the minutes state that the Board "felt" that it is appropriate to include 'conduct', but in the next sentence, the minutes show that it was felt that the words 'having regard to all the circumstances' met the objective. It is recorded in the Minutes that there were extensive discussions concerning the scope of the arbitration. The Board would have considered the proposals of Professor Vasciannie and Mr. Armstrong and of course, of other directors. There would no doubt have been suggestions, counter suggestions, concessions and new demands, and at the end the parties came to an agreement which was embodied in the Board's resolution. In my view, an agreement came into being at the time the resolution was passed. Indeed, the appellant's attorney's letter of October 29th in which reference was made to the **confirmation** of the acceptance and the appellant's letter of November 3, 2008 are consistent with this conclusion.

Further, the following Board members confirmed that there was an agreement to submit the dispute to arbitration:

- Professor Vasciannie, by letters dated November 5 and 8 2008 to members of the Board - pages 153 and 171.
- Senator Mark Golding, by letter dated November 5, 2008 to the members of the Board - page 157.
- Mr. Charlie Johnson, by letter dated November 5, 2008 - page 162.
- Dr. Herbert Thompson, by letter dated November 6, 2008 - page 174
- Ms. Jean Dixon, by letter dated November 8, 2008 to members of the Board - page 177.

42. I now turn to some of the decisions to which this Court was referred. Mr. Vassell relied on **Hyde v Wrench** (1840) 3 Bear 334. In that case, the defendant on June 6th offered to sell an estate to the plaintiff for £1,000. On June 8th, in reply, the plaintiff made an offer of £950 which was refused by the defendant on 27th June. Finally, on 29th June, the plaintiff wrote that he was now prepared to pay £1,000. Lord Langdale M.R. held that no contract existed. By his letter of 8th June the plaintiff had rejected the original offer and he was no longer able to revive it by changing his mind and tendering a subsequent acceptance. The facts of **Hyde v Wrench** (supra) are clearly distinguishable from those of the instant case. In the instant case, proposals by both parties were extensively discussed at a Board meeting of the directors of the respondent bank. The appellant,

also a director, was present at the start of the meeting. He told the Board that the parties' interests would be best served through arbitration proceedings. It was confirmed that Professor Vasciannie, a director, would present the appellant's proposal and that Mr. Armstrong would make representations to the Board. At this point, the appellant recused himself. Thereafter, for about three (3) hours the Board heard and discussed the presentations and resolved that "the parties proceed to arbitration".

43. Another case relied on by Mr. Vassell is **Barnett Ltd. v Emanuel Olasemo** (1995) 32 JLR 284. That case can also be distinguished. In that case the existence or otherwise of the agreement was determined by the conventional or traditional approach of identifying an unqualified offer and the communication of a specific acceptance. It was held that a particular letter of the appellant company was not an unqualified offer. Alternatively, even if the letter constituted an offer, the respondent's amended draft agreement was a counter offer. The circumstances of the instant case as stated in the preceding paragraph are completely different.

44. Mr. Vassell Q.C. cited **Gunn's** case (1867) L.R. Ch. App. 40 in support of his argument that it was erroneous for the appellant to treat the Minutes of the Board on October 21, 2008 as an acceptance by the

respondent of an offer by him, or as an offer by the respondent to him or as a representation by the respondent to him. In **Gunn's** case, Gunn had applied for shares in a company. Shares were allotted to him but he was not notified of the allotment. It was held that no contract of allotment came into existence since there was no communication of the company's decision.

45. I do not agree with learned Queen's Counsel that the appellant in the instant case, although a director, is in the same position as **Gunn** was. As a director, the appellant was a member of the respondent's Board and unlike **Gunn** he had access to all the Minutes of the meeting and all other communication. Further, the offer was made to the respondent's Board by Professor Vasciannie with the approval of the appellant and Dr. Herbert Thompson was asked to liaise between the appellant and the Board. Thus it is unreasonable to conclude that what transpired at the October 21 meeting was not communicated to the appellant. It is important to note that in **Gunn's** case the Court said that it was not necessary that there should be a formal notice sent to him, if it appeared that he was made aware that the company had accepted his application.

46. In **Manatee Towing Company and another v Oceanbulk Maritime SA and another** [1999] 2 All ER (Comm)306 the claims arose from

negotiations over a period of two (2) months for the proposed sale of a tanker. At the end, the plaintiffs sent the defendants a recap which purported to confirm the sale of the vessel; paragraph 11 (c) of the recap stated Buyers' right to place two (2) representatives on board after conclusion/confirmation of the sale by telex/fax. The central issue was whether or not those negotiations resulted in a binding contract of sale.

Creswell J, drawing on the judgment of Bingham J and Lloyd LJ in **Pagnan Spa v Feed Products Ltd.** [1987] 2 Lloyd's Rep. 601, set out at page 325 the general principles to be applied in deciding whether the parties have concluded a contract. The following, I think, are relevant to this case:

> "(1) The Court's task is to review what the parties said and did and from that material to infer whether the parties' objective intentions as expressed to each other were to enter into a mutually binding contract. The Court is not of course concerned with what the parties may subjectively have intended.
>
> (2) ...
>
> (3) Where the parties have not reached agreement on terms which they regard as essential to a binding agreement, it naturally follows that there can be no binding agreement until they do agree on those terms...
>
> (4) ...

> (5) The Court must bear constantly in mind the subject matter with which it is dealing. The relevant principles of the law of contract are of universal application, but the proper inference to draw may differ widely according to the facts of the particular case ...
>
> (6) ..."

47. In the **Manatee Towing Company** case, the defendants' opening offer was subject to agreement of further terms and conditions and so there could be no concluded agreement until those terms and conditions had been agreed. In the instant case, the parties were agreed that if the offer in relation to the retirement package was not accepted the parties should proceed to arbitration. In so far as the arbitration is concerned, the only disagreement was as to whether or not the appellant's conduct should be included in the scope of the arbitration. And after extensive discussions "it was felt that the words 'having regard to all the circumstances' met this objective'. Thereafter, in its resolution the Board stated unequivocally the question to be referred to the Arbitration Panel. In my judgment, the words "it was felt" suggest that there was finally a meeting of the minds of the parties. The Board in its wisdom chose, as Dr. Barnett puts it, not to include a tendentious prejudicial statement in the terms of the reference but rather chose a phrase which was unobjectionable and which met the objective.

48. In the foregoing paragraphs I have examined what the parties said and did at the October 21st meeting in the context of the fact that up to then the negotiations were deadlocked. In determining whether or not there was the necessary consensus ad idem for a binding and enforceable agreement, I have attempted to apply the 'new' approach. I will now proceed to consider the conventional approach adopted by the learned trial judge and which counsel for the respondent submitted is correct.

49. In my view, even if I am wrong in concluding that a contract came into existence at the October 21st meeting, the resolution was at least an offer by the respondent to proceed to arbitration. The learned judge held that the appellant's offer, through Professor Vasciannie, was rejected at the October 21st meeting. The learned trial judge held that the Board made a new offer of arbitration to the appellant which was contained in Mr. Armstrong's letter of October 22nd. This letter, he said, set out the terms of the arbitration which "mirrored closely those which the Board had indicated in the meeting of the 21st October". The judge also held that the appellant's letter of the 29th October was a counter offer which was not accepted by the respondent. The judge in effect upheld the contention of learned Queen's Counsel for the respondent.

50. The contention of learned counsel for the appellant was that if a contract was not formed at the meeting of October 21st, it was formed on the 29th October, 2008. In this regard, the appellant contended that the Board's resolution at the October 21st meeting was the offer which was accepted by the appellant on October 29th when the appellant's attorneys wrote the respondent's attorney confirming the acceptance.

51. In my view there is merit in the appellant's contention. Mr. Armstrong's letter of October 22nd varied from the Board's resolution in critical aspects. First, it departed from the Board's decision by stating:

> "The scope of the dispute will be to determine what if any obligations the parties may have to each other, whether they have breached any obligations and what amount may be due to Mr. Clarke in all the circumstances. All the circumstances will include, but not be limited to, evidence about the events leading to his retirement".

By no stretch of the imagination can it be said that Mr. Armstrong's formulation "closely mirrored" the Board's decision which was that the question to be referred is:

> "What is a fair and equitable retirement plan for Mr. Clarke having regard to all the circumstances?"

It should be noted that Mr. Armstrong purported to widen the scope of the arbitration to include the determination of breaches of obligations.

He also substituted "what amount may be due to Mr. Clarke" for "what is a fair and equitable retirement plan for Mr. Clarke". And, importantly, he added the sentence "All the circumstances will include but not be limited to evidence about the events leading to his retirement".

52. I agree with Dr. Barnett that Mr. Armstrong's letter is an attempt to repudiate the fair decision of the Board made after due consideration and discussion. The learned trial judge erred in finding that Mr. Armstrong had the legal authority to alter or modify the clear decision of the Board of Directors as to the formulation of the terms of reference of the arbitrators. As I understand it, a resolution of the Board of Directors can only be amended by the Board and the amendment must be proposed and voted upon - see **Charlesworth Company Law** 17th Ed. page 261. Mr. Armstrong was not authorized by the Board to revise the terms of the Board's resolution and his letter was certainly not an accurate statement of the Board's offer. The learned judge erred in approving such alterations for the reason that they would avoid unprofitable arguments.

53. If the modern approach is not applicable to the facts of this case and if the conventional approach is applied, an analysis of the correspondence and the minutes of the October 21st meeting with a view to identifying the necessary components of offer and acceptance would support, in my view, the alternative contention of the appellant that the

Board's resolution constitutes an offer. There can be no doubt that this offer was communicated to the appellant because on the 29th October his attorneys-at-law wrote the respondent's attorney 'confirming' the acceptance of the offer and sending him a draft agreement. The appellant's response was consistent with the terms of the Board's resolution. The learned judge, in my view, erred in holding that the appellant's attorney's letter of the 29th October indicated that there was no acceptance. It seems to me that the learned judge treated the appellant's rejection of the retirement package offered by the respondent as a rejection of the terms of the arbitration agreement.

54. Accordingly, whether on the modern approach or the conventional approach, in my judgment, there is a binding agreement between the parties to proceed to arbitration.

55. I would therefore allow the appeal and set aside the judgment entered on the 19th March, 2009. I would grant the declaration that the appellant and the respondent are bound by agreement to submit to arbitration the existing dispute between them as to what is a fair and equitable retirement plan for the appellant, having regard to all the circumstances.

The appellant should have his costs both in this Court and in the Court below.

COOKE, J.A.

56. The appellant was employed to the respondent (BNS) from 16th April 1968 until his retirement on November 1, 2008. For the last 13 years he was the President and Chief Executive Officer. His stature within the banking community was unrivalled. He has been the recipient of accolades, not least the award of a national honour. B.N.S. is a household name in Jamaica and a very successful entity.

57. The appellant was summoned to a meeting in Toronto, Canada by Robert Pitfield, the Chairman of the Board of B.N.S. This meeting was on July 8, 2008. Also present at this meeting was the Deputy Chairman of the BNS Board. At this meeting the appellant was informed that a decision had been made. He would "be separated" from B.N.S. and would retire on August 31, 2008. This separation would be done on "an amicable basis to be negotiated" (see affidavit of Robert Pitfield dated January 8, 2009). In this affidavit in paragraph 5, it was stated that the appellant "was apprised of certain allegations and complaints made against him with regard to his personal and professional conduct that called seriously into question the claimant's fitness to continue as CEO of B.N.S." In a subsequent affidavit dated 29th January 2009, Robert Pitfield elaborated

on the complaints as to the appellant's personal and professional conduct. In paragraph 12, these were listed as:

(a) alleged inappropriate conduct with particular women;

(b) his abusive treatment of the staff of the bank;

(c) his un-cooperative conduct concerning Jamaican organizations; and

(d) his unacceptable conduct with members of B.N.S., Canada.

At the meeting of July 8th in Canada, the appellant was given a letter which proposed the terms on which he should retire. This was not accepted. Subsequent negotiations between the parties as to the terms of the appellant's retirement package have proved fruitless and it would not be unfair to say that both parties, despite any outgoing show, understood that there would be no amicable resolution to this issue. Thus, after this meeting, the appellant's separation from B.N.S. was not an issue; it was a *fait accompli*. The sole question pertained to the terms of the retirement package. Of course, as will be later observed, B.N.S. was faced with the factor of dealing with the appellant's retirement in such a manner that, as regards public consumption, there would be no fallout in any way to B.N.S.' operation. This was a sensitive task. Earlier, B.N.S.' position underpinning the appellant's separation from the bank has been set out. This is necessary for an appreciation of the contending positions advanced to the court.

58. The question of arbitration was first broached by the appellant's attorney on the 11th October 2008. This was to Mr. Robert Armstrong who has been described as B.N.S' "Canadian Counsel." Despite the fact that the latter said he had not received instructions from his client, there were discussions as to the medium of arbitration as a means to resolving the terms of the retirement package. There was no consensus as between the respective attorneys and it is significant that a fundamental issue of discord was the insistence of Armstrong that –

> "The scope of arbitration will generally relate to the circumstance surrounding the Claimant's [Appellant's] departure from the Defendant [BNS], including his rights and obligations and any breach thereof, and the quantum of any compensation he may be entitled to. (para 11(b) Pitfield's affidavit dated 8th January 2009).

On the 12th October 2008, the appellant sent an e-mail to the directors of BNS seeking "favourable consideration that I will demit office as President and Chief Executive Officer on condition that the dispute be referred to an Arbitration Tribunal of eminent persons." The respondent has correctly submitted that the separation of the appellant from B.N.S. and the retirement package were independent issues. Additionally, the appellant's floating of proposed Arbitration proceedings was bereft of any specificness. Accordingly, I agree that the contents of the appellant's letter of the 12th October, 2008 does not constitute an offer.

59. The B.N.S.' Board of Directors met variously on the 16th July, 18th July, 28th July and 21st October, 2008. It is the Board Meeting of 21st October 2008 which specifically addressed the issue of arbitration. This meeting is of great significance. The minutes will be reproduced in their entirety. Suffice it to say that, in the prior meetings of the Board mentioned above, the concern pertained to (a) the terms of the retirement package (b) the protection of the reputation of the appellant in the communication of information and (c) safeguarding the image of B.N.S. as a stalwart financial institution. The news release issued by the B.N.S. is as follows: -

"William 'Bill" Clarke to Retire"

> "**Kingston Jamaica, July 18, 2008** - The Board of the Bank of Nova Scotia Jamaica Limited wishes to advise that President and CEO William 'Bill" Clarke has decided to retire on October 31, 2008. The Board refutes any allegations that Mr. Clarke has separated from the Bank.
>
> The Board wishes to express its admiration for the exemplary leadership which Mr. Clarke has provided to the Bank over the past fourteen years, and its appreciation for his forty years of service to the Bank.
>
> Scotiabank has been part of the Caribbean and Central America since 1889. It is now the leading bank in the region, with operations in 26 countries, including affiliates. The bank has some 12,081 employees in the region, serving more than two million customers, with 437 branches and about 919 automated banking machines."

60. As indicated, these were minutes of the Board Meeting : -

"4. **NOTICE OF MEETING**

It was agreed that the Notice convening the meeting be taken as read.

5. **OPENING REMARKS**

Mr. Waugh addressed the Board and expressed gratitude and appreciation to the Board for their patience and concerns on the issue. He advised that in the current financial environment compensation and severance packages will be subject to scrutiny by the regulators. He further stated that the Bank's desire is to treat the matter fairly.

Mr. William Clarke responded to the sentiments and told the Board that he will demit office on October 31, 2008. Mr. Clarke also expressed his disappointment in that he did not believe that proper negotiation proceedings were being followed in arriving at his retirement package.

Mr. Clarke advised the Board that there is no intention to destroy the legacy of the Bank and there is no desire for litigation. He further stated that all parties (sic) interest would be best served through Arbitration proceedings which is by nature confidential and would protect the Bank.

It was confirmed that Professor Stephen Vasciannie would present the Arbitration Proposal and that Mr. Robert Armstrong would also make a presentation to the Board.

At this point Mr. Clarke recused himself from the meeting.

6. **PROPOSAL TO CONSIDER ARBITRATION PROCEEDINGS**

Professor Vasciannie presented to the Board for consideration, a proposed Arbitration Agreement and proposed Resolution which are attached hereto and deemed to form a part of these Minutes.

Professor Vasciannie advised that a private Arbitration would protect the Bank's name from the public domain at a time when the financial sector is experiencing difficulty. The size of the award would not be seen as a golden handshake but as a settlement of a dispute.
Professor Vasciannie proposed that Mr. Clarke would select an arbitrator from the list of names set out in the proposed Resolution and the Bank would select an arbitrator in the same manner. The Chairman of the arbitration panel would be selected by joint agreement by the two arbitrators from the list.

Mr. Robert Armstrong made a presentation to the Board regarding the proposal sent to Mr. Clarke. He advised that the identical offer that was approved by the Board was submitted to Mr. Clarke except that the car was removed to allow for negotiation with his attorneys. He advised that Mr. Clarke's Attorneys had responded that there was a deadlock and suggested arbitration.

Mr. Armstrong advised of the following options:

a) that the Bank resubmit the offer with the Car, and
if the offer is not accepted

b) that both parties proceed to Arbitration

Mr. Armstrong further advised that the main benefits of arbitration proceedings are privacy, neutrality and duration of time.

Mr. Armstrong submitted a proposed Arbitration Agreement which is attached hereto and deemed to form a part of these Minutes.

Professor Vasciannie responded to the proposed Arbitration Agreement submitted by Mr. Robert Armstrong and indicated that if there is a sole arbitrator neither side would be comfortable. He suggested that the Bank should select an arbitrator and Mr. Clarke should select an arbitrator, the two arbitrators selected should then select a third person as chairman of the panel.

7. **DISCUSSION**

The Board then discussed the following issues in relation to the proposals regarding resubmission of the offer and the option to proceed with arbitration:

A. **Monetary Value of the Offer**

Members of the Board sought clarification whether the total value of the Offer of CDN$3.7M was communicated in the Offer to Mr. Clarke.

A copy of the Offer Letter was provided for review by some Members. It was confirmed that the letter was not clear as the total value

of the Offer was not reflected in the document.

B. **Issues for determination by Arbitration**

The meeting reviewed and discussed the recommendations by Professor Vasciannie and Mr. Robert Armstrong as set out in the respective documents submitted to the Board. Mr. Mark Golding indicated that the question for the tribunal should be objective and proposed a reformulation of question for the tribunal presented by Professor Vasciannie to state what is the '*fair and equitable*' retirement plan.

The Board discussed extensively the question of the scope of the Arbitration and felt it is appropriate to include all matters leading to Mr. Clarke's separation from the Bank including his conduct, It was felt that the words 'having regard to all the circumstances' met this objective.

C. **Supplemental Pension**

The Board discussed the supplemental pension and noted that Mr. Clarke had advised that the Supplemental Pension had been agreed previously. The Chairman advised the Board that there were a series of correspondences with Mr. Clarke on the issue with draft documents being discussed but the agreement was never signed and the Bank's position is that they are not legally bound to offer the supplemental pension.

Members of the Board raised the issue of whether the amount of CDN$3.7M could remain and with the pension be substituted with a payment of CDN$IM cash and re-offered at CDN$3.7M. The Chairman confirmed that the offer is a total package and this is the best offer the Bank is prepared to make.

D. **Other Arrangements**

The Board enquired about the arrangement that would be in place while Arbitration proceedings are pending in relation to Mr. Clarke.

Ms. Chrominska advised that during the period of Arbitration Mr. Clarke would receive his outstanding vacation payment and all normal payments for retirement. Mr. Clarke would have the option to remain in the house and continue to have the benefits of the housekeeper, gardener and security. These benefits would be valued in a dollar amount and deducted from the Arbitration Award.

She further advised that if the proposal for Arbitration was not accepted a letter would be sent to Mr. Clarke outlining what happens on October 31, 2008 in respect of the house and other matters.

8. **RESOLUTION**

The Board resolved that:

a. The retirement package be restated with the value of the supplemental

pension foreign exchange protection and car along with a total value of CDN$3.7M, or

b. The parties proceed to Arbitration

c. The Arbitration panel be constituted by a panel of three arbitrators selected in the following manner:

- Each party to select an arbitrator of his/its own choice
- the two arbitrators shall select a Chairman.
- In the event that the two elected arbitrators are unable to agree upon the selection of the Chairman, the Chairman shall be selected under The London Court of Arbitration (LCIA) Rules.
- The Chairman will decide the location of the Arbitration and the rules to govern the Arbitration.
- The Agreement to be governed by Jamaican Law.

d. The question to be referred to the Arbitration Panel for determination is:

What is fair and equitable retirement plan for Mr. Clarke having regard to all the circumstances.

9. **TERMINATION**

There being no further business, the meeting concluded at 12:15 p.m."

61. On the day following this Board Meeting, Robert Armstrong who was present at the Board Meeting of the 21st October, sent the following letter which speaks for itself :-

"VIA E-MAIL

WITHOUT PREJUDICE

Toronto, October 22, 2008

Mr. R.N.A. Henriques, Q.C., LL.M.
Attorney-at-Law
72 Harbour Street
Kingston, Jamaica

Dear Mr. Henriques:

Re: William Clarke

Mr. Vassell and I have now received instructions from our client. They are as follows:

1. I attach a revised Offer to Settle. Its value is approximately Cdn$3.7miillion dollars. It is open for acceptance until 12:00 noon on October 30, 2008. If you wish to speak about it or meet to discuss it, please let me know as soon as possible.

2. If your client does not agree to accept this offer we are willing to arbitrate our differences. The terms of such arbitration would include the following:

(A) Each party will appoint a panellist of their choice within 30 days of an arbitration agreement being signed. The two arbitrators will together

choose a third arbitrator (who shall be the Chairman) within 45 days of their appointment. If they cannot agree the Chairman will be chosen pursuant to the LCIA rules.

(B) The location of the arbitration will be decided by the Chairman.

(C) The governing law will be that of Jamaica.

(D) The schedule and rules will be agreed by us or failing that be set by the Chairman in accordance with LCIA rules.

(E) The scope of the dispute will be to determine what if any obligations the parties may have to each other, whether they have breached any obligations and what amount may be due to Mr. Clarke in all of the circumstances. All of the circumstances will include, but not be limited to, evidence about the events leading to his retirement.

(F) Any award shall be final.

(G) If you accept this option Mr. Clarke will be able to stay in the house, use the cars and servants and security until the arbitration is concluded and an award is made. The value of these benefits (being a monthly charge of Cdn$40,000 paid by BNSJ) will be deducted from any award made by the arbitrators.

3. If neither option 1 or 2 is accepted, Mr. Clarke will receive the usual letter from BNS HR setting out his rights and paying him certain final amounts. He will be asked to leave the home

> and return all Bank property within 90 days of October 31, 2008. I will send you early next week (and HR will send Mr. Clarke early next week) the proposed letter so Mr. Clarke will have ample time to consider its terms.
>
> 4. No other offers will be made. These are the proposals endorsed unanimously by my client.
>
> We look forward to your reply.
> Yours very truly,"

62. On the 29th October 2008, Mr. Henriques, one of the attorneys-at-law acting for the appellant, communicated with Mr. Armstrong to the effect that:

> "(i) Arbitration now appears inevitable and
>
> (ii) With respect to the offer to refer the matter to arbitration, the acceptance of which we now confirm, we enclose a draft agreement which we are instructed, conform (sic) with the decision of the Board."

63. In the preceding paragraphs I have set out the relevant background at the time when the appellant by means of a Fixed Date Claim Form filed on 24th December, sought -

> "(1) a declaration that the Claimant and Defendant are bound by agreement to submit to arbitration the existing dispute between them as to what is a fair and equitable retirement plan for the Claimant having regard to all the circumstances."

On March 19, 2009 the court below (Marsh J.) dismissed the declaration sought. Marsh J. made other orders which are the subject of appeal, but it is agreed that those matters are to be subsumed to the central issue of the debate conducted in this court which was as to whether or not there was an agreement to go to arbitration.

64. Marsh J. appears to have founded his decision on his acceptance of the following: -

> (i) That the letter of Robert Armstrong, dated 22nd October 2008 (supra) represented no more or no less than the Board meant when it formulated the question as it did, having decided that the claimant's conduct and all matters leading to his separation from the Bank would be appropriately covered by the term "having regard to all the circumstances.

Thus, the learned judge rejected the then claimant's contention that Robert Armstrong had exceeded his authority in the way he had framed the Board's question. Further,

> (ii) The learned judge considered that Henriques' letter of 29th November was a counter offer to which there was no acceptance
>
> (iii) Although the learned judge did not state so specifically, he seems to have found favour with the submission that the Board had not communicated directly to the appellant and therefore as far as the resolution of the Board on the 31st October 2008 is concerned, the appellant is a

stranger and cannot place reliance on it. For this proposition counsel relied on **Gunn's Case** (1867) L.R. Ch. App. 40

65. The appellant contended firstly that the resolution of the Board of the 21st October 2008 was an acceptance of the appellant's offer to go to Arbitration. This is without merit for the reason which has already been indicated. Further, the proposed arbitration proceedings put forward on behalf of the appellant by Professor Vasciannie was not accepted — or for that matter, the proposal put forward by Mr. Armstrong. Secondly, it was submitted that the resolution constituted an offer by BNS which was accepted on behalf of the appellant by the Henriques letter of 29th October, 2008 (supra).

66. It is my view that the resolution of the Board was an offer to proceed to Arbitration failing agreement on the terms of the appellant's retirement package. The Board's position was definitive in the question to be referred to the Arbitration Panel. The procedural requirement for the conduct of the proposed Arbitration proceedings was comprehensive.

67. The respondent submitted that the offer of BNS to proceed to Arbitration was contained in Armstrong's letter of the 22nd October 2008. As to this, the appellant's stance was that, that letter was an attempt to repudiate the clear decision of the Board, made after due consideration and discussion. A perusal of the resolution and the Armstrong letter

demonstrates that there is no harmony between them. I therefore find it impossible to accept the learned trial judge's view that the question, as formulated in Armstrong's letter of 22nd October for referral to the Arbitration Panel, "was no more or no less than the Board meant." It must be taken that the Board said what it meant and what it said in the resolution was clear and unambiguous. Further, the Armstrong letter bore differences in respect of the procedural regime enunciated in the resolution. The Armstrong letter did not accurately represent the offer of the Board. Consequently, in the determination of this appeal, I will attach no significance to this Armstrong letter. From the written submissions of the respondent, it was apprehended that the issue of evidence to be called being left to the arbitrators was problematic, in that such arbitrators may exclude evidence of the appellant's conduct and it would thereafter be difficult to have it corrected by a court since the grounds on which an arbitrator's award can be impeached are narrowly circumscribed.

68. In **Gunn's Case** (supra) the headnote which accurately reflects the decision states: -

> "Where a person applies for shares in a company, and shares are allotted to him, he will not be constituted a member of the company unless he has notice of the fact of the allotment. It is not, however, necessary that there should be a formal notice sent to him, if it appears that he was made aware that the company had

> accepted his application. The mere entry of his name on the register of shareholders is not sufficient for this purpose.
>
> The decision of Stuart, V.C., affirmed. Bloxam's Case (1), and Cookney's case (2) distinguished."

This authority does not support the contention that the appellant had to receive formal notification of the offer of the Board. There is no reason why awareness of an offer should be treated any differently from awareness of an acceptance.

69. There are now two issues to address. One is whether or not the appellant was aware of the offer and the other is whether there has been acceptance. The Henriques letter to Armstrong dated 29th October 2008 is instructive. The excerpts from this letter in reference to acceptance have already been reproduced. In respect of the 'draft agreement', I now set out a portion:

"SECTION ONE

THE QUESTION FOR THE TRIBUNAL IS:

What is the fair and equitable retirement plan for the claimant having regard to all the circumstances?"

SECTION TWO

THE ARBITRATION TRIBUNAL

1. **The Arbitration Tribunal shall consist of three Arbitrators:**

(a) Each party shall appoint one arbitrator not later that 14 days after service of a request in writing by either party to do so, and

(b) The two so appointed shall forthwith appoint a third arbitrator as Chairman of the Tribunal

(c) In the event that the parties are unable to agree on a Chairman, the Chairman shall be appointed in accordance with LCIA Rules

2. The seat of arbitration shall be determined by the Chairman

3. This agreement shall be governed by and construed in accordance with the Laws of Jamaica."

70. The Henriques letter clearly demonstrates the appellant's awareness of B.N.S.' offer to go to Arbitration. But, did he know of the essential substance of this offer? The aspect of the Henriques letter reproduced above in paragraph 13 is substantially that of the resolution. Where there is any difference it is subsidiary to the fundamental issue as to the question for the Arbitration Panel to decide. To regard the Henriques letter of the 29th October 2008 as a counter offer is incorrect. Thus, the learned trial judge was in error in this regard. The error flowed from, according the Armstrong letter of the 22nd October 2008 an import which it did not have. I would say that the appellant accepted the offer of B.N.S. and that there is an agreement for arbitration.

71. I would allow the appeal and award costs both here and in the court below to the appellant. Finally, all contingent matters will fall within the purview of the Arbitration Panel.

HARRIS, J.A.

72. In this appeal the appellant challenges a judgment of Marsh, J. delivered on March 19, 2008 in which he declared that there was no binding agreement between the parties to submit, to arbitration, an existing dispute between them.

73. The appellant is a retired banker. He was formerly employed to the respondent (hereinafter called the 'bank'). His employment to the bank continued for a period of 40 years, commencing on April 16, 1968 and ending on October 31, 2008. He served as President and Chief Executive Officer for 13 years.

74. On July 16, 18 and 28, 2008 special meetings of the bank's Board of Directors were held touching the question of the appellant's retirement from the bank and a suitable retirement package for him. The Board, on July 16, 2008, having received reports of misconduct on his part, requested him to proceed on retirement with effect from October 31, 2008. This directive was subsequently communicated to all relevant

regulatory authorities. A Press release, contemporaneous with the date of retirement, was issued.

75. At the meeting of July 18, 2008, the Board deferred to July 28, 2008 the matter of the review of the appellant's date of retirement and a suitable retirement plan for him was discussed. During the meeting of July 28, a resolution was passed appointing Mr. Bruce Bowen, President and Chief Executive Officer of the bank, consequent on the appellant's retirement. On that date the Board received an update of negotiations conducted between the appellant and the Chairman of the Board. Negotiations continued but no agreement was reached as to a retirement package for the appellant.

76. A proposal regarding the submission of the parties to arbitration was first raised by the appellant's attorney-at-law on October 11, 2008 in an e-mail to Mr. Robert Armstrong, the bank's agent. This was followed on October 12, 2008 by an e-mail, circulated by the appellant to the Board with a proposal for the parties' submission to arbitration. On October 14, 2008, Mr. Armstrong wrote to the appellant's attorney at law, indicating that he had no instructions from the bank, but proposed certain terms under which the bank would be willing to submit to arbitration. The proposals were rejected by the appellant's attorney-at-law.

77. On October 21, 2008 the Board convened a meeting and a resolution was passed in the following terms:

Resolution:

"The Board resolved that:

a. The retirement package be restated with the value of the supplemental pension foreign exchange protection and car along with a total value of CDN $ 3.7M, or

b. The parties proceed to Arbitration

c. The Arbitration panel be constituted by a panel of three arbitrators selected in the following manner:

- Each party to select an arbitrator of his/its own choice.
- The two arbitrators shall select a Chairman,
- In the event that the two elected arbitrators are unable to agree upon the selection of the Chairman, the Chairman shall be selected under the London Court of Arbitration (LCIA) Rules.
- The Chairman will decide the location of the Arbitration and the rules to govern the Arbitration.
- The Agreement to be governed by Jamaican Law.

d. The question to be referred to the Arbitration Panel for determination is:

> ***What is fair and equitable retirement plan for Mr. Clarke having regard to all the circumstances"*** [emphasis supplied]

78. On October 22, 2008 the bank's agent wrote to the appellant's attorney-at-law advancing certain terms on which he stated that the bank would be willing to submit to arbitration. In this letter he sought to augment the proposals in the Resolution by adding the following:

> *"The scope of the dispute will be to determine what if any obligations the parties may have to each other, whether they have breached any obligations..."*

"What amount may be due to Mr. Clarke" was substituted for "what is a fair and equitable retirement plan for Mr. Clarke", and he added "in all of the circumstances". He also added the term that "All the circumstances, will include but not be limited to evidence about the events leading to his retirement."

Those terms were rejected by the appellant's attorney at law. On October 29 the appellant's attorney-at-law wrote to the bank's attorney-at-law expressing a desire to proceed to arbitration.

79. Arbitration proceedings having not ensued, on December 24, 2008, the appellant commenced proceedings against the bank by way of a Fixed Date Claim Form seeking the following relief:

> "1. A declaration that the Claimant and Defendant are bound by agreement to submit to arbitration the existing dispute between them as to what is a fair and

equitable retirement plan for the Claimant having regard to all the circumstances;

2. An order that the Claimant shall appoint an Arbitrator and serve notice on the Defendant to appoint an arbitrator within seven days of such notice, failing which the person appointed by the Claimant shall act as sole arbitrator;

3. An injunction restraining the Defendant by itself, its officers or agents from taking any steps to eject the Claimant from the residence at 12 Hyperion Avenue, Kingston 6 in the parish of Saint Andrew now occupied by him or to terminate his possession of the vehicles, namely: BMW 750 and Audi Q7 now or his possession until the determination of the arbitration or further order of the arbitration or the court.

4. An order that the Defendant files its Defence or affidavit in answer within 14 days after the service of the Fixed Date Claim Form on the Defendant or such other time as the Court may consider appropriate."

The bank filed a defence denying that there was an agreement between the parties to proceed to arbitration. It also filed an ancillary counterclaim seeking an order for the appellant to deliver up possession of a dwelling house, two motor vehicles and properties of the bank, which were in the appellant's custody. A defence to the ancillary counterclaim was filed by the appellant.

80. On March 19, 2009, the learned trial judge made the following order on the claim:

"1. That the Claimant's application seeking a declaration as stated in paragraph 1 of the Fixed Date Claim Form dated and filed on December 24, 2008, in the matter herein is dismissed.

2. That the Claimant's Application seeking an order as stated in paragraph 2 of the Fixed Date Claim Form dated and filed on December 24, 2008, in the matter herein is dismissed.

3. That the Claimant's Application for an injunction as stated in paragraph 3 of the Fixed Date Claim Form dated and filed on December 24, 2008, in the matter herein is dismissed.

4. The Costs and Attorneys (sic) Costs be paid by the Ancillary Defendant to the Ancillary Claimant."

81. On the Ancillary Claim he made the following order:

"1. That the Ancillary Defendant vacate and deliver up the premises situated at 12 Hyperion Avenue, Kingston 6 in the parish of St. Andrew to the Ancillary Claimant on or before May 31, 2009.

2. That the Claim (sic) vacate and deliver up the two motor cars, namely a BMW 750 bearing registration number 0984 EX and a Audi Q7 bearing registration number 9441FH, to the Ancillary Claimant on or before May 31, 2009.

3. No order as to mesne profits.

4. Costs and Attorneys Costs (sic) be paid by the Ancillary Defendant to the Ancillary Claimant."

82. The following grounds of appeal were argued:

"f. The learned Judge erred in finding that the Board felt that it was appropriate to include "all matters leading to Mr. Clarke's separation from the Bank, including his conduct" in the question referred to the Arbitrator as the evidence shows that this was deliberately excluded from the Board's resolution and was only attempted to be added at a later date without the Board's approval.

g. The learned Judge erred in finding that the terms of the letter of the 22nd October 2008 closely mirrored those of the Board as resolved in the meeting of the 21st October 2008 as it purported to alter the terms specifically approved by the Board's Resolution of the 21st October 2008.

h. The learned Judge erred in finding that Robert Armstrong did not unilaterally determine that the Claimant's conduct should be expressly included in the question to be referred to the Arbitrator since the Board specifically discussed the matter and decided otherwise.

i. The learned Judge erred in finding that the e-mail of the 12th October 2008 by the Claimant was the only operative offer to arbitrate made by the Claimant and there was consequently no binding agreement in light of the fact that:

    i. The Claimant made a proposal to the Board on the 21st October 2008 by way of a proposed resolution and draft Arbitration Agreement, which was presented to the Board by Professor Stephen Vasciannie and was accepted; and/ or

    ii. The Board determined the essential terms of the Arbitration agreement

which were acceptable to it and these terms were accepted by the Claimant on November 3, 2008.

j. The learned Judge erred in finding that the scope of the Arbitration was as outlined in the letter of the 22nd October 2008 by Robert Armstrong, as the contents of the letter are inconsistent with the resolution of the Board passed on the 21st October 2008.

k. The learned Judge erred in finding that the Claimant's letter enclosing the draft arbitration agreement came after Robert Armstrong's Letter of November 25, 2008 as the Claimant's letter was in fact dated and sent October 29, 2008.

l. The learned Judge also erred in finding that the Claimant's letter of the 29th October 2008 was a counter offer to Robert Armstrong's offer of the 25th November 2008 since the Claimant's letter was written to the Board before Robert Armstrong's letter of November 25, 2008.

m. The learned Judge erred in finding that there was no agreement to arbitrate as the evidence shows that both parties agreed to arbitrate and the terms of the dispute was (sic) agreed in the specific resolution of the Board which was "What is a fair and equitable retirement plan for Mr. Clarke having regard to all the circumstances?"

o. The learned judge erred in law in accepting Robert Armstrong's alteration of the precise terms of the question decided by the Board on the basis that the Board's formulation would lead to unprofitable argument at the Arbitration as to its exact scope.

p. The learned Judge erred in failing to find that the Arbitrator or Arbitrators on an application of the proper principles of law would have the duty to decide in the arbitral proceedings what evidence was relevant and admissible and it was clearly inappropriate to seek to identify even before any "pleadings" are settled what any of those factors are."

83. Dr Barnett submitted that the evidence undoubtedly discloses that the appellant and the bank had arrived at an agreement to proceed to arbitration to determine what is a fair and equitable retirement plan for the appellant. He presented his submissions in respect of an offer and acceptance of the offer, on two plinths. On the one hand, he argued that the appellant's e- mail of October 12, 2008, as supported by Professor Vasciannie's proposals was an offer which was accepted by the Board by its resolution of October 21, 2008. On the other hand, he argued that even if the e-mail of October 12 is not considered an offer, the Resolution is an offer which was accepted by the appellant's attorney at law in the letter of October 29, 2008 and reaffirmed by the appellant in his letter of November 3, 2008.

84. He argued that the learned judge had wrongly treated the appellant's e-mail of October 12, 2008 as incapable of being an offer for the reason that it was too vague. It was also his submission that the learned trial judge failed to take into account the appellant's attorney-at

law's letter of acceptance of October 29 and the appellant's letter of November 3 which clearly confirmed the acceptance of the Board's offer.

85. The letter of October 29, which clearly, was an acceptance of the bank's offer, was erroneously found by the learned trial judge to be a counter offer, he argued. He further argued that although the learned trial judge treated the Resolution of the Board on October 21, 2008 as an offer, he failed to consider the response made on the appellant's behalf in the appellant's attorney-at-law's letter of October 29. Mr. Armstrong's letter of October 22, 2208, he contended, was erroneously treated by the learned trial judge as mirroring the terms of the Resolution.

86. Mr. Vassell Q.C., argued that a binding contract for the parties to submit to arbitration had not been concluded as they were never ad idem on all issues and that the learned trial judge was correct in his determination of the issues before him. The appellant's letter of October 12, 2008 was an invitation to proceed to arbitration and not an offer, he argued. It was submitted by him that the Resolution of the Board at its meeting of October 21, 2008 is indicative of the Board's willingness to broker an agreement and if there was acceptance, it would have been for the attorneys -at-law to arrange to bring into existence contractual relations between the parties.

87. At the heart of the dispute, he argued, is the question as to whether the conduct of the appellant was included in the terms to be referred to arbitration and that the inclusion of the words "in all the circumstances' appearing in the minutes of the meeting clearly demonstrates that the conduct of the appellant which led to his separation from the bank was to be part and parcel of the matters to be considered in any arbitration proceedings. It was his further submission that although there was no specific reference that the appellant's conduct would fall within the scope of the resolution, the language of the Resolution inescapably embraced his conduct.

88. The critical issue to be determined in this case is whether there is in place, for submission to arbitration, a binding agreement between the parties that the dispute between them "as to what is a fair and equitable compensation for the appellant, in all the circumstances". The Resolution passed by the Board on October 21, 2008 is pivotal to the determination of this issue. This gives rise to the following questions:

1. Did the appellant's e-mail of October 12, 2008 and/or Professor Vasciannie's proposals contain an offer for the parties to submit to arbitration which was accepted by the Board in its Resolution of October 21, 2008?

2. If neither the e-mail nor the proposals is found to be an offer, was the Resolution an offer and the letter of October 29, 2008 from the appellant's

> attorney-at-law to Mr. Armstrong an acceptance, by the appellant, of that offer?

89. A court, in determining whether parties have agreed to enter into contractual relations, seeks to ascertain whether in the circumstances of a particular case, the elements of an offer and an acceptance of that offer can be inferred. The learned authors of **Cheshire Fifoot and Furmston's Law of Contract** 15th Edition (page 39) acknowledge this proposition in the following context:

> "In order to determine whether, in any case given, it is reasonable to infer the existence of an agreement, it has long been usual to employ the language of offer and acceptance. In other words, the court examines all the circumstances to see if the one party may be assumed to have made a firm 'offer' and if the other may likewise be taken to have 'accepted' that offer. These complementary ideas present a convenient method of analysing a situation, provided that they are not applied too literally and that facts are not sacrificed to phrases.
>
> It must be emphasised, however, that there are cases where the courts will certainly hold that there is a contract even though it is difficult or impossible to analyse the transaction in terms of offer and acceptance, for as Lord Wilberforce has said:
>
> > English Law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration."

90. Where parties have conducted negotiations over a period, the question as to whether there is an offer and an acceptance of that offer, may give rise to some difficulty as to when, or if, an acceptance had been reached. This imposes on the court a duty to ascertain the true intention of the parties. How then should the court discover the necessary intent? In determining whether the parties have arrived at an agreement, it is usual for the court to apply an objective test. The learned author of **Chitty on Contract**, Thirteenth Edition (Vol. 1 p. 144 pp. 2-002) places the court's approach in the following perspective:

> "In deciding whether the parties have reached agreement, the courts normally apply the objective test ..... Under this test, once the parties have to all outward appearances agreed in the same terms on the same subject matter, then neither can generally rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree."

91. The exercise requires the court examining the entire transaction, taking into account all that had transpired during the course of negotiations between the parties and deciding whether there is an offer and an unqualified acceptance which had in fact solidified into an agreement. See **Drake Insurance Plc v Provident Insurance** [2004] 1Q.B. 601 at 100.

92. Where the evidentiary material upon which the court is required to adjudicate is in the form of correspondence, the court is obliged to examine the correspondence as a whole and determine whether on the construction of the correspondence, the parties had arrived at an agreement on similar terms.

93. Traditionally, the creation of a binding contract does not only require the existence of offer and acceptance of that offer but also some evidence of consideration. There must be evidence of the performance of an act by one party from which another obtains a benefit or advantage. It may also assume the form of a detriment or inconvenience suffered by one party with the other party's consent.

94. Besides invoking the customary method of offer and acceptance, in recent years, the courts have adopted a modern approach in which they carry out an examination of all the circumstances in a given case so as to establish whether consensus ad idem had been reached by the parties. In order to decide whether there has been a meeting of the minds of the parties, the court looks at the relationship between the parties as a whole - see **New Zealand Shipping Co. Ltd. v. Satterthwaite** [1974]2 WLR 865.

95. What is the court's approach to the question of arbitration? The learned author of **Russell on Arbitration**, Twenty- First Edition, offers some answers to this question when at page 28 it is stated:

> "English law respects the parties' freedom to enter into arbitration agreements in the same way as it respects their freedom to enter into other contracts. As a result the court gives effect to arbitration agreements except in cases of hopeless confusion:
>
> > An agreement contained a clause referring "any dispute and /or claim" to arbitration in England. It was followed by a clause referring "any other dispute" to arbitration in Russia. It was held that the arbitration agreement was void for ambiguity, and was neither effective nor enforceable.
>
> However "the court should if the circumstances allow lean in favour of giving effect to the arbitration clause to which the parties have agreed", and seek to give effect to their intentions."

96. The authorities dictate that the requisites for a binding arbitration agreement are consent to submit a dispute to arbitration and a term or terms of reference of the dispute. However, a submission to arbitration must be in writing as prescribed by the Arbitration Act. Section 2 of the Act states as follows:

> "submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

Section 3 outlines the effect of a submission. It reads:

> "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of Court."

97. I will first give consideration to the matter of the appellant's e-mail of October 12, 2008. The learned judge found that it was not an offer but an invitation to treat. He said:

> "The Claimant's e-mail to the Board of the 12th October, 2008, was a proposal, inter alia that the dispute be referred to Arbitration Tribunal of eminent persons. By no stretch of the imagination could that be considered an offer which could be accepted and which could be held to consist of any definite promise to be bound. 'An offer capable of being converted into an agreement must consist of a definite promise to be bound provided that certain specified terms are accepted'..."

98. In the appellant's e-mail of October 12, 2008 to the Board, he outlined certain facts and requested that the bank consider submission to arbitration. The request for submission to arbitration is contained in the 8th paragraph of the e-mail. It reads:

> "I am therefore requesting the Directors to give favourable consideration to the proposal that I will demit office as President & CEO on October 31, 2008, on condition that the dispute be referred to an Arbitration Tribunal of eminent persons."

99. Was this an offer? I think not. It is simply an inquiry by the appellant as to whether the bank would be willing to proceed to arbitration should he demit office on October 31. The request is a bald proposition that the parties proceed to arbitration. It is devoid of the essential elements from which an offer could be inferred. No terms were advanced which the bank could have accepted or to which it could have properly given its assent. The request as formulated did not convey sufficient material demonstrating a promise by virtue of which the appellant would be willing to be bound. His request as framed, as the learned judge rightly found, was an invitation to treat. In my opinion, Professor Vasciannie's proposals were merely recommendations to assist the board with its deliberations.

100. I will now advert my attention to the next question, that is, whether the resolution can be treated as an offer for the parties to proceed to arbitration. The learned trial judge found that when the Board met on October 21, "it resolved to offer the appellant a restated retirement package." It is without doubt that he treated the resolution as an offer and, in my, view it cannot be said that he was incorrect in so doing. At the meeting on October 21, Professor Vasciannie presented to the Board an arbitration agreement as well as a proposed resolution. Mr. Armstrong also presented a proposed arbitration agreement. Both men addressed

the Board. Professor Vasciannie made further suggestions which included the assignment of three arbitrators instead of a sole arbitrator.

101. After hearing their submissions, the Board, in giving consideration to the matter, conducted an extensive discourse. This shows that it paid careful attention to the submissions made by both Professor Vasciannie and Mr. Armstrong before taking a decision as to whether it would put forward terms which would be satisfactory to the appellant on the issue of arbitration. It thereafter formulated full, clear and distinct terms which were eventually sent to the appellant, which afforded him the opportunity of accepting or rejecting same.

102. Undoubtedly, the members of the Board were at one in their assent for the parties to proceed to arbitration. The contents of the Resolution clearly reflect the bank's intention to be bound by the proposals in the Resolution, should these proposals be accepted by the appellant. In my judgment, an offer came to life with the birth of the Resolution. The language of the Resolution clearly portrays an offer to the appellant for the parties to proceed to arbitration.

103. On October 29, 2008 the appellant's attorney-at law wrote to Mr. Armstrong enclosing a draft agreement which was in conformity with the Resolution. Paragraph 5 of that letter states:

> "With respect to the offer to refer the matter to arbitration, the acceptance of which we now confirm, we enclose a draft agreement which we are instructed conform (sic) with the decision of the Board."

This obviously shows that the appellant treated the terms of the Resolution as an offer which he accepted. Further confirmation of the acceptance is shown in the appellant's letter of November 3, 2008 to the Board, in which, at paragraph 7, he stated:

> "My understanding is that the Board accepted my proposal as a result of our common understanding that the dispute relating to my early retirement package would be referred to arbitration."

104. It was contended by Mr. Vassell Q.C. that the minutes of the Board lacks the force of an offer by the Board to the appellant, but even if it was viewed as an offer it had not been communicated to him. An offer, to be valid, must be communicated to the offeree, he submitted. In support of this submission, he cited the case of **In re Universal Banking Corporation – Gunn's case** (1867) L.R. Ch App. 40. In that case the appellant made an application for shares in a company which were allotted to him. Notice of the allotment was not sent to him. It was held that the allotment having not been communicated to him, he could not be constituted a member of the company.

105. I am constrained to disagree with Mr. Vassell's submission. **Gunn's case** is distinguishable from the present case. In **Gunn's case**, the

appellant had made an offer for the shares and the offer was accepted but the acceptance had not been communicated to him. In the present case, the appellant was a member of the bank's Board. Professor Vasciannie and Dr. Herbert Thompson represented him at the meeting. Logic dictates that both men would have disclosed to the appellant the contents of the minutes of the meeting, which obviously includes the offer contained in the resolution. There can be no doubt that they would have done so. Further, it is evident that he was aware of the Resolution in light of the letter of October 29, 2008 from his attorney-at-law to Mr. Armstrong, confirming his acceptance of the offer.

106. A further error on the part of the learned trial judge was that he found that the terms of Mr. Armstrong's letter of October 22, closely mirrored those of the Board's Resolution of October 21, 2008. He was wrong. The letter was not in close harmony with the terms of the Resolution. It did not reflect an accurate statement of the Board's offer. The proposals put forward by him contained several obvious alterations to the Resolution which were substantially inconsistent with the terms of the Resolution.

107. I will now address the learned trial judge's treatment of the letter of October 29. He found it to be a counter offer to Mr. Armstrong's letter of October 22, 2008. He said:

> "Robert Armstrong's e-mail dated 25th October, 2008 from Robert Armstrong to Myrna Brown stated "the basic terms of our submission to Arbitration are not agreed". He made it clear there had been no agreement.
>
> The Claimant's Attorney in his letter to the Defendant's Attorney, among other things stated "with respect to the offer to refer the matter to arbitration, the acceptance of which we now confirm, we enclose a draft agreement which we are instructed conforms with the decision of the Board."
>
> This, coming as it does after Robert Armstrong's letter of October 22, 2008 can only be a counter offer. The Defendant's position was clearly stated in that letter of the 22nd. There is nothing to suggest that this counter offer of the 29th was ever accepted."

108. The foregoing is a serious error on the part of the learned trial judge. A valid offer from the bank was in existence. The learned judge failed to appreciate that the letter of October 29 was a firm acceptance of that offer. Importantly, so far as the letter of October 22 is concerned, there is no evidence that Mr. Armstrong's deviation from the terms of the Resolution had been sanctioned by means of a vote by the directors. Substantial amendments to a resolution must be voted upon by the Board. See **Henderson v. Bank of Australia** (1890) 45 Ch.D. 330. It is not without significance that Mr. Armstrong, in writing that letter, had exceeded his authority as an agent for the Board. What he endeavoured to do was to amend or modify the Board's offer. This he had no power to

do. The purported amended proposals would ordinarily be treated as positive indisputable amendments to the Resolution and would have required the Board's assent. It follows that Mr. Armstrong's letter is without force, and undoubtedly ineffective.

109. It is common ground that a dispute exists between the parties as to a compensation package for the appellant. I will now turn my attention to the terms of reference of the Resolution in order to determine whether the terms contain a dispute, which is capable of being placed before arbitrators. The terms of reference of the dispute is "What is a fair and equitable retirement plan for Mr. Clarke having regard to all the circumstances.''

110. It was Dr. Barnett's contention that the learned trial judge erred in finding that the Board decided to include all matters leading up to the appellant's separation including his conduct because the word "separation" had been rejected by the Board and 'conduct' had been excluded from the Resolution. The words of the Resolution are clear, they met the objective, and the use of the words "having regard to all circumstances" does not mean that the conduct of the appellant should be taken into account in assessing a reasonable compensatory award for him, he argued. He further argued that the position adopted by the Board was that his retirement was not treated as a dismissal and it would

therefore be left to the arbitrators to determine such matters as are relevant and admissible.

111. Mr. Vassell, Q.C., contended that the minutes reveal that the appellant's departure had been treated as a separation from the bank and it was the opinion of the Board that the conduct of the appellant should form an integral part of the matters to be taken into consideration by the arbitrators. The inescapable conclusion, he argued, is that the appellant's conduct is included in the phrase "in all the circumstances" as agreed by the Board.

112. In discovering the true meaning of a clause in a document, the canons of construction must be invoked. In so doing, a document must be read as a whole. Lord Watson in **Chamber Colliery Co. Ltd. v. Twyerould** [1915] 1Ch. 268 said:

> "I find nothing in this case to oust the application of the well known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible."

In dealing with the question of the rule of construction, in **Barton v. Fitzgerald** (1812) 15 East. 530, Lord Ellenborough had this to say:

> " It is a true rule of construction that the sense and meaning of the parties in any particular part

> of an instrument may be collected ex antecedentibus et consequentibus, every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done."

113. In its application of the rule, the court is not obliged to restrict itself to the constraint of a particular expression but may glean the requisite intention from the document or documents, taken as a whole. In **Hume v. Rundell** [1824] 2 S. & St. 174, Leach VC said:

> "In the construction of all instruments it is the duty of the court not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument taken together. But a court is not authorized to deviate from the force of a particular expression, unless it finds, in other parts of the instrument, expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly expressed, every court is bound by it, unless it be plainly controlled by other parts of the instrument."

114. The question which arises is what was the true intention of the Board with regard to its use of the words "having regard to all the circumstances". It cannot be denied that the minutes disclosed that prior to the passing of the Resolution, the scope of the arbitration was comprehensively reviewed by the Board which "felt it is appropriate to include all matters leading to Mr. Clarke's separation from the bank

including his conduct". But it went on to say, "it is felt that the words having regard to all the circumstances met the objective".

115. During the negotiations, the words 'separation' and 'retirement' had been used interchangeably by the Board in respect of the appellant's departure from the bank. Although the bank had invited the appellant to retire, and he demitted office, this does not show that the retirement was intended to be treated as dismissal. Notwithstanding that, Mr. Pitfield, the Chairman of the Board alluded to reports of misconduct by the appellant, these were denied by him. It is not insignificant that in the Press Release and letters to the relevant bodies he was commended and extolled as an outstanding employee of the bank.

116. The terms of reference to arbitration are clear and unambiguous. In my view Mr. Vassell has placed too wide a construction on words used by the Board. The Resolution as framed shows that the word 'conduct' was excluded from the terms of reference. This is so as the words "having regard to all the circumstances", met the objective. It seems to me that the exclusion of the word 'conduct' indicates that the Board, having felt the phrase met the objective, intended that the matter ought to be left to the arbitrator's discretion to decide whether the question of the appellant's conduct should be taken into account as part of the conditions which led up to the appellant's retirement. It would be open

to the bank to bring to the attention of the arbitrators the opinion of the Board as regards conduct, and if taken into account, it would be for them to decide what weight should be attached to it.

117. The essential elements of an agreement had been formulated for the parties to proceed to arbitration to settle the dispute as to a reasonable compensatory award for the appellant. This is recorded in a written contract, in conformity with section 2 of the Arbitration Act. The formation of the contract is grounded in the Board's Resolution of October 21 and the letter of October 29, 2008 from the appellant's attorney- at-law. This clearly signifies that a consensus had been reached by the parties to proceed to arbitration.

118. Several other grounds of appeal were also filed with regard to certain benefits which the appellant enjoys. It is unnecessary to give consideration to them, as they relate to the house of which the appellant is in possession and the motors cars which are in his custody. It was agreed between the parties that if the dispute is referred to arbitration the status quo touching the property and the motor cars would remain.

119. I would allow the appeal with costs of the appeal and costs of the court below, to the appellant.

ORDER

SMITH, J.A.

Appeal allowed.

Judgment entered on 19th March 2009 set aside. Declaration granted that appellant and respondent are bound by agreement to submit to Arbitration the existing dispute between them as to what is a fair and equitable retirement plan for the appellant, having regard to all the circumstances.

Costs to the appellant in this court and in the court below, to be taxed, if not agreed.