

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

*In the matter of an Application under
and in terms of Article 126 read with
Article 17 of the Constitution.*

SC FR Application No. 388/2016

K.H. Lasantha Goonewardena
No. 330/08, Saman Mawatha,
Lake Road,
Boralasgamuwa.

Petitioner

Vs.

1. Monetary Board of Sri Lanka
Central Bank Building,
P.O. Box 590,
No. 30,
Janadhipathi Mawatha,
Colombo 1.

2. Ajith Nivard Cabraal
Chairman of the Monetary
Board and Governor of the
Central Bank of Sri Lanka.

2A.Dr. P. Nandalal Weerasinghe
Governor,
Central Bank of Sri Lanka.

3. S.R. Attygalle
Member of the Monetary
Board of Sri Lanka and
Secretary to the Ministry of
Finance.

3A.K.M. Mahinda Siriwardana
Member of the Monetary
Board of Sri Lanka and
Secretary to the Ministry of
Finance.

4. Sanjeewa Jayawardena, PC
Member of the Monetary
Board of Sri Lanka.

5. Dr. Raneer Jayamaha
Member of the Monetary
Board of Sri Lanka.

6. Samantha Kumarasinghe
Member of the Monetary
Board of Sri Lanka.

6A. Anthony Nihal Fonseka
Member of the Monetary
Board of Sri Lanka.

All at the Office of the
Monetary Board of Sri Lanka,
Central Bank Building,
P.O. Box 590,
No. 30,
Janadhipathi Mawatha,
Colombo 1.

7. Director
Banking Supervision
Department,
Central Bank of Sri Lanka,
P.O. Box 590,
No. 30,

Janadhipathi Mawatha,
Colombo 1.

8. Lankaputhra Development
Bank Limited
No. 80, Nawala Road,
Nugegoda.

8A. Pradeshiya Sanwardhana
Bank
No. 933, Kandy Road,
Wedamulla,
Kelaniya.

9. Secretary,
Monetary Board of Sri Lanka
Central Bank Building,
P.O. Box 590,
No. 30, Janadhipathi
Mawatha,
Colombo 1.

10. Hon. Attorney General
Attorney General's
Department,
Colombo 12.

Respondents

Before :

**Murdu Fernando, PC, J.
[As Her Ladyship was then, and the present
Honourable Chief Justice.]
Yasantha Kodagoda, PC, J.
Shiran Gooneratne, J.**

Appearance: Harsha Fernando, PC with Chamith Senanayake, Yohan Cooray and Ruwan Weerasinghe instructed by J. Talgaswattage for the Petitioner.
Rajiv Goonetilleke, DSG for the 1st to 7th, 9th, & 10th Respondents.

Argued on: 26th & 27th January 2022, 9th November 2022 and 25th January 2023.

Written Submissions tendered on: 3rd May 2021 and 21st March 2023 for the Petitioners.
26th January 2023 for the Respondents.

Judgment delivered on: 17th July, 2025

Judgment

Yasantha Kodagoda, PC, J.

Introduction and background

1. **Jurisdiction** – By filing this Application, the Petitioner has invoked the jurisdiction conferred on the Supreme Court by Article 126 read with Article 17 of the Constitution.
2. **Principal parties to the Application** – During the period immediately preceding the event that led to the filing of this Application, the Petitioner Lasantha Goonewardena had functioned as the Chairman and as a member of the Board of Directors of the 8th Respondent - Lankaputhra Development Bank Limited. In this Application, the Petitioner has impugned a decision taken in respect of him by the 7th Respondent – Director of the Bank Supervision Department of the Central Bank of Sri Lanka, which resulted in his having to cease to be the Chairman and a Director of the 8th Respondent. Subsequently, the impugned decision had been endorsed by the 1st Respondent – Monetary Board of Sri Lanka. The 2nd

Respondent is the Chairman of the 1st Respondent and the Governor of the Central Bank of Sri Lanka.

3. **Procedural formalities** - Following this Application being supported on 16th January 2017, a differently constituted Division of this Court had by a majority decision granted *leave to proceed* against the Respondents on the premise that *prima facie*, it appeared to Court that the fundamental rights of the Petitioner guaranteed by Articles 12(1) and 14(1)(g) of the Constitution had been infringed. On three separate occasions, an application made on behalf of the Petitioner for the grant of *interim relief* had been refused by this Court.
4. **Lankaputhra Development Bank Limited** - The 8th Respondent - Lankaputhra Development Bank Limited (hereinafter sometimes referred to as “the LDBL”) is a licensed specialised bank which comes under the regulatory supervision of the 7th Respondent - Director of the Bank Supervision Department of the Central Bank of Sri Lanka (hereinafter referred to as the ‘Director Bank Supervision’) and the 2nd Respondent - Monetary Board of Sri Lanka (hereinafter sometimes referred to as “the MBSL”). One hundred percent (100%) of the shares of the LDBL are owned by the Secretary to the Treasury, who does so on behalf of the Government of Sri Lanka. The Secretary to the Treasury also serves as the Secretary to the Ministry of Finance. LDBL’s primary activity is to provide financing facilities (loans) to small and medium-scale entrepreneurs. In an unrelated move, after the filing of this Application, on 1st April 2019, the 8th Respondent - Lankaputhra Development Bank was acquired by the Pradeshiya Sanwardhana Bank (8A Respondent).
5. **The case in a nutshell** - On 9th February 2015, the Petitioner was notified of his appointment by the 3rd Respondent - Secretary, Ministry of Finance as the Chairman and as a Director of the Board of Directors of the LDBL (“P2”). On 30th April 2015, an application was made on behalf of the Petitioner and other newly appointed Directors of the LDBL, ostensibly seeking clearance from the 7th Respondent - Director Bank Supervision that they be declared ‘fit and proper’ persons to hold office in the positions they had been purportedly appointed. By letter dated 24th March 2016, the 7th Respondent informed the Petitioner that it had been decided to refuse to declare the Petitioner as a ‘fit and proper’ person to function as the Chairman of the LDBL (“P13”). The Petitioner presented two Appeals (“P18” and “P19”) against that decision, to the 2nd Respondent – Governor of the Central Bank and to the 1st Respondent – Monetary Board of Sri Lanka. By letter dated 18th October 2016 the Petitioner was informed by the 9th Respondent -

Secretary to the Monetary Board of Sri Lanka that both Appeals had been considered and rejected (“P20”). This resulted in the Petitioner ceasing to function as the Chairman and as a Director of the LDBL. Aggrieved by the afore-stated decisions of the 7th and the 1st Respondents contained in letters dated 24th March and 18th October 2016 (marked respectively as “P13” and “P20”), the Petitioner filed this Application.

6. **Positions of the parties** - The position of the Petitioner is that the decision of the 7th Respondent to declare him not to be a ‘fit and proper’ person to function as the Chairman of the 8th Respondent – LDBL is unlawful. He has given reasons for that assertion. The 7th Respondent has accepted that he decided to declare the Petitioner to be unfit to function as the Chairman of the LDBL, that he conveyed such decision and that the two Appeals presented by the Petitioner were rejected. The 7th Respondent has sought to justify the decision he had taken. The 7th Respondent has presented to this Court, reasons for his decision and purported grounds on which he claims that such decision impugned by the Petitioner is lawful and therefore should stand.
7. **The Judgment** - This judgment initially sets out in detail the positions taken up by the Petitioner and the 7th Respondent and submissions made on their behalf by their respective counsel. Thereafter, the Judgment contains an analysis of the facts and certain conclusions reached regarding the sequence of events. The Judgment contains references to the applicable law and describes the manner in which such law should be interpreted and applied to the facts of the case. The Judgment also contains the findings of the Court relating to the impugned decision of the 7th Respondent and the rejection of the Appeals of the Petitioner by the 7th and the 1st Respondents. Finally, the Judgment contains the outcome of the case.

Case for the Petitioner

8. On 9th February 2015, by evenly dated letter (“P2”) addressed to the Petitioner, he was notified by the 3rd Respondent - Secretary to the Ministry of Finance (also the Secretary to the Treasury) of his appointment as the Chairman and as a Director of the 8th Respondent – LDBL, in terms of Article 73 of its Memorandum of Association. As depicted in “P3” (Minutes of a meeting of the Board of Directors of the LDBL), at its meeting held on 6th March 2015, the Board of Directors of the LDBL had ‘approved and ratified’ this appointment. By letter dated 30th April 2015 (“P4A”), the General Manager cum Chief Executive Officer of the LDBL had

submitted to the 7th Respondent - Director Bank Supervision an Affidavit of the Petitioner ("P4") placing on record his qualifications, experience and his unblemished character. Similar documents relating to the other Directors of the LDBL were also forwarded. This had been in purported compliance with section 42 of the Banking Act, No. 30 of 1988 (as amended).

9. The 7th Respondent did not respond to "P4A" up until the communication of the decision contained in letter dated 24th March 2016 ("P13"), which decision has been impugned in these proceedings.
10. From 9th February 2015 to 24th March 2016, the Petitioner functioned as the Chairman and as a Director of the Board of Directors of the 8th Respondent - LDBL. He has asserted that he did so in the best interest of the LDBL.
11. Providing some insight to this Court into the past financial activities of the LDBL, the Petitioner has explained that there were many allegations relating to the (mis)management of the LDBL during the era prior to February 2015. The Petitioner has cited a newspaper report (being "P6", which is a news item that appeared in the *Daily FT* newspaper on 5th May 2010) as an instance where such allegations of malpractices associated with the grant of major loans by the LDBL to certain individuals and companies were publicly revealed. In the circumstances, the Board of Directors of LDBL had contracted the services of an independent audit firm - Price Waterhouse Coopers (PWC) Sri Lanka, to carry out a 'credit audit review'. The audit conducted by this firm had revealed that certain loans had been granted without following proper procedure and in violation of applicable banking rules and procedures. The findings of the said audit firm had been communicated to the 3rd Respondent - Secretary to the Treasury since he was the sole shareholder of the LDBL. In response, the Department of Public Enterprises of the Ministry of Finance had by its letter dated 25th September 2015 ("P5") advised the Board of Directors of the LDBL to take necessary action.
12. According to the Petitioner, following a 'special examination' conducted by the Department of Bank Supervision of the CBSL in 2014, by letter dated 3rd June 2014 ("P9"), the previous Director of Bank Supervision had also noted certain concerns he had regarding the operations and management of the LDBL and directed that necessary remedial action be taken.

13. Based on the audit findings, the Board of Directors of the LDBL had entertained suspicion of fraud and corruption with regard to 14 loans granted by the previous management of LDBL, and had accordingly reported the matter to the Financial Crimes Investigation Division (FCID) of the Sri Lanka Police. The Petitioner claims that these non-performing loans (loans not being settled by the debtors) had during that era been granted by the LDBL on the directions issued by persons in authority from outside the bank such as politicians, which included the then personnel of the Presidential Secretariat. The total amount lost to the LDBL by the non-settlement of these loans had been Rs. 1.7 billion. The Petitioner claims that on a consideration of this matter, having obtained the views of a three-member independent committee of bank officials, the Board of Directors commenced taking certain remedial action including re-structuring of the Legal and Recoveries Departments of the LDBL. Meanwhile, the Petitioner received formal information ("P7") from the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) of investigations underway against the General Manager cum Chief Executive Officer and the Senior Manager (Legal) regarding several matters. The Petitioner claims that the two individuals concerned were 'political appointees' under the previous government. In these circumstances, the services of the Chief Executive Officer had been terminated and the Senior Manager (Legal) had been transferred out of the headquarters of the LDBL.
14. On 28th May 2015, the 7th Respondent had sent a letter ("P16") to the Petitioner titled "*Lankaputhra Development Bank Ltd., Alleged violation of section 77 of the Banking Act*". It claimed that the CBSL had evidence from three sources, namely, *Lankadeepa* newspaper of 12th May 2015 ("P16B"), *Sunday Times* newspaper of 17th May 2015 ("P16C") and *Sirasa* TV news telecast of 11th May 2015, that the Petitioner had disclosed certain information to the public which was in violation of the Banking Act. The Petitioner has been reminded that on 12th May 2015, he had been informed of the concern of the CBSL relating to the failure on his part to maintain confidentiality of information as required by the Banking Act. Accordingly, the Petitioner had been required to submit his explanation within 14 days of the receipt of the letter.
15. In response to "P16", the Petitioner by his letter dated 29th May 2015 ("P16A") sought to explain to the Director, Bank Supervision of the CBSL, that former President Mahinda Rajapaksa had made certain baseless allegations which tarnished the image of the LDBL. Also, the image of the Minister of Finance Ravi

Karunanayake, MP had been tarnished. Therefore, the Minister of Finance had organised a press conference to respond to these allegations. At that press conference held on 11th May 2015, the Petitioner had denied the allegations made by the former President and had explained how under the previous administration the non-performing loans profile remained very high. He had also explained what remedial action was being taken to recover the loaned moneys. According to the Petitioner, the information he had disclosed during the press conference had already been in the public domain.

16. On 31st August 2015, the Department of Bank Supervision of the CBSL had conducted another special investigation of the LDBL. By its letter dated 1st February 2016 ("P12"), the Report of that investigation ("PX2") had been made available to the management of the LDBL.
17. On a couple of occasions, the Board of Directors headed by the Petitioner had in writing (such as by "P11A") sought appointments to meet with the 7th Respondent - Director of Bank Supervision. However, initially they were not successful in securing an appointment to meet him. By letter dated 21st March 2016 ("P11B") addressed to the Petitioner, the 7th Respondent had undertaken to grant an appointment, and had advised that necessary measures be taken to address 'supervisory concerns' previously expressed by the CBSL following the special examination conducted during the previous year. By letter dated 31st May 2016 ("P11C"), the Board of Directors of the LDBL had sought an appointment to meet with the Governor of the CBSL due to the reason that the 7th Respondent had not granted them an appointment to meet him.
18. In late March 2016, the 7th Respondent - Director Bank Supervision addressed a letter dated 24th March 2016 ("P13") to the General Manager / CEO of the LDBL - Lasantha Amarasekara. It drew reference to "P4A" (letter dated 30th April 2015) and another letter dated 17th July 2015 (which was not pleaded in these proceedings). "P13" states the following:

"Dear Sir,

Affidavits and Declarations of Directors

Reference to your letters dated 30.04.2015 and 17.07.2015 on the above subject.

I write to inform you of the refusal of appointment of Mr. Lasantha Goonewardena as the Chairman under the provisions of section 42(2) read with section 76(H) of the Banking Act No. 30 of 1988 as amended, due to following reasons.

- i. According to findings of the Special Examination of Lankaputhra Development Bank Limited (LDBL) conducted by this department, Mr. Goonewardena has failed to comply with section 3(5)(ix) of the Banking Act Direction No. 12 of 2007 on Corporate Governance for Licensed Specialised Banks.*
- ii. Despite supervisory concerns raised at the meeting held on 12.05.2015 with Mr. Goonewardena and you on maintaining confidentiality of information, Mr. Goonewardena has failed and / or been negligent to maintain the duty of confidentiality in his capacity as the Chairman of LDBL in violation of section 77 of the Banking Act.*

Yours faithfully,

Director of Bank Supervision"

19. The Petitioner's position is that, due to the following reasons, the allegations contained in "P13" against him are baseless and unjustified:

- i. From a time prior to the Petitioner assuming duties of LDBL (pre-2015 era), the LDBL had been mismanaged and the stability and credibility of the bank had been under stress.
- ii. During the period of the previous management, the Department of Bank Supervision had carried out examinations of the LDBL, and the 7th Respondent should have taken action against the previous management.
- iii. As at the time the Petitioner assumed duties, no meaningful steps had been taken to arrest the mismanagement of the bank.
- iv. All recruitments to the bank during the Petitioner's tenure had been done following proper procedure and based on merit.
- v. What the Petitioner revealed during the press conference held on 11th May 2015 was in fact not 'confidential information', as the relevant information was already in the public domain.
- vi. The Petitioner had directly approved only the grant of 8 loans and none of them had been above Rs. 300,000/=.
- vii. It is the General Manager cum Chief Executive Officer Lasantha Amarasekara who had failed to take necessary action based on the findings

of the Director Bank Supervision and the audit reports referred to in this Petition. As he failed to take necessary action, on 29th June 2016, Lasantha Amarasekara was removed from his post.

viii. The Director of Bank Supervision not taking necessary action against Lasantha Amarasekara amounts to regulatory failure.

20. The Petitioner brought to the attention of the then Minister of Finance Hon. Ravi Karunanayake, MP, his having received “P13”. Sequel thereto, a meeting had been convened by the Minister to discuss the matter. It was held on 28th March 2016. While the Minister of Finance chaired the meeting, the then Governor of the CBSL, the Petitioner and other members of the Board of Directors of the LDBL had participated. At that meeting, the Petitioner claims that the Governor of the CBSL Arjuna Mahendran having considered the representations made, had undertaken to withdraw “P13”. The Petitioner has presented to this Court a copy of the Minutes of that meeting marked “P14”. According to “P14”, the Governor of the CBSL had addressed the gathering regarding the supervisory concerns raised by the CBSL. The Minutes reveal that towards the end of the meeting, the following had taken place:

“The Governor informed the GM/CEO to return the original of the fax sent by the Director, Bank Supervision of CBSL with regard to the Declaration and Affidavit of Chairman once he received the original.”

The Petitioner claims that the reference to *“the fax sent by the Director, Bank Supervision of CBSL”* is a reference to “P13”.

21. By letter dated 5th June 2016 (“P18”), the Petitioner Appealed to the 2nd Respondent – Governor of the Central Bank against the decision contained in “P13”.

22. By letter dated 2nd September 2016 (“P17”), the Petitioner was informed by the 9th Respondent - Secretary to the Monetary Board of the CBSL that the Attorney-General had expressed an opinion that in terms of section 42(7) of the Banking Act, from the date of the receipt of letter dated 24th March 2016 (“P13”), he (the Petitioner) cannot any longer hold the office of Chairman of the LDBL. The Petitioner was also informed that his Appeal against the decision of the 7th Respondent – DBS was under consideration by the Monetary Board and that the decision will be conveyed to him once a decision is arrived at.

23. Further to the receipt of “P17”, in view of the fact that the 7th Respondent had therein provided for a further opportunity to present another Appeal to the 1st Respondent – Monetary Board of Sri Lanka against the decision contained in “P13”, the Petitioner dispatched a letter dated 12th September 2016 (“P19”). In response to the Appeals contained in “P19” and the previous Appeal contained in “P18”, by letter dated 18th October 2016, the 9th Respondent – Secretary, MBSL, CBSL informed the Petitioner that the MBSL had considered both Appeals, had found that the allegations against the Petitioner were substantiated and therefore had decided to ‘confirm the refusal made by the DBS contained in the notification dated 24.03.2016’ (“P20”). This amounted to a dismissal of both Appeals.
24. Accordingly, the Petitioner ceased to function as the Chairman and as a Director of the LDBL. [The Petitioner has not revealed the exact date on which he ceased to function as the Chairman cum Director of the LDBL.]

Case for the Respondents

25. The position advanced on behalf of the 1st to 7th, 9th and 10th Respondents is contained in an Affidavit tendered to this Court by the 7th Respondent – Director Bank Supervision of the CBSL dated 10th March 2017. (He had previously tendered a limited Affidavit dated 23rd December 2016 for the purpose of resisting the grant of interim relief.)
26. Drawing the attention of this Court to the ‘letter of appointment’ of the Petitioner (“P2”), the 7th Respondent has asserted that, though in terms of Article 82(2) of the Memorandum of Association of the LDBL (“P1”) the power to nominate Directors of the company has been vested with the Secretary to the Treasury, the Petitioner had not been nominated or appointed by the Secretary to the Treasury. It is the Minister of Finance who had purportedly appointed the Petitioner as the Chairman and as a Director of the LDBL. As contained in “P2”, it is that decision which had been communicated to the Petitioner by the Secretary to the Ministry of Finance.
27. The 7th Respondent has explained that, though he received “P4A”, what he received as an attachment to “P4A” was “7R1”, and not “P4”. As that Affidavit (“7R1”) of the Petitioner tendered together with “P4A” was not in order, he had returned the documents on 9th June 2015, requesting the Petitioner to re-submit the documents having prepared them afresh. The purported fresh Affidavit

(attachment to “7R2”) re-submitted together with letter dated 17th July 2015 (“7R2”) was in order. The fresh Affidavit (attachment to “7R2”) tendered by the Petitioner to the 7th Respondent indicated that it had been signed and attested on 11th February 2015.

28. According to the 7th Respondent, after assuming office, the Petitioner had, contrary to directions issued by the Monetary Board, participated in day-to-day executive functions of the LDBL such as being directly involved in the recruitment of 64 persons and promotion of 34 staff members of the LDBL. They were persons without the requisite qualifications. These recruitments and promotions had taken place in 2015, within 7 months of the Petitioner’s own appointment. The 7th Respondent has explained that these recruitments and promotions were contrary to recruitment and promotion procedures of the LDBL. Furthermore, the Petitioner had been involved in altering Minutes of Board Meetings of the Board of Directors and in functioning as Chairman of management level committees of the LDBL. The 7th Respondent has asserted that thereby, the Petitioner had acted in contravention of clause (3)(5)(ix) of the Corporate Governance Direction No. 12 of 2007.
29. On 11th May 2015, the Petitioner had participated in a press conference at which the Petitioner had revealed to the media, certain confidential information regarding the LDBL and details of certain accounts maintained by the customers of the bank. This amounted to the Petitioner conducting himself in violation of the secrecy provision contained in section 77 of the Banking Act. Therefore, by letter dated 28th May 2015 (“7R3”, the original of which was produced by the Petitioner marked “P16”), the 7th Respondent issued a ‘warning’ to the Petitioner.
30. Furthermore, without obtaining the prior approval of the Monetary Board of Sri Lanka (as required by Directions issued to licensed specialised banks) the Petitioner had caused the opening of two branches / service centres of the LDBL in Tambuttegama and Akuressa. Due to supervisory concerns the MBSL had in that regard, by letter dated 19th January 2016 (“7R4”) informed the General Manager / Chief Executive Officer of the LDBL of its decision not to grant approval for the opening of the said two branches, and accordingly notified the LDBL to close down the said branches.

31. The Petitioner had also taken certain decisions relating to the grant of credit (loans) bypassing the established Credit Committee of the LDBL.
32. Due to these 'serious supervisory and prudential concerns over the operations of LDBL', based on a decision made by the MBSL ("7R6"), on 31st August 2015, a 'special examination' of the LDBL was conducted by officials of the DBS. This special examination focused *inter alia* on non-performing loans granted by the bank and the quality of the management of the bank.
33. The 'special examination' conducted by officials of the Bank Supervision Department revealed several instances of non-compliance with Direction No. 12 of 2007, which included a finding that the Petitioner had engaged in activities involving direct supervision of key management personnel and the performance of other day-to-day executive functions. The 7th Respondent has produced marked "7R7", a copy of the Report which related to the special examination that was conducted from 14th September 2015 to 18th September 2015, reflecting the position of the LDBL as at 31st August 2015.
34. In this backdrop, the 7th Respondent deferred taking a decision on whether the Petitioner and the other five (5) Directors of the LDBL were 'fit and proper' persons to hold the positions to which they had been purportedly appointed.
35. Furthermore, by letter dated 18th January 2016 ("7R5"), the Governor of the CBSL had addressed a letter to the Minister of Finance drawing his attention to the regulatory concerns the CBSL had regarding the conduct of the Petitioner and requested the Minister to 'warn' the Petitioner to conduct his functions in accordance with the 'established procedures'. The Governor has also stated in the letter, the possibility of the Petitioner being declared not to be a 'fit and proper' person, should he continue to conduct himself in a manner 'not abiding by established banking norms of good governance'.
36. At its meeting held on 18th December 2015, the Monetary Board decided to instruct the LDBL to suspend all recruitment of personnel to the bank. (Document marked "7R8" contains the Minutes of the said meeting.) This Direction was communicated by the 7th Respondent - DBS to the LDBL by its letter dated 1st February 2016 ("7R9"). However, in contravention of that directive, the Petitioner had continued to recruit personnel to the bank.

37. Due to the foregoing reasons, and in particular, (i) the Petitioner having been responsible for non-compliance with clause 3(5)(ix) of Direction No. 12 of 2007 issued under the provisions of the Banking Act, and (ii) the Petitioner having failed to maintain confidentiality and thereby having acted in violation of section 77 of the Banking Act, the 7th Respondent decided not to approve the appointment of the Petitioner as the Chairman and as a Director of the LDBL. It is this decision that was conveyed to the Petitioner by letter dated 24th March 2016 ("P13").
38. The first Appeal of the Petitioner ("P18") was considered by the 7th Respondent and refused, since it did not contain valid reasons for reversal of the decision taken by the 7th Respondent. The second Appeal of the Petitioner ("P19") was considered by the 1st Respondent - Monetary Board and was rejected since it too did not contain valid reasons to vary the decision contained in "P13".

Submissions of Counsel

39. **Submissions made on behalf of the Petitioner** - Supporting the position contained in the Petition, learned President's Counsel for the Petitioner submitted the following:
- i. As per the criteria contained in section 42(2) of the Banking Act, the Petitioner was a person eligible to be appointed as a Director and as the Chairman of the LDBL. The appointment of the Petitioner by the Secretary to the Treasury with effect from 9th February 2015 as a Director and as the Chairman of the LDBL was in terms of clause 73 of the Articles of Association of the LDBL, and thus was lawful. This appointment was approved by the Board of Directors of LDBL on 6th March 2015.
 - ii. On behalf of the Petitioner, in terms of section 42 of the Banking Act, the LDBL sought clearance from the 7th Respondent by submitting to the 7th Respondent "P4" and "P4A" ("P4" being the Affidavit of the Petitioner and "P4A" being the covering letter).
 - iii. Since the 7th Respondent failed to respond to "P4" and "P4A" within one (1) month of the notification to the CBSL, it must be deemed that the Petitioner was a 'fit and proper' person to function as a Director of the LDBL. "P4" is the correct Affidavit submitted on behalf of the Petitioner in compliance with section 42 of the Banking Act. Any irregularity or delay in the submission of "P4" and "P4A" should not be attributed to the Petitioner.
 - iv. The Petitioner has duly placed his signature to the Affidavit ("7R1") that was submitted to the DBS. Though there is a difference in dates of the

Petitioner (affirmant) having placed his signature and the Justice of Peace having attested the signature, that is not a defect that may be attributed to the Petitioner. If at all, the defect arises from the conduct of the Justice of Peace R.S. Pandithasekera by not having certified the Petitioner's Affidavit correctly.

- v. The Petitioner satisfies the requisite criteria to be declared a 'fit and proper' person, as contained in sections 42(2)(a) to (i) of the Banking Act. The DBS has never considered and decided that the Petitioner was not a 'fit and proper' person to function as a Director of the LDBL.
- vi. In view of the foregoing, it must be deemed that the Petitioner had been duly appointed as a Director of the LDBL and had thereby been properly appointed as the Chairman of the bank.
- vii. The Petitioner is challenging the decisions contained in (i) "P13" (sent by the 7th Respondent - Director, Bank Supervision, CBSL) stating that he was refusing to 'appoint' the Petitioner as the Chairman of the LDBL, and (ii) "P20" (sent by the 9th Respondent - Secretary to the MBSL, CBSL) stating that the MBSL had decided to refuse both Appeals of the Petitioner contained in "P18" and "P19". However, what is in effect being challenged in these proceedings is the 'removal' of the Petitioner from functioning as the Chairman / Director of LDBL. There is no provision in the Banking Act which authorises the 7th Respondent to refuse to 'appoint' and/or 'remove' a person as the Chairman of a bank. The position of 'Chairman' is distinct from the position of 'Director'. The methods for the appointment and removal of a Director are different to those of a Chairman.
- viii. The request of the LDBL to grant approval for the appointment of the Petitioner as a Director of the said bank, comes within section 42(4)(b) and section 42(8) of the Banking Act, since approval of the 7th Respondent - DBS was sought after the appointment of the Petitioner as a Director and as the Chairman of the LDBL. In the circumstances, prior to the issue of "P13", the 7th Respondent should have followed the procedure prescribed therein, which he has not done in the instant occasion. If at all, the removal should have been in terms of section 42(8)(a) by the 1st Respondent - Monetary Board of Sri Lanka. On that ground too, "P13" is *ultra vires* the powers of the 7th Respondent. Therefore, the 7th Respondent has acted in contravention of sections 42(4)(b), 42(6) and 42(8) of the Banking Act.
- ix. The 7th Respondent has wrongfully acted in terms of sections 42(4)(a) and 42(5) of the Banking Act.

- x. Furthermore, under the provisions of the Banking Act, the jurisdiction of the DBS is limited to Directors and not to the Chairman of a bank. The DBS does not have legal authority to either approve the appointment of or remove the Chairman of a bank. Therefore, the purported 'removal' of the Petitioner is *ultra vires* the powers vested in the 7th Respondent.
- xi. What the 7th Respondent has done amounts to 'removal' of the Petitioner as the Chairman of the LDBL. He was not removed as a Director of the LDBL. It is section 42(8) of the Banking Act that provides for the 'removal' of a Director of a bank. However, the 7th Respondent has not acted in terms of section 42(8) (which provides for 'removal' of a Director of a bank after the initial appointment), and has purportedly acted under 42(2) read with section 76H of the Banking Act.
- xii. The purported reasons given by the 7th Respondent for the decision contained in "P13" relates to the Petitioner having functioned as the Chairman of the LDBL and not as a Director of that bank.
- xiii. The officials of the CBSL have acted in *bad faith* by imposing retaliatory measures against the Petitioner in view of the regulatory failures highlighted by the Petitioner contained in "P16B" and "P16C".
- xiv. The impugned conduct of the 7th Respondent - DBS is unreasonable, arbitrary and illegal.
- xv. The 1st Respondent - MBSL which rejected the Appeal ("P19") presented to it by the Petitioner, has not properly considered the grounds of Appeal contained in "P19". Further, prior to rejecting the Appeal, the 1st Respondent did not afford the Petitioner a fair hearing. Therefore, the 1st Respondent has acted in violation of the rules of natural justice.
- xvi. The impugned decisions infringe the Petitioner's fundamental rights guaranteed under Articles 12(1) and 14(1)(g) of the Constitution.

40. In view of the foregoing, learned counsel for the Petitioner moved this Court to grant relief to the Petitioner, by making a declaration of the infringement of his fundamental rights and quashing the impugned decisions made by the 1st and 7th Respondents.

41. **Submissions made on behalf of the Respondents** - Learned Deputy Solicitor General (DSG) made the following principal submissions:

- i. Since the LDBL is a licensed specialised bank, in terms of the Banking Act, it is subject to regulation by both the Monetary Board and the Director of Banking Supervision of the Central Bank of Sri Lanka.
- ii. The authority given to the Secretary to the Treasury (in his capacity as the sole shareholder) to appoint Directors to the LDBL, is subject to the provisions of the Banking Act. Though the Memorandum of Association (MoA) of the LDBL empowers the Secretary to the Treasury to appoint and remove Directors of the LDBL, by virtue of the provisions of the Banking Act, that power of appointment is subject to the provisions of the Banking Act. Article 73 of the MoA empowers the Secretary to the Treasury to also nominate the Chairman of the bank.
- iii. In this instance, the Petitioner had been purportedly ‘appointed’ by the Minister of Finance, which is in contravention of the provisions of the MoA. Therefore, the purported appointment of the Petitioner as the Chairman and as a Director of the LDBL was flawed.
- iv. In terms of the Regulations issued under the Banking Act, the Petitioner was required to submit a Declaration by way of an Affidavit to the 7th Respondent for him to be considered under section 42 of the Banking Act to be a ‘fit and proper’ person to hold office as a Director of the LDBL.
- v. In the Petition to the Supreme Court, the Petitioner has taken up the position that this requirement was fulfilled by the submission of “P4” and “P4A”. Such Affidavit and the Declaration submitted were contrary to the provisions of section 42(4)(b) of the Banking Act, in that, they had not been submitted within 15 days of the Petitioner’s appointment. Furthermore, drawing the attention of this Court to “7R1”, the learned DSG submitted that the said Affidavit was contrary to law due to the fact that, while the Petitioner claims to have signed it on 6th March 2015, the Justice of Peace R.S. Pandithasekera who has purportedly attested the signature of the Petitioner as having been signed in his presence, has certified the Affidavit on 22nd April 2015. Therefore, that Affidavit was not valid as it contravened sections 12(2) and 12(3) of the Oaths and Affirmations Ordinance, No. 09 of 1895 (as amended).
- vi. Following the request made in June 2015 by the DBS to re-submit the said Affidavit and the declaration, on 17th July 2015, the Petitioner submitted another Affidavit which indicated that it had been signed and attested on 11th February 2015. That is the Affidavit (P4) which the Petitioner has presented to this Court along with “P4A”.

- vii. In these circumstances, the contents of the Petition lacks *uberima fides*.
- viii. By participating at a 'press conference' held on 11th May 2015 and revealing confidential information, the Petitioner had grossly violated the secrecy provision contained in section 77 of the Banking Act. Therefore, the 7th Respondent dispatched "7R3" requiring the Petitioner to explain his conduct. Learned DSG drew the attention of this Court to portions of "P16-B" and "P16-C" (which are newspaper articles relating to the press conference held), which reveal that at the press conference the Petitioner had disclosed details of certain transactions of the LDBL. This was confidential information, which the Petitioner was prohibited from disclosing to the public.
- ix. By opening branches of the LDBL without the prior approval of the Monetary Board of Sri Lanka, Direction dated 21st November 1997, issued in terms of section 76(J)(1) of the Banking Act had been violated. The Petitioner was responsible for this violation.
- x. The Affidavit and supporting documents submitted by the 7th Respondent reveals that contrary to clause 3(5)(ix) of the Direction issued by the 7th Respondent under the Banking Act, the Petitioner had got involved in the day-to-day functions of the bank. [The report of the special examination dated 31st August 2015 ("7R7") reveals details of instances where the Petitioner had acted in contravention of Clause 3(5)(ix).]
- xi. "7R8" reveals that at its meeting held on 18th December 2015, the 1st Respondent – MBSL had considered the conduct of the Petitioner and had decided to bring such conduct to the attention of the Minister of Finance and inform him that the Petitioner cannot be considered to be a 'fit and proper' person. Accordingly, a letter to such effect ("7R5") had been sent.
- xii. In this backdrop, learned DSG submitted that the 7th Respondent acted in terms of the law and for valid reasons when it refused to grant 'fit and proper' status to the Petitioner by issuing "P13".
- xiii. Learned DSG pointed out that by his Appeal dated 5th June 2016 ("P18") against "P13", the Petitioner had admitted the allegations against him. In his second Appeal ("P19") presented to the 1st Respondent, the Petitioner has elaborated his position contained in "P18" and has taken up a new position that he had been removed as the 'Chairman' of the LDBL and not as a 'Director'. These Appeals had been considered by the 1st Respondent at its meeting held on 3rd October 2016, and by his letter dated 18th October 2016 ("P20"), the 9th Respondent – Secretary to the MBSL conveyed the

decision of the 1st Respondent to reject the Appeals made in respect of “P13” for the reasons contained therein.

42. In view of the foregoing, learned Deputy Solicitor General moved this Court to dismiss the Application presented by the Petitioner on the ground that none of the Respondents had infringed the Petitioner’s fundamental rights.

Analysis and conclusions

43. **Appointment of the Petitioner as a Director and as the Chairman of the Lankaputhra Development Bank** – Consideration of this matter is necessary, since the 7th Respondent has claimed that the Petitioner’s appointment as a Director and as the Chairman of the LDBL was ‘flawed’. I shall first examine the applicable provisions of the law and thereafter consider whether the purported appointment of the Petitioner as a Director and as the Chairman of the LDBL was lawful.
44. Section 204(2) read with section 205(1) of the Companies Act, No. 7 of 2007 empowers **shareholders** of a company to **appoint all Directors** of such company other than the first set of Directors following incorporation. (A different provision of the Companies Act regulates the appointment of the first set of Directors following the incorporation of a company.) Following the appointment of the initial set of Directors, **the appointment of subsequent Directors** shall be by ordinary resolution adopted by the shareholders. However, in terms of section 204(2), this empowerment conferred on the shareholders of a company to **appoint Directors** shall be subject to the Articles of the company. Other than providing for the first set of Directors of the LDBL, the Articles of Association (Articles – 2nd document of “P1”) of the LDBL does not directly provide for the **appointment of Directors** of the company. However, it provides that the Government shall be represented on the Board at all times by at least a minimum of two (2) **Directors nominated** by the Secretary to the Treasury in his official capacity. Furthermore, Clause 74 of the Articles provides for any shareholder who holds not less than 20% of the issued capital to be entitled to **nominate** one (1) Director to the Board.
45. Clause 73 of the Articles of the LDBL also provides that the **Chairman** of the Board shall always be **nominated** by the Secretary to the Treasury.

46. It is common ground that the entirety (100%) of the shares of the LDBL are owned by the Secretary to the Treasury in his official capacity. Therefore, it is evident that the **appointment of the Directors** and the **nomination of the Chairman** of the LDBL shall be by the **Secretary to the Treasury**.
47. Section 42(1) of the Banking Act, No. 30 of 1988 (as amended) (contained in Part VI of the Act, which *ex-facie* relates to licensed commercial banks) read with section 76H (which causes the provisions of *inter alia* Part VI of the Act to apply to licensed specialised banks as well) provides as follows:

*"No person shall be
appointed,
elected, or
nominated*

*as a **Director** of a licensed commercial bank (in this instance to be read as a reference to a 'licensed specialised bank') or*

continue

*as a **Director** of such bank*

*unless that person is a **fit and proper person** to hold office
as a **Director** of such bank and
if he is not prevented from doing so by any provision of this
Act or any other written law."*

[The section has been dissected into its constituted ingredients and emphasis has been added by me to ensure clarity.]

48. "P2" printed on a letterhead of the 'Ministry of Finance' and dated 9th February 2015, addressed to the Petitioner and signed by 'R.H.S. Samaratunga, Secretary' provides as follows:

"Appointment as the Chairman and a Board Member of the Lankaputhra Development Bank

In terms of section 73 of the Articles of Association of the Lankaputhra Development Bank, Hon. Minister of Finance has been pleased to appoint you as the Chairman and a Member of the Board of Directors of the Lankaputhra Development Bank with immediate effect.

I shall be grateful if you could please inform me of the acceptance of this appointment."

49. It is thus seen that, by “P2” the Secretary to the Ministry of Finance had notified the Petitioner that he has been purportedly **appointed** as the **Chairman** and as a **Board member** (a Director) of the LDBL **by the Minister of Finance**. Though “P2” indicates that such appointment has been made in terms of section 73 of the Articles of Association of the LDBL, it must be noted that section 73 of the Articles of the LDBL provides that *‘the Chairman of the Board shall always be **nominated** by the Secretary to the Treasury’*. Thus, the entitlement to nominate the Chairman of the LDBL has also been conferred on the Secretary to the Treasury. Furthermore, it provides that *‘the Government shall be represented on the Board at all times with at least a minimum of two **directors nominated by the Secretary to the Treasury’***. Section 74 provides that *‘any shareholder who holds not less than twenty percent (20%) of the issued capital shall be **entitled to nominate one (01) Director to the Board’***. Section 73 of the Articles must be read in conjunction with sections 204(2) and 205(1) of the Companies Act. Then, it becomes clear that the power of appointment of Directors is vested with the shareholders of the company. Since the Secretary to the Treasury holds 100% of the issued capital of the LDBL (the entirety of the shares of the company) he receives the entitlement to appoint all the Directors of LDBL. Similarly, it is the Secretary to the Treasury who may nominate the Chairman of the company. In terms of clauses 2(5)(iii) and 3(1)(iii) of Direction No. 12 of 2007 on ‘Corporate Governance for Licensed Specialised Banks in Sri Lanka’ (“P21”) [issued by the 1st Respondent - MBSL], it is the Board (Board of Directors) of a licensed specialised bank that should appoint the Chairman of such bank. Therefore, the nomination of the Secretary to the Treasury should reach the Board of Directors appointed by the Secretary to the Treasury. The Board on a consideration of such nomination, should appoint the Chairman of the LDBL.

50. **In view of the foregoing, it is seen that the applicable law (the Companies Act and the Banking Act), the Articles of LDBL and the Direction (No. 12 of 2007) issued by the 1st Respondent do not confer any power on the Minister of Finance to appoint either the Chairman or a Director of the LDBL. Therefore, as pointed out by the learned DSG, the purported ‘appointment’ of the Petitioner as a Director of the Board of Directors of the LDBL and as its Chairman is seriously flawed.** In the circumstances, I hold that the Petitioner was neither appointed in terms of the law as a Director of the LDBL nor as the Chairman of such bank.

51. The purported appointment of the Petitioner as a Director of the LDBL must be considered from another perspective as well. As stated above, section 42 of the

Banking Act provides *inter alia* that no person shall be **appointed, elected or nominated as a Director** of a licensed specialised bank, unless that person is a **fit and proper person** to hold office as a Director of such bank.

52. In terms of section 42(5) of the Banking Act, the power to declare a person to be or not to be a 'fit and proper person' has been vested with the Director Bank Supervision.

53. Section 42(4) of the Banking Act provides as follows:

Every licensed commercial bank shall notify the Director of Bank Supervision in such form as may be determined by the Director, the name, address and occupation of –

(a) each person proposed to be appointed, elected or nominated as a director of the bank, before such appointment, election or nomination as the case may be;

(b) each person appointed, elected or nominated as a director of the bank, within fifteen days after such appointment, election or nomination as the case may be;

(c) any director of the bank, if the bank is aware that such person is not a fit and proper person, or where such Director becomes otherwise ineligible to hold office as such Director, within fifteen days of its becoming aware of such facts.

[The dissection of the section and the addition of emphasis are by me.]

(Due to section 76H of the Banking Act, this provision should be read as a reference to a licensed specialised bank such as the LDBL, as well.)

Thus, for the purposes of the LDBL, the scheme to be followed for the appointment of a Director provided for by law is as follows:

- i. Following the identification of a suitable person to be appointed as a Director of the bank, the Secretary to the Treasury should convey such intention to the LDBL. In identifying such person, the Secretary to the Treasury shall pay due regard to the guidelines contained in clause 2(2) of Direction No. 12 of 2007 ("7R7") as regards the desirable composition of the Board of Directors of a licensed specialised bank, and the qualifications and disqualifications contained in section 42(2) of the Banking Act. Ideally, the

Secretary to the Treasury should first form his own opinion that the identified person is a 'fit and proper person' to be appointed as a Director of the LDBL. Doing so is important as, in terms of section 42(4) of the Banking Act, prior clearance that a person to be appointed as a Director is a 'fit and proper person' by the Director Bank Supervision, though desirable, is not essential. Thus, the identification of a suitable person to be nominated / appointed as a Director should certainly not be founded upon the pleasure or the whims and fancies of the Minister of Finance or any such other person in authority.

- ii. Upon receipt of the intention of the Secretary to the Treasury, the LDBL should, acting in terms of section 42(4)(a) of the Banking Act seek the clearance of the Director Bank Supervision that the nominated person is a 'fit and proper person'.
- iii. Should the Director Bank Supervision declare that the nominee is a 'fit and proper person', such person shall be appointed by the Secretary to the Treasury as a Director of the LDBL.
- iv. In the alternative to 'i', 'ii' and 'iii' above, should the Secretary to the Treasury deem it appropriate and necessary to directly appoint a person as a Director of the LDBL, he shall communicate such appointment to the LDBL. Following the receipt of the appointment, the LDBL shall acting in terms of section 42(4)(b) of the Banking Act, within 15 days of such appointment, notify the Director Bank Supervision of such appointment, and seek clearance that such appointee is a 'fit and proper person'. However, in terms of clause 2(3)(i) of Direction No. 12 of 2007 (issued by the 1st Respondent - MBSL) "*directors should be fit and proper persons in order to be eligible to hold office as directors of a bank and no person should serve as a director unless such person is a fit and proper person*". It must also be noted that, if recourse is to be had by the Secretary to the Treasury to directly make an appointment (without seeking the prior clearance of the Director Bank Supervision), he runs a serious risk, as the appointed person commences to function as a Director of the bank without any prior vetting by an independent authority (such as the Director Bank Supervision) as to his suitability to function as a Director of the bank. Thus, the Secretary to the Treasury should have recourse to this course of action, only if there is an urgency or other good reason for doing so.

[It would be noted that the provision contained in section 42(4)(c) of the Banking Act would apply to situations where a person previously duly appointed as a Director of a licensed specialised bank, suffers from a disqualification to function as a Director of such bank.]

In this instance, it is evident that the aforesaid procedure provided by law has not been followed prior to the purported appointment of the Petitioner as a Director of the LDBL. Reliance on section 42(4)(b) would not be possible, since as at the time the Chief Executive Officer of the LDBL sought clearance from the 7th Respondent – Director Bank Supervision by forwarding letter dated 30th April 2015 (“P4A”), the Petitioner had not been ‘appointed’ in terms of the law as a Director of the LDBL. Therefore, in that regard too, the purported appointment of the Petitioner as a Director of the LDBL is seriously flawed in the eyes of the law and is therefore unlawful.

54. The appointment of a Chairman to a company (in this instance to the LDBL) is founded upon the prerequisite that such appointee is a Director of such company. Therefore, in as much as the Minister of Finance did not have the legal authority to appoint the Petitioner as a Director of the LDBL, he also could not have appointed the Petitioner as the Chairman of the LDBL. Therefore, the purported appointment of the Petitioner as the Chairman of the LDBL is equally bad in law.
55. **In view of the foregoing, I hold that the Petitioner had not been appointed in terms of the applicable law, either as a Director or as the Chairman of the Lankaputhra Development Bank Limited. In the circumstances, I also hold that the Petitioner is deemed not to have ever lawfully held office as a Director or as the Chairman of the Lankaputhra Development Bank.**
56. **Fit and proper persons** - During the hearing, both the learned President’s Counsel for the Petitioner and the learned Deputy Solicitor General highlighted the importance of a Director of a bank (may it be a licensed commercial bank or a licensed specialised bank) to be a ‘fit and a proper person’. They also agreed with each other that, for a person already functioning as a Director of a bank to retain his entitlement to continue to function, he must remain as a ‘fit and proper person’. It was common ground that while reaching the status of a ‘fit and proper person’ was necessary to be a Director of a bank, if a person who functions as a Director of a bank loses that ‘fit and proper status’, he thereby loses his entitlement to remain as a Director. Learned President’s Counsel for the Petitioner submitted

quite rightly that the 'fit and proper test' is a requirement that ensures that Directors of banks and Senior Executive officers are suitable persons to carry-out their duties. It is the view of this Court that 'suitability' arises out of two aspects: the persons being 'competent' and them being persons with 'integrity'. Given the complexity of banking operations and their impact on the financial markets, the overall financial sector, economy of the country and the interests of the customers and other transacting parties of banks, those at the level of the Board of Directors and key management personnel must be persons with (i) a high degree of competence, as reflected by their qualifications, (ii) previous work exposure and (iii) experience. Furthermore, they must be persons of high integrity, moral standing and unblemished reputation. It is for this purpose that section 42(2) contains certain criteria based upon which the Director of Bank Supervision may determine whether a particular individual is a 'fit and proper person' to be appointed or function as a Director of a bank. Permitting a person who has lost his 'fit and proper' status to remain to function as a Director of a bank would be most undesirable and contrary to the interest of all stakeholders of banks and the Sri Lanka's public interest.

57. **Seeking clearance from the Director Bank Supervision on behalf of the Petitioner that he is a 'fit and proper person' to function as a Director** – It was by letter dated 30th April 2015 ("P4A") that the General Manager / Chief Executive Officer of the LDBL Lasantha Amarasekara, sought the clearance of the 7th Respondent – DBS for *inter alia* the Petitioner, to be declared a 'fit and proper person' to hold office as a Director of the LDBL. [I have previously dealt with the necessity of such clearance to be obtained for the purpose of a person to be appointed, elected, or nominated as a Director, or to continue to hold office as a Director of a licensed specialised bank.] Though "P4A" does not make a specific reference to that effect, as stated in the Petitioner's Affidavit, it was agreed during the hearing that, it was for that purpose that "P4A" had been dispatched. Furthermore, the 7th Respondent has also viewed "P4A" as having been submitted for that purpose. Thus, the purpose for which "P4A" was submitted is clear.

58. The Petitioner's position is that, "P4" was the Affidavit submitted by the Petitioner to be forwarded to the 7th Respondent as an attachment to "P4A". *Ex-facie* "P4" has been signed by the Petitioner on 11th February 2015 and his signature has been attested by Justice of Peace R.S. Pandithasekera on the same day. That it was "P4" that was submitted to him along with "P4A" is contested by the 7th Respondent.

According to the 7th Respondent, what was received by him along with “P4A” was “7R1” and not “P4”. “7R1” is another Affidavit of the Petitioner. *Ex-facie*, in “7R1”, while the contents appear to be identical with those of “P4”, it has been signed by the Petitioner on 6th March 2015. However, the attestation by the Justice of Peace R.S. Pandithasekera had been on 22nd April 2015. The 7th Respondent has claimed that, since the Affidavit he received was faulty (as the Petitioner had not signed the Affidavit in the presence of the Justice of Peace as evident from the two dates of the signatures of the Petitioner and R.S. Pandithasekera), these documents had been returned by him to the LDBL on 9th June 2015, requesting that the Petitioner re-submits the completed documents for consideration of granting approval under section 42(2) of the Banking Act. According to the 7th Respondent, the amended Affidavit was received on 17th July 2015 along with a covering letter. That covering letter (“7R2”) and the Petitioner’s Affidavit and declaration have been produced to this Court as attachments to “7R2”. That Affidavit reveals *ex-facie* that it was signed by the Petitioner on 11th February 2015 and attested also by R.S. Pandithasekera on the same day.

59. This Court notes that the revenue stamp appearing on “7R1” is different to what appears on “P4”. The revenue stamp appearing on “P4” is the same as which appears on the attachment to “7R2”. Furthermore, this Court also notes that the R.S. Pandithasekera has signed on “P4” and on the attachment to “7R2” on more or less the same occasion, and in “7R1” his signature appears on a different location altogether.
60. The Petitioner in his Petition and Affidavit filed in this Court, makes no reference to the first Affidavit (“7R1”) he submitted being returned by the 7th Respondent, and he being required to re-submit a fresh Affidavit. If the Affidavit which is the attachment to “7R2” was signed by him and attested by R.S. Pandithasekera on 11th February 2015, it is doubtful as to why that Affidavit was not submitted to the 7th Respondent along with “P4A”.
61. Furthermore, the Petitioner does not explain how he had with him the original (together with his signature appearing on top of a revenue stamp) of the Affidavit he submitted to the 7th Respondent to be certified by his Registered Attorney as a ‘true copy’ to be filed together with the Application filed in this Court. That can be explained only if the original of “P4” was never submitted to the 7th Respondent and remained with the Petitioner. At the time of dispatching “P4” to the 7th

Respondent, if the Petitioner wished to retain a copy, he would have either obtained a photo-copy of the original "P4" or kept a copy of the original Affidavit prior to applying the revenue stamp and signing it. As stated above, "P4" contains an image of a revenue stamp on which the Petitioner had signed. If so, it must have been a photo-copy of the original "P4", and then the Registered Attorney could not have certified it as a 'true copy', as it if at all is a 'true copy' of an uncertified copy of "P4".

62. In any event, the narrative contained in the Petitioner's Affidavit is incomplete, as it does not contain any reference as to how "7R1" and "7R2" came to be dispatched to the 7th Respondent and are found filed in the official file maintained by the 7th Respondent.
63. Therefore, a serious doubt arises regarding the genuineness of "P4" and the validity of "7R1". Furthermore, as stated in the preceding paragraph, it is also evident that the Petitioner has not revealed to this Court the totality of the circumstances relating to the preparation and the submission of the Affidavit relating to seeking clearance from the 7th Respondent that he is a 'fit and proper person' to be appointed, or continue to hold office as a Director of the LDBL. Thus, I am compelled to conclude that **the Petitioner has not shown *uberrima fides* towards this Court when he presented this Application seeking relief and therefore, he is guilty of material suppression of a relevant fact.** As has been pointed out on numerous occasions by the Court, a party seeking relief from this Court must come to Court with clean hands and must show *uberrima fides* towards this Court. A party seeking relief must reveal to Court the totality of the relevant circumstances without picking and choosing from events and thereby presenting a narrative that is favourable to such party. The expectation of this Court is that, a party seeking relief from any court should reveal the truth and the whole truth, and should not cunningly suppress or distort relevant facts. Not complying with that standard of openness and thereby displaying the lack of candor and integrity, can be a ground in itself for the dismissal of an Application.
64. Furthermore, in terms of section 42(4)(b) of the Banking Act, the obligation cast on the LDBL to notify the DBS of the appointment of the Petitioner as a Director of the LDBL, was to be fulfilled within 15 days of the purported appointment. Admittedly, the communication by the LDBL to the 7th Respondent had not been dispatched within that stipulated time period.

65. Be that as it may, it is now necessary to see how the 7th Respondent – Director Bank Supervision processed the Application he originally received (“P4A”) in April 2015 and subsequently received (“7R2” and its attachments) on 20th July 2015. According to the 7th Respondent, the valid Application seeking clearance as a ‘fit and proper person’ was received by him on 20th July 2015 (“7R2” and its attachment). This Court is ready to accept that position. According to section 42(5) of the Banking Act, upon the receipt of the communication seeking clearance for an appointment submitted in terms of section 42(4), it is the statutory duty of the Director Bank Supervision to process the Application, and within 30 days, decide on whether or not the relevant Director is a ‘fit and proper person’. In this instance, the 7th Respondent has failed to comply with that requirement. Even the Affidavit of the 7th Respondent does not indicate the decision he took in terms of section 42(5) of the Banking Act upon receipt of “7R2”. Thus, I must conclude that in that regard, the 7th Respondent has not acted in terms of the law.

66. **Sequence of events which culminated in the issuance of “P13”** - From the time the Petitioner commenced functioning as a Director and as the Chairman of the LDBL, *inter alia* the following came to the attention of the 7th Respondent:

- i. Contrary to clause 3(5)(ix) of Direction No. 12 of 2007, the Petitioner had been getting directly involved in the day-to-day executive functions of the LDBL. Examples of such instances were, (a) recruitment of personnel to the LDBL, (b) granting promotions to employees of LDBL, and (c) directing the grant of loans to certain persons. On a consideration of the totality of the available material, it is apparent that there is cogent evidence in respect of such wrongful conduct on the part of the Petitioner.
- ii. The Petitioner had been involved in altering Minutes of Board Meetings of the Board of Directors of LDBL. Though the 7th Respondent makes such allegation, there is no proof in support of that allegation.
- iii. In violation of Direction No. 12 of 2007, the Petitioner had directly and personally been supervising the work of key management personnel and other executive level personnel of the bank. There is cogent evidence in support of this allegation emanating from the findings of the special examination conducted by the officers of the Department of Bank Supervision (“7R7”).
- iv. On 11th May 2015, the Petitioner amongst others participated at a Press Conference relating to the LDBL, and at that conference, acting in contravention of section 77 of the Banking Act, he amongst others revealed to the media certain confidential information relating to the bank. The

Petitioner's explanation supports this allegation. There is no proof that some of the revelations made by the Petitioner at the Press Conference were already in the public domain. Even if that be the case, that is not a justification for acting in contravention of section 77 of the Banking Act. In any event, the statements made by the Petitioner at the Press Conference amounts to a violation of the prohibition contained in section 77 of the Banking Act.

- v. Two branches of the LDBL had been opened in Tambuttegama and Akuressa, without obtaining the prior permission of the Monetary Board, as required by law. There is strict proof in support of this allegation.
- vi. Bypassing the Credit Committee of the LDBL, the Petitioner had personally directed that certain loans be granted to some individuals. However small may be the loaned amounts, it remains a fact that it had been at the instance of the Petitioner that the relevant loans had been granted, bypassing the internal procedures of the LDBL.

67. In view of the afore-stated developments coming to the attention of the 7th Respondent, he claims to have deferred the decision to grant clearance to the Petitioner and to the other Directors of the LDBL as 'fit and proper' persons. I am unable to accept that position due to the following reasons, notwithstanding the fact that other than in respect of (ii) above, there is adequate evidence in support of the allegations contained in the preceding paragraph. However, it is necessary to note that, there are two phases relating to the declaration of a person as a 'fit and proper person'. They are –

- i. Declaration of whether (a) a person to be appointed, elected or nominated as a Director of a bank (before such appointment, election or nomination) or (b) a person appointed, elected or nominated as a Director (within 15 days of such appointment, election or nomination), is a 'fit and proper person' [Sec. 42(4)(a) & (b)].
- ii. Declaration of whether a person functioning as a Director of a bank has ceased to be a 'fit and proper person' [Section 42(4)(c) and 42(8)].

Therefore, upon receipt of the Application either in April or July of 2015, it was incumbent on the 7th Respondent to have taken a decision on whether or not the Petitioner was a 'fit and proper person' to be a Director of the LDBL. That decision (which falls within phase 'i (b)' above) should have been taken based on credible information relating to the background and credentials of the Petitioner as at the time he was purportedly appointed as a Director of the bank, and not based on the

conduct of the Petitioner while functioning as a Director of the LDBL. If the Petitioner while functioning as a Director of the LDBL ceased to be a 'fit and proper person' to function as a Director of the bank, the procedure to be followed with regard to declaring him 'unfit' is contained in section 42(4)(c) read with section 42(8), and thus is different to the procedure followed by the 7th Respondent.

68. The Affidavit of the 7th Respondent is conspicuous in the absence of a reference to his finding on whether or not as at the time of the purported appointment of the Petitioner, he was a 'fit and proper person' to be appointed as a Director of the LDBL. That absence of forthrightness in the 7th Respondent's Affidavit (particularly regarding a matter of importance and relevance) is a matter for considerable regret, particularly given the responsible position he holds. If in fact after processing "7R1" and "7R2", the 7th Respondent formed the view that the Petitioner is a 'fit and proper person' to be appointed as a Director of the LDBL, it was his duty to act in terms of section 42(5) of the Banking Act and forthwith inform the LDBL of that finding. If it was his view that the Petitioner was not a 'fit and proper person', it was even more important for him to have taken steps to notify the LDBL of his view, so that the Petitioner could have, acting in terms of section 42(6) appealed against such decision, and also for the bank to have taken steps under section 42(7) to ensure that the Petitioner ceases to be a Director of the LDBL. Particularly since the Director Bank Supervision is the 'gatekeeper' and policeman of those who function as Directors of banks, he should have acted promptly and taken a decision on the matter. In this regard, I find that the 7th Respondent has been derelict in the performance of his duties.
69. Be that as it may, let us for the purpose of argument, accept the position of the 7th Respondent that the decision contained "P13" was founded upon the unacceptable conduct of the Petitioner, following his assumption of office. This appears to have been highly likely.
70. According to the 7th Respondent, the following took place:
- i. Based on a decision taken by the Monetary Board on 17th August 2015 ("7R6"), an on-sight special investigation was conducted on the LDBL by officials of the Department of Bank Supervision during the period commencing from 14th September to 18th September 2015 regarding the affairs of the LDBL as at 31st August 2017.

- ii. The Report of the special investigation ("7R7") was considered by the 7th Respondent. The Report revealed the following (among several other findings) regarding the Petitioner:
- a. That he had engaged in direct supervision of key management personnel.
 - b. That he had got involved in other executive duties such as approving credit facilities (despite the absence of a delegated authority) to borrowers depicting adverse status, authorising imprudent changes to interest rates and conditions proposed by the management and approving recruitments deviating from internal procedures.
 - c. That he had recommended the grant of facilities to ineligible persons, contrary to the approved Credit Policy and Manual.
 - d. That he had instructed the management to recruit staff deviating from the internal recruitment and promotion procedure.
 - e. That he had made amendments to the Minutes of a Staff Committee meeting, even though he was not a member of that Committee.
 - f. That he along with the Working Director had taken part in deliberations on additional facilities to be provided and revisions of payments to themselves.

An examination of "7R7" reveals that these allegations of misconduct on the part of the Petitioner are well-founded.

- iii. At its meeting held on 18th December 2015, the 1st Respondent – Monetary Board of Sri Lanka had considered the Report relating to the special investigation of the LDBL carried out by the DBS, and had *inter alia* decided to inform the Minister of Finance of the serious supervisory concerns the DBS had with regard to the Petitioner (who had been purportedly appointed by the Minister of Finance) and inform the Minister that due to the Petitioner's conduct, he would have to be declared as unfit (not a 'fit and proper person') to hold a position in the LDBL's Board. It is the view of this Court that, the procedure adopted by the 1st Respondent - Monetary Board of Sri Lanka is not provided for in the Banking Act or the Regulations made thereunder. There was no basis for the 1st Respondent to have sought the intervention of the Minister of Finance in this matter. If the 1st Respondent was of the view that the Petitioner had engaged in misconduct, the 1st Respondent should have acted in terms of the provisions of the Banking Act and arrived at a determination on whether the Petitioner had ceased to be a 'fit and proper person'.
- iv. By letter dated 18th January 2016 ("7R5"), the then Governor of the Central Bank of Sri Lanka Arjuna Mahendran wrote to the Minister of Finance

appraising him of the conduct of the Petitioner, i.e., recruitment of staff to the Bank bypassing the recruitment procedure, and taking credit related decisions on his own bypassing the Credit Committee. The Governor had indicated to the Minister that by such conduct, the Petitioner was running *“the risk of being deemed not to be fit and proper to hold the position of bank director”*. Therefore, the Governor had requested the Minister to warn the Petitioner to conduct himself in terms of established procedures and to abide by banking norms of good governance.

71. It is in this backdrop that the 7th Respondent wrote to the General Manager / CEO of the LDBL on 24th March 2016 (“P13”) informing him that it had been decided *‘to refuse the appointment of the Petitioner as the Chairman of the LDBL’*. He has cited two reasons for his decision. They being, (i) failure of the Petitioner to comply with clause 3(5)(ix) of Direction No. 12 of 2007 and (ii) breaching confidentiality and thereby acting in contravention of section 77 of the Banking Act. The evidence placed before this Court amply supports both those findings. Furthermore, the 7th Respondent has presented to this Court adequate evidence in support of his contention that by his own conduct the Petitioner had established a sufficient evidential basis to conclude that he was an ‘unfit and improper’ person to be permitted to continue to function as the Chairman / a Director of the LDBL. However, what is it that the Director Bank Supervision is empowered to do under such circumstances? According to section 42(8) of the Banking Act, the Director of Bank Supervision is required to submit a Report regarding the matter to the Monetary Board. The position of the 7th Respondent is that “7R7” was tantamount to the Report contemplated in section 42(8). Even if “7R7” is recognised by this Court to be the ‘Report’ provided for by section 42(8), on a consideration of such Report, it is the Monetary Board that is empowered to declare that a Director of a bank is not a ‘fit and proper person’, and direct the bank in writing to remove such person from the office of Director within such period as may be specified in such direction, giving reasons for such direction, and notify in writing such person whose removal is required under such direction, of such direction, a copy of which shall be annexed to such notification. It would thus be seen that the terminology contained in “P13” to the effect that *“I write to inform you of the refusal of appointment of Mr. Lasantha Goonewardena as the Chairman under the provisions of section 42(2) read with section 76(H) of the Banking Act No. 30 of 1988 as amended, due to the following reasons”* is flagrantly *ultra vires* the powers conferred on the 7th Respondent by the Banking Act. In fact, the evidence does not disclose the 1st Respondent – Monetary Board having dispatched its determination under section 42(8) of the Banking Act.

Conclusions

72. As pointed out above, the following factors cannot be overlooked by this Court:

- i. That the purported appointment of the Petitioner as a Director of the LDBL was flawed and hence it is not possible to recognise that the Petitioner had ever been lawfully appointed as the Chairman or as a Director of the LDBL.
- ii. A serious doubt arises regarding the integrity of the documentation submitted to the 7th Respondent on behalf of the Petitioner pertaining to the LDBL seeking the clearance under section 42(4) of the Banking Act that the Petitioner is a 'fit and proper person'. Thus, the Petitioner has not shown *uberrima fides* towards this Court.
- iii. The Petitioner's conduct during the period he purportedly conducted himself as the Chairman and a Director of the LDBL had been irresponsible, dangerous and is in flagrant violation of the provisions of the Banking Act and Direction No. 12 of 2007.

73. In view of the foregoing, even though the decision contained in "P13" is *ultra vires* the power conferred on the 7th Respondent by the Banking Act and therefore carries no force in the eyes of the law, it is not possible to issue a declaration in favour of the Petitioner that the Respondents have infringed his fundamental right guaranteed by Article 12(1) of the Constitution.

74. In view of the decision arrived at by this Court regarding "P13", it would not be necessary to conclude on the two Appeals presented by the Petitioner produced marked "P18" and "P19".

75. The material placed before this Court by the Petitioner does not enable this Court to arrive at a finding that the 7th Respondent and his officers had acted *mala fide* towards the Petitioner.

Certain observations

76. The Secretary to the Treasury being the custodian of the Treasury, in such official capacity owns either the entirety or almost all of the shares of approximately all of the State-owned enterprises (SOEs), including State-owned banks. In this instance, he is the sole shareholder of the LDBL. Thus, he has the entitlement to nominate persons to be appointed as (or in accordance with the applicable law including the Articles of the relevant companies appoint), Directors and the Chairmen of such

companies. This is a function he must exercise independently, and with considerable caution and responsibility. He is called upon to exercise such function as a trustee of the People's trust conferred on him.

77. In performing such function, the Secretary to the Treasury should identify and nominate persons who are most suitable for the relevant functions. Particularly when nominating / appointing persons to function as Directors of a financial institution such as a bank, he must exercise considerable caution, particularly due to the far reaching and disastrous consequences to the Nation, in the event his nominees / appointees become unsuitable, incapable, or incompetent to perform the relevant functions. Furthermore, when nominating / appointing an individual to function as a Director of a licensed specialised bank, he must pay due regard to clause 2(1) of Direction No. 12 of 2007, which provides for the responsibilities of the Board of Directors, and clause 2(2) which describes the composition of the Board. According to section 42(2)(a) of the Banking Act, the person to be appointed as a Director of a bank should possess academic or professional qualifications or effective experience in banking, finance, business or administration or in any other discipline such as law.
78. According to clause 2(1)(i) of Direction No. 12 of 2007, Directors should assume overall responsibility and accountability in respect of the management of the affairs of the bank, and the safety and soundness of the bank. According to clause 2(1)(iv), Directors should understand the business and risk management mechanism of the bank and be capable of taking objective decisions in the interests of the bank's depositors, creditors, shareholders and other stakeholders. Furthermore, as per clause 2(1)(v), members of the Board should be capable of taking responsibility for compliance with accepted Rules of corporate governance. Thus, it would be seen that the law requires a high degree of competence and specialisation from persons who are called upon to function as Directors of banks. According to the Petitioner, he has merely completed a Diploma programme in Computer Engineering and Network Administration. From 1986 to 1992, he has served as a Media Officer of the Ministry of Housing and Construction. From 1993 to 2015, he claims to have served as a Director of certain companies. No proof has been submitted in that regard. He has also been the Managing Director of a company called Raytronics Computer Systems (Pvt) Ltd. He has lectured students in computer hardware and networking. Additionally, from 2006 to 2011, he has been the District Governor of Lions Club International District 30662. Given the

competence and the expertise referred to above, would this profile be sufficient to be nominated / appointed as a Director and as the Chairman of a licensed specialised bank? In my view, it is highly doubtful.

79. In this regard, it is to be noted that normal shareholder autonomy to appoint Directors of their choice and confidence as Directors of companies would be restricted, due to the application of other principles recognised by law, which regulate the types of persons to be nominated / appointed as Directors of banks. The required threshold of competence and integrity is very high. Furthermore, the Public Trust doctrine which would be applicable to the decision-making process of the Secretary to the Treasury would also necessitate him **to act not according to his or the Minister's personal choice, but to make nominations / appointments in the best interests of the Nation and the Public at large.**
80. Regrettably though in this instance, it does not appear that the Secretary to the Treasury has paid due regard to any of these relevant factors. Rather, he in his capacity as the Secretary to the Ministry of Finance has permitted the Minister of Finance to exercise a function in respect of which the latter does not possess any legal authority, and has permitted the Minister to make the appointment. Thereby, the Secretary to the Treasury has abdicated his authority to the Minister. This I note as a serious dereliction of duty by the Secretary to the Treasury.
81. As I have noted in this Judgment, the 7th Respondent – Director Bank Supervision has been derelict in not having promptly taken action with regard to the misbehaviour of and mismanagement by the Petitioner, no sooner such conduct came to the attention of the 7th Respondent. In fact, as it has transpired, even during the pre-2015 era, there has been many such instances by the previous management of the LDBL. Such laid-back approach displayed by the 7th Respondent could have resulted in far-reaching and catastrophic consequences. Sri Lanka has witnessed the crash of a certain bank. As empowered adequately by the provisions of the Banking Act and Directions issued thereunder, the 7th Respondent ought to have been vigilant and acted promptly and proactively, while disregarding possible political patronage persons under scrutiny may be seen to be enjoying.

Outcome

82. The Attorney-General is directed to issue a legal advisory to the Secretary to the Treasury and to the Director Bank Supervision of the Central Bank of Sri Lanka explaining to them the findings of this Court, legal principles described, and guidance and observations contained in this Judgment.

83. This Application is dismissed.

84. Parties shall bear their own costs.

Judge of the Supreme Court

Murdu Fernando, PC, CJ.

I agree.

Chief Justice

Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court