

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. B-032 OF 1999

**IN THE MATTER of BUCK SECURITIES
MERCHANT BANKERS LIMITED (In Voluntary
Liquidation)**

A N D

**IN THE MATTER of SECTION 284 of the Companies
Act.**

**BETWEEN BUCK SECURITIES MERCHANT APPLICANT
BANKERS LIMITED**

**A N D ENVIRONMENTAL FOUNDATION 1ST RESPONDENT
OF JAMAICA**

A N D MAYBERRY INVESTMENT LIMITED 2ND RESPONDENT

**Mr. John Vassell, Q.C. and Mrs. Y. Whitely instructed by Messrs Dunn, Cox,
Orrett & Ashenheim for Applicant.**

**Mr. Michael Hylton, Q. C., and D. Noel instructed by Myers, Fletcher & Gordon for
1st Respondent**

Mr. A. Williams and Mr. Palomino for 2nd Respondent.

Mr. Charles Piper of Piper & Samuda for Interested Parties.

**HEARD: November 1, 3, 10 and 30, 2000
December 15, 2000 and January 17, 2002**

IN CHAMBERS

ELLIS, J

The Applicant by an Originating Summons of 29th March, 2000 issued by it's
Liquidator seeks the determination of the following, and for directions thereon:-

1. What was the nature of the interest, if any, of the First

Respondent in the LRS 2003E security in the sum of \$15,819,000.00 when it was forwarded by the Applicant to the Second Respondent on or about the 21st October, 1998.

2. What is the nature of the interest now, of the Applicant and/or the First Respondent and/or the Second Respondent, in the said security or any securities into which splintered by the Second Respondent or, if disposed of, in proceeds of such disposal?
3. What, in the events that have occurred, is the nature and rights and liabilities of the Applicant, the First Respondent and the Second Respondent as between each other?
4. How shall the sum of \$13,000,000.00, currently held in a Bank Account by the Applicant be applied as between those entitled thereto?
5. What steps, if any, should the Applicant take in relation to Suit No. C. L. 037 of 1999, and should the said action be stayed?
6. General liberty to apply.
7. That the costs of this application be provided for.

At the outset of these proceedings Mr. Hylton Q.C. submitted that the funds held by Applicant are Trust Funds and should be paid to 1st Respondent.

Mr. Williams informed the court that the 2nd Respondent had no claim on the funds held by the Applicant.

The Applicant hereafter called "the Company" for many years until 1998 managed by way of an unexecuted Agreement, funds for the 1st Respondent. In September 1998 the Company informed the 1st Respondent of it's intention to cease managing its funds vide the Agreement.

It is to be noted that in July 1998 the company did invest \$15,427,916.68 in Government Securities for the First Respondent. This investment attracted interest at 26% with a maturity date of 22nd May, 1999.

On 28th August, 1998 the company sold to the Second Respondent security in the form of Government of Jamaica Treasury Bill in an amount of \$3,235,646.58. This transaction had a maturity date of 27th September, 1998 with interest at 25% per annum.

On the 21st September, 1998 or on the 22nd October 1998 the second Respondent also purchased Government of Jamaica Local Registered Stock for \$10,000,000. This was to mature on 21st October 1998 or 22nd November, 1998 at an interest rate of 25%.

I have made reference to the above two transactions as they, to adopt the word of Catherine Craig in her affidavit filed 3rd March, 2000 “complicated” the relationship between the Company and the 1st Respondent.

The relationship between the Company and the 1st Respondent is governed by, inter alia, the terms at Clauses 5.9. and 5.10 of The Agreement marked “ST.3” at page 130 of the Bundle. The relationship between the Company and 1st Respondent has only been “complicated,” not erased and is still governed by the Agreement at page 125 of The Bundle .

In any event, the 2nd Respondent has no claim on the funds held by the Company.

The elimination of the 2nd Respondent from this matter has not resulted in a matter just between the Company and the 1st Respondent. There are now other “Interested Parties” who claim equity in the funds in the hands of the Company. These “Interested Parties” are Caribbean Communication Corporation, Byron Lee Snr., and Sheila Lee.

It is their contention, as I gather from the affidavit of Byron Lee Jnr., dated 11th December 2000, that they invested funds with an entity called Caribbean Trust Merchant Bankers limited (C.T.M.B). The affidavit of Byron Lee Jnr., at paragraph 4, states “That as a result of difficulties which were experienced with C.T.M.B.

in obtaining a licence to operate as investment bankers, in or about December 1996, or January 1997, C. T.M.B. handed over its investment portfolio to Buck Securities Merchant Bankers Limited (B.S.M.B.). That thereafter, BSMB having taken over the said investment, commenced issuing to the 'interested Parties,' CCC confirmation of Notes Purchased which were guaranteed by CTMB."

Based on the above circumstances Mr. Piper for the "Interested Parties" submitted that the 1st Respondent and the "Interested Parties" are to be accorded equal treatment with regards to the funds held by the Company. The 1st Respondent should have no priority.

He relied on the case of Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Company (the Hamol) Ltd [1896]3 All . E. R. 75 for support. He correctly submitted that the case demonstrates a distinction between monies paid into a bank as deposit and monies which are entrusted to a bank for the purposes of management. In the first case no trust arises but in the latter case a trust arises on the dictum of Templeman L. J. at p. 76 letter j. Consequently, where a trust arises, it is equitable that when the trustee bank acts unlawfully with trust funds the claims of beneficiaries should be paid in full out of the funds in the hands of the trustee bank in priority the claims of customers and other unsecured creditors.

The cited cases does not therefore avail the "interested Parties". A fortiori, the allegations contained in the affidavit of Byron Lee Jr. does not stand up to the contrary allegations contained in the affidavits of (i) Catherine Craig, (ii) Kenneth Tomlinson (iii) Kurt Hollingsworth and (iv) Catherine Parke-Thwaites.

I therefore make the following findings relative to the claim of the “Interested Parties”.

- (1) The common issuance of certificates of Participation does not alter the basis of the relationship between the Company and the 1st Respondent;
- (2) There has been no waiver of the terms of the Agreement under which 1st Respondent placed its funds with the Company;
- (3) That the 1st Respondent and the “interested Parties” have separate relationship with the Company;
- (4) There is no basis for any claim by the “Interested Parties” on funds held by the Company;
- (5) The Agreement made the Company a trustee for the funds of the 1st Respondent and obliged the Company to act to the benefit of the 1st Respondent. (See Barclays Bank Ltd v Quistclose Investments Ltd. [1968]3.W.L.R. 1097 and the unreported case of Universal Investment Bank Ltd (In Liquidation) vs Ludlow Lawla and ors. C.L. U -005 of 1996 decided 5th December, 1997.

I now go to make the determinations and give the directions sought in the Originating Summons.

In the circumstances, and in light of the submission of the Company’s Attorney-at-Law I make no determination in respect of Questions 1 and 2.

In relation to Question 3 the Company is trustee for the benefit of the 1st Respondent and is obliged to satisfy the claim of the 1st Respondent from funds which it

holds. The 1st Respondent as cetuis que trust has a right to claim any funds wherever held by the Company. I have made a determination on Question 3 because I think the circumstances demand such determination.

The position of the 2nd Respondent is redundant.

It is my determination that the amount of \$13,000,000.00 is subject to an equitable charge solely in favour of the 1st Respondent and I direct that that amount be paid forthwith to the 1st Respondent.

The 1st Respondent as cetius que trust is entitled to, and claims an amount in excess of \$13,000,000.00 from the Company (see Suit C. L. E-037 of 1999). I am, of opinion that the 1st Respondent should not be inhibited in the pursuit of that claim. The payment of \$13,000,000.00 should not affect the 1st Respondent's right to pursue its claim. There should be no stay of Suit C. L. E-037 of 1999. This tribunal hs no competence to direct the Company with respect to Suit C. L. E-037 of 1999.

The costs of this application are to be paid from the assets of the Company vide S. 285 of The Companies Act.

Liberty to apply.