[2012] JMSC Civ No. 57

Judgment

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 03174

BETWEEN	**COK SODALITY CO-OPERATIVE CREDIT UNION LIMITED**	**CLAIMANT**
AND	**INTERTRADE FINANCE CORPORATION LIMITED (IN TEMPORARY MANAGEMENT)**	**DEFENDANT**

HEARD TOGETHER WITH:

CLAIM NO. 2011 HCV 05247

BETWEEN	**THE FINANCIAL SERVICES COMMISSION**	**CLAIMANT**
(AS TEMPORARY MANAGER OF INTERTRADE FINANCE CORPORATION LIMITED)		
AND	**INTERTRADE FINANCE CORPORATION LIMITED (IN TEMPORARY MANAGEMENT)**	**DEFENDANT**

Mrs. Arlene Harrison-Henry and Ms. Marlene Uter instructed by Alton E. Morgan & Co. for COK Solidarity Co-Operative Society Limited.
Mrs. Loretta Reid-Pitt, Ms. Melanie Williams and Mr. Earl Ferguson for the Financial Services Commission Limited.

Heard : 3rd, 24th, 25th November, and 14th December 2011, 16th, 20th April 2012 and 8th May 2012.

Company Law- Law of Trusts-Financial Services Commission Act- FSC assuming temporary management of institution carrying on both securities and cambio business-applying for stay of proceedings commenced against institution- subsequent filing of Winding Up Petition by the FSC- cambio operation-whether trust arises when moneys paid for particular purpose not fulfilled- whether funds become assets of insolvent company or whether impressed with a trust - Methods of Distribution of assets when assets insufficient to fulfil all claims-Bills of Exchange Act-dishonoured cheques-liquidated damages-entitlement to judgment for amount stated in cheque

Mangatal J :

[1] The Financial Services Commission "the FSC" is a body corporate, established under the Financial Services Commission Act "the FSC Act". The mandate of the FSC is to have oversight, and create a regulatory framework for prescribed financial institutions. Amongst its duties are the promotion, maintenance and adoption of, sound financial governance, the control and management of risk, and to develop public confidence and stability in financial institutions.

[2] The FSC has oversight, powers and duties in relation to entities providing financial services connected with:

(a) insurance under the Insurance Act;

(b) securities, within the meaning of the Securities Act;

(c) units under a registered unit trust scheme within the meaning of the Unit Trust Act;

(d) private pensions pursuant to the Pension (Superannuation Funds and Retirement Schemes) Act ; and

(e) such other services as the Minister may by order declare to be financial services for the purposes of the FSC Act.

[3] Intertrade Finance Corporation Limited "Intertrade" is a limited liability company duly incorporated under the Companies Act, and is licensed by the FSC under the Securities Act to carry on the business of dealing in securities.

[4] COK Sodality Co-operative Credit Union Limited "COK" is a cooperative society duly incorporated under the Co-Operative Societies Act. On the 6th of May 2011 COK filed Suit, Claim No. 2011 HCV 03174 "the COK Suit", against Intertrade.

[5] Both Intertrade and COK were, at the time of the transactions the subject matter of this Suit, licensed cambio dealers, authorised by the Bank of Jamaica Limited "BOJ'" pursuant to the Bank of Jamaica Act "the BOJ Act".

THE COK SUIT

[6] In the COK Suit, COK pleads that on March 23 and 31 2011, it contracted to purchase a total of Two Million United States Dollars (US$2,000,000.00) from Intertrade. COK forwarded the Jamaican Dollar equivalent, being J$171,426,000.00 to Intertrade for the specific purpose, and with the express instruction that the sum was to be used for the purchase of US$2,000,000.00.

[7] COK pleads, at paragraph 4:

> *4. At the material time, the trade of money between the parties related to the cambio portfolio of the parties.*

[8] Between March 23 2011 and April 2011, Intertrade presented to COK seven cheques drawn by Intertrade upon Citibank North America, BR #2, totalling US$2,000,000.00 payable to COK, to settle the funds outstanding to COK.

[9] COK accepted the cheques and presented them to its banker the National Commercial Bank Jamaica Limited "NCB" for payment. However, on April 4 2011, COK was informed by NCB that the cheques deposited to COK's cambio account, totalling US$800,000.00 and which were traded with

Intertrade, would be returned for the reason of insufficient funds. NCB also informed that a further US$1,200,000.00 worth of cheques from Intertrade were at risk of being returned for the same reason but which had not yet been presented. By letter dated April 15 2011, NCB forwarded to COK copies of all seven returned cheques.

[10] Numerous discussions were held between representatives of COK and representatives of Intertrade, concluding with Intertrade promising to wire the outstanding funds to COK's account as well as to pay the costs incurred by COK as a consequence of the dishonoured cheques, agreed at US$10,000.00.

[11] Intertrade did not wire the funds as promised. On May 2 2011, COK issued a Notice of Dishonour to Intertrade in writing.

[12] COK pleads that Intertrade has failed, neglected and/or refused to provide COK with the sum of US$2,000,000.00, which COK claims that Intertrade holds in trust for it.

[13] At paragraph 25 of the Amended Particulars of Claim, COK sets out the particulars of the alleged breach of trust and breach of contract and its claim as follows:

> *…..*
>
> *PARTICULARS OF BREACH OF TRUST AND BREACH OF CONTRACT*
>
> *(a) Collecting the sum of J$171,426,000.00 from the Claimant for the specific purpose of providing the Claimant with US$2,000,000.00 and failing to provide the Claimant with the US$2,000,000.00;*
>
> (b) *Converting the sum of $171,426,000.00 for its own use;*
>
> (c) *Dishonestly issuing cheques totalling US$2,000,000.00 to the Claimant, knowing that the said cheques would be dishonoured ;*

(d) *Failing, neglecting and/or refusing to pay the sum of US$2,000,000.00 to the Claimant which it holds on trust.*

AND THE CLAIMANT CLAIMS:

1. *A Declaration that the Defendant holds on trust for the Claimant the sum of US $2,000,000.00 and interest ;*
2. *In the alternative, a Declaration that the Claimant is entitled to be paid the sum of $2,000,000.00 and interest by the Defendant, pursuant to sections 47 and 57 of the Bills of Exchange Act ;*
3. *That the Defendant is liable to account for and repay the sum of US$2,000,000.00 and interest from any funds owned and/or held by the Defendant, in and/or outside of the jurisdiction;*
4. *Damages for breach of trust;*
5. *In the alternative, damages for breach of contract;*
6. *In the alternative, the sum of US$2,000,000.00 with interest as the sum due and owing to the Claimant;*
7. *Interest on the sum of US$2,000,000.00 at the rate of 6.75% or such other rate as this Honourable Court deems just pursuant to section 57 of the Bills of Exchange Act.*
8. *Legal fees and costs.*
9. *Such further and/or other relief as this Honourable Court deems just.*

Claim No. HCV 05247-Financial Services Commission v. Intertrade Finance Corporation Limited

[14] On August 19 2011, the FSC filed a Fixed Date Claim Form "the FSC Suit" in which it seeks the following orders from the Court:

(1) Staying for such period as the Court thinks fit:

(a) the commencement or continuance of any proceedings by or against… Intertrade

(b) any execution against the property of Intertrade;

(2) Restraining any person from dealing with or removing from Jamaica or elsewhere any assets belonging to Intertrade; and

(3) Such other Order as the Court may make in the interest of justice.

[15] The stated grounds of the application are that such orders would be in the best interests of the customers of Intertrade and all creditors.

[16] I indicated to the Attorneys-at-Law for the FSC that in my view, the application for the stay of proceedings ought to be made in the Suits of which they were aware, including the COK Suit. In considering the matter further, I do not think there is any order to be made in relation to COK in the Suit filed by the FSC so I intend to consider only the application in the COK Suit. The applications by the FSC for an injunction, paragraph 2 of the Fixed Date Claim Form in the FSC Suit, were adjourned for a date to be fixed by the Registrar. The rest of this Judgment is therefore concerned solely with the COK Suit.

CLAIM NO.HCV 03174

[17] The FSC on the 28th of September 2011 filed a Notice of Application in the COK Suit seeking the following orders:

(1) Staying for such period as the Court thinks fit:

(a) The continuance of the proceedings by the Claimant against the Defendant;

(b) The execution by the Claimant against the property of the Defendant.

(2) Restraining the Claimant from dealing with or removing from Jamaica or elsewhere any assets belonging to the Defendant.

(3) Such further Orders as the court deems just in the circumstances.

[18] The stated grounds in support of the application are as follows:

a. The Applicant is the regulator of the securities industry under whose regulation the Defendant falls as a licensed Securities Dealer.

b. The Applicant has assumed temporary management of the Defendant since the 3rd day of August 2011, and pursuant to paragraph 2(3) of the Third Schedule may, if it considers it to be in the best interests of the investors and creditors of the institution which is being temporarily managed by it apply to the court for such orders.

c The Applicant, having regard to the foregoing, intends to exercise its powers pursuant to paragraph 3(b) of Part C of the Third Schedule to the Financial Services Commission Act to present a petition for the winding-up of the Defendant under the Companies Act.

d The Applicant has taken all reasonable steps to obtain the relevant information and documents as relate to the Defendant's assets and liabilities. This information is contained in the Final Report of the Temporary Manager filed herein on the 28th day of September 2011.

e. That the Orders obtained by the Claimant on the 5th day of July 2011 were obtained subsequent to, and in contravention of, a Cease and Desist Order issued by the Applicant on the Defendant.

f. These Orders are sought on the basis that such orders would be in the best interests of all the investors and creditors of the Defendant.

FSC'S APPLICATION FOR A STAY

[19] On the 20th of May 2011, the FSC had issued a Cease and Desist Order to Intertrade which prohibited, among other things, the withdrawal, assignment, transfer, pledging, sale or disposal of Intertrade's property or other assets. A similar Cease and Desist Order was also issued to Intertrade's affiliate and subsidiary Intertrade Investments Limited. On that date the FSC alleges, among other things that the value of Intertrade's assets may have been significantly less than the amount of its liabilities, contrary to item 7 of Part A of the Third Schedule to the FSC Act. Further Directions from the FSC prohibited Intertrade from entering into the sale, disposal, assignment, charge or transfer in any manner of any asset or any interest in any asset that might prejudice any of Intertrade's existing clients unless the prior written approval of the FSC was obtained.

[20] The FSC had also issued a public notice and a news release regarding the issue of these Cease and Desist Orders.

[21] The FSC alleges that in the circumstances, COK had notice of the existence of the Cease and Desist Orders, the grounds for making them, and the prohibition of the transfer, sale, disposal or mortgage of any of the assets of Intertrade and its affiliates.

[22] During the course of the Temporary Management, Mr. Linval Freeman, the Temporary Manager, advised the FSC that Intertrade had transferred to COK on the 27th of June 2011, its title to property where its registered office was located, at 23 Barbados Avenue, Kingston 5, Saint Andrew, being the land comprised in Certificate of Title registered at Volume 955 Folio 541 of the Register Book of Titles. Also, that COK is holding for sale a private property owned by Mrs. Joan Powell, Director of Intertrade. Further, that Intertrade entered into a separate arrangement with COK to settle its outstanding indebtedness by the transfer/assignment of some portion of proceeds from its overseas investments managed by Freedman, Boydston & Roylat.

[23] On the 5th of July 2011 a consent order was entered into between COK and Intertrade, which included worldwide freezing orders in respect of assets not exceeding in value US $2.2 Million, and whereby it was agreed that Intertrade would disclose to COK the location of all its assets, wheresoever located. It was also agreed in the consent order that Intertrade could cause the Order to cease to have effect if Intertrade pays to COK's Attorneys-at-Law or provides security by some agreed method in respect of the indebtedness.

[24] On the 26th of September 2011, the FSC received a letter from the Tax Administration of Jamaica advising that it had on the 15th of June 2011 commenced proceedings against Intertrade Investments Limited, in respect of the sum of approximately $36 million, representing outstanding taxes.

[25] It is the FSC's contention that Intertrade failed to make full disclosure to the Court of its financial position and all relevant facts regarding its assets and liabilities at the time of the Consent Order. FSC argue that to prevent further dissipation of Intertrade's assets, and to protect the interests of Intertrade's creditors and clients as a whole, it would be in the public interest to grant a stay of execution of the proceedings filed by COK, and indeed, all other existing proceedings.

[26] On the 26th of August 2011, on the application of the FSC in the FSC Suit, my brother E. Brown J. granted, amongst others, an order that the commencement of any proceedings by or against Intertrade by any party other than the FSC be stayed until the completion of the Temporary Management of Intertrade by the FSC.

[27] On the 3rd of October 2011, on the application of the FSC, I made an order confirming that on the 3rd of August 2011 at 4:30 p.m., full and exclusive powers of management and control of Intertrade vested in the FSC pursuant to paragraph 1(5) of Part C of the Third Schedule to the FSC Act. In addition, in his Third Affidavit sworn to on the 7th of November 2011, the FSC's Executive Director, Mr. Rohan Barnett informed the Court that on the 3rd of October 2011, the FSC had filed, (as it had indicated was its intention in the

grounds for the application), a winding up petition pursuant to the Companies Act. The Petition seeks that Intertrade be wound up on the ground that it was just and equitable to do so, and on the ground that Intertrade is unable to pay its debts.

COK'S APPLICATION TO STRIKE OUT FSC'S APPLICATION FOR A STAY OF PROCEEDINGS AND TO HAVE JUDGMENT ON ADMISSIONS ENTERED AGAINST INTERTRADE

[28] On the 2nd of November 2011 COK filed a Notice of Application seeking to strike out the FSC's application as well as to have judgment entered in its favour against Intertrade. COK's application was only filed a day before the date fixed for the hearing of the FSC's applications for the stay. On the 3rd of November 2011, I adjourned the FSC's applications until the 24th and 25th November 2011, as well as COK's application filed November 2 2011. I also ordered that COK's application was to be heard first. Ultimately, in the interests of time, taking into account the fact that I would likely have to reserve my decision based upon the complexity of the matter, I heard both COK's application to strike out and seeking entry of judgment, as well as the FSC's application for a stay of the proceedings brought by COK.

[29] On the 25th of November 2011 I granted an application by COK to amend its Particulars of Claim, notwithstanding the lateness of the application. Essentially, the amendment was in order to add the claim in equity and the Law of Trusts. The FSC had opposed the application. However, I formed the view that it was in the interests of justice to grant the application and that it was necessary in order to resolve the real issues in controversy between the parties. I was also of the view that the FSC would not be taken by surprise since throughout the matter COK has been maintaining, in its written submissions and otherwise, that it was in a different position from the investors in Intertrade's securities business.

[30] I made it clear to the parties that I would, as a matter of logic, have to rule on the COK application to strike out first, even though the FSC's

applications for a stay had been filed long before. COK's application seeks the following orders and states its grounds as follows :

> *1. That the application for stay of proceedings filed on behalf of the Financial Services Commission in its capacity of Temporary Manager of the Defendant, be struck out pursuant to Part 26, Rule 26.3(1) of the Civil Procedure Rules, 2002;*
>
> *2. That judgment on admission be entered in favour of the Claimant against the Defendant;*
>
> *……*
>
> *The grounds……are as follows:*
>
> 1. *The Financial Services Commission has no jurisdiction in the claim brought by the Claimant against the Defendant and therefore has no locus standi to apply for a stay on behalf of the Defendant.*
> 2. *The application for a stay has no reasonable grounds for succeeding.*
> 3. *The application for a stay of proceedings is an abuse of the process of the Court.*
> 4. *The Defendant has admitted to the Claim.*
> 5. *An interlocutory freezing order was made on July 5, 2011 by and with the consent of the Claimant and the Defendant.*

[31] COK's application is supported by the Affidavit of Mr. Courtney Wynter, Chief Financial Officer of COK, sworn to on the 2nd of November 2011. At paragraph 11 of his Affidavit, Mr. Wynter alleges that FSC brought the application to stay proceedings before it had obtained the Court's confirmation of its right to exercise temporary management of Intertrade and before the court had vested powers of management in the FSC.The FSC obtained the court's confirmation and vesting on the 3rd of October 2011. Mr. Wynter avers that on all occasions prior to October 3 2011, the application for a stay was brought prematurely and without legislative authority.

[32] COK also argue that the FSC recognize that a necessary prerequisite to a stay being granted is the existence of a view that the stay is in the best

interests of Intertrade's customers. The submission continues that the formation of such a view must be made after an assessment is made of the condition of the ailing prescribed financial institution.

[33] According to Mr. Wynter, as regards the factual background, COK in its Cambio portfolio had conducted business with Intertrade's Cambio for about 6 years. The transaction out of which COK's claim arises relates to a transaction in which both Cambios were trading money. COK provided Intertrade's Cambio with the Jamaican money in exchange for US dollars. The amount of the trade was US $2,000,000.00.

[34] Intertrade's Cambio took COK's money and gave COK cheques pretending that they had the value of the trade and which cheques were dishonoured.

[35] Mr. Wynter discloses that in April 2011, Intertrade delivered to COK the duplicate Certificate of Title for the property at 23 Barbados Avenue and an executed Instrument of Transfer for the property in an effort to settle the trade in money with COK.

[36] By letter dated April 26 2011 Intertrade informed COK that the sum of US$2,010,000.00 would be wired to COK's NCB Account and once this was verified as being done, Intertrade asked that COK return its Title which was "in (COK's) custody". However, the promised wiring never took place.

[37] Mr. Wynter indicates that it was after COK reported Intertrade to the Fraud Squad for having failed to pay over the sums due, that Mrs. Powell, the Chief Executive Officer of Intertrade, gave her assurance to transfer to COK, property registered at Volume 1310 Folio 236, owned by herself and Mr. Hugh Powell, her husband, in further extinguishment of the liability of Intertrade to COK.

[38] Mr. Wynter testifies that the failure of Intertrade to provide COK with the US $2,000,000.00 has had an adverse effect on COK's operations.

Further, that COK has been one of the stable financial institutions in Jamaica providing for the needs of ordinary Jamaicans whether for back to school expenses, housing solutions, or small businesses. It is COK's evidence that "if COK is not paid, its members, who are ordinary Jamaicans, will bear the costs, in that all profits earned by COK, are distributed to its members and the members cannot be asked to bear the cost of a fraud".

COK's Submissions

THE FSC'S JURISDICTION

[39] It is COK's contention that the FSC's powers do not extend to financial institutions that are involved in taking deposit investment. It is submitted that the FSC Act does not give the FSC regulatory, supervisory or oversight powers over Cambios.

[40] COK submits that it is the Bank of Jamaica that is the sole regulator of Cambios in Jamaica. It is the Bank of Jamaica that provides regulatory/supervisory oversight of all foreign exchange traders and remittance companies and entities and not the FSC. The submission continues, that a financial institution can have two regulators.

[41] COK rely upon sections 22A, 22B and 22G of the Bank of Jamaica Act "the BOJ Act". Sections 22A, 22G, and sub-section 22B(1) provide as follows:

PART IVA. Dealings in Foreign Currency.

Foreign Currency Transactions-

22A. –(1) Except as provided in subsections (2) and (3), any person may buy, sell, borrow or lend foreign currency or foreign currency instruments.

(2) No person shall carry on the business of buying, selling, borrowing or lending foreign currency or foreign currency instruments in Jamaica unless he is an authorized dealer.

(3) It shall be unlawful for any person to buy, sell, borrow or lend foreign currency or foreign currency instruments in a transaction involving the payment of Jamaican currency, unless the payment is made to or, as the case may be, by an authorised dealer.

Ministerial Directions to Certain Classes of Persons

22B. –(1) Persons belonging to the following classes, that is to say-

(a) authorized dealers;

(b) persons to whom any powers of the Minister under this Act are delegated;

(c) companies licensed under the Financial Institutions Act;

(d) insurance companies;

(e) credit unions;

(f) societies registered under the Building Societies Act;

(g) persons who, with the approval of the Minister, operate exchange bureaux;

(h) managers and trustees of unit trust schemes registered under the Unit Trusts Act;

(i) persons who operate or manage superannuation or pension funds;

(j) approved money transfer and remittance agents and agencies,

shall not acquire foreign assets except in accordance with such directions as may from time to time be given to them, respectively by the Minister as respects the acquisition of foreign assets.

……

PART IV B. Money Transfers and Remittances.

Money transfer or remittance agency or agent

22G.-(1) Except with the approval of the Minister, no person shall carry on the business of a money transfer and remittance agency or operate as a money transfer and remittance agent.

(2) Any person who carries on the business of a money transfer and remittance agency or who operates as a money transfer and remittance agent shall do so in accordance with such directions as may be issued by the Minister from time to time, and the provisions of section 22B(3) shall apply with necessary modifications in relation to directions issued under this subsection.

[42] COK avers that Cambios are licensed and supervised by the Bank of Jamaica through its Cambio Remittance, Licensing and Monitoring Department which has responsibilities for money service businesses.

[43] COK submits that the FSC's Cease and Desist Order can only relate to Intertrade in its capacity as an entity providing /offering financial services in relation to the matters and legislation that accord powers to the FSC. Further, it is argued that the FSC's Cease and Desist Order is not applicable to COK and Intertrade's Cambios, as such a direction would have to be given by the Bank of Jamaica under the Bank of Jamaica Act, and none has been issued by the Bank of Jamaica. It was also submitted that the FSC does not have any mandate or authority over a credit union such as COK which operates under the Co-Operatives Societies Act.

[44] COK submits that in particular, the FSC's Cease and Desist Order does not affect the transfer of the Barbados Avenue property to it. The unencumbered Duplicate Certificate of Title for the property and an executed Instrument of Transfer were given to COK from April 18, 2011 in Intertrade's effort to settle the trade in money with COK. Further, that the property was transferred to COK prior to the appointment of the temporary manager which took place on August 3, 2011. The result is that COK has, it is argued, under the Registration of Titles Act on registration acquired an indefeasible interest in the property which cannot be defeated or impeached.

COK'S SUBMISSION AS TO PREMATURITY OF APPLICATION TO STAY PROCEEDINGS AND EXECUTION

[45] It was submitted that the provisions of the FSC Act provide a step by step approach and that the legislation identifies remedial measures, conferred on the FSC in a gradual manner up to the winding up of the institution. Winding up, the submission continues, must be a last resort.

FSC'S APPLICATION FOR A STAY

[46] Claim No. HCV 05247/2011, the FSC Suit, was filed August 19 2011. Amended Fixed Date Claim Form was filed September 2 2011. The action

was filed after FSC on August 3 2011 assumed temporary management of Intertrade.

[47] COK submits that under Part C of the Third Schedule, the FSC as at August 19 did not have statutory power to apply for a stay. Prior to October 3 2011, the FSC as temporary managers had powers over Intertrade to:

(a) Continue or discontinue its operations;

(b) Stop or limit the payment of its obligations;

(c) Employ any necessary officers or other employees;

(d) Execute any instrument in the name of the institution;

(e) Initiate, defend and conduct in the name of the institution any action or proceedings to which it may be a party.

[48] COK submits that the scheme of the legislation gives the FSC power to apply for a stay only after the court has confirmed and has made an order "confirming the vesting in the Commission of full and exclusive powers of management of the institution.." and not prior to such confirmation. It is therefore submitted by COK that the application before the court is ultra vires and misconceived.

COK's SUBSTANTIVE OPPOSITION TO THE STAY

[49] Under the heading in their written submissions, "Particular Facts of the Matter with COK", COK submits that the question the FSC has failed to consider is this:

Did Intertrade at any time become the beneficial owner of the in excess of J $170,000,000.00 when the money was used for a purpose or for purposes other than providing COK with the US$2,000,000.00?

[50] COK prays in aid the doctrine of unjust enrichment. The submission is that it would be against conscience and equity to allow a stay with the intention of allowing liquidators or temporary managers claiming the sum for the benefit of all customers/investors and such other persons.

[51] COK submits that the money given to Intertrade did not become the property of Intertrade-whether in contract or in trust. What COK means by this submission is that the money paid by COK for the US$2,000,000.00 in the

cambio trade did not become a part of the bankrupt or insolvent estate or assets. This money was paid for a specific purpose. COK contends that it was used for a purpose other than the agreed purpose, and used to pay Intertrade's creditors. The submission is that the money provided by COK for the US$2,000,000.00 entered Intertrade's hands impressed with a trust and does not form a part of the general pool of funds to satisfy any demands of Intertrade or temporary managers and cannot be used and divided amongst creditors or customers.

[52] COK further submits that they did not give Intertrade a loan. COK is not a creditor and not an investor. COK indicates that its policy when giving credit is to take sufficient security in the event of a default of payment. The role of a creditor is a mutual one and cannot be unilaterally superimposed on COK, nor is COK an investor as it did not part with its money as a customer with instructions to invest in one of the permitted activities of Intertrade.

[53] COK concludes with the submission that any attempt by the FSC to exercise oversight in respect of the cambio transaction between COK and Intertrade is ultra vires, without jurisdiction and without lawful authority. The Attorneys close with the rather harsh written submission that "The effort to have the court stay proceedings and execution is an attempt to have the court give judicial approval to a fraud."

[54] COK 's Counsel Mrs.Harrison-Henry referred to and relied upon the FSC Act, the BOJ Act, and the authority of Supreme Court Civil Appeal Numbers 9 and 19 of 2005, **Eagle Merchant Bank of Jamaica v. Lets Ltd. and Lets Ltd. v. RBTT Bank Jamaica Ltd. and National Commercial Bank Jamaica Limited** , judgment delivered February 22, 2008. Counsel also referred to **Chase Manhattan Bank N.A. v. Israel –British Bank London Ltd.** [1979] 3 All E.R. 1025, and **Sinclair v. Brougham** [1914-15] All E.R. 622.

FSC'S SUBMISSIONS

[55] **THE STAY** – Miss Melanie Williams, one of the Attorneys-at-Law appearing for the FSC, submits that a clear reading of paragraphs 1(4) and 2(3) of the Third Schedule to the FSC Act, indicates that on service of the notice of temporary management on the prescribed financial institution, full and exclusive powers of temporary management vest immediately in the FSC. Miss Williams submits that the FSC was fully empowered to apply for a stay before the Court granted the order of confirmation.

FSC's Jurisdiction

[56] The FSC submit that while Intertrade Finance Corporation was granted a cambio licence pursuant to the Bank of Jamaica Act, the FSC continues to exercise regulatory authority over Intertrade Finance Corporation Limited as a licensed securities dealer. Further, that to the extent that Intertrade Finance Corporation Limited sought to settle a failed cambio transaction by transferring assets which were derived from client investment funds attributed to that securities dealership, the FSC, as temporary manager of the Defendant has the relevant statutory basis to seek a stay of these proceedings and a stay of execution.

[57] The FSC contends that the FSC Act, the BOJ Act, and the Financial Institutions Act all recognize that both the FSC and the Bank of Jamaica may exercise simultaneous regulatory authority over a company provided certain requirements are met. For example, section 2 of the Financial Institutions Act defines the term "regulated or supervised financial institution" as:

"….an institution supervised or regulated by the Bank of Jamaica or the Financial Services Commission".

[58] FSC's Counsel submit that the regulatory powers of the Bank of Jamaica over Intertrade's cambio licence does not prevent the FSC from exercising its powers over Intertrade's securities business or seeking a stay of proceedings filed against Intertrade where it has been demonstrated that Intertrade is attempting to satisfy its debt from assets derived from the securities business.

[59] The FSC point out that Intertrade was first licensed by the Securities Commission, the FSC's predecessor, as a securities dealer on the 1st day of December 1996. Intertrade was licensed by the Bank of Jamaica as a cambio. On the 3rd day of June 2011, Intertrade surrendered its cambio licence to Bank of Jamaica. The directions issued by the Minister pursuant to the Bank of Jamaica Act recognize that a licensed securities dealer may also carry on the business of an exchange cambio. The requirement is that the cambio business be conducted as a separate line of business from that of the securities dealership. Separate books and records of transactions must be maintained. Reference was made to Items 9 and 10 of the Draft Bank of Jamaica Approval of a cambio licence. Item 10 reads as follows:

" Where approval to operate a cambio is granted to an entity that operates another business, the cambio business must be kept separate and apart from the other business. Separate accounts and other records shall be maintained for the businesses and foreign currency received in respect of transactions undertaken at the cambio shall be kept separate and apart from foreign currency resulting from transactions undertaken in the course of the other business dealings. Where approval is given to an entity that maintains a private foreign account, the foreign currency holding of the cambio are not to be comingled with the funds in the private account."

[60] The submission continues, that since a cambio is meant to operate as an exchange of one currency for another, and not as a lending agency, there is no need for a cambio to maintain a large pools of assets. In fact, the BOJ Act specifies to the contrary. There are distinct requirements in terms of the assets which are required to be maintained to satisfy liabilities incurred in respect of either business. Items 7A-7B of the BOJ Directions, requires cambios to surrender to Bank of Jamaica a percentage of their daily gross foreign exchange purchases from commercial clients (this excludes purchases from authorised dealers, cambios or the BOJ) in accordance with the limits advised by the Bank of Jamaica from time to time. The creation of a reserve is also required pursuant to the Financial Institutions Act, section 8, as a financial institution licensed by the Bank of Jamaica to take deposits. Thus

Intertrade was required to maintain a reserve at the Bank of Jamaica to satisfy any liabilities.

[61] The Directions issued by BOJ for the operation of a cambio focus on the total foreign currency held at the end of the business day and the maintenance of accounts. There is no requirement to have any fixed assets of the cambio. The FSC submit that the transaction is meant to be an "in and out" transaction; an exchange of foreign currency for local currency and vice versa. No sizable pool of assets are meant to be maintained to meet any liabilities as the cambio is not to engage in the business of lending and borrowing foreign currency.

[62] The FSC submit that it was to Intertrade's reserves that COK should have had recourse for a failed cambio transaction and not to the assets of Intertrade, acquired during the course of its securities business as a licensed securities dealer. The office building and the other investment properties of Intertrade are subject to the existing equitable interests of Intertrade's securities clients and creditors. In the event of an insolvency of Intertrade, Intertrade's securities clients. i.e. its investors, are entitled to have their claims satisfied from the Defendant's assets of its securities dealership. These assets are not to be transferred to settle a cambio transaction.

[63] The FSC also refer to letter dated 26 April 2011, where Intertrade informed COK that due to the off-timing of a pending overseas securities trade, Intertrade was experiencing cash flow problems. Settlement of the sums owed to COK was to have taken place once this trade was completed. It was submitted that it is clear that this transaction relates to Intertrade's securities business.

[64] The title to the property at 23 Barbados Avenue shows that this property was transferred to Intertrade on September 16, 1998. This was clearly long before the relevant cambio transaction with COK. The FSC take the view that the transfer of this property to COK by Intertrade ought not to have taken place since this property formed part of Intertrade's capital for the

purposes of its Securities dealer's licence under the Securities Act. According to the FSC, Intertrade ought to have replaced this fixed asset immediately.

[65] The FSC point out that COK has at no point alleged that the monies paid by COK to Intertrade were used to satisfy investors, i.e. securities clients of Intertrade. COK cannot state what happened to the funds it paid. FSC's Counsel submit that as a cambio and licensed securities dealer, COK is aware of the BOJ's directions which require that the cambio business must be maintained separately from the securities dealership. COK, it is contended, are fixed with constructive notice of the beneficial interests of Intertrade's securities investors in any assets of the securities dealership. FSC's Counsel therefore argue that COK is not a bona fide purchaser without notice of a prior equitable or legal interest in the property.

Unjust Enrichment

[66] At paragraph 61 of its written submissions filed on November 3 2011, the FSC reason that COK's argument that the US$2 million which it paid to the Defendant for a cambio transaction does not form part of the pool of the Defendant's assets, while plausible, is weakened by COK's insistence that it is entitled to take a capital asset-namely the office building, which formed part of the assets of Intertrade's securities business as security for the repayment of the debt. At no stage in its pleadings, avers the FSC, did COK claim that it was able to trace the monies paid to Intertrade into that asset.

[67] COK has also not only accepted the transfer of the office building, but also an assignment of the proceeds from an overseas investment managed by Freeman Boydston & Rowlat for the customers and investors of Intertrade's securities business.

[68] The FSC submit that equity would require that where several investors made payments to the Defendant to invest monies in securities for them, these investors were the beneficial owners of the assets and COK was aware of this beneficial ownership. The FSC allege that as temporary manager it must take steps to prevent Intertrade defrauding these investors. Reliance

was placed on **Barlow Clowes International Limited (in liquidation) and others v. Vaughn and others** [1992] 4 All E.R. 22. In that case, where there was wrongful mixing of different sums of trust money in an investment fund, to avoid injustice, the assets were ordered to be applied on a pari passu basis between all investors.. The FSC submits that the stay of proceedings and the stay of execution are necessary to protect the interests of all the investors who had a prior beneficial interest in the assets of the securities dealership. The FSC also rely upon **Russell-Cooke Trust Co. v. Prentis and others** [2003] 2 All E.R. 478. In that case, where several investors had made deposits to a solicitor which was placed in a client account, it was held that a pari passu system should be applied to determine the portion of the assets which would be distributed to investors. Reliance was also placed on the authority **Australian Prudential Regulation Authority v. CAN 000 007 492(under judicial management) (subject to deed of company arrangement)** 79 A.C.S.R. 492 and a number of other cases.

[69] The FSC submit that to permit COK to proceed with this litigation would be to allow Intertrade to use the court proceedings to defraud investors. It would also mean that COK would be unjustly enriched as it has not claimed any equitable interest in the assets of the securities dealership and is unable to prove that its monies were invested in these assets.

[70] The FSC deny that the application for a stay is premature, or that it must wait until the winding up petition is heard.

RESOLUTION OF THE ISSUES

THE JURISDICTION POINT

[71] I agree with Counsel for the FSC that the plain and ordinary meaning of Part C of the Third Schedule to the FSC Act is that the FSC may, at any time after it has served on an institution a notice of its intention to temporarily manage the Institution pursuant to Part C paragraph 1(1), apply to the court for a stay of proceedings or of execution-paragraph 2(3). It is not necessary for the FSC to await the Court's order of confirmation under Part C paragraph 1(5) before applying for the stay. This is in my judgment the plain and ordinary

meaning of the Act since the power to apply for the stay arises from the time when an institution is being temporarily managed by the FSC and paragraph 1(4) states that on the date and time specified in the notice of intention, "there shall vest in the Commission, full and exclusive powers of management and control of the institution". (My emphasis) In short, an institution is in a state of being temporarily managed by the FSC from the time of the notice, and before the court's order confirming the vesting of full management powers. In any event, even if I am wrong, and the correct position is that the FSC would have to await the confirmation, I do not consider this issue to be a point of substance since I made the order of confirmation on the 3rd of October 2011, and the application was not heard until after that date, i.e. November and December 2011. The application for the stay filed in the COK Suit was filed in September 2011.Thus at the time of hearing the application the order confirming the vesting of the management powers had already been made.

[72] I also agree with Counsel for the FSC that the fact that COK's claim arises in relation to Intertrade's cambio operations, which operations fall under the regulatory authority of the Bank of Jamaica, and not the FSC, does not prevent the FSC from making an application to stay these proceedings or execution on the property of Intertrade. There is no limitation on the FSC's power to apply for the stay; indeed, paragraph 2(3) (a) speaks to the right to apply for a stay of the continuance of "any proceedings" and paragraph 2(3)(b) to a stay of "any execution against the institution's property". (My emphasis).

[73] I have therefore ruled against COK on the jurisdiction point and so it is now appropriate to examine the other issues.

THE STAY

[74] It is quite clear that the Supreme Court has express statutory authority under the FSC Act to stay the proceedings. It also has power under C.P.R. Rule 26.1(2)(e) to stay proceedings. This does not affect the inherent jurisdiction of the Supreme Court to stay proceedings which, as set out in section 28 of **The Judicature (Supreme Court) Act** "Such jurisdiction shall

be exercised so far as regards procedure and practice, in manner provided by this Act, and the Civil Procedure Rules……". In **Texan Management Ltd. & Ors v. Pacific Electric Wire & Cable Company Ltd.** [2009] UKPC 46, cited by the FSC, at paragraph 54, reference was made to **Rockware Glass Ltd. v. MacShannon**[1978] A.C. 795, where it was stated that on general principles, the courts would not stay an action lightly, but only if convinced that justice required that it should be stayed.

[75] I think that it is important to observe the context in which the FSC's power to apply for a stay arises under the FSC Act. It arises in this case after the FSC was satisfied, as set out in the First Affidavit of Rohan Barnett, the then Executive Director of the FSC, filed on the 19th of August 2011,that the following conditions existed in relation to Intertrade:

(i) Paragraph 5 of Part A of the Third Schedule to the FSC Act- The institution had given the FSC false statements concerning its affairs; and

(ii) Paragraph 7 of Part A of the Third Schedule to the Act- The value of the institution's assets is substantially less than the amount of its liabilities.

[76] Under the Companies Act, section 224, at any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory, may apply to the court to stay any pending proceedings. By virtue of section 229, when a winding up order has been made or a provisional liquidator appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose.

[77] In order therefore to decide whether it is just to grant a stay in the circumstances, it seems to me that it would be useful to decipher what purpose a stay is meant to serve in circumstances where one may be dealing with an insolvent company. The purpose of a stay of proceedings as well as a stay of execution would be to ensure that no one to whom the institution may

be liable gets a “headstart” on, or obtains an advantage over, anyone else to whom the institution is liable, by obtaining judgment and proceeding to execution. In **Westbury v. Twigg & Co** [1892] 1 Q.B. 77, where the goods of a company had been taken in execution of a judgment after the passing of a resolution for voluntary winding up of a company, it was held that the court had jurisdiction to stay further proceedings in the execution. In the course of his judgment, Day J. indicated that, under the Companies Act, by enabling liquidators in a company winding up to apply for a stay of proceedings, what the Legislature aimed at “was that the assets of the insolvent companies should be distributed equally among their creditors, and it aimed at such equality of distribution just as much where the company was being wound up voluntarily as where it was being wound up under an order of the court”.

[78] I intend to examine the status of the COK Suit and the prospects of success that it would have in obtaining judgment before examining the approach to distribution taken in a range of decided cases.

BILLS OF EXCHANGE

[79] Intertrade gave COK seven cheques totalling US $2,000,000.00, which cheques were dishonoured. Section 57 of the Bills of Exchange Act provides as follows:

> ***57.*** *Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages shall be as follows:*
>
> > *The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser-*
> >
> > *(a) the amount of the bill;*
> >
> > *(b) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;*

(c) the expenses of noting, or, when protest is necessary and the protest has been extended, the expenses of the protest.

In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment.

[80] As to the significance of the term "liquidated damages", the learned authors of Bullen & Leake, **Precedents of Pleadings**, 12th Edition, state in section 34, headed "Damages", at page 380 :

" Liquidated damages are a sum agreed upon in a contract by the parties thereto as to the damages for a breach of it.

The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage- per Lord Dunedin in **Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Company Limited** [1915] A.C. 79."

[81] The learned editors of the **Encyclopedia of Banking Law** at F (92) state that "the holder of a dishonoured bill is normally able to obtain summary judgment against the parties liable on it."

[82] Harrison P. reasoned in In **Eagle Merchant Bank of Jamaica Ltd. V. Lets Ltd et al.** Supreme Court Civil Appeal Nos. 9 & 19 of 2005, (referred to in greater detail below), that as between Lets, the payee James Ogle and NCB, the four cheques were governed by the provisions of section 3. Sections 3 and 57 of the Bills of Exchange Act would also apply in the instant case as between Intertrade and COK in relation to the seven dishonoured cheques totalling US$2,000,000.00.

[83] In my view, subject to what I decide in relation to the FSC's application for a stay, COK would be entitled to judgment for US $2 Million or the Jamaican equivalent thereof at the date of payment, the amount of the Bills/cheques being liquidated damages. They would be so entitled because of the fact that cheques were presented and dishonoured, as well as because of admissions, as constituted in the letter of April 26 2011 exhibit COK 4, attached to the Affidavit of Courtney Wynter, filed May 6 2011, as well as embodied in the consent order made in July 2011. I note that Attorney-at-Law Mr. Barrington Frankson represented Intertrade upon a number of occasions, including the 5 July 2011 when the consent order was entered. On the 6th of June 2011, in appearing before my brother Morrison J. on the hearing of one of the freezing order applications, Mr. Frankson had given his professional undertaking to file an acknowledgement of service. I cannot trace any such document on file, and therefore the judgment would not fall within Part 15 of the CPR which requires that a defendant must have filed an acknowledgment of service. Nevertheless, COK would be entitled to have judgment entered forthwith on its merits, barring the application for a stay. The COK's reliance on the law of Trusts is most relevant to the application for a stay and thus I will consider this claim and cause of action separately and in the context of the FSC's application for a stay.

THE APPROACH TAKEN TO DISTRIBUTION OF ASSETS WHERE INSUFFICIENT TO MEET ALL CLAIMS

[84] In **Re Golden Key (In Receivership)** 2009 EWCA Civ 636, the English Court of Appeal, discussed the question of an appropriate method of distribution to be adopted in relation to assets insufficient to meet all the claims against them, as well as the broad rationale behind insolvency legislation similar to our own . At paragraphs 2, 3 and 4, Arden L.J. stated:

> [2]….. Distribution on the basis of "first come, first served" is self-explanatory, but it is appropriate to say a little by way of introduction about the principle of pari passu distribution.
>
> PARI PASSU DISTRIBUTION
>
> [3] Pari Passu distribution is derived from the maxim that "equality is equity". Halsbury's Laws, 4th Edition, Volume 16 paragraph 747 states:

"The maxim that equality is equity expresses in a general way the object both of law and equity, namely to effect a distribution of property and losses proportionate to the several claims to the several liabilities of the persons concerned. Equality in this connection does not necessarily mean literal equality, but may mean proportionate equality….[I]n the distribution of property, the highest equity is to make an equality between parties standing in the same relation, though this cannot be done contrary to the plain meaning of the deed."

[4] In **Cox v. Bankside Members Agency Ltd.** [1995] 2 Lloyd's Rep. 437, Peter Gibson L.J. explained:

"The fairness of a rateable distribution of limited assets insufficient to meet all the claims on them is what underlies the insolvency legislation and has led the court to adopt that solution in contexts not governed by that legislation where a common misfortune has occurred(see for example, **Barlow Clowes International v. Vaughan**.....) But the maxim is not of universal applicability. It always yields to a contrary intention, express or inferred…..".

[85] As Peter Gibson L.J stated in **Cox v. Bankside Members Agency Ltd.**, whilst the fairness of a rateable distribution of limited assets is what underlies the insolvency legislation, that solution has also been adopted in relation to situations not governed by the insolvency legislation. Arguably, the situation dealt with under the relevant provisions of the FSC Act also falls under the head of insolvency legislation. In any event, it is certainly dealing with a situation immediately prior to insolvency or analogous to insolvency. A stay would therefore in the circumstances arguably facilitate the carrying out of this rateable distribution of limited assets as the FSC indeed contends to be the appropriate approach. However, as the learned Judge of the English Court of Appeal also points out, the maxim is not always applicable. As pointed out in the Halsbury's, equality in this context may not mean literal equality. Further, in my judgment, the question at the heart of the application for a stay of the proceedings brought by COK and of execution of any judgment that COK may obtain, is the question of (1) whether there is a constructive trust involved in this case, as between Intertrade and COK, and

(2) as between COK and the securities investors and customers that the FSC is trying to protect, whether there are in existence equal equities. It is quite possible for equity to exist in a number of different parties but for one of them to have the better, or greater equity.

THE APPROACH TAKEN IN THE CASES

[86] There is an ancient rule referred to as "The rule in Clayton's Case", which was established in **Clayton's Case, Devaynes v. Noble** (1816) 1 Mer 572, [1814-23] All ER Rep 1. That case, as explained by Woolf L.J. in **Barlow Clowes International Ltd. (in Liquidation) v. Vaughan** [1992] 4 All ER 22, at page 35 b, is authority for the principle that, when sums are mixed in a bank account as a result of a series of deposits, withdrawals are treated as withdrawing money in the same order as the money was deposited. This is also referred to as the "first in, first out" rule.

[87] As to this rule, a Judge with a most fascinating name, Judge Learned Hand, in **Re Walter J Schmidt & Co, ex p Feurbach**(1923) 298 F 314 at 316, made this astute comment :

"When the law adopts a fiction, it is, or at least it should be, for some purpose of justice. To adopt [the fiction of first in, first out] is to apportion a common misfortune through a test which has no relation whatever to the justice of the case."

[88] This rule in Clayton's case is a rule of convenience based upon presumed intention.-per Lord Greene MR in **Re Diplock's Estate, Diplock v. Wintle** [1948] 2 All ER 318, at page 364. " It is settled law that the rule in *Clayton's Case* can be applied to determine the extent to which, as between each other, equally innocent claimants are entitled in equity to moneys which have been paid into a bank account and then subject to the movements within that account. However, it does not, having regard to the passages from the judgments in the other authorities cited, follow that the rule has always to be applied for this purpose. In a number of different circumstances the rule has not been applied. The rule need only be applied when it is convenient to do so and when its application can be said to do broad justice having regard to the

nature of the competing claims. *Re Hallett's Estate* shows that the rule is displaced where its application would unjustly assist the trustee to the disadvantage of the beneficiaries. In *Re Diplock's Estate* the rule would have been displaced by the trustee subsequently earmarking the beneficiary's funds. It is not applied if this is the intention or presumed intention of the beneficiaries. The rule is sensibly not applied when the cost of applying it is likely to exhaust the fund available for the beneficiaries."- Woolf L.J, page 39, **Barlow Clowes** .

[89] The headnote in **Sinclair v. Brougham** [1914-1915] All E.R.Rep. 622, an authority upon which COK relies, is instructive. It reads(so far as relevant):

> " A building society, established under the Building Societies Act…….
> and having borrowing powers, established and developed, in addition to the legitimate business of a building society, a banking business, which was admitted to be ultra vires. In connection with this banking business, customers deposited sums of money in the usual way. An order winding-up the society was made, and the assets of the society, after payment in full of the outside creditors and the costs, were found to be sufficient to pay in full them and also the customers of the bank on deposit and current accounts.
>
> **Held:** (i) the doctrine of ultra vires excluded any claim in personam based on the circumstance that the society had been improperly enriched at the expense of the depositors of the bank, and so the depositors could not recover their money unless, adopting the dealings by the society with the money and claiming in rem, they could trace their money into the hands of the society as actually existing assets; at law money could be followed not only where a fiduciary relationship existed, but in any case where the property in the money had not passed and the money could be earmarked in the hands of the recipient or traced into assets acquired with it, and that was true where money had been paid under an ultra vires contract under which no property could pass; in equity, when money had been paid to a person who had wrongfully obtained it, the court would declare that there was a charge on the fund in the bank with which the money had been

mixed, and that doctrine applied in the case of money acquired under a transaction which was ultra vires the recipient; accordingly, in the present case the depositors had the right to follow the money so far as it was validly converted into the, possibly depreciated, assets in which it had been invested, whether those assets were mere debts due to the society or ordinary securities: (ii) no action for money paid under a mistake of fact or for money had and received would lie to enable the depositors to recover their money: (iii) subject to the payment of all proper costs, charges, and expenses, the liquidator, in distributing the remaining assets of the society between the depositors and the unadvanced shareholders, should proceed on the principle of distributing them pari passu in proportion to the amounts properly credited to them respectively in the books of the society in respect of their advances at the date of the commencement of the winding up."

At page 651 Lord Sumner stated:

"No one has ventured to argue before your Lordships that the shareholders take everything, to the exclusion of the depositors, and so make a huge windfall. In my opinion, if precedent fails, the most just distribution of the whole must be directed, so only that no recognized rule of law or equity be disregarded. In this case neither the shareholders nor the depositors have the better equity; the money of each has, with the consent of all, been indiscriminately applied in acquiring assets beyond as well as within the society's powers, the former in much the larger measure. The claims of each class are equal, and, I think, for the present purpose identical." (My emphasis)

[90] In **Re Diplock's Estate, Diplock v. Wintle** [1948] 2 All E.R. 318, the English Court of Appeal had to resolve conflicting equitable claims which arose in consequence of executors distributing the testator's residuary estate to approximately 139 charities under a bequest which was subsequently held by the House of Lords to be invalid –sub nom **Ministry of Health v. Simpson**. In relation to a payment to one particular Home, the Court of Appeal applied the rule in *Clayton's Case* to the sum paid by the executors into the charity's general current account. Lord Greene MR said at page 364:

> "The above result would only follow if *Clayton's case* applies. It might be suggested that the corollary of treating two claimants on a mixed fund as interested rateably should be that withdrawals out of the fund ought to be attributed rateably to the interests of both claimants. But in the case of an active bank account this would lead to the greatest difficulty and complication in practice and might in many cases raise questions incapable of solution. What, then, is to be done? In our opinion, the same rule as that applied in *Clayton's case* should be applied. This is really a rule of convenience based on so-called presumed intention. It has been applied in the case of two beneficiaries whose trust money has been paid into a mixed banking account from which drawings were subsequently made….."

[91] The rule in *Clayton's Case* was regarded in **Re Diplock** as establishing nothing more than a rule of convenience. Indeed, a bequest to the National Institute for the Deaf was treated differently. It was thought that the charity had earmarked the Trust's money and by placing it in a different account it was regarded as excluding the rule. It was also held that equity recognized the right of the testator's next of kin to the money as a proprietary interest, and when once that proprietary interest had been created as a result of the wrongful dealing with the funds by the executors, it would persist and be operative against an innocent third party who was a volunteer provided only that means of identification in or disentanglement from a mixed fund remained. There could be no difference in principle between a case where the mixing had been done by the volunteer and one where the mixing had been done previously by the fiduciary agent.

At pages 363-364, Lord Greene M.R. dealt with "earmarking" and "unmixing of funds" as follows:

> "Here, however, the charity has earmarked the sums withdrawn from its account and deposited at the Post Office Savings Bank. It seems to us that equity cannot disregard this. A volunteer, who mixes what turns out to be trust money with his own, can surely himself "unmix" it subsequently if he thinks fit to do so. And as the operation of equity is directed to preventing the volunteer doing what is unconscionable,

surely it would be unconscionable for the volunteer, who, for his own purposes, has earmarked the trust money, to assert that what he has earmarked is not trust money but money which he is entitled to keep as his own." (My emphasis).

[92] In **Barlow Clowes International Ltd. (in liq) v. Vaughan** [1992] 4 All E.R. 22, the Headnote states that a deposit-taking company and its associated companies went into liquidation and receivers were appointed. The companies managed a number of investment plans including in particular two plans known as Portfolios 28 and 68 for investment in gilt-edged stock, but the funds had been misapplied and at the time of the collapse the companies had a total liability of over £115 m owed to around 11,000 investors. The amount available for distribution to investors was far less than the amount of the investors' claims. The receivers brought proceedings for directions as to the basis on which assets and moneys in the hands of the receivers should be administered. The moneys and assets available for distribution to investors consisted of moneys paid in by investors for investment in Portfolios 28 and 68, moneys in certain bank accounts awaiting investment at the time the receivers were appointed and the net proceeds of sale of other additional assets, including a yacht. The judge appointed the first defendant to represent those investors(the late investors) who contended that the available assets should be distributed on the basis that withdrawals from the investment fund and its consequent depletion had been made on a 'first in, first out' basis so that late investors were those most likely to be repaid. The judge also appointed the second defendant to represent those investors (the early investors) who contended that the first in, first out rule should not apply. The judge held that the rule should be applied to the distribution of the assets in the hands of the receivers so that investors who could trace into the funds held by the receivers were to be paid in the reverse order to that in which they had made deposits. The second defendant appealed. After the appeal had been set down the Secretary of State for Trade and Industry made an offer of a composition payment to most investors in consideration of the investors assigning their claims in his favour. The offer was accepted by both the first and second defendants and the Secretary of State pursued the

appeal in the name of the second defendant by way of subrogation. The first defendant had no interest to oppose the appeal. The appellant contended that instead of tracing or the application of the first in, first out rule, the available assets and moneys should be distributed pari passu among all unpaid investors rateably in proportion to the amounts due to them regardless of the dates on which investors made their investment. It was accepted that a third solution, the 'rolling charge' solution whereby the investors would share their loss in proportion to their interest in the investment fund immediately before each withdrawal, was impracticable.

[93] It was held, allowing the appeal, that the first in, first out rule that, when monies were blended in one current or running account as a result of a series of deposits, withdrawals were to be treated as withdrawing the money in the same order in which it was deposited, applied if the rule provided a convenient method of determining competing claims where several beneficiaries' moneys had been blended in one account and there was a deficiency or where there had been a wrongful mixing of different sums of trust money in a single account. Where, however, the application of the rule would be impractical or would result in injustice between the investors, because a relatively small number of investors would get most of the funds, or would be contrary to the intention, express or implied, of the investors, the rule would not be applied if a preferable alternative method of distribution was available. In view of the basis on which the investors had contributed to the two investment plans, Portfolios 28 and 68, which was that they intended to participate in a collective scheme by which their money would be mixed together and invested through a common fund, it would be contrary to the presumed intention of the investors to distribute what remained from their common misfortune by the application of the first in, first out rule so that those who had invested first could expect least. Instead, the presumed intention must have been that that rule would not apply and that all the assets available for distribution, whether moneys already invested in gilt-edged stock, moneys awaiting investment and monies diverted into other assets, such as the yacht, would be shared pari passu rateably in proportion to the amounts due to them, and an order would be made to that effect. (My emphasis).

[94] In researching this matter to see whether there were any more recent cases where these various rules or approaches have been applied, and where the cases cited to me have been considered and applied to varied factual scenarios, I came across the Irish High Court first Instance judgment of **In the matter of Money Markets International Stockbrokers Ltd. (in liquidation) Gill Hess v. Tom Kavanagh**, which is reported at [1999] 4 I.R. 267.In this case the company was a stockbroker and a member of the Irish Stock Exchange. The applicant instructed the company on the 15th February 1998, to buy a specified number of shares and the company on the same day confirmed the purchase and advised the amount due and the date for settlement, 22nd February 1998. The applicant paid the amount due on the 18th of February. On the 19th of February, the company's membership of the stock exchange was suspended. A court order for the winding up of the company was made on the 15th March. A further court order was made on the 19th March, requiring the company, in order to enable the default rules of the stock exchange to take effect, to give the stock exchange access to the books and records of the company and to furnish such information as would be required to identify the parties to any unsettled contracts on the stock exchange so that these contracts could be completed.

[95] The applicant was notified of the name of the counterparty to his contract and he was later requested by that party to complete the contract by paying the full amount due. The applicant then brought this application seeking to have the respondent, who was the official liquidator of the company, directed to complete the contract on the applicant's behalf, or in the alternative, to repay the sum paid by the applicant to the company in respect of the contract.

At the time of the hearing of the applicant's motion the investigations of the respondent had identified a deficit in the account of clients' funds, but the respondent had at that time a separate application pending in which he sought directions on a number of matters which could affect the final conclusion as to whether or not there would be a deficit. The applicant's motion was heard on the assumption that there would be a deficit. It was agreed between the parties that the company was in a fiduciary relationship to

the applicant and that the funds transferred by the applicant to the company were held as trust funds. These funds were mingled with trust funds of other clients and probably also with company funds because the company at times put some of its own funds into client accounts to cover deficits.

[96] It was held by the High Court, Laffoy J., in granting the alternative relief sought, (1), that since the applicant uniquely amongst the client creditors, transferred prior to the settlement date, the monies in issue to the current client account of the company for the specific purpose of paying the sum due in respect of the share purchase transaction to enable that purchase to be completed, and since the company was not able to use the money to complete the transaction since it had been suspended from membership of the stock exchange before the settlement date, the applicant had a better equity than the other client creditors in relation to monies represented by the balance on the current account.
(2) That, the equities not being equal, equitable principles did not require that the applicant be subjected to pari passu distribution under which he could be treated in the same way as other clients who had equitable claims against the funds. (My emphasis).
(3) That, whether the rule in Clayton's case was applicable or not in determining entitlement to the monies represented by the balance on the current account, the applicant was entitled to the repayment of the entirety of the monies transferred by him to the company account since the details of that account showed the whole of his monies to be still in the account.
Obiter, Laffoy J. stated that in relation to the first relief sought, the liquidator had no power to complete the transaction since the company agency had terminated on the making of the winding up order. Amongst the cases referred to were **Barlow**, *Clayton's Case,* and **Re Diplock's Estate** .

[97] In **Eagle Merchant Bank of Jamaica Ltd. V. Lets Ltd et al.** Supreme Court Civil Appeal Nos. 9 & 19 of 2005, relied upon by Mrs. Harrison-Henry on behalf of COK, Eagle Merchant Bank of Jamaica Ltd. "EMB" was a merchant bank authorized to conduct the business of banking including the acceptance of monies for investment and the conduct of foreign currency

transactions. Lets Ltd. “Lets” was a company licensed under the BOJ Act to operate as a cambio dealing in the buying and selling of foreign currency instruments and transactions. Lets Investment Company Ltd. was a company owned and controlled by the shareholders and directors of Lets. Both companies operated from the same office.

[98] In 1996 Lets entered into an agreement with EMB. The terms of the agreement were that EMB would send to Lets foreign currency cheques or other investments, for sale at an agreed rate of exchange. In return Lets would send to EMB, the equivalent amount in Jamaican dollars. A further condition was that EMB would hold the Jamaican dollar funds, and not make payments therefrom until Lets had informed EMB that the foreign currency cheques or instruments had been cleared or paid. EMB’s branch manager assured Lets that the persons on whose behalf they submitted the foreign currency items, had the necessary funds and were reliable. There was a new manager at EMB in 1997 who had a similar agreement continuing with Lets and gave Lets similar assurances.

[99] On the 28th of April 1997 two (2) U.S. dollar cheques dated 28th April 1997 each for US$475,075.61 payable to Lets Investment Ltd, were sent to Lets Ltd by the then manager of EMB, pursuant to the said agreement. These cheques were drawn on Merrill Lynch Bank One, the account of Transact Resources Group/James Ogle/Marina Ogle. EMB’s manager assured Lets that the drawers were reputable and reliable, that they had the equivalent necessary funds in their account and that EMB would hold the Jamaican dollar equivalent against the uncleared US dollar cheques. Lets in pursuance of the agreement and relying on the assurances, sent to EMB four cheques, in Jamaican currency, totalling $33,350,000.00 payable to James Ogle, as instructed by EMB’s Manager. These cheques were the equivalent of the US dollar cheques totalling US$950,151.22, and were drawn on Lets’ bankers, NCB. EMB’s Manager had also told Lets that the EMB account was in the name of James Ogle.

[100] On the 16th of May 1997 Lets was advised by its bankers, NCB that the said two US dollar cheques, lodged to its account had been returned unpaid due to "insufficient funds". Lets advised the EMB Manager, who advised Lets that funds were available and were being lodged. On the 21st May 1997 the requisite amount of US dollar cheques were lodged to Lets account at NCB. Payment on these cheques was later stopped. Lets never received the US dollar sums nor a refund of the equivalent sum of Jamaican $33,350,000.00.

[101] Lets' four cheques were stamped with the stamp of EMB and lodged to EMB's account at Eagle Commercial Bank. These cheques were not endorsed by the payee James Ogle. They were however paid by NCB, and Lets' account debited in the sum of $33,350,000.00. Lets commenced proceedings against-

(1) EMB for damages for breach of contract, and in the alternative for breach of trust and for loss and expenses.

(2) ECB(at the time RBTT) for negligence and the sum of $33,350,000.00 and

(3) NCB, a declaration that it had wrongly debited Lets' account, a return of the said $33,350,000.00 and damages.

[102] The learned trial judge Marsh J. in one of the suits filed gave judgment for Lets against EMB in the sum of J$33,350,000.00, with interest from 14th April 1997 to the date of judgment at the rate of 18.60% per annum with costs to the claimant to be agreed or taxed. In the other Suits, judgment was entered (a) for NCB with costs to the defendant to be agreed or taxed and (b) for the Defendant ECB/RBTT with costs to the defendant to be agreed or taxed.

[103] In dismissing the appeal, in the course of his judgment, Harrison P. stated at page 5:

"A merchant bank authorized and licensed in Jamaica to carry on banking business, including the acceptance of monies from clients, may also be

authorized to engage in foreign currency transactions on behalf of such clients."

[104] At pages 11-13 the learned President stated:

> "….when EMB received the four (4) cheques from Lets, on the agreed understanding that EMB would hold them until the foreign currency cheques from Transact Resources Group/Ogle and Ogle were cleared, and being aware that the latter cheques were dishonoured, EMB held Lets' four (4) cheques as constructive trustee in favour of Lets. The ordinary implied agreement between banker and customer is one of lender and borrower(**Joachimson v. Swiss Bank Corp** [1921] 3 K.B. 110). This relationship precludes the existence of the concept of trust. However, in the instant case, Lets was not in a relationship as a customer of EMB. The constructive trust is one that is inferred from construing the facts of the case, and which the courts may impose on a person in the interests of conscience and justice. A fiduciary relationship may arise in such circumstances. No formal legal trust is contemplated. In **Reading v. The Attorney General** [1951] A.C.507, a soldier who, wearing his army uniform, assisted smugglers of goods to escape police searches in Egypt, was held to hold the money he received in illegal payments, on trust for the Crown.
>
> A cheque which, as a bill of exchange , (section 73of the Bills of Exchange Act) is an unconditional order to the bank on which it is drawn, to pay. Section 3 of the said Act reads:
>
> "**3.** A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a certain sum in money to or to the order of a specified person or to bearer."
>
> As between Lets, the payee James Ogle and NCB, the four cheques were governed by the provisions of section 3. However, as between Lets and EMB, the agreed stipulation that EMB was required to hold the said cheques on condition of the clearance of the foreign currency cheques, imposed that duty on EMB. The latter cheques not having

been honoured, EMB held the said cheques as constructive trustee for Lets.

Counsel for Lets argued before this Court that the evidence against Hunter, if a servant or agent of EMB, supported the existence of the constructive trust. I find virtue in the point of view. This may be inferred from the facts. ….

The learned judge was correct to find EMB liable to Lets. EMB is liable both in breach of contract and as constructive trustee for the benefit of Lets."

THE ISSUE OF WHETHER INTERTRADE HELD COK'S FUNDS IN TRUST OR HAD FIDUCIARY DUTIES

[105] In the House of Lord's decision in **Twinsectra v. Yardley** [2002] UKHL, Lord Millett gives a clear description of the trust and fiduciary relationship that arises when money is paid for a specific purpose:

"[76]…….

It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. Such conduct goes beyond a mere breach of contract. As North J explained in Gilbert v. Gonard (1884) 54 LJCh 439, 33 WR at p.440 of the former report:

> *It is well known law that if one person makes a payment to another for a certain purpose and that person takes the money knowing that it is for that purpose, he must apply it to the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty and there is a legal obligation on him, to apply it for that purpose.*

The duty is not contractual but fiduciary. It may exist despite the absence of any contract at all between the parties, as in Rose v. Rose (1986) 7 NSWLR 679; and it binds third parties as in the Quistclose case itself. The duty is fiduciary in character because a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and

confidence in the recipient to ensure that it is properly applied. This is a classic situation in which a fiduciary relationship arises and since it arises in respect of a specific fund it gives rise to a trust."

INFORMATION FROM TEMPORARY MANAGER AS TO THE STATUS OF INTERTRADE AND ITS ASSETS AND LIABILITIES

[106] Intertrade was indebted to COK in the sum of US$2,010,000.00. Intertrade is also indebted to its investors who participated in its securities business, as well as other clients and creditors. Mr. Linval Freeman, Partner in the firm of Ernst & Young, Chartered Accountants, was on the 3rd of August 2011 appointed by the FSC to act as Temporary Manager of Intertrade Finance Corporation. In his comprehensive Affidavit filed on the 28th of September 2011 and Report of Temporary Manager dated 26 September 2011, Mr Freeman indicates (paragraph 21 of the Affidavit), that he has determined that the total liabilities of Intertrade Finance Corporation are approximately $3.551 Billion. The total claims submitted to him as Manager by investors up to the date of the Report was $3.427 Billion. These investor claims include such sums as were invested through Intertrade Investments Limited, an affiliate of Intertrade, Intertrade being its majority shareholder. In his Report, Mr. Freeman refers to Intertrade as IFCL and to Intertrade Iinvestments Limited as IIL. He also refers to three other affiliates, Digitourism Society Limited (DSL), a locally registered Industrial and Provident Society, Intertrade Capital Corporation (ICC), a company registered in the USA, and Worlddigibeat.com Inc (WDB), a company which appears to be also registered in the USA.

[107] Mr. Freeman's Report is well-drafted and thorough, though with his caveat that it is subject to difficulties which he identified, such as incomplete books and records, and the refusal of the then CEO Joan Powell, to make herself available for dialogue with him . I think it is useful to quote extensively from pages 2-4 of the Report and Appendix 9 as follows:

(Page 2)

"STATUS OF FINANCIAL ASSETS AND LIABILITIES

Liabilities

Based on all the information available to me, the estimated liability position is approximately J$3.551 Billion. To date, liabilities amounting to approximately J$ 3.2 billion have been independently confirmed by investors and other creditors (see listing of investor balances confirmed at Appendix 3). Liabilities are summarised as follows:

	(J$M)
Due to investors	3,427
Due to COK (After transfer of office building)	109
Tax Administration (Appendix 3A)	36
Others	24
Total liabilities	3,596

(Page 3)

The investor liabilities are distributed among the entities as follows (See listing of investor balances per company records at Appendix 4) :

	(J$M)
IFCL	1,773
IIL	1,530
DSL	124
Total investor liabilities	3,427

It should be noted that neither IIL nor DSL is registered with the FSC to carry on security dealer activities. IIL is registered with the FSC as an issuer of World Digibeat Bonds. Included in the total of $1.530 billion are World Digibeat bonds of an estimated value of $352.8 million based on certificates submitted by bondholders.

Included in liabilities is an amount of $109 million payable to COK Solidarity Co-Operative Credit Union (COK). This resulted from dishonoured cheques tendered by IFCL to settle foreign exchange obligations to COK. The original obligation was approximately US$2.1 million or approximately J$179 million, inclusive of expenses incurred to recover the amount, but this was reduced by J$70 being estimated

value of office building which was transferred to COK on June 27, 2011 in part settlement of this obligation(see copy title for Barbados Avenue property at Appendix 5A). COK is also holding for sale a private property owned by Joan Powell, valued at $70 million (see copy title for Joan Powell residence at Appendix 5B), as well as a commitment to receive US$2.4 million from any payout of an overseas investment controlled by Freeman, Boydston & Rowlat, Inc. of Tulsa Oklahoma, U.S.A. on behalf of IFCL. (See confirmation from COK at Appendix 6).

Other liabilities represent unpaid salaries and statutory deductions of approximately $4.8 million, estimated redundancy cost of $7.5 million and other sundry payables amounts of $2.7 million and cost of the temporary management by the FSC of $8.8. million. (See Statement of Assets and Liabilities at Appendix 7).

(Page 4)

Assets

Gross available assets amount to approximately $1.137 billion. Assets are summarised as follows:

	(J$M)
Real estate	30
Funds invested overseas	934
Deposit-Maroon Bay Property	122
Others	51
Total Assets	1,137

Real Estate……..

Funds invested overseas-Freeman, Boydston &Rowlat, Inc (FBR) has confirmed that they have been engaged to collect funds from an Estate for which they serve as the executors of which US$10.992 million will be distributed to IFCL. It will be necessary for probate procedures to be completed and for court approval to be obtained for the amounts to be paid. Distribution of the amount is expected to take place in October

2011 with a maturity date of December 2011. The original sum invested by IFCL in 2000 in a project known as "Country Deal", based on the assertion of Leroy Paul, is believed to be US$ 1.3 million. FBR has also confirmed that US$2.4 million of the total payable to IFCL has been pledged to COK as noted above (See correspondence from FBR at Appendix 9). I have not been able to independently verify the information confirmed by FBR or establish the likely outcome from this investment project."

[108] An examination of the documents at Appendix 9, i.e. a letter from Freeman Boydston & Rowlat Inc. to the FSC dated September 1 2011, and its enclosure, being a copy of letter/document/undertaking dated July 15 2011 from Freeman Boydston & Rowlat Inc., written on its letterhead to COK, is most instructive. I think it is worth setting out the contents of this document in full. It reads as follows:

July 15, 2011

Mrs. Jacqueline Mighty
Chief Executive Officer
COK Sodality Co-operative Credit Union Ltd.
66 SLIPE ROAD
KINGSTON 10
JAMAICA W.I.

Dear Madam,
Re: <u>Assignment in favour of COK Sodality Co-operative Credit Union Ltd. for US$ 2.4 M</u>
This is to confirm that on the instructions of our client, Intertrade Finance Corporation Limited an amount of Two Million Four Hundred Thousand United States Dollars (USD$2,400,000) has been removed from their portfolio and assigned to COK Sodality Co-operative Credit Union Ltd. The underlying investment becomes due and payable

December 11 2011 but arrangements are being made to provide liquidity by December 31 2011.

We give our irrevocable undertaking to pay COK Sodality Co-operative Credit Union Ltd. the sum of Two Million Four Hundred Thousand United States Dollars (US$2,400,000) on or before October 31 2011.

Yours truly,

(sgd)	*(sgd)*
Charles W.Taylor	*J. Stephen Alley*
CEO &Chairman	*Senior Vice President*

STATE OF OKLAHOMA
COUNTY OF TULSA

On this 15th day of July 2011 personally appeared before me Charles W.Taylor, in his capacity as Chairman and CEO of Freeman Boydston & Rolyat, Inc., an Oklahoma Corporation, known to me to be this person and signing in this capacity who does further confirm that he is signing of his own free will and accord. As Notary Public for the above State and County, I Taijm Dorris do hereby attest to his signature.

(sgd)
Notary Public

My Commission expires 01/08/2013.

[109] The parties have advised that to date COK has not received the proceeds of this assignment or any sums from Freeman Boydston & Rolyat.

RESOLUTION OF THE ISSUES

[110] In my judgment, the equities as between COK and the investors in Intertrade's securities business are not equal. COK's money was, unlike the situation that obtained in **Barlowe Clowe** not paid in the capacity for investment in common funds with other investors, in respect of which there were established risks in relation to securities investments. It was paid for the specific purpose of a cambio transaction, of purchasing foreign exchange in

exchange for Jamaican dollars. Though COK and investors may all have undergone misfortune, it is not common misfortune. This is not a case in which the parties have contributed to some collective investment and thus suffered some common misfortune which would be a factor favouring a pari passu distribution. I am of the view that COK would be entitled to judgment for the US$2,000,000.00 representing the dishonoured cheques, or the Jamaican equivalent thereof at the date of payment. Alternatively, it seems to me that COK would be entitled to the sum of $171,426,000.00 as being monies paid to Intertrade in a fiduciary capacity and impressed with a constructive trust. The fact that Intertrade actually purported to provide the US$2,000,000.00 in the dishonoured cheques means that the trust could be said to attach to this US sum as an alternative. As a further alternative, COK would be entitled to the sum of $171,426,000.00 as money had and received by Intertrade to COK'S use on the basis of a fictional promise implied by law. By this doctrine the law will compel a person, who has received moneys which in equity belong to another, to pay them over to that other-**Sinclair v. Brougham**. From the sum of $171,426,000.00 would fall to be deducted the sum treated as the value of the office building at Barbados Avenue, i.e. J$70,000,000.00. (I note however that the Duplicate Certificate of Title states a consideration figure of $50,000,000.00).

[111] This case has really been complicated by the fact that the pleadings have not kept abreast of the developments taking place and the different negotiations that occurred between COK and Intertrade. So for example, although the Court has been told in Affidavits that Intertrade transferred the Barbados Avenue property to COK in reduction of its indebtedness, this and the value, have not been deducted from the amount claimed as set out in the Particulars of Claim. Further, there has been no pleading specifically addressing the assignment of the US$2.4 Million by Intertrade to COK from the monies held by Freeman Boydson and Rowlat Inc. In addition, up to April 20 2012, it was not clear what was the position with regard to the Cherry Gardens property.

[112] In the same vein, I did not completely understand whether the FSC intend to still challenge the transfer of the Barbados Avenue property or the assignment of the US$2.4 Million since they were transferred after the issue of the FSC's Cease and Desist Order on the 20th of May 2011. They have not done so up to this point, save to raise concerns in support of the application for a stay. Thus I am dealing with those matters as if there is no formal challenge. I am of the view that the FSC's Cease and Desist Order would properly relate to all of Intertrade's activities, and not just those concerning its securities operation. I note however that in any event section 8 (4) of the FSC Act states that a contravention of any direction or prohibition imposed under this section (and I understand it to include directions (referred to in s.8(1)(b) as well as a cease and desist order referred to in s. 8(1)(c)), "shall not invalidate any transaction". Further, COK's Attorneys are correct in arguing that the delivery of the Duplicate Certificate of Title for the property and an executed Instrument of Transfer by Intertrade to COK from April 18, 2011 (in Intertrade's effort to settle the trade in money with COK), was not caught by the Cease and Desist order made by the FSC. Delivery of the Title on the terms specified in Intertrade's letter of April 26 2011 would in law amount to COK having at least the rights that flow from an equitable mortgage.

[113] In my judgment, as stated in **Re Diplock's Estate** the trustee who has mixed its funds with the trust funds referrable to a number of other persons is free to "unmix it". I appreciate the FSC's point that Intertrade was required to maintain separate accounts in respect of its cambio operations and its securities or other investment businesses. Intertrade does not appear to have adhered to these requirements. However, that is not the fault of COK. Further, the FSC's argument that COK cannot trace its money into the Barbados Avenue property is unassailable. However, the fact that COK chose to accept the transfer of the property in partial satisfaction of the sums due to it, is not a tracing remedy. It would seem to me it is more in the nature of a compromise and self-help measure. The tragedy in this case is that the culprit, Intertrade, has caused loss and misfortune to many innocent parties, including COK, as well as investors in Intertrade's securities business. It has, as the FSC maintains, in breach of its obligation to provide capital in respect of its security

dealer's licence, used such an asset, i.e. the Barbados Avenue property, to settle a cambio obligation, without replacing that asset. COK, no doubt in its bid to protect its membership of "ordinary Jamaicans", has been very proactive in seeking to recover its money and to mitigate its losses.

[114] Although in his Affidavit Mr. Wynter makes the broad statement that COK's money was used by Intertrade to pay its creditors, there is no evidence to support that, and no evidence has been forthcoming as to what Intertrade did with COK's J$170,426,000.00. Whilst there is evidence that the sums held by Freeman Boydson and Rolyat Inc. consists of investment monies relating to the securities business, there is no specific evidence to suggest that this was the only type of monies or funds that were placed with it. Reference can be made to page 4 of Mr. Freeman's Report which does show that the original sum invested was invested from 2000, long before COK's cambio trade. It is not known whether funds, if any, whenever added to the original sum invested, also included Intertrade's own money. Further, the cost of trying to ascertain precisely where all these funds came from may place a significant, and in my view, undesirable dent in the funds available to investors and creditors for distribution. In its letter to COK dated April 26 2011 promising to wire money to COK's NCB account, Intertrade stated that they were at an advanced stage in completing a "financial transaction"; they did not specify what type of financial transaction it was. As occurred in **Re Diplock**, Intertrade has earmarked the sum of US$2.4 million as COK's trust money. Indeed, Freeman Boydston's letter describes the sum as being "removed from (Intertrade's) ..portfolio and assigned to COK". Further, In the circumstances of this case, it seems to me that it would be just to treat the remaining amount due to COK, as being held on trust for COK but to have them receive from the Freeman Boydston funds, or indeed any other US funds that have been identified by the Temporary Manager, the US$ equivalent of the sum remaining due, together with interest at a commercial rate to be assessed. COK would of course have to hand over to the Temporary Manager the balance of the US Dollars remaining from the US$2.4 Million after extracting its money, if that is the fund out of which COK obtains it. COK would also

have to return Mr. and Mrs. Powell's Certificate of Title to them or give credit for the value of this property.

[115] In my judgment, there is no proper basis upon which any stay of execution should be granted, since the relevant sum belongs to COK and does not form part of the assets of Intertrade. It is to be noted that the rights arising from the fact that Intertrade holds the money in trust for COK are superior to the rights that COK would have to claim the amounts stated in the dishonoured cheques as liquidated damages. This is because under the trust, the monies belong to COK and not to Intertrade, whereas a judgment based on liquidated damages would require settlement from funds or assets properly belonging to Intertrade. There would be no reason to grant a stay of COK's Suit if the money belongs to COK as I have ruled, whereas if the dishonoured cheque cause of action is employed, FSC would have better,(but not necessarily persuasive), grounds to support a stay. I intend to enter judgment in COK's favour based upon trust and equitable principles and not on the basis of the dishonoured cheques since COK cannot be permitted double recovery.

[116] In **Jamaica Carpet Mills Ltd. v. First Valley Bank** 23 J.L.R. 338, following the House of Lord's decision in **Milliangos v.George Frank (Textiles) Ltd.** [1975] 3 All E.R. 801, it was held that where a Claimant is entitled to judgment in a foreign currency, the judgment should be for the foreign currency or the Jamaican equivalent thereof at the date of payment.

[117] Since there have been a number of developments since the matter started and there is a need for equitable accounting and inquiries, on the 20th of April 2012, I ordered that COK file and serve a further affidavit by 4:00 p.m. on the 23rd of April 2012, indicating the current US $ amount outstanding, and the Jamaican equivalent thereof. COK was also ordered to exhibit all documentary proof, including receipts and valuations. COK has filed and served two Affidavits of Mr. Wynter, one on the 23rd of April 2012, and one on the 5th of May 2012, this latter to deal with certain concerns raised by the

FSC. Evidence and documentation has also been filed in relation to the rate of interest claimed by COK.

[118] Following the decision of the Judicial Committee of the Privy Council in **Seepersad v. Persad** [2004] UKPC 19, 66 2/3 % costs are to be awarded to COK to be taxed if not agreed. The reduction in costs is to reflect the fact that the FSC succeeded, and COK lost, on the distinct and separate issue of jurisdiction, and a significant amount of hearing time was allotted to dealing with this issue. This reduction also takes into account the adjournment occasioned on the 25th November 2011 as a result of COK's application to amend.

[119] As a result of this additional information in Mr. Wynter's Affidavits, I was able to conduct accounts and inquiries. Having conducted that exercise, in Claim No. 2011HCV 03174, there will therefore be judgment for the Claimant COK Sodality Co-Operative Society Limited against the Defendant Intertrade Finance Corporation Limited (In Temporary Management) as follows:

1. It is declared that the Defendant Intertrade Finance Corporation Limited (in temporary management) holds in trust for the Claimant COK Sodality Co-Operative Credit Union Limited, the sum of US$721,727.90, being the balance due from the sum of US$2,000,000.00 after the application of the following sums:-

    a) The net proceeds of sale of 23 Barbados Avenue comprised in Certificate of Title registered at Volume 955 Folio 541 of the Register Book of Titles, being US$725,605.89; and being the US Dollar equivalent of the sale price of J$72,000,000.00, less equitable compensation in the form of damages for breach of trust as set out at paragraph 3 below.

    b) The estimated net proceeds of sale of Lot 29 Cherry Gardens comprised in Certificate of Title registered at Volume 1454

Folio 614 of the Register Book of Titles, now registered in the name of the Claimant, being US$628,645.75, based on the forced sale value pursuant to Valuation Report dated January 30, 2012; and

2. The Defendant is to forthwith hand over/make available to the Claimant the said sum of US$721,727.90.
3. Damages for breach of trust totalling US$75,979.54 itemized as follows:

   (i) Bank charges and interest on loan of US$2,873.45;
   (ii) Management costs and legal costs, excluding litigation costs, of US$73,106.09.

4. Interest at the rate of 9.38% per annum is awarded to the Claimant on the sum of US$2,000,000.00 from April 1, 2011 to January 5, 2012 (date of receipt of the balance purchase monies in respect of 23 Barbados Avenue) and thereafter on the sum of US$721,727.90, or the Jamaican equivalent thereof, until the date of payment.

5. The Claimant undertakes:
   i. to account to the Court and to the Temporary Manager/Liquidator of the Defendant for the net proceeds of the sale of Lot 29 Cherry Gardens comprised in Certificate of Title registered at Volume 1454 Folio 614 of the Register Book of Titles;
   ii. to account to the Court and to the temporary Manager/Liquidator for any sums received from Freeman, Boydston & Rolyat Inc.; and
   iii. to pay to the Temporary Manager/Liquidator any sum received in excess of the judgment debt, and interest.

6. By May 16, 2012, the Claimant shall provide the Court with an Undertaking under Resolution and Seal from its Board of Directors in respect of the matters at Order 5 herein.

7. Costs to the Claimant of 66 $^{2/3}$ % against the Defendant to be taxed if not agreed.

8. Liberty to Apply.

[120] The FSC's application filed on 28 September 2011 is dismissed, with costs to COK to be taxed if not agreed.