

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 32/87

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT  
THE HON. MR. JUSTICE CAMPBELL, J.A.  
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

BETWEEN	DAILY NEWS LIMITED	DEFENDANT/APPELLANT
AND	INTER-ALLIANCE TRADING CORPORATION	PLAINTIFF/RESPONDENT

Patrick Foster and Judith Brown for appellant

Raphael Codlin and Barbara Lee for respondent

September 30 & 31; October 1 and November 18, 1987

ROWE, P:

I have read the judgment of Campbell JA with which I entirely agree and I have nothing to add. Accordingly the appeal is allowed, the order of the Master is set aside and judgment is entered for the defendant/appellant with costs here and in the Court below to be agreed or taxed.

CAMPBELL, J.A.:

The issue raised before the learned Master was whether the sum of \$679,000.00 paid by the Ministry of Finance to the liquidator of Communications Corporation Limited for the purchase of assets of that Corporation on behalf of Daily News Limited, a wholly owned Government Company, was disqualified as a provable debt in the subsequent compulsory liquidation of Daily News Limited due to the declared intention of Government subsequently that the advance was by way of capital injection to crystallise in shares of equivalent amount to be acquired in Daily News Limited.

The above issue is disclosed in the Summons taken out by Inter-Alliance Trading Corporation the plaintiff respondent, hereafter called the 'petitioner'. The said Summons sought an order that:

"the sum of \$679,000.00 which was advanced by the Ministry of Finance to the liquidator of Communications Corporation of Jamaica Limited for the purchase of the assets of that company was advanced to purchase shares for equity injection and cannot be admitted as a debt in the winding up of Daily News Limited."

The affidavit in support of this Summons is not logically consistent with the Summons. In the Summons, the basis of the order is that the money paid to the liquidator of Communications Corporation of Jamaica Limited was for the purchase of the assets of that Corporation ostensibly on behalf of Daily News Limited and that this constituted equity injection in Daily News Limited, which would subsequently be reflected in shares of an equivalent value issued to the Government of Jamaica by Daily News Limited. In the affidavit the petitioner contrarily depones that the sum was paid to the receiver of Communications Corporation of Jamaica Limited by the Ministry of Finance "to purchase the shares in Daily News Limited". But the receiver of Communications Corporation of Jamaica Limited was not shown to be a broker and even if he was, there were no shares in Daily News Limited which he could purchase on behalf of Government at the material time because the total authorised share capital of Daily News Limited was then \$100-shares of \$1.00 each fully subscribed by Government through the Accountant General and the Deputy Accountant General. That which the receiver had and of which it could dispose were assets of Communications

Corporation of Jamaica Limited.

The petitioner's affidavit states in paragraphs 5 and 7 as follows:

- "5. That it is to my knowledge that the sum of \$679,000.00 was paid to the receiver of Communications Corporation of Jamaica Limited by the Ministry of Finance to purchase the shares in Daily News Limited. This was done because the former Government decided to take over the running of the newspaper. (Emphasis mine)
- 7. That I have been informed and verily believe that sum cannot be recovered by the Ministry of Finance as a debt owed by the Company because when the sum was advanced it entitled the Government to shares in the company." (Emphasis mine)

In a further affidavit the petitioner deponed to facts more consistent with the Summons. It deponed as hereunder:

- "2. That I have been informed and verily believe that the amount of \$679,000.00 was paid directly to the Receiver appointed by the Jamaica Development Bank by Communications Corporation of Jamaica Limited, owners of the Jamaica Daily News.
- 3. That this sum was used to purchase the equipment which was being used by Communications Corporation to operate the Jamaica Daily News.
- 4. That I have been informed and verily believe that the transaction was conducted in this way:  
  
The Ministry of Finance provided on behalf of the Purchaser to the Receiver, the sum of \$679,000.00 and the Receiver in turn paid that sum to the Jamaica Development Bank.
- 5. That I am further informed and verily believe that the reason why the Ministry of Finance did not regard this sum as a loan to Daily News Limited is because the new company was wholly owned by Government and the Government intended that sum to be used as capital injection."

The petitioner relied on an abstract from the audited Balance Sheet of Daily News Limited for the 13 months ended 31st August, 1979 together with the explanatory notes thereto which are detailed hereunder:

"ADVANCES FROM GOVERNMENT OF JAMAICA COMPRISE:

Loan (including interest)	461,000
Advance re equity	<u>679,000</u>
	<u>1,140,000</u>

(a) Under the terms of the loan agreement between the company and the Government of Jamaica through the Ministry of Finance the amount of

1355

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" \$679,000 is to be converted into share capital. The legal requirements to facilitate the conversion of this advance into share capital were not finalised at the balance sheet date.

(b) The loan balance attracts interest at the rate ruling for Treasury Bills from time to time."

The affidavit sworn to on behalf of the Ministry of Finance in material paragraphs is as follows:

"2. That on August 31, 1978 the company Communications Corporation of Jamaica Limited former publishers of the Jamaica Daily News went into liquidation. Consequent thereon a new company known as the Daily News Limited was incorporated to continue publication of the Jamaica Daily News. The Ministry of Finance agreed to advance the sum of \$679,000.00 as a loan to the Daily News Limited in order that the said Daily News Limited would purchase the assets of the defunct Communications Corporation of Jamaica Limited. The said sum was thereupon advanced as a loan to the Daily News Limited by the Ministry of Finance through the Accountant General's Department. (Emphasis mine)

3. That subsequent to the said loan being advanced there were discussions between the Ministry of Finance and the Daily News Limited as to whether the said loan should be converted to share capital that this never went beyond the discussion stage ..... and the authorised share capital of the Daily News Limited was never increased beyond its initial share capital of \$100.00."

Before the Master, the Ministry of Finance took the view, as gleaned from the Master's ruling, that not only was it entitled to recover its advance but it was entitled to recover the amount in full as on a resulting trust. It was thus not compelled merely to prove as a debtor in the liquidation of Daily News Limited. The view of the Ministry of Finance is predicated on a totally erroneous view of the facts namely that the advance of \$679,000.00 had been made for a specific purpose namely equity injection in the form of share acquisition. The advance was thus, on this view, stamped with a trust. Since the shares were never issued prior to the compulsory liquidation of Daily News Limited the trust had failed, and the Ministry of Finance was entitled to the return of the trust monies. It was thus in a more favourable position than that of being merely an unsecured creditor seeking to prove a debt in the liquidation proceedings. The petitioner, in my view, unwittingly gave support to this view of the matter by deponing

that the sum was advanced to purchase the shares in Daily News Limited.

The Master did not accept the view of the Ministry of Finance and delivered herself thus:

"In the instant case there is nothing in the transaction which specifically spells out a trust. There were no conditions imposed as between the company and the Financial Secretary regarding the advance of \$679,000.00 which would impress on the money a trust in favour of the Financial Secretary. I therefore so find."

The Master did not however, expressly rule that the advance was not provable as a debt but such was inferred because the Formal Order drawn up is stated thus:

"IT IS HEREBY ORDERED:

- (1) That the sum of \$679,000.00 which was advanced by the Ministry of Finance to the liquidator of Communication Corporation of Jamaica Limited for the purchase of the assets of that company, was advanced to purchase shares, or for equity injection, and therefore cannot be admitted as a debt in the winding up of Daily News Limited."

The Ministry of Finance has appealed the Master's decision both in respect of the express ruling and also against the order as formally drawn.

Before us Mr. Foster for the appellant submitted that the primary purpose of the advance of \$679,000.00 was for the purchase of shares in Daily News Limited which was all that was meant by "equity injection". The shares were never issued, therefore the appellant became entitled to a return of the money advanced on the basis of a resulting trust for failure of consideration. He relied on Barclays Bank Limited v. Quistclose Investments Ltd. [1968] 3 All E.R. 651. Alternatively since there is no evidence that the advance was intended as a gift it was provable as an unsecured debt in the liquidation of Daily News Limited in the event the submission based on "resulting trust" does not succeed.

In my opinion, the indisputable fact is that no money was advanced directly to Daily News Limited for any purpose whatsoever much less for the prime purpose of the purchase of its shares. Money was however, indirectly advanced to Daily News Limited by the Ministry of Finance when on its behalf the Ministry of Finance purchased the printing equipment of Communications Corporation of Jamaica Limited for use by Daily News Limited. The advance

was utilised to provide Daily News Limited with fixed capital as part of its general assets in relation to which it exercised full proprietary rights.

No trust of these assets was created in favour of the Ministry of Finance. However, inasmuch as the money used to pay for these assets was not stated to have been advanced by way of gift, Daily News Limited who enjoyed the proprietary rights in the assets became a debtor to the Government of Jamaica through the Ministry of Finance. It is this indebtedness which was to be discharged by Daily News Limited by its issuing to the Government with the latter's consent, shares to the value of \$679,000. Shares were never issued, consequently the indebtedness of Daily News Limited to Government remained undischarged at the date of liquidation of that company. The reasons which may have motivated Government not to press for and or to secure the issue to itself of the shares are in my view totally irrelevant. Government could legitimately, properly, and without moral opprobrium decide not to effectuate its intention to acquire any further shares in Daily News Limited which was in financial difficulties.

Government by declaring the manner in which the advance of \$679,000.00 could be repaid made no representation cognizable in law capable of being acted upon by anyone. Certainly it made no representation to the petitioner, nor did Government act in relation to the petitioner in any manner which would be frowned upon by a Court of Equity.

Though Government on the facts cannot make out a case for a refund of the entire advance on the basis of a resulting trust it is clearly entitled to prove in the liquidation of Daily News Limited for this advance in like manner as any other unsecured creditor.

The appeal ought to be allowed.

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BINGHAM, J.A. (Ag.):

Having read in draft the judgment prepared by Campbell JA, I wish to state that I agree with his reasoning and the conclusion at which he has arrived, that the appeal be allowed and to state that I have nothing further to add.