

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO: E. 240 of 1986

IN THE MATTER OF JAMINCORP INTERNATIONAL
MERCHANT BANK LIMITED

A N D

IN THE MATTER OF THE COMPANIES ACT

R.N.A. Henriques, Q.C. of Livingston, Alexander & Levy
and Douglas Leys Assistant Attorney General for Petitioner

Carl Rattray, Q.C. of Rattray, Patterson, Rattray
Hilary Phillips and Denise Kitson both of Perkins, Tomlinson, Grant
Stewart & Company for Respondents.

Heard: 5th November, 1987; 1st -5th February, 1988
8th-12th February, 1988; 15th -19th February,
1988; 30th June, 1988; 4th-7th July, 1988;
11th-15th July 1988; 18th-22nd July, 1988;
25th-28th July, 1988; 9th September, 1988

MORGAN, J:

This matter concerns a winding-up Petition under the Protection
of Depositors Act. I will attempt to state the preliminary law and facts
as shortly as possible.

Section 11 of the Act empowers the Minister of Finance to present
a winding-up petition if -

- (a) the Company is unable to pay sums due and payable to
its depositors or is able to pay such sums only by
obtaining deposits or by defaulting in its obligations
to its other creditors.
- (b) the value of the Company's assets is less than the
amount of its liabilities.
- (c) the Company has failed to comply with any requirement
of this Act as to the delivery of accounts.

Section 6 places a duty on each licensee under the Act to
deliver Returns as approved by the Minister -

- (d) not later than 60 days after the end of each financial
year of such business, audited accounts comprising

balance sheets and profit and loss accounts
in respect of the operations of that business
in that financial year.

Section 4 empowers the Minister of Finance to grant a licence to a Company under the Act.

The licensees are called Institutions or Near Banks. They are not commercial banks like National Commercial Bank or Citizens Bank. They do not operate Savings Accounts and checking accounts, neither are they regulated by the Banking Act. These licensed institutions accept deposit for fixed term from customers at a generally handsome rate of interest and invest it for the depositor, paying out at the end of the term sums as agreed. They therefore attract clients like those persons who have saved moneys all their lives and now wish that money, by the amount it gains to work for them, to maintain them to the end of their days-widows, pensioners, trustees with funds and organisations among others. They form a group of persons who largely need protections and the nomenclature of the Act could not express any clearer its intent and purpose. It is designed to protect the interest of the people large and small who entrust their savings or moneys - large or small - to institutions which are expected to use management skills in investing the deposits and to return the deposit with interest as agreed on demand.

It is probable then that situations could arise in the institutions where there is bad management or mere skulduggery causing the depositor's moneys to waste away. Section 12 of the Act therefore, for the purpose of supervising the institution, gives power to the Minister to designate a fit and proper person to be "Inspector of Banks" who may in turn with the approval of the Minister authorize any person to assist him in the performance of his functions under the Act. The Governor of the Bank of Jamaica is so designated as "Inspector of Banks" and a Mr. Oscar Simpson is one of the persons authorized to work with him as an Assistant Inspector. His duties are to examine the books, records, documents etc., reviewing the institutions' business of accepting deposits in compliance with the Act and in protection of the depositors. This examination must be done at least once per year and

a report submitted to the Minister. The Inspectors who perform these functions do not manage or give directions, they supervise by examining the institutions, their systems and methods, they make observations, point out their concerns and give advice or make comments to the institutions.

The Respondent Jamincorp is a licensed institution under this Act since 1978, and is engaged inter alia in the business of accepting deposits, granting loans, investing in Companies and moreso in affiliated Companies.

As a result of several review visits to the institution the Inspector submitted reports which culminated ⁱⁿ the presentation and filing of this Petition by the Minister of Finance on the 7th October, 1986 to have the Company wound up under Section 11 of the Protection of the Depositor's Act, and on an Exparte order a Provisional Liquidator was appointed on 15th October, 1986. The petition was served on respondent on the 17th October, 1986.

The grounds on which the Petition is based are as set out in paragraphs 7 and 8 of the said Petition and which comprise Section 11(1) paras (a) (b) and (d) of the said Act:

1. the Company is unable to pay sums due and payable to its depositors.
2. the Company is able to pay such sums only by obtaining additional deposits or by defaulting on its obligations to its other creditors.
3. the value of the Company's assets is less than the amount of its liabilities.
4. the Company has failed to comply with Section 6(b) of the Depositor's Act, in that it has not delivered accounts for the financial year ending 1985.

On October 23, 1986 appearance was entered on behalf of the respondent Jamincorp and on the 31st October, 1986 a Motion was filed seeking certain reliefs. The Petition and Motion were heard in the Supreme Court on November 6, 1986, when the Petition was dismissed and the appointment of the Provisional Liquidator discharged. The petitioner filed an appeal to the Court of Appeal which was heard on November 19 and 20, 1986.

The appeal was allowed and the Provisional Liquidator restored. So between the period November 6-20 the Bank was again able to do business. Leave was granted by the Court of Appeal to appeal to Her Majesty in Council and on the 10th day of June, 1987, the Privy Council dismissed the Appeal affirming the Order of the Court of Appeal.

The matter came before me for hearing on November 2, 1987 and has continued intermittently over a period of nine months. A plethora of affidavits have been filed and continuously so during the period of the hearing which is vigorously contested and the deponents have been extensively cross-examined, culminating in a mass of evidence on affidavit and viva voce to be considered by me. Unhappily, I am restricted by constraints of time and will have to be in my judgment as concise as possible.

Jamincrop which has been trading since 1978 and had then as its Manager Mr. Elworth Williams, is one of a network of related companies of which Meridian Investment Corporation (Meridian) is the holding Company. To each of these Companies, it has loaned considerable sums of money from time to time.

These companies are :

Antillean Food Processors Limited (Antillean)

Lear Trust Holdings Limited (Lear Trust)

Carimex Trading Corp. Limited (Carimex)

Medallion Galleries Limited (Medallion)

Jamaica Pump and Valve Limited

These are subsidiaries of Meridian. Additionally, there is Alcron Development Company Limited a related company also a beneficiary of Jamincorp's loans. Alcron is the owner of a building situated at 71 Marcus Garvey Drive in the Free Zone which is built on lands leased for a period of 49 years from the Port Authority. This building is rented to Antillean which carries on the business of a Fish Processing Plant.

1. Jamincorp loaned moneys to Meridian who loaned it to Alcron to erect the fish processing building. This loan is secured by a second debenture on Alcron's assets.
2. Jamincorp also loaned moneys to Antillean to erect the fish processing factory. This was secured by a debenture and

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guarantee granted by Meridian.

3. Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) also loaned moneys to Antillean which was guaranteed by Meridian.
4. Jamaica Development Bank also loaned Antillean money which is secured by a first debenture on the fixed and floating assets of Alcron.

Antillean has rented the building from Alcron at a rental of US\$70,500 (approximately Ja.\$412,400) per month. Alcron has assigned this rental money to Jamincorp to satisfy its own debts and that of Meridian's ((1) and (2) above).

Antillean's problems:

Antillean is situated in the Free Zone where prices are quoted in U.S. dollars. The Free Zone is an area which is regarded as "a little piece of Jamaica outside Jamaica." This is meant to encourage foreign investors to operate factories in order that more Jamaicans can find employment. Antillean is part-owned by Norwegian investors who hold shares in this business, and has facilitated Jamincorp through Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) with Lines of Credit and are unsecured creditors.

The Free Zone carries its advantages in that it is outside the custom territory where custom duties are not paid on goods and raw material etc., but it also has its disadvantages for goods manufactured in the Free Zone cannot be marketed in Jamaica; a foreign market must be found or authorization/^{obtained} from the Ministry of Industry if you need to sell in the local market.

Antillean suffered two setbacks as I see it.

1. When the rental for Antillean was fixed at US\$70,500 per month the Jamaican dollar was \$1.78 to the US\$. The US\$ rate having escalated they were faced with this exorbitant rental calculated at US\$5.50 to Jamaican dollar.
2. They did not find their quota of market for their goods abroad, which was important as their loans were only in foreign

exchange and had to be earned in foreign exchange for payment.

The Norwegians who are their primary investors say they were not told or made aware of the difficulties. Antillean with all these problems were unable to service their loans or pay the rental to Jamincorp. Principal and interest accumulated and rental for fourteen (14) months was due and owing. The loans were non-performing and unsatisfactory.

Antillean's indebtedness to Jamincorp

Debt Schedule

In 1983: Antillean had a loan debt to Jamincorp of \$2.9 million as principal and \$150 thousand interest of which they paid \$853 thousand in that year. For the entire year 1984 nothing was paid for principal or for interest. In 1985 Jamincorp loaned Antillean \$1,281 million to pay interest in the said amount of \$1,281 million to Jamincorp. Jamincorp thereby capitalized the interest. In 1986 again nothing was paid. Antillean now carried a loan balance of \$4.2 million and interest amounting to \$2.95 million.

Meridian debts not being paid by Antillean to Jamincorp also suffered a similar fate.

In 1983 starting with a loan debt of \$4.3 million they paid \$529,316 principal and interest of \$384,343.

In 1984 nothing was paid for the year for principal or interest.

In 1985 again nothing was paid for the year for principal or interest, but Jamincorp increased the loan by \$5,361,711.

In 1986 there was a further increase on the loan by Jamincorp of \$651,632 thousand to Meridian. They repaid \$3.5 million on the principal thus leaving a balance of \$6.113 million principal for loan and \$4.986 million for interest. This \$3.5 million of shares was bought by Jamincorp with hypothecated shares.

Antillean sought the help of the Bank of Jamaica -

- (1) would they assist in opening up the local market to Antillean to sell its goods.

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- (2) would they assist in getting the Antillean Receiver to pay the rent. Jamincorp then blamed the Bank for Antillean's difficulties and spoke of confidential documents it had to prove it. I will deal with this matter later. Mr. Williams of Jamincorp said that the Governor promised to give him an answer. There was no response. Antillean was put in Receivership in June 1985. Jamincorp had expected co-operation from the Governor, but none had come.

In the meantime, and up to the 30th June 1986, Jamincorp's Audited Financial Report for 1984 had not been delivered or advertised. It was subsequently delivered but still not advertised. Why was it not delivered? The Auditor's had expressed doubts about Jamincorp's recovering the loans totalling now \$12.9 million. Jamincorp could not afford to have this information known to the depositors as by then the Auditors clearly advised that because of the nature of the securities it was not possible to quantify how much the company will realize in the event the securities are enforced and that no provisions had been made for losses in respect of this sum in the financial statement. Up to April 1986, however, there was clearly trouble at Jamincorp. Looking at the Audited Balance Sheet for 1985 December, the networth of the Bank was approximately \$2 million. At that time the Auditors expressed doubts as to the collection of \$18 million taking into account the securities they saw. The same doubts were again expressed with regard to those two debts by the same Auditors in 1985. In 1985, the loans had grown and the prudent thing to have done then, was to write-off all or some losses as the Auditors succinctly advised but this would have placed the Bank in a deficit position of \$16 million approximately so no loan losses were written off. The Petitioner's witness, Mr. Holland an Accountant considered it a unique and unusual situation that there was no provisions made for any loss or loans made by Jamincorp to related companies, third parties or directors and opined that it must be the only Bank in the world not to have any loan loss.

Jamincorp wrote off no losses, what it did was to buy in April 1986

prior to the delivery to Bank of Jamaica of the audited financial statement of 1985, 92% of Alcron for \$5.5 million for which it paid by means of hypothecated shares. Alcron has valuations ranging from \$28.8 to \$11.4 million. Barron's Dictionary defines 'hypothecated' as "pledging property to secure a loan (shares). It does not transfer title but it transfers the right to sell hypothecated property in the event of default." In layman's terms no money passes, only in book entries - but this is perfectly legitimate in Banking.

Alcron however, had the following charges on its assets:

1. Jamaica Development Bank first debenture secured on the Antillean factory in the sum of \$6.6 million. Interest has accrued and is accruing on this debt which takes priority to all other debts.
2. Meridian Investment loan secured by a second debenture on the fixed and floating assets of Alcron amounting to \$11.4 million with interest accruing.

Respondent however says that it was not therefore necessary to write-off any loans or part thereof as the loans were all secured.

It must be noted that Jamincorp did three (3) things to assist its assets.

1. It capitalized \$1.2 million of unpaid interest by Antillean and added it to the Principal.
2. Bought \$3.5 million shares from Meridian reducing loan principal and paid by way of hypothecated shares.
3. Bought 92% of Alcron with hypothecated shares for \$5.5 million thus making Alcron a subsidiary.

Holland says as to (1) above that the capitalization of \$1.2 million unpaid interest was mere "window dressing" of the accounting records to present a favourable position in respect of profits and as to (3) above that the unquoted investment by Jamincorp in Alcron of \$5.5 million shares with a carrying value of \$5.8 million in Alcron is essentially "window dressing". All these acts have indicated that Jamincorp was well aware that it was having severe financial problems, and that those problems concerned its loans. Inasmuch as I appreciate that Antillean fell upon hard times

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as a result of these varied factors, the reality of the situation is that Antillean owed these sums to Jamincorp, was unable to pay them resulting in a massive build up of Interest and Principal. Perhaps, better management and a realistic approach and acceptance of what was happening to Antillean was what was needed at this time but this was not to be. The heavy dependence of each company on the other had resulted in the failure of one underpinning the others. Antillean was in trouble and all were in trouble.

In compliance with the Act the Inspectors from Bank of Jamaica were visiting Jamincorp and examining the accounts annually and Jamincorp was in turn complying with the delivery of their Returns. The inspector had review meetings and gave advice. The advice was never followed. In 1986, Jamincorp had three (3) inspections between January and August two inspections by Simpson and a third by another inspector. Each made a report.

Review Meetings

The Respondent's complain was that it was customary for the Bank inspectors to meet with them within six weeks after such inspection to review their findings but that no such meeting was held in 1986, instead an application was made for a winding up, a decision taken out of malice. They admitted that review meetings were held in 1983, 84, and 85 but none in 1986 in order to allow them to clarify and correct misunderstandings or discuss any serious problem detected.

Mr. Simpson says it is customary to have the meetings but there is nothing to compel them to do so, that between January to August 1986, three inspections were held, the last at the instance of the Governor in verification of the others. After each inspection, he says the Management of Jamincorp was spoken to indicating that its capital base was inadequate and advising them of the worsening situation.

I accept that management was spoken to after each inspection and the mere fact that there were three inspections held in eight (8) months in place of one ^{in one} year ought at least to have put Jamincorp on their enquiry and appraised its management that something serious was not right.

In spite of a strong denial that no Review Meeting was held in 1986, Mr. Simpson on his last day in the box admitted that out of three (3) inspections in 1986 one review meeting was not held as the Inspection Department had not submitted the report and so did not make an appointment with Jamincorp. On one occasion he was in Washington but was of the view that it was held at Bank of Jamaica by other officers. In respect of 1986, I find this evidence was very hazy and unreliable and find the probabilities are that no review meeting was held in 1986. This is not surprising in view of the management's attitude to the loans - that they were all secured with no effort made to realize any of the securities in spite of the fact that they were aware of the problems of the inability of the loans to perform. For this reason and the fact that the Review Meetings were "gratuitious" that matter of the filing of the winding up Petition without notice cannot be wholly condemned as the Respondent states.

Simpson has said that all the risks in terms of loans and advances were concentrated in the related companies and were not performing and the inspector's concern was discussed with Jamincorp in 1983, 84 and 85. On each inspection, the loan became larger and the problem became repetitive and chronic.

Winding-up proceedings were commenced by the Minister.

An Affidavit in support of the Petition was filed by A.B. Simpson the Assistant Inspector. It said inter alia -

5. The total of the deposits outstanding on the Company's books as of August 31, 1986 amounted to \$42,445,030.00 and the liquid assets in other financial institutions amounted to only \$9,540,596.00.
6. That loans as of August 31, 1986 amounting to \$26,676,713.00 were made to affiliated companies most of which are unsecured or the security in respect thereof dubious or worthless.
7. That one of the affiliates to which loans have been made totalling \$4,216,525.00 was put in receivership in June 1985 and it is unlikely that this debt will be recoverable.
8. That there are also loans to its parent company of \$11,000,000.00 which are unlikely to be repaid and this is also evident in a note of the audited accounts for 1984.
9. That several of the loans are in default, the due date for repayment passed with interest continuing to accrue and there was no payment or servicing of the said loans.

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10. That the Company is now receiving little or no return on its investments in its affiliated companies, have resorted to endeavour to contract deposits at rates higher than the current commercial deposit rates in the hope that new deposits will be able to service the interest on previous deposits and repay such deposits.
11. It was his view that the situation of the Company continues to deteriorate and is in such a financial state now that it cannot be in the best interest of the public to continue carrying the business as the Company cannot meet its liabilities to depositors.

An affidavit in reply was filed by Mr. Elworth Williams now Vice-Chairman and Director of Jamincorp, vehemently refuting the facts and stating inter alia :-

1. The balance sheet of Jamincorp as at August 31, 1986 submitted to the Inspection Department of the Bank of Jamaica showed total liabilities of J\$42.7 million and total assets of \$49.8 million thereby showing a surplus of J\$2.1 million.
2. Jamincorp had a portfolio of stock if traded on the Kingston Stock Exchange at market value on 28th August, 1986 would have reached \$8.4 million.
3. That cash in Bank was approximately \$11.740 million.
4. That loans granted to its affiliates and others were all adequately secured and Jamincorp had made prudent investments in other companies.
5. No depositor had been unable to collect his deposit upon presentation of his certificate.
6. That loans with accrued interest made to affiliated companies totalled \$18.1 million at 31st August, 1986 and are secured.

A balance sheet was attached showing the networth of the Bank to be \$6.5 million indicating thereby that the assets exceeded the liabilities. That was on 31st October, 1986. A Alcron had been acquired in April 1986 and the outlook for Jamincorp had changed. Alcron's assets was not consolidated in the balance sheet of the subsequent monthly returns to the Bank of Jamaica and Simpson had paid no attention to it. There was obviously a vast difference between Mr. Simpson's assessment and Mr. Williams' assessment. Could Mr. Simpson have gone wrong? If so, the Petition would have to be withdrawn. The Minister had taken a serious step on the basis of his presentation and the Bank of Jamaica showed its concern. An independent assessment to determine what was the true position was needed. The firm of Coopers & Lybrand, an International firm of

Auditors with business in Jamaica, was asked to do an examination of Jamincorp. Mr. Stephen Holland a partner and chartered accountant working with the firm for 13 years attended to do the examination. Jamincorp objected on the ground that he was not properly appointed and on November 5, 1986 when he attended at Jamincorp's office together with Bank of Jamaica officers, Jamincorp protested and he was withdrawn.

On February 18, 1987 he was provided access by the Provisional Liquidator. Jamincorp took the view that the operations were frozen and that these circumstances did not allow for a scrupulous observance in that he would be affected by the fact that the Petition was filed, that there were established procedures for inspection of Banks into which his appointment did not fit, and that a suit was pending in respect of the surrendering of confidential documents in the corporate file of Jamincorp and that the inspection could be used for other purposes pertaining to the suit. Other allegations of like nature pertaining to documents were noted. Jamincorp then indicated that they would not be participating in the inspection by Holland.

The background to this objection lay in the fact that the Receiver of Antillean was a Mr. Leon Robertson of the same firm as Stephen Holland, i.e. Coopers & Lybrand. A suit was pending in the Supreme Court for conspiracy in which Robertson was named as one of six defendants. Another suit filed by Antillean and the holding company Meridian was pending against the said Receiver for trespass to Antillean, and it was alleged that he misappropriated funds belonging to another related company CARIMEX. This allegation it was said was subsequently abandoned.

Stephen Holland has exhibited his written authorisation dated 2nd February, 1987 and, in my view, it complies with the provisions of the Statute. In Re Craven Insurance Company Ltd. (1968) Lloyd's Law Report p. 361,362 a petition was filed to wind up a company. When it came before the Court, the proceedings were adjourned to allow an independent firm of accountants to go in and assess the financial position of the company. This they did and returned with their findings, which the Court used and acted

upon. The investigation by the Board of Trade commenced in the month of August, 1967, the Petition was filed in December 1967, the matter came before the Court in January 1968 and the audit report of the company was in respect of year ending December 31, 1967. Peculiarly, the time frame is identical as it is in this case - August to December 31st.

It is my view that Holland was properly appointed. It does not matter whether at the time of the appointment a petition was pending or was before the Judge. His findings can be used and acted upon. The respondent says that his presence represented a conflict of interest, as the Receiver for Antillean against whom these charges were laid by Antillean was a fellow employee of the same firm. Holland says there was none - that it would arise only if the firm was acting for two (opposing) parties, he for one and Robertson for the other, but in this case both were acting for Bank of Jamaica and a holding of the Bank - Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.)

Mr. Rattray submitted that in view of the unpleasant allegations made against Mr. Robertson, a member of his firm, it was imprudent of him and he should not have undertaken this assignment. Holland said that he was aware of the unpleasant situation which existed but it is a fairly normal circumstance as in these situations one finds that Directors are unhappy, having lost their jobs etc. It is always a very emotive situation but, Holland admitted there were very few circumstances which would arise for the firm to refuse an assignment; indeed only if there was a conflict of interest. He said they undertake jobs because they are professionals and want to do business and so accept business; that the tasks sometimes become unpleasant and nasty which is unfortunate, but they are trained to deal with such matters.

I think I very well understood Mr. Holland's point and Mr. Rattray, a professional himself, seemed to have appreciated it also. I find there is no conflict of interest.

The officers of Jamincorp refused to co-operate, repeatedly. On each occasion Holland asked for assistance, he was told by Dr. Levermore, the Manager, that he would not assist. He got tired of asking and stopped. He said it made the examination more difficult but not incomplete. He

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concluded that Jamincorp would not assist because they were concerned for personal reasons about the result of his finding. Now Jamincorp had been having problems with Antillean and no rent was being paid. Notwithstanding, Jamincorp was of the view that they were able to make the bank a going concern as the bank was solvent. The Inspectors had not given them any chance, they said, to indicate their views prior to the presentation of the petition. This was their glorious chance - but Holland says they gave him no co-operation. Jamincorp had taken a strong point as to his presence. Jamincorp knew why he was there and his purpose. Jamincorp had also taken a consistent position that they were solvent. It is reasonable to expect, in those circumstances, that each day a representative would say "I am here, I will assist you but I do so under protest". That being so, it was Jamincorp's time to show that it was solvent indicating where Inspector Simpson had gone wrong. Having done so, it would mean that the Minister would have to withdraw the Petition, the depositors would be spared of their anxiety as to the outcome of their deposits, Jamincorp would have received free advertisement and the Bank would have been opened for trading by January 1987.

Holland did his examination and in his report has put forward some figures which have been challenged to the last detail as being wrong; and because he did not look at documents locked away in safes and vaults, not made available to him because of non-co-operation, I am asked to reject his examination as being partial, incomplete, and unreliable. Instead of having agreed figures, the added burden is placed on the court to look at each disputed figure, the basis on which it is arrived at, and to find as a question of fact the proper figure to accept. But I will do my best in the circumstances.

I will now deal with the grounds on which the Petition is based.

GROUND I

The Company is unable to pay sums due
and payable to depositors

Miss Philips submitted that this ground must fail as there was no evidence from any depositor that he attended on Jamincorp and was unable to

collect funds. Indeed there was no such evidence.

Mr. Simpson said to arrive at that conclusion he applied the liquidity process, that he observed the inflow of funds from the assets and matched them against out-flows of expenses like depositor's interests and maturity of deposits. He analysed these and found very little inflow from loans, and deposits that matured were either rolled over or paid off at the expense of inflow of further deposits and found that there was liquidity imbalance.

I have no doubt that an exercise of this nature could be performed but am not sure of its success in leading to the proper inference without more.

Mr. Henriques argued that if an institution becomes insolvent it will eventually be unable to pay as the time will come when it would be manifested that Respondent is unable to pay; if not it would mean that the Petitioner would have to wait until the day when the institution is unable to pay depositors before he can take action.

I accept that that would make a mockery of the Act and defeat its intent and purpose.

So he submits that the ground is applicable when circumstances are such that it becomes patently clear that in the near future the institution will be unable to repay its depositors; the action can be taken to protect the depositors from a situation of total obliteration of an investment.

I entirely agree with this proposition but it can only be so if the Petitioner satisfies the Court that the liabilities of the Company exceeds its assets.

I will return to this then at the appropriate time.

GROUND 2

The Company is able to pay such sums
only by obtaining additional deposits

Jamincorp says that depositors had confidence in the Bank and it had an excellent turn-over of deposits after maturity. The effect of this

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would be that the payments out would be considerably reduced resulting in less strain on their liquid assets thus making more moneys available to meet depositors' interest.

Simpson said they were paying interest from deposits made by new depositors but had not supported it by any firm evidence. Jamincorp's main funds were from this source and Simpson, I find, assumed that it could be the only way in which Jamincorp could have moneys to keep the payments going. Holland said, however, that Jamincorp was liquidating its shares on the Stock Exchange - something which indicated they were in problems. This investment was available to pay depositors and probably did.

I find this ground fails.

GROUND 4

Delay in filing Financial Statements

The facts contained in the last ground of the Petition have been admitted by the Respondent and it may be best to deal with this ground before I go on to Ground III.

The Respondents are required to deliver to the Bank of Jamaica Audited Financial Accounts not later than 60 days after the end of each financial year of business in respect of the operations of that year. Jamincorp's financial year ends at 31st December. Returns were due for 1985 in accordance with Section 6 of the Act, at the beginning of March 1986. At the time of the filing of the Petition it was seven (7) months overdue, in spite of a reminder in June 1986. The account was in fact delivered without leave of the Court on the 15th June, 1988, fully two (2) years and four months after the required date. The Returns for 1984 which do not form a part of this Petition were not filed up to the 30th June, 1986 when a reminder was sent. At that time they were sixteen (16) months late and still not filed. They were filed on a subsequent date which has not turned up in these proceedings and no Petition was filed in respect of that default. The Respondent said that he was required to file monthly statements and this was faithfully done. This appears to be so but those statements are not audited and do not say all that needs to be said and has been said by the audited

statements. So why is the audited statement available but not delivered? Is it that the audited statement says something Jamincorp does not want to be said?

Mr. Williams, the Managing Director, says he was actually seeking the co-operation of the Governor of the Bank of Jamaica to resolve certain issues which impinged materially on matters to be dealt with in the said accounts. A subsidiary had owed money to Jamincorp which was paid through a related company then in Receivership by Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) as the company (Antillean) was unable to pay its debts. The Bank of Jamaica was being asked to secure payment by the Receiver of this sum to Jamincorp. The Bank of Jamaica was not responding. The auditors Price Waterhouse & Company had told Jamincorp that unless it could satisfy their auditors as to the prospect of collecting the outstanding sums in advance of the completion of the Audited accounts of Jamincorp, they would have to consider making a bad debt provision on a portion of the loan. Matters were in dispute in relation to the payment of this sum of money. It was the rental money from Antillean (in Receivership) which was assigned to Jamincorp by Alcron. The matters which arose were:-

1. Was rental an "operational expense" which should be paid in priority to all other debts?
2. Was the Receiver acting on orders by the Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) not to pay?
3. The rental was exorbitant and the debts were high and the Receiver was unable to pay.

Respondent urged that late filing of returns has always been observed as a minor infraction, indicated that other institutions were in breach and not wound up, and that Inspector Simpson had said that the whole economic system would crash if all institutions were wound up for this breach, and that he would not recommend winding-up on that alone unless having gone into the reasons it became necessary. Counsel cited Girod Bank & Workers Savings and Loan Bank as financial institutions who committed several breaches without any action taken against them by the Bank of Jamaica and said that the treatment of the breaches in those institutions indicated a breach of

even-handedness in the attitude of the Inspectorate towards Jamincorp as opposed to other institutions.

It was a technical ground he urged and it would be inequitable for the petitioner to place reliance on it. He urged that the accounts are now delivered and the institution should only be penalized in cost and not by a winding-up order.

Mr. Henriques made the point that it was not a technical ground but one of a serious nature designed to protect and guide the public whether or not to make investments; that Parliament has regarded it so seriously that the Act requires:

- A. 1. publication in the Jamaica Gazette
- 2. publication in a Daily Newspaper
- 3. exhibition in the Office of the Company, and
- 4. delivery of a copy to every new depositor.
- B. The sanction for breach of delivery was not a mere fine but the harsh sanction of winding-up.
- C. Parliament has set a time of 60 days for delivery indicating thereby that it must be delivered at the earliest possible time.

The financial state of an institution, he continued, can only be furnished by an independent audit of the institution's account if it is to be relied on.

The fact of the matter is that both audited financial reports did reveal in each case that there were sums of \$13 million in 1984 and \$18 million in 1985 being loans to two related companies which the auditors said that from financial information received they were in doubt that the sums were collectable as one of the companies was in Receivership and they expressed their doubts about the securities. Indeed, Mr. Williams admitted that if the sums were not collected, the liabilities would exceed the assets, though he held to the view that they were collectable and held his own view as to what the auditor's qualifications meant.

Mr. Williams admitted that neither of these reports was published in the Daily Gleaner, but 1984 was sent for publication in the Jamaica Gazette. When asked if he had seen the publication in the Gazette he replied that the

Gazette took two (2) to three (3) years to publish notices. Certainly, if he knew that, and he was desirous of publishing at all, why did he not use our only daily newspaper (at that time) which in all respects was certainly reliable. He knew the purpose was to alert depositors as to the state of the business of the Bank, so why did Jamincorp intend to inform two (2) years after the event by Gazette? Why is Jamincorp reluctant to alert depositors? Is it that they knew the unhealthy state of the Bank and is desirous of keeping it a secret from the depositors, Inspectors and Bank of Jamaica? This is contrary to the intent and purpose of the statute - disseminating information to the public.

It was submitted by the Respondent that delivery was observed more in the breach and no action taken. I accept that companies are known to be late in filing returns, but when a company is solvent and not experiencing any problems and maintains this non-problematic position it is not unreasonable that the Bank of Jamaica would not become anxious if Returns are not delivered. It is when there is concern about an institution and its finances, and because of this, concern is necessary to be maintained over some period then it becomes natural and reasonable that anxiety will prevail concerning the lack of delivery of the Returns. That is how the difference lies. Simpson said that to his certain knowledge, they had not experienced the type of problems with other licences that they met with Jamincorp.

I would not consider this default a failure in terms of incompetence or tardiness, but as culpable and inexcusable - a deliberate refusal to deliver for motives clearly in the interest of itself and not in the interest of the depositors or intended depositors who the Bank of Jamaica is authorized to protect.

Miss Phillips urged that the Audited accounts having been filed, the Court can dismiss^{the}/Petition and consider the matter of costs. In support she cited Newman vs. Howard[1961] 2 ALL E.R. p. 495 in which the facts were that a contributor petitioned for the winding up of a company on the ground that it was "just and equitable" so to do because he was unable to obtain any accounts or information from the company. It was the rule that a

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contributor must allege and prove "that there are assets of such amount as that in a winding up she will have a tangible interest." This was not alleged in the Petition. The fact is it could not be alleged as she had not seen the accounts. The accounts were produced subsequent to the filing of the Petition and the contributor was satisfied and no longer sought a winding up. The company contended that she was not entitled to costs on the ground that the Petition was demurrable. It was held that by the nature of the case the rule must be qualified as the Petitioner was unable to tell whether or not there was a surplus because the company had defaulted in supplying accounts. The Court held that the petition was not demurrable, dismissed the petition and ordered that the company should pay the cost.

The difference as I see it here is that in that case the ground was "just and equitable" albeit the facts relied on to prove the ground was "failure to file accounts," In the case before me the ground of "failing to file accounts" is a statutory one. It is conceded that Section 11(2) gives the Court a discretion in winding up a company but discretions must be judicially exercised. I find that there was a deliberate withholding even from this court the facts as contained in the accounts. No application was made to the court for filing at any stage and it was not until 28 months after the filing of the Petition and nearing the end of the case when Jamincorp sought to put in the consolidated accounts with Alcron and it became abundantly clear that the facts would be available to the court that it was tendered, and, as I was informed, delivered to Bank of Jamaica. If you seek equity you must come with clean hands.

In any event, the facts surrounding this ground would make this procedure wholly inappropriate for the exercise of the Court's discretion.

To value the assets of Jamincorp a valuation must be determined for the Alcron building which is 92% owned by Jamincorp.

VALUATION OF ALCRON

The assets of Alcron are:

1. The factory building which Antillean rents at 71 Marcus Garvey Drive.
2. Two Pinehurst apartments, Hope Road, St. Andrew
3. Two lots on Millsborough Heights, St. Andrew

4. One lot Torado Heights, Montego Bay

The main asset is the building at Marcus Garvey Drive on which three values have been placed :

Messrs. Goldson, Barrett & Johnson Quantity Surveyors valued it at current Replacement Cost approach in 1985 at \$28.8 million (US\$5.2 million).

Easton Douglas & Company, Chartered Surveyors, using the Income approach valued it in 1987 at \$22.8 million.

The C.D. Alexander Company Realty Limited, Real Estate Brokers & Appraisers Auctioneers & Property Consultants valued it in 1986 at \$11.470 million using Depreciated Replacement and Income approach with comparative approach.

An important question in this issue is what measure should be used for valuation? Alcron is an asset of Jamincorp but Alcron is used as a security for mortgage purposes. Admittedly, both purposes will bring up different valuations. As an asset, you need the best value but as a security you need what is a realizable value on the market. That is why Holland was able to say that he would have no quarrell at all with Alcron valuing itself for \$28.8. million. What it boils down to is that the Petitioner is saying "I will have to get my money out of the sale of Alcron as Alcron is offered as a security." In other words, what is the realizable value that this building can fetch on the open market?

Instructively, during the cross-examination of Mr. Beckles, Counsel produced the following paragraph from the book Prentice Hall Real Estate Guide.

The basis of valuation

The valuer is, however, faced with the difficulty of assessing open market value for a number of types of property which are, rarely, if ever, sold on the market. These are classified as 'specialised properties' because more often than not they are sold as part of a business through an inter-company transaction or a purchase and sale of shares. Very often the properties used by these companies have been developed by the company purchasing the land and putting up the buildings on an assessment by the directors that they will have a sufficiently profitable earning power to give adequate return on the capital expended. These types of buildings are

only worth owning whilst profits can be made, and very often their decline in value is due to changes in fashion (termed 'obsolescence') rather than to the physical wear and tear of the buildings (more appropriately termed 'depreciation').

The method which has been devised for valuing these specialised properties is known as 'depreciated replacement cost'.

The words underlined are mine. The structure of those words clearly suggests that "specialised properties" which fall within the ambit of this approach to valuation, are those sold as "part of a business by a company to a related company or a company sold and bought by shares". I do not interpret it to mean that all industrial properties wherever in the English speaking world they may be, ought to use that approach simpliciter. Jamaica has just started to be industrialized and it is fair to say cannot be treated as other industrial areas like England or other parts of the world.

The respondent relies on the replacement cost approach valuation for the Alcron building which when added to the leasehold interest of the land as given by C.D. Alexander at \$3.47 million stands at \$32.27 million - and challenges the valuation of C.D. Alexander, through Easton Douglas & Company who was instructed by Respondents to analyse both valuation reports. He comes with a formidable list of qualifications. Chartered Surveyor, Land Economist, Town Planner and principal in the said firm. M.S.c. in Urban Appraisal, University of Reading - England, Diploma as a professional Associate of the Royal Institute of Chartered Surveyors - University of London England and membership in a number of Professional Associations. He was a former Managing Director of Alcron resigning in 1983 and also a former Director of Jamincorp until 1984. The latter information caused Counsel for the Petitioner to say he was not an independent person as he never disclosed that he was once a Director of Jamincorp, and registered as such at the Registrar of Companies until asked in cross-examination, and that the Respondent could have selected a person totally unconnected as several other professional names had been put to Mr. Beckles.

It is my view that in matters like these there should be full disclosure and care should be taken that it ought not to be left to cross-

examination to ferret out such information. The independence of a valuator where strict mathematical conclusions are not the only basis upon which figures are arrived at is paramount. Not that there cannot be an association between both parties but that full disclosure ought to be made to allow the Court to make its own assessment of the effect, if any, of the relationship on the valuation. Absence of full disclosure could tend to sow doubt where none ought to exist.

Mr. Thomas Barrett a Quantity Surveyor prepared the first valuation which was done sometime prior to these proceedings and which the Respondent says was used by the Auditors and the Bank of Jamaica previously without question.

The C.D. Alexander Company report was prepared by Mr. Kenneth Beckles, a young man with whom I was very impressed. He was very calm and answered questions promptly and professionally. He is a Senior appraiser of the firm and a graduate of the College of Arts Science & Technology, Mona and holds its diploma in Land Economy and valuation Survey which is a three (3) year course of study. To be professionally qualified he has to be accredited by serving two (2) years apprenticeship with an accredited member and finally a dissertation which he has not yet completed so he is not yet professionally qualified. He has however been working with the firm for approximately four years and had done a stint with a company in England as a trainee valuer. He had valued all types of Real Estate for market value purposes, mortgage, insurance and rental, but he had not previously valued an industrial premises of such a specialized nature. The firm he says does many many international valuations for both commercial and industrial complex and works for government agencies in Jamaica and outside. The method he used was approved by the firm. He says that his valuation was one for open market value and there are three acceptable different methods of asset valuation to arrive at market value:

Income approach

Comparative approach, and

Replacement cost approach

and sometimes, a combination and in this case he used a combination to arrive at the market value. Market value, he said depended on demand and demand depended on competitiveness and if you reduce the competitiveness, you

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also reduce the value that the property can obtain. So, if the property is scarce and the clients are scarce it all cancels out.

There was no property comparable to Alcron from the point of view that it is a leasehold interest and there was no similar leasehold to compare with it. Yet it is still an Industrial property which with adjustments could be used for other industrial business, like warehouse or manufacturing, after removing the equipment. His comparative approach was done on this adjusted basis it seems. He did a depreciated replacement value using gross internal area without balcony and landings and got 70,000 square feet, using net square feet it came to \$15 million. He also did an income approach valuation at a rental of \$15 - \$17 per square foot for 62,000 square feet using only functional areas. Mr. Barrett used the replacement cost valuation which is the cost ascertained by assessing the current cost of replacing the actual building including in it values for site preparation, external works (fences etc.) and storage tanks. This valuation Douglas says is appropriate subject to wear and tear of 2½% per annum for depreciation to take account for effluxion of time as between completion and Data Evaluation. He has not taken into account the Jamincorp situation as far as I can see in making allowance for characteristics which he says are to be taken into account in appraisals of industrial properties which are :

1. Design and construction for special use
2. Plant location
3. Limited market
4. Obsolescence

Mr. Douglas said that application of replacement cost approach sometimes results in higher than market value then he says that it is particularly acceptable in the case of industrial premises for which vibrancy in the market does not exist. Mr. Henriques calls this inconsistent. I agree, as one would expect that where there is no vibrancy in the market the sale price would decrease and certainly not increase. Mr. Douglas agrees that the value is what a willing purchaser would pay as both parties wish to be guided by a price it has to pay. Both Mr. Beckles and Mr. Holland state

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that replacement cost gives a higher value than the market value and in one instance it was said that it could be misleading.

I find this approach to valuation simpliciter is not appropriate for the purpose of achieving a value which can be realized on the open market. Mr. Douglas was critical of C.D. Alexander's methods and techniques but admitted that the firm had been preparing valuations for a number of years though he was unable to say if as much as 40 years and is one of the most popular firms; that they provide valuations for a wide field over the years, and are reputable valuers though not accepted by some institutions. Mr. Stephen Holland of Coopers & Lybrand said he had expertise in the use of valuers and what they mean in terms of finance and that C.D. Alexander & Company Limited was most respected and given as the most reputable firm of valuers.

It was contended that Mr. Beckles' valuation was erroneous in principle, and should be disregarded and in support the case of Jones v. Jones [1971] 2 ALL E.R. 676 was cited the headnote of which states -

"The valuation of the premises on a break-up basis instead of a going-concern basis contrary to the scheduled terms was a valuation made on an erroneous principle which would justify the interference of the Court."

The Court then said it was not necessary for those seeking to attack its valuation to show further that it was naturally different from one done on the correct principle. Mr. Douglas has gone very carefully through the report and traces how Mr. Beckles arrives at his valuation. He makes his general comments and looks at the approaches to value, he speaks of the use of "Cost and Market Data" approach plus other methods and says they appear to be unusual and have principles of valuation which require clarification; he says there is no indication that appropriate costs are applied and it appears to have been applied overall. He says it is impractical and says the valuation is most unusual - that steps taken to arrive at the value even more unusual and in conclusion says the method used though having some relevance and merit is not properly or knowledgeably applied; ~~has~~ been mixed up in unusual combinations and confusing applications which "suggests

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guesstimations and misunderstanding" of the principles of valuation.

Mr. Douglas has not pointed to any erroneous principle, but states some as unusual, more unusual and most unusual values which do not make it erroneous. The "method used" he says has relevance and merit but he has not satisfied the Court in any respect that they are "mixed up" or confusing which would give rise to suggestions to him that they have been guessed or misunderstood. Had he pointed out any, I would have been able to look at them and come to a conclusion.

Respondent's counsel says the Code of Measuring Practice by the Royal Institution of Chartered Surveyors and the Incorporated Society of Valuers and Auctioneers says that the proper measurement for the building is gross internal area and Beckles has used a net rental area and external measurements for certain portions.

This code is issued in the United Kingdom and is "a guide for Surveyors and Valuers", is published for uniformity and common practice and states in its foreword that it does not obviate the need for professional judgment on the part of the valuer in applying it in practice. It lists gross internal area as a recommended measure to apply to, inter alia, Industrial warehouses. Beckles says it is not a hard and fast guide to measuring in Jamaica though well recognized by members of the profession. He said his valuation consists of gross internal area of building and net rentable area.

It seems to me that to utilize the income approach he would need the net rentable area. He said he measured for valuation the factory building and the office separately and did not include the balcony or landings as he would be double counting. This could have accounted for the difference between his figures and Barrett and Goldson which is 78,208 square feet and his 75,000 square feet without balcony. He says they were not market values and cannot be regarded simpliciter as giving a fair indication of the market value of the property, replacement cost being far in excess usually of the market value of premises. He looked also on the prices paid in industrial areas which are influenced by local and overseas investors and made comparisons with new factories in the Free Zone.

Indeed, some of the characteristics to be taken into account and which are listed by Mr. Douglas in his analysis I observe have been well taken into account by Beckles. These are :

Design and construction for special use

Alcron, Beckles said, was not basic it was specialized well constructed but too sophisticated for the location and the purpose for which it is used, and foreign investors would not pay for the extra finish.

Plant location

The location was a disadvantage being at the other end of Marcus Garvey Drive, not within the main complex of the Free Zone but at the other end which was least developed. Investors, he said would pay a better price if the plant was within the complex. The area it occupies is a small pocket which is not attractive for industrial enterprises. It faces Tivoli Gardens one of the political unstable parts of Kingston.

Limited market

It was built as a Fish Processing plant to process sardines and mackerel only. If any other type of fish is used it would require much structural adjustment. The plant is in the building and both will be sold in one entity. Foreign investors are not interested in it because of its non-profitability and local investors have not shown interest because of high expenses.

Obsolescence:

The value of the building he said will be written off by the end of the first lease which is 49 years.

He also looked at the foreign market as to what investors require as the company speaks to foreign and local investors and this information was in his office as ^{he says} the company rents and sells property in Newport East and West. He had arrived at a valuation report on the basis of collaboration between several members of the firm who had knowledge of the market and various people in the Sales Department and the Rental Department who assist from time to time in making these assessments, and that his valuation was approved by the members of the company.

He asserts that to arrive at a market value all three combinations

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can be used. Mr. Douglas says only one can be used. I find it is a matter of difference in training and not an erroneous principle.

He used two - the Depreciated Replacement Cost plus land value was \$15,000 million and the capitalized fair market value at \$9,000 million. The latter figure he got by assessing the fair market rental and capitalizing that hypothetical annual income. Taking a high of \$15,000 million and a low of \$9.00 million and taking everything into consideration they took a figure in between of \$11.700 million as the fair market value being \$8 million for building and \$3.7 million for the land. The market value of the lease was valued at \$230 thousand dollars which reduced Alcron's interest to \$11.470 million. He said he understood when Mr. Douglas said that taking a figure between the two was unusual but this was ^{done} based on their experience in market transactions and he disagreed with Douglas' remarks on it.

Mr. Douglas arrived at a valuation of \$22.8 million applying the Income approach, only. However, this figure was computed on the basis of a rental figure of U.S.\$70,500 per month. Although it was the contractual rent it has been described as exorbitant, and excessive and it indeed is. It is not the true rental value for the building and any valuation based on that figure would also be untrue. That figure is rejected. Mr. Douglas was asked if he knew of any one building sold for \$24 million in Jamaica. The answer was no.

Mr. Henriques made a strong submission that the market value should be reduced to a forced sale value using 60%, the lowest percentage which Mr. Douglas has advised the Court is used by the Banks. He submitted that Alcron being a security, it should be valued less than the open market value and pointed to the following in support:

1. It is a specialized building, with no comparison between it and any other food processing building.
2. There is no local market because of this and its unusual design.
3. It is so sophisticated that it is limited to sardines and mackerel only anything else will require modification or removal of the fixed equipment.
4. If the building is to be sold as it is, it is unlikely that it will

realize open market price as its potential profitability is of paramount importance - Antillean being insolvent would cause it not to realize a price.

5. If the building is to be sold as it is it would not be a sound investment to pay current market price when the building and plant are intertwined as one entity.
6. The Jamaica market is unlikely to fetch any such figure and as the building was given as a security it should be treated as a mortgage and a forced sale value applied to it, which Douglas has said is 60-80% of market value.
7. Alcron's situation is: Antillean is unable to pay rent and Alcron's debts are mounting up so as the days go on eventually you are forced to liquidate and a forced sale situation evolves. He ended by saying figures are meaning-less if you are not going to realize it.

It is my view that a valuation of a security on the basis of what can be realized on the open market is appropriate for these circumstances.

I accept the valuation of C.D. Alexander Limited of \$11.470 million for the Alcron Building.

Alcron owns other assets which are :-

2 Pinehurst Apartments for \$1.2 million carrying a mortgage of \$340,000 thousand and valued at \$920,000 also Torado Heights Ironshore, Montego Bay and 4 lots at Millsborough Heights, St. Andrew which were given an assumed value by Holland. The Respondent has placed a valuation figure of \$120,000 and \$910,000 respectively which I will use making a total for Alcron's Assets of \$13.420 million. From this sum Alcron will pay Antillean's debt of \$7.164 million and Jamaica Development Bank debt of \$5.8 million a total of \$12.964 million. The remaining \$456,000 will be absorbed in interest accrued and accruing and disposals.

GROUND 3

I turn now to the third ground that the value of the company's assets is less than its liabilities.

For the Petitioner, Mr. Simpson, the Bank Inspector, and

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Mr. Stephen Holland, the chartered accountant from Cooper & Lybrand, presented a balance sheet of Jamincorp's assets and liabilities and were cross-examined in great detail.

For the Respondent, Mr. Elworth Williams, the General Managing Director of Antillean and Director of Jamincorp, presented balance sheets for Respondent and was cross-examined.

Mr. Simpson's sheet represented the balance at the 31st August, 1986. Mr. Holland's represented the balance at 31st December, 1986. Mr. Williams' sheet represented the balances both at 31st August 1986, and that of 20th November, 1986 - the date on which the Bank last closed for business. It follows that Mr. Simpson's sheet and that of Mr. Williams' of 31st August, 1986 should correspond. Also Mr. Williams' sheet of 20th November, 1986 and Mr. Holland's of 31st December, 1986 should be similar save and except that Mr. Holland's sheet might show a decrease in cash in Bank representing cheques issued by Jamincorp and cashed in that six (6) weeks period November 20 - December 31 and possibly before. During the week of November when Jamincorp was opened no deposits were taken but moneys were paid out so as between 31st August, 1986 and 31st December 1986 the difference should be slight.

It is unfortunate that the figures in each of these balance sheets vary. I therefore propose to consider each of these Balance Sheets in turn, leaving over for subsequent consideration the detailed evaluation by Mr. Holland to conclude whether or not the assets exceed the liabilities, the extent of which should not be relevant.

A strong submission came from Miss Phillips for the Respondent that the relevant date of excess of liabilities over assets should be the 31st August, 1986 as it was on Jamincorp's monthly return for that month upon which Simpson's report was based and which led to the filing and presentation of the Petition on October 7. She argued that to use the 31st December 1986 is erroneous as on that date assessments were made in hindsight, the assessor being affected by the filing of the Petition, and further submitted that Section 11 which gives the Minister the discretion to exercise the power to present the Petition also addresses the relevant period in which licensed institution must be reviewed in order to ascertain whether the powers

should be invoked. The relevant part of the Section says:

The Minister for finance may
 present a winding up Petition
 in respect of any company which is a
 licensee OR (any company) which at any
 time during the 3 months preceding the
 presentation of the petition has carried
 on business of accepting deposits etc.

The grounds for winding up (a) to (d) follow.

Section 3(1)(a) of the Act prohibits the carrying on of the business of accepting deposits without a licence and Section 3(5) provides the penalty for so doing. Section 11 clearly contemplates two sets of companies, one licensed and the other unlicensed i.e. registered or unregistered as a company but not licensed under Protection of Depositors' Act and accepting deposits. It is to the latter that a three (3) month period is addressed. In the circumstances, paragraphs (a) (b) and (d) of the Section would scarcely apply but the illegal unlicensed company could be caught within the ambit of paragraph (c).

(c) (if) the company has been convicted
 of an offence against ss(1) of
 Section 3 (supra)

Counsel I think is caught by the adroitness of the draftsman. Jamincorp is a licensed institution and is not restricted to any statutory period.

Parliament has shown its awareness of the non-static nature of the exercise of liabilities exceeding assets and has amply provided for it in Section 11 (6) where it enacts that to determine whether liabilities exceed assets, account shall be taken of contingent and prospective liabilities of the company.

I find that there is no reason, statutory or otherwise, to make 31st August 1986 the "relevant" day as long as it can be ascertained that over that period and continuing the liabilities exceed the assets.

Mr. Simpson, the Inspector of Banks, is a Chartered Secretary C.I.S. CCS. He reported that the capital base of the Bank was adversely affected by the build up of accumulated deficits since 1984 -- recording losses since then -- that supervision of the loan portfolio was poor and the concentration of loans in related companies which were non-performing was affecting the viability of

the Bank. He constantly reiterated that Jamincorp was over exposed - they invested largely in stocks and shares which were speculative and thus not prudent and that the management of Jamincorp did not enforce agreements for repayment resulting in a very high level of delinquent loans. He said that he had raised the matter with them but little was done, instead the company tended to make further loans and call them 'receivables'. Mr. Williams said that the receivables were connected to the related company (Medallion) which was in the export trade, that Jamincorp would make advances on the company's behalf and on receipt of their money the company would repay. He did not agree with Mr. Simpson's assessment.

It was suggested to Mr. Simpson that his view that assets were less than the liabilities was erroneous as he did not take into account the securities, but Mr. Simpson had a different view. He said that securities were merely collaterals on the side; that in the regulation and supervision of financial institutions which take deposits from the public the examiner must be careful that they are of a high liquidity nature and can be turned into liquid funds easily as fixed assets. Things, like building, land, take time to be realized. Shares he said suffered much the same fate - for if a company is known to be having difficulties its asset shareholding will fall. His concern was moreso in the non-performance of the loans as out of 59 loans examined 39 of them were unsatisfactory and Jamincorp had made no provisions for loan loss.

Mr. Holland said much the same thing and opined that the Directors of the borrower company were the same as the lender company - borrowing from and lending to themselves. This he said was the cause for lack of proper securities with respect to loans. He deposes that both in terms of value and substance for "loans to third parties" the securities were inadequate and where he was able to identify a security, there was very little value offered. Mr. Simpson's view of the securities was that they were bad, dubious, unsubstantial not easily realizable and were in the form of guarantees or hypothecation of shares on an inter-company basis. He cited the instance where Jamincorp obtained no security for its loan made to Antillean until August 1985, a time after Antillean was put in receivership (i.e. June 85). It was then that Jamincorp obtained security by way of a second debenture

on Alcron building.

Jamincorp refuted this and held that the securities were all good, and sufficient. It seems to me that Jamincorp showed some laxity with this aspect of its affairs and that this was so because they were dealing almost wholly with related companies and so treated with it on a inter-personal basis. Same Directors being lenders and borrowers.

One of the criticisms raised was that the rate of interest offered by Jamincorp was high. Jamincorp refuted it but it was indeed so.

On a careful examination of the list placed before me, I have observed that for the first eight (8) months of 1986, the number one spot for the highest rate over the period of the Banks recorded therein, varied from Bank to Bank with Jamincorp taking the number one spot on one occasion, but what I find is that the rate of Jamincorp's interest was consistently, the second highest throughout the eight month period and exceeded the average interest rates for each month of the period.

Another criticism was that it was frantically advertising for deposits. Jamincorp had a standard advertisement listing the services given by institutions and one such service advertised was accepting deposits. These advertisements appeared in 1986 October on more than one occasion. So when Jamincorp denies it in reply to the allegation of generating funds (by advertisement) it is insufficient in my view to say it is "patently false" without an explanation. The plain truth is if you advertise the services you offer, you are in effect offering your services and if you advertise accepting deposits as one such service you are in effect asking for deposits which in another way is an "effort to generate funds" - probably not "frantic" but "generating funds" by means of more than one such advertisement.

Now Mr. Simpson in his affidavit of 26th November 1987 at paragraph 5 deposes.

The audited financial statement of 1984 disclose the existence of doubtful debts amounting to approximately \$13.9 million representing sums owed to Jamincorp by its parent - affiliated companies for which Jamincorp made no provision

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and was the subject of comment in the Auditor's report submitted by Price Waterhouse

Later he continues

I attach extracts from Reports of Inspections carried out in 1985 and statement of indebtedness of Jamincorp's holding company and affiliates as at August 31, 1986 compiled by the Bank inspection Department showing doubtful debts of \$15.5 million for 1985 and \$23.1 million for August 1986.

For the purpose of ascertaining the true financial position of Jamincorp the Bank Inspection Department has had to take into account these doubtful debts with the result that as at August 31, 1986 the net assets of Jamincorp are approximately \$26.8 millions liabilities are approximately \$47.7 million resulting in a deficit of \$20.9 million.

I will now take a closer look at Jamincorp.

The assets of Jamincorp are from the following investments:

1. Shares in Alcron a private affiliated company
2. Shares in 25 Public companies traded on the Stock Exchange.
3. Interest on deposits in Banks and other institutions and
4. Interest on loans.

It also invests in what is called leveraged buy-outs and recapitalization. By this process money is used to take over a flagging company using the **assets** of the company being taken over as a security for the loan. The loan is then paid from the profits of the company. Jamincorp would buy **insolvent** companies and try to bring them on stream. One such company created was Medallion Galleries Limited to which I will later refer.

The last statutory monthly Balance Sheet sent to Bank of Jamaica by Jamincorp was on 31st August, 1986. At the time of the filing of the

Petition in October the Balance Sheet for September was not yet received. Mr. Simpson's report was based on the August returns. Mr. Holland's balance sheet is as at December 31, 1986 as taken from the accounts in the office of Jamincorp, so save for the week in November when the Bank was reopened and payments made but no moneys received the difference ought not to be much. The specific numbers would be different but the conclusion would be the same.

Mr. Simpson had not made an evaluation of loans and securities individually. Mr. Holland did so, and I propose to look at them along with other matters complained of by the Respondent as errors and miscalculation in his presentation. To do this I will allude to Mr. Holland's Balance Sheet which is referred to as Exhibit S 1-3. Appendices 3 and 3(a) and attached to his affidavit.

On the asset side challenge is made to the following items:

- (a) Deposit with other financial institutions
- (b) Interest on loans and
- (c) Investments
- (d) Fixed assets

On the liabilities the challenges refer to -

- (a) overdrafts
- (b) customer deposits
- (c) Debenture
- (d) Accounts payable
- (e) Investments in and amounts due to affiliated companies.

As to assets - (a) Deposit with other financial institutions

Jamincorp had a fixed deposit at Jamaica Citizens Bank (J.C.B.) given as security for overdraft facilities extended to Jamaica Citizens Bank (J.C.B.) by Antillean. On the maturity of this deposit Jamaica Citizens Bank (J.C.B.) withheld the amount (\$1.467 million) and applied it to Antillean's overdraft (in Receivership). Mr. Holland in his computation ascribed it as a loan to Antillean - Respondents objected, so Holland removed it from Antillean's loan, and where he had added it as a part of Jamincorp deficit networth he removed it, resulting in a benefit to Jamincorp, reducing the original figure of liability exceeding asset from \$18,395 to \$16,928.

(Appendix 4 and 5 referred.) No change is required on the figure \$3,022.

Respondent had insisted that the sum allotted to Antillean by Jamaica Citizens Bank (J.C.B.) and which Holland accounted for as a debt by Antillean to Jamincorp should not be so regarded but should be calculated as an asset to Jamincorp. Holland conceded and made adjustments inasmuch as he insisted that that was not his information. What the Respondent has deposed about this sum is that Jamincorp had guaranteed \$700.000 but not the entire \$1.466.627 million which Jamaica Citizens Bank (J.C.B.) held and applied to Antillean's loan. The effect is that Jamincorp is entitled to receive from Jamaica Citizens Bank (J.C.B.) \$766.627 and not \$1.467 million which goes to their asset. Mr. Ratray said Holland had not so adjusted the \$1.467 (actually that figure must be \$766.627 thousand). Holland said he did. Frankly looking at the adjustments I am unable to say. However, the excess of liabilities over assets is so wide that this amount \$766.627 would not affect the conclusions of either party. If it is already adjusted as Holland says then he would have overstated Jamincorp's assets position by \$766.627. If it is not adjusted then he would have understated it by the said sum and Mr. Williams in his Balance Sheet may have overstated it by the said sum.

(b) Investments at cost

It was conceded that shares are valued normally at market value. Simpson said mid-point. However, this Petition is made under the Protection of Depositors' Act where its regulations require shares to be valued at cost. Though there is a strong case for market value valuation, I am of the view that since this application is brought under the Protection of Depositors' Act, the rules governing assessment of shares, which rules are used as a basis for evaluating the assets of licensed institutions on which this Petition is based, that valuation at cost is the proper method to be used. The basis for this, Simpson says, is that until you realize shares, you never know its value.

Mr. Williams did not agree with that, he said they are valued at cost by Bank of Jamaica for purposes of comparison when one is comparing the value for purposes of sale. I do not agree with this and following what Mr. Simpson says it is my view that it is done to prevent the over-estimation of assets.

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It is noteworthy that Simpson said that the Bank of Jamaica was concerned with the extent of the over-exposure in this speculative investment and considered it excessive. In cross-examination this was pointed out to Mr. Williams as being 20% of the deposit portfolio in shares. Mr. Williams accepted there was an element of risk but did not consider such investment speculative and was not concerned as he said the investment was conservative.

Shares are indeed speculative as they are susceptible to daily price changes up or down and you never really know whether it will be more or less until you realize it. Whereas you can say I have five hundred shares in National Commercial Bank (N.C.B.) you can never say I have \$4,000.00 there.

Cost is the statutory form for valuation for the licenced institutions under the Protection of Depositors' Act and I find, the appropriate value to be used.

Fixed Assets:

Holland quotes it at \$1.236 million, while Jamincorp quoted it as \$1.322 million. Holland said that land and buildings were included in this heading but should properly have been included in investments which would carry a lesser value. However, the items were previously revalued by Jamincorp and were carried at market value. Furniture and fixture were valued at book value, that figure will remain \$1.236.

Liabilities:

Overdrafts:

Mr. Williams insisted that he had no overdrafts at the 31st August 1986. Mr. Holland says he was informed by the Banks that an overdraft existed at 31st December, 1986. The probabilities are that by December all outstanding cheques for Jamincorp were then cashed. It would be a very foolhardy person to have a cheque still in his possession after that date. Those encashments could well account for the overdrafts at the Banks. The Protection of Depositors' Act empowers the Court to include contingent and prospective liabilities and I will regard this as a part of such. The figure is accepted - \$678 thousand.

Customer Deposits Liability

There is a difference of approximately \$3.1 million between the figures of the Petitioner and the Respondent. Mr. Holland said that there were poor accounting records at Jamincorp and no proper placing of the loan cards but he took the figures from the Bank's general ledger and those on the loan cards which had on such information as he required. It is rare that his clients keep a perfect set of accounting records. He was able to apply the techniques and skills acquired in training and practice to elicit the information he wished, as there was a difference of \$2.65 million and it had the lower figure. He used the ledger figure in place of the cards. His figure is \$38.4 million but he considers he has understated the figure as the cards appeared to be valid.

Mr. Rattray had put to Mr. Simpson that in September 1986 the customer deposit liability of the Bank was \$50.4 million. Jamincorp said it paid out \$7.4 million in November which would leave approximately \$43 million though Holland said the correct amount was \$5.6 million paid out. Mr. Williams said he checked the figures personally to arrive at his figures of \$35.2 million. I see no reason to reject Mr. Holland's figures, as the higher figure is more consistent with the evidence, furthermore, Holland is an independent party to this action. While his position was no doubt difficult in view of the manner in which Jamincorp had kept its records, I find nothing to criticize. The Statement of account on a fixed date at the Bank is not relevant as items are always in transit so it is best to look at the balance as recorded in Bank's Books.

(C) Debenture

Mr. Williams said it was paid but Mr. Holland said that the records reflected no such payment. General Ledger Account No. 44 bears the customer's name and debenture approximately \$2 $\frac{3}{4}$ million. The Bank of Commerce account for October to December revealed \$2.560 million paid to the customer leaving approximately \$190.000 (thousand) with accrued interest amounted to \$335.000 (thousand). The information was taken from the records of Jamincorp in respect of a customer now deceased. I accept this as correct.

(d) Accounts payable

This figure shows tax the Bank is allowed to hold and pay over and sundry liabilities. The figure is \$3,560 million.

Loans:

Mr. Holland divided the loans into three categories. (1) loans to related companies (2) loans to third parties (3) loans to Directors.

I turn now to:

Investments in and amounts due to related companies

Holland's Affidavit has this item amounting to \$32.3 million divided among the following related companies.

Antillean is a fish processing plant and is indebted to Jamincorp by assignment of Alcron's rental to pay its and Meridian's debt. It has been unable to meet the payments and at 31st December, 1986 was due and owing \$4.218 million principal and \$2.95 million interest a total of \$7.168 million. Antillean is unable to pay having accrued a large debt of \$87 million to Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) and a debt to Jamaica Development Bank (J.D.B.) of \$5.8 million but owns nothing. It will only be able to pay if Alcron is liquidated. After paying Jamaica Development Bank's first debenture it is expected that Alcron will be able to satisfy this debt to Jamincorp. No valuation of assets was done as presently its liabilities have exceeded its assets. It is in Receivership and has no assets available. Meridian's investment in Antillean is valueless. No provision was made in respect of Antillean.

Carimex is a paper company not existing in substance and is 100% owned by Meridian. Antillean is a Free Zone company and is not allowed to sell directly into the custom's territory. Antillean agreed to import and sell some of its products to companies in Jamaica in the custom territory but to ensure that the letter of the law is followed, Antillean would sell to Carimex who would then sell to the distributor. The goods are sent by Antillean to the distributor and so the transactions are in fact paper transactions. The records at Jamincorp were sparse and the documentation at the Registrar of Companies showed only the share allotment notice and the registered office of the company being the office Jamincorp occupies.

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Holland found they were unable to service the debts as there were no assets. Jamincorp had no security and held no legal charges. It seems to me that when Antillean flagged it flagged Carimex also. Of the amount outstanding, Holland made a provision of 90% as there was no information and he concluded that information was non-existent. The debt was \$1.038 million. It was suggested to him that Carimex debt was a part of Meridian's but Holland was adamant. He said it had its own accounting number "ledger account No.20" and the accounting records reflected it as an amount owed by Carimex. Mr. Simpson however, has it as a part of Meridian. Mr. Holland was willing to add it as a part of Meridian but he said he would have had to place on it the reasoning regarding Meridian and conclude that the entire amount was not collectable. This would increase Meridian's provisions by \$1.038 million and put Jamincorp in a worse position. He was not encouraged. Provisions for \$934 thousand was made.

Holborn Road

No provision was made in respect of Holborn Road. It was said that the loan was secured by a debenture over the fixed and floating assets of Alcron but Holland said no papers were seen to support that.

Lear Trust has a loan of \$2.8 million from Jamincorp but Jamincorp's files contain nothing. \$1.1. million was loaned to buy shares and for this sum there is a declaration of trust unsigned for Life of Jamaica shares at a cost of \$124.000. The Life of Jamaica's register does not list Lear as a shareholder. All shares have been sold. Another declaration of trust unsigned from Lear to Jamincorp for Salada Foods Limited shares at cost \$108.000 was seen. An unsigned agreement between Lear and Jamincorp for Meridian shares cost \$123.000 and debenture \$1.090. To 31st December 1986 payments of only \$90,000 were made. The ledger account No.27 shows Lear as owing Jamincorp \$2.8 million, there was no security except the unsigned declarations of trust and nothing at the Registrar of Companies. Provision was made in respect of the entire sum of \$2.8 million. Holland said it was extremely doubtful, that any moneys would be recovered.

Medallion is the company trading in furniture and is the "leverage buy-out" investment already referred to. It was formerly named "Jamaica Heritage

House" and was a failing company dealing in top-class furniture. Jamincorp bought it out renamed it Medallion Galleries injected moneys in it with a view to selling furniture and capturing some of the foreign markets.

Holland said the security for the loan was inadequate - A first debenture over the fixed and floating asset of the company to the extent of \$475,000 only was recorded at the Registrar of Companies. Mr. Simpson however said that the debenture was stamped to cover \$1.125 million but Holland said he did not see that and that there were serious doubts whether the debenture was valid. It was apparently upstamped but not registered. Entries regarding the loans were in the ledger but no files were in the filing cabinet as none were maintained. The loan was \$2½ million and was owing for a considerable time. The export of furniture for which they had high hopes had not done well. He visited the location and saw little or no activity there. They were only able to repay \$380,000 of principal and interest and Holland concluded the performance to be poor. He evaluated it on the basis of whether or not it could repay its debts, and performance indicated it could not. He made a major provision for non-collection of the unsecured portion of the loan of \$2.202 million.

Meridian Investment company is the parent company who hold shares in the following with current valued Jamincorp - Nil Antillean - Nil - Alcron \$115,000 - Carimex \$10,000 Medallion \$100,000 Jamaica Pump and Valve \$100,000. Total value being \$325,000 as valued by Holland. These shares were valued with the caveat that the companies were being liquidated to pay the liabilities as they were not going-concerns, owed very substantial sums, had demonstrated that they were unable to liquidate their liabilities in the ordinary course of business. Holland said that the performance of the loans were abysmal and much of the moneys loaned to them would not be recovered.

I have already adverted to the companies and their state except Jamaica Pump and Valve.

Jamaica Pump and Valve is situated in Mandeville, it had previously been put into Receivership by Jamaica Development Bank when Holland did some work there. The company subsequently came out of Receivership. He was aware that they had substantial assets and liabilities and was aware of the

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company. He valued the shares at face value and gave the face value of \$100,000 to Meridian.

Meridian now owed to Jamincorp \$11.5 million secured by a second debenture over the fixed and floating asset of Alcron. This sum was loaned to Alcron who loaned it to Antillean and became a part of the money which was assigned for payment to Jamincorp by means of payment by Antillean of Alcron's rental to Jamincorp, Antillean failed to pay. For a period amounting to fourteen months before Receivership it never paid and has not paid since then. The performance of the loan had been very poor.

I have tried and failed to find a reason for the open obstinacy and gross insensitivity to the depositors in the stern refusal to this day by Jamincorp to make the slightest provisions in respect of this loan when Mr. Williams has accepted in cross-examination that Meridian could not pay if a formal demand was made but could, if it was a long term loan. He says he was exercising his options. Very late in the event he sued Antillean and has not realised anything from the judgment. From as far back as 1984, Jamincorp's auditors said that current financial information indicated considerable doubt as to the ability of the company to repay the debt. Meridian's situation has never improved, it is generating no funds and its situation has worsened. What is more it has guaranteed part of the Antillean debt which is said to be now \$87 million. My own view is that this is a most unrealistic approach to a very serious matter. A major provision was made of \$10.937 million.

With respect to Antillean it was Holland's view that Alcron on liquidation would satisfy that debt of \$7.164 million. Jamincorp, however will loose \$4.543 on its investment in Alcron. This figure I believe is overstated by \$766.6 (thousand) but for ease of calculation it will remain.

Adjustments were made to the second and third categories "Loans to third parties (\$209 thousand) and "loans to other" (\$77.000 thousand)."

The performance of these had been unsatisfactory he said. The original formal period of the loans as reflected in the loan cards was two to three years but based on their actual performance the effective loan period had become twelve years. The interest alone on some had exceeded 50% of the

principal. The collection of the total amount was uncertain, so provisions were made. On the basis of these facts, I agree with the recommended provisions and find the sum of \$286.000 (thousand) fair, for both categories.

So on the full loan portfolio, he recommended write-off provisions totalling \$16.937 and \$286 on loans totalling \$21.766.

Mr. Rattray suggested adjustments to items overdrafts - as non-existent, Debenture as paid, Deposit Liability and accounts payable as overstated and Investment in related companies as secured and the Jamaica Citizens Bank figure of \$1.467 million as omitted. Mr. Holland did not agree.

These arithmetical adjustments would increase the stated figure of Jamincorp's networth by \$5.2 million making it \$10.380 million. Mr. Holland observed that that could never be correct and turned his attention to Jamincorp's Balance Sheet of 31st August 1986, where Jamincorp showed its networth then as \$6.5 million. Applying Mr. Rattray's adjustments would mean that the profits of Jamincorp had increased by approximately \$4 million (\$10.380 - \$6.5) from 31st August, 1986 to 31st December 1986. This period unfortunately, was Jamincorp's lowest period when for those sixteen (16) weeks it was closed for ten (10) weeks without any business being conducted and functioned for the remaining six weeks with payments out being the only business done for two of those weeks. I find that the resultant figures as proposed by Respondent is erroneous, misleading and flawed in logic.

Mr. Holland looked at each loan item by item, then listing their value and their securities where he was able to identify any, and valued the provisions as he found adequate. He considered what was the right value to place on them taking such matters into account as he thought right to do. The respondent did not like the valuations and sought to challenge them. Holland has attended and under strenuous cross-examination has explained his reason for arriving at the figures. He said he thought he dealt generously with the provisions in respect of the loan. I agree with him. Having carefully considered the valuations and the evidence, I find and accept that the recommended provision of \$21.766 million is the appropriate sum in respect of:

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(a)	Loans and advances	\$16.937 million
(b)	Investment in Alcron	4.543
(c)	Loan to Directors and others	286
		<u>\$21.766</u>

Retrospective Evidence

It was contended that Mr. Holland used retrospective evidence to come to his valuation that his knowledge was tainted by subsequent events which he considered in arriving at his valuation of assets of Jamincorp and the related companies, and as such his evidence is valueless.

Mr. Holland said he did not consider Jamincorp as a going-concern as much of the money lent to related companies would never be recovered, and that there was a time frame at the end of which Jamincorp would no longer be possible to pay its debts but this was not applicable in deciding whether it was a going-concern. When he proposed the various values the circumstances which would raise doubts as to whether it was a going concern were (a) the Bank was closed as a result of a Petition by the Ministry of Finance (b) it had re-opened in November for a few days and paid out substantial sums (c) there was substantial sales of shares in September indicating problems in cash flow and (d) Jamincorp had applied to Bank of Jamaica for assistance in cash. He said he had to look at what went on in the past to come to his conclusions whereupon Mr. Rattray said he could not take the factors of what had happened afterwards to use them as justification for the valuation. He read from The Principles and Practice of Business Valuation by Ian R. Campbell.

"It is well established that retrospective evidence is not admissible in reaching a notional valuation conclusions. Therefore if in 1975 it is necessary to determine the fair market value of the outstanding shares of a corporation at December 31, 1971 any facts or information which become known after December 31, 1971 should not be considered."

Mr. Rattray has fixed the relevant date as that of 31st August, 1986, but the Court has not said that. Mr. Holland himself has done his valuation for the 31st December 1986. That is his relevant date. Mr. Holland is not now looking at the valuation of the property as at 31st

August, 1986, he is looking at it as at 31st December, 1986, and certainly, he could not and did not take into account anything which became known after 31st December, 1986 in valuing the companies. His balance sheet clearly states "As at 31st December 1986."

So from the point of view of what Mr. Holland was asked to do and when, I find he has not breached the principle.

Miss Phillips relied on the case of "Holt and others vs. Inland Revenue Commissioners" 1953 2 ALL E.R. p. 1499.

Very briefly in that case the Judge was trying to ascertain the value of shares bequeathed for Estate duty purpose at a particular date being the date of death of the testator - December 31, 1971. This exercise he was doing in 1975. Between 1971 and 1975 there had been various circumstances affecting the value of the shares. He concluded that he had to value the shares at its value in 1971 "by making the most intelligent guess that I can if sold on the open market, which the authorities and the Section in the Act require me to assume.

The fact that at the time of Holland's valuation the Petition was filed does not make the recommended provisions worthless. Indeed, if the knowledge of the Petition did operate on his mind it would seem to have had the opposite effect for his recommendations show clarity, fairness, professionalism, skill and generosity in many areas. He was frank and honest in the witness box and was thoroughly and expertly cross-examined on every item. I am in fact in great doubt as to whether what he did can properly be called a "valuation". I find the evidence admissible and reliable.

I go now to the Balance Sheets.

BALANCE SHEETS

Simpson's Balance Sheet as at August 31, 1986.

Mr. Simpson's figures were those on which the Bank made its recommendation and can be easily reconciled with Jamincorp's returns. I will deal with it first.

He took a very pragmatic approach. From the unaudited accounts of Jamincorp to Bank of Jamaica for the month of August, that is 31st August 1986, he found on Protection of Depositor's Act Schedule 1 that Jamincorp returned assets of \$49.9 million, that loans and advances made

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to related companies had not been performing satisfactorily in that since 1983 the principal and interest had been growing each year and had now reached a figure of \$23.1 million. This left assets of \$26.8 million. The deposit liabilities was \$42.5 million and others \$5.2 million making a total liability of \$47.7 million with only \$26.8 million assets. He concluded that there was a massive deficiency of liabilities over assets of \$20.8 million. He was aware of the 1985 Financial Audit Report, where the auditors - after seeing the securities - expressed doubt - of recovering \$12.9 million of the total loan of \$23.1 million. He said he analysed the components of the balance sheet during his inspections from 1983 onwards and concluded that even if partial recovery of the sum was effected, it was unlikely that the basic situation would change.

Certainly to the layman this looks accurate, indeed, this is the manner in which every housewife balances her house keeping money. It is only that in banking and commercial undertakings it is not quite so simple. At the time of his presentation no returns were made by Jamincorp in respect of the newly acquired Alcron although Simpson had advised Jamincorp hitherto to return a consolidated statement. Jamincorp said the business of both companies were different. It did not consolidate. Simpson was unaware of its networth. His figures were all taken from the returns of Jamincorp to Bank of Jamaica. He had examined the securities, he called them "dubious and worthless" and held to the view that as long as a loan is not performing satisfactorily it is bad, should be written off and if afterwards there is any payment, then the account can be brought back on the books.

Again to the layman it makes good arithmetic and good sense. It was on the above information and assessment that he made his report and recommended to the Minister, bearing in mind the effect on the financial community, that the Company should be wound up or else the Bank should be prepared to initiate massive bail-out operations.

The Respondents said Simpson had not taken into account the traded stocks - that the other assets were not properly valued - that collaterals held to secure loans were not received and there was no confirmation from Public Companies as to shares owned by Jamincorp. This was a just complaint.

Mr. Holland, however, has attended on all these matters and found, which I have accepted, that the sum to be adjusted as provision is \$16.937 million plus \$286 which gives an excess of liabilities over assets of \$14,404,280.

Jamincorp's Balance Sheet as at August - 31.8.86

August 31, 1986 has networth of \$6,512,950. This must be adjusted by writing off bad debts of \$17.268 million which leaves liabilities exceeding assets by \$10.756 million,.

All Jamincorp's figures are retained. Not that I accept them but I use them to indicate that using Jamincorp's own balance sheet would leave it still in a deficit position.

Jamincorp Balance Sheet as at
November 20, 1986 - E.A.E.W. No.

This has networth of \$5,133,023 which must be adjusted by writing off bad debts of \$17.628 which leaves liability exceeding assets by \$12.495.023

I repeat my observations on the figures as above. The amount computed for provisions in respect of loans and advances (\$17.628) would be constant from August to December. It maybe that it would be increased but certainly not decreased.

Holland's Balance Sheet of
31st December 1986

To summarise I find: on Holland's accounting the following :

Assets	\$15.097 million	
Liabilities	(43.046)	
	(27.949	
Loans due from related companies and Directors	<u>\$32.787</u>	
Networth:	4.383	
Deduct provisions (bad debts) made from loans and investment (Alcron)	(21.766) (16.928)	\$16.937 286 4.543 <u>\$21.766</u>
Liabilities exceeding assets		<u>\$16.928</u>

It is to be noted that the Jamincorp's shares in Alcron are included in this computation. Alcron will have to be liquidated and having

paid Antillean's debt of \$7.164 and Jamaica Development Bank's debt of \$5.8 million and continuing interest, Jamaica Citizens Bank's debt of \$1.2 million and cost of disposal etc. approximately (\$14.2 million) nothing will be left for Jamincorp.

One must note that if the shares were computed at market value, the conclusion would remain the same.

Counsel for the Respondent has adverted the Court to the approach of the Court in exercising its discretion in petitions when the matter in issue is one of insolvency and cited in support -

Re Craven Insurance Co. Ltd.

[1968] 1 Lloyd's Law Report p. 361.

The facts are omitted as it is sufficient for this purpose to show what the Court held.

Pennywick, J.

that although an order should be made in simple cases where companies excess of assets over liabilities was below relevant amount and there was no firm prospect of redressing position within a short time, Court had power to refuse an order where such a firm prospect did exist, that in this case, it would be harsh to wind up the company where there was every prospect that in less than eight weeks deficit on margin of solvency would automatically disappear and that therefore petition would be dismissed on terms.

None of the factors considered by the learned Judge is before me. This is not a simple case, the deficit here is not marginal and no prospect of redressing the position is before me whether in the short term or long term.

The Respondent in that case had put an acceptable proposal before the judge to wipe out the deficit and put in new management. The judge exercised his discretion on that basis.

There is no base on which this Court can exercise its discretion in this case.

I have already indicated that the Audited Reports of Price Waterhouse & Company for 1984 and 1985 would each have shown a deficit if the proper loan provisions had been made. On each of the Balance Sheets which I have examined, I have come to the firm conclusion that the liabilities of Jamincorp exceeds its assets. Holland deposed that it is his view that

this position had existed for a considerable period of time prior to 31st December, 1986. I am satisfied that he is not incorrect. Jamincorp depositors had confidence in them says Mr. Rattray and "almost every customer whose deposit had matured had the deposits rolled over." Indeed, that could be some help in keeping the deficit away. As Holland said, that banks are in an advantageous position than other borrowers as its cash flow may be positive with cash coming in and going out and it can appear to be operating quite successfully when in fact it is not in a healthy state of affairs. At Jamincorp the loans were not performing, save for the shares, the investments were scarcely performing. It is clear that in spite of the window dressings whatever way you look at it the liabilities of Jamincorp exceeds its assets.

Just now I will look at some submissions made to me which I think I have not addressed so far in the judgment.

1. That Jamincorp made no loan to Alcron of \$40,000 thousand. I find that Alcron is not included in the assessment of "loans made to related companies" and no provision is made in respect of this.
2. That the loan to Construction Developers Associates is fully secured and should be removed. I accept that no security existed in Jamincorp's records but because of its performance no provision was made in respect of this company.
3. That the rent due from Antillean \$7.164 million should be put in as a Receivable. It is clear that this sum is already included under "Accounts and loans receivable due from related companies" in the asset side of Holland's Balance Sheet.

Ulterior motive

It has been submitted that even if I find a reason to wind up the company an order ought not to be made because the Petition was not presented in good faith and for the legitimate purpose of obtaining a winding-up order but for the intended purpose of acquiring the Alcron building at Marcus Garvey Drive for a pepper-corn consideration. This the respondents support by two inter-office photocopied confidential documents, and another document marked "Aide Memoir".

The inter-office correspondence is on the form of a memorandum addressed to "the Governor" from "Mrs. D. Mordecai" subject being "Antillean Food Processors Ltd." and date '11 November 1985.' Attached to it is another document headed "Status report on Antillean Food Processors" and at the foot is printed "Deborah Omphroy Mordecai, 24 September 1985".

The first paragraph informs that the attachment was submitted to the Honourable Prime Minister in September 1985. This document is unsigned. I have not been made aware of the origin of these documents, but the first purport to indicate the financial history of Antillean Food Processors and Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.).

I shall set out the contents as briefly as I can. Antillean is partially financed through Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) by three Norwegian groups - Trio Fabukker - shareholders, CIEK and Thomas Bell International also Eksport finans a Credit Insurance Agency who was undertaking the Line of Credit. All three agencies here are unsecured creditors. Advances to Antillean under the Line of Credit was denominated in US dollars and repayable to Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) in US dollars. These loans were secured partly by a Bill of Sale and guarantees from Meridian.

Antillean had defaulted severely in its payments and Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) had a management audit done in November 1984. By May 1985 Antillean was overdue in payment of Principal to Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) on the Norwegian line US\$1.941.607 and overdue on interest US\$1.401.421 a total on the Bergen Line of US\$3.904 million. Based on the result of the audit Antillean was put in Receivership by Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) in June 1985. By September 1985, a total of J\$70 million was owed by Antillean for which they held guarantees of \$7.873 million from Meridian in relation to the Norwegian Line of Credit. Meridian's guarantees were called in and the company was given twenty-one (21) days to pay or it would be wound up. There has been no complaint of the company being wound up although the debt is still due.

At this point Jamincorp, a related company, is pressing for payment

of US\$70,500 per month rental assigned by Alcron to Jamincorp for payment of debts. Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) it seems plans its strategy to regain its money -

1. to put pressure on all the associated companies to force them away from suing for the rental;
2. to re-negotiate the rental agreement or to relinquish the building for pepper-corn consideration.

The third document "Aide Memoir" is what purports to be a note of what transpired at a meeting in October 1985 when the then Governor of the Bank of Jamaica went to London and met the Norwegian interests who are the creditors and shareholders of Antillean Food Processors. This document has a signature "D. Omphroy - Mordecai Mrs." and beneath this the name is typed and the words "Secretary/Legal Officer Jamaica Export Corporation and Investment Corporation November 11, 1985." The memoir states that at the meeting the Norwegians were told that J.E.C.I. C. commissioned a management audit of Antillean which showed - that the company lacked proper management, was in urgent need of working capital and had no recent audited financial statements. The company had been put in Receivership, the cash position of the day after the Receivership was almost nil and the Bank of Jamaica had to advance money to meet the payroll of June 4, 1985. It was felt that the company needed a management group to protect the interests of the existing shareholders and creditors and was discussing with Grace/I.C.D. to undertake the management with the Receiver. They had therefore come to consult the group to determine management, raw materials and how to achieve a viable operation.

Several suggestions were made by Trio who said they had had no success in influencing the running of Antillean. Trio viewed marketing as the main problem and was told that Mr. Williams of Antillean had made an oral request for access to the Jamaican market and was asked to document the level of local access, the period of time required, and to submit a marketing plan but none of the information requested was received by the relevant authority. Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) had now made a similar request and was asked to provide the same information which

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was being prepared. The then Governor of the Bank of Jamaica advised that the company was not able to service its external and non-external debt and requested assistance. Bell international said Antillean had been grossly mis-managed for a period of time and this had been hidden from Bank of Jamaica and its creditors that the management needed changing and the Norwegians as experts in fish yield could assist. He wanted to know how its unsecured debt of \$1.3 million would be paid. Trio also wanted to know how its unsecured debt would be settled.

CIEK stated that Antillean was a direct debtor of CIEK unsecured in the sum of NKR 2.5 million on a short term credit. All three stated that their debts had to be settled before they co-operated in any restructuring of the company. The Governor stated he could not support that request. Bank of Jamaica was itself a large unsecured creditor and would be hurting itself - his initial position was to liquidate the company and realize the equipment for its salvage value. It was at the urging of the staff of Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) that he agreed to keep the plant open. If these investigations revealed that the plant could provide certain lines profitably it would then be a matter of getting the existing management and shareholders out of the way. Under the Norwegian line of Credit Antillean had not paid even one instalment of its loan and since Receivership the Bank of Jamaica had supported it to the extent of J\$4 million. He felt strongly that if a way could not be found by the end of October to deal with Antillean it should be locked down and the company liquidated. Trio said its problems in choosing to run the plant was how to deal with the shareholders and the management and expressed his concern of Mr. Williams' 80% shareholding of Antillean and how it will be dealt with. The Governor indicated that he was concerned about keeping the spirit of the co-operation between the Norwegian Government and the Government of Jamaica alive.

The remaining portion of the Aide Memoir contains discussions geared towards decisions as to the possibilities of operating Antillean and the re-scheduling of Antillean's debts to Norway.

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Prima facie, it appears to me that the Bank of Jamaica was worried about Jamaica's relationship with foreign investors and, with respect to the plant, would wish to change the present management and put proper management in place, remove the present shareholders to make the plant viable in order to regain their moneys as had been spent by them. But this is open to argument.

Miss Phillips submitted that the contents of these documents support the fact that the Petition though ostensibly for a winding-up order was really to achieve a collateral purpose as follows:

Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) Receiver had refused to pay the rental to Jamincorp well knowing that it would cause the loan which Alcron had with Jamaica Development Bank (J.D.B.) to fall into arrears. Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) acquired the Jamaica Development Bank (J.D.B.) debenture on Alcron well knowing that as debenture holder it would be able to seize the assets of Alcron, the main asset being the building in which Antillean is housed. Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) would then be entitled to act on it, once Antillean is in default. The then Governor of the Bank of Jamaica she said had five months before stated that if the Antillean plant proved viable the next step would be to get the existing shareholders and management out of the way and run the plant. (See Aide Memoir). The ownership of the Alcron building in which Antillean was situated would, she said, be essential to achieving this end - and this is the collateral purpose for the presentation of the Petition.

Mr. Holland has said that since 1983 Antillean had been in trouble with the payment of rental to Jamincorp and had paid nothing in the course of the year 1984, so at the time of the Receivership in June 1985 fully fourteen months rental was due by Antillean to Jamincorp. The time when this purported direction was suggested was in October 1985, five months after the Receivership. The lack of payment of rental by Antillean was therefore nothing new and cannot properly, I would say, be part of or the base of a plan concocted in 1985. Failure to pay rental had been in operation from a period when Mr. Elworth Williams was the Managing Director and he could never have been

regarded as being a part of this "plan", yet Antillean was in arrears. Subsequent to the Receivership no rental was paid. Can it be said then that the Receiver is now in a better position to pay it than Mr. Williams was? If it had been continuously paid before and was paid up to date, it would be reasonable to infer that it could now be paid. If it had been able to pay, the debt to Jamaica Export Corporation and Industrial Corporation (J.E.C.I.C.) on the Norwegian Line of Credit, on which no payment was made, would not have accrued. Can it be honestly said on the basis of what is before me that] the Receivership of Antillean was able to pay and his failure was part of a plot to acquire the Alcron building? His ability to pay is paramount and that has not been proved.

It has been admitted by both Petitioner and Respondent that there is a substantive suit filed in the Supreme Court in connection with these matters. Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) the party who seeks to recover \$70 million from Antillean and from whom the documents purport to emanate, are not parties to this petition. On such a substantive issue they need to be heard and following the Judgment of the Court of Appeal on a related matter the weight and admissibility of the documents will have to be determined by the trial Judge. To come to any decision on this matter on such evidence as is before me, would fetter the hands of the Court at that trial. The evidence I will say is insufficient for me to make a finding that there is a collateral purpose for which the Petition is filed.

Three cases were cited to support the principle that where a petition is presented ostensibly for winding-up but really for another purpose the Court has an inherent power to prevent such an abuse of process by refusing it.

In re A Company
[1894] 2 CL. 349

On 20th March 1894, a Petition was presented to wind up a company that it had no money in hand to meet expenses etc. The Petitioner had become a shareholder by transfer of shares from another on 14th February, 1894. To present a Petition the Act required the shares to be registered

in his name for six months, if he was not an original allottee. He claimed he was entitled to be considered as an original allottee and the object of the petition was to put pressure on the company to do so. The company applied for an injunction to restrain him from advertising as it would do the company great harm. The Court held it was an abuse of the process of the Court and granted the injunction restraining all further proceedings.

The Petitioner here had no status to present the Petition and sought to use an application to wind up in order to receive a personal benefit.

The other

Re Belladore Silk
[1965] 1 ALL E.R. p.667

A co-director presented a Petition to wind up a company on the ground that it was just and equitable so to do because of oppressive conduct of the company's affairs by the other Directors. At the hearing he admitted that he did not want a Receiver appointed, his real concern was to force an agreement with his co-directors with respect to part of a loan which if not repaid to him he would be faced with ruin.

Florman J. found that he did not really want the relief sought, but the real object was to pressure the company to achieve a collateral purpose namely the repayment of the loan. He found it an abuse of the process of the Court and dismissed the Petition.

Here again the Petitioner had wished to receive some personal benefit.

The last case Re a company 1974
1 ALL E.R. 256

The Petitioner presented a petition for winding up a company that the company had failed to obey an Order of the Court with respect to lodging into Court sum due to him by the company as money had and recieved. In fact, it was an order setting aside a Judgment if a sum was paid into Court. Respondent applied for a restraining order and that the petition be struck out as it was an abuse of the process of the Court.

Megamy J. held that the facts were misrepresented - the Petition

was unsatisfactory and would be struck out as an abuse of the process of the Court.

Here again the Petitioner had wished to receive some personal benefit. In these cases, all the parties concerned were parties to the petition and were before the Court and heard on all the issues pertaining to the ulterior objectives they sought.

The facts are quite different to this case and do not assist me in applying the principle, in deciding what constitutes a collateral purpose to the extent of the sufficiency of the evidence.

Mr. Henriques has posed the question what personal interest has the Minister of Finance to gain? He adverted to the fact that his sole interest was in protecting the depositors of Jamincorp and this he sought to do by powers conferred on him by the Statute.

It seems to me that as Minister of Finance he would maintain a general interest in financial matters affecting all financial institutions but would he achieve any purpose in closing Jamincorp to settle a matter between Jamaica Export Corporation and Investment Corporation (J.E.C.I.C.) and Antillean? There is no credible evidence before me to support that. Such evidence has, I must assume, been reserved for the substantive suit.

What then is the future for Jamincorp? They have very little investment of their own. With no rent coming in from Antillean, now closed, their major source of funds is entirely cut off. Where will her funds come from? She has shares in private companies on the Stock Market, the larger portion of which is already sold. Of her related companies Antillean is in Receivership with an estimated debt of \$87 million - no moneys can be expected from it. Alcron's money is absorbed by Antillean's present and prospective liabilities. It is not now generating any funds and will have to be liquidated to pay its debts. The Jamaica Development Bank has been accruing interest on its loan and as it presently appears to me Alcron will not be able to satisfy all her debtors on liquidation. Meridian is also generating no funds and as admitted by Mr. Williams, is unable to pay her own debt of \$18.5 million unless re-scheduled over

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a 10-15 year period, which in these circumstances seem impossible.

Medallion Galleries they are barely able to help themselves.

Carime x the off shoot of Antillean, dies with Antillean, whose failure has underpinned Carimex.

Lear Trust again not generating any added funds having dispose of most if not, all of its investments.

Jamincorp has permitted its customers to default indefinitely in their loans.

I was alerted to an excerpt from 'Canons in Banking' which said -

"Lending should be well spread. To lend more than 5% of the total to one borrower, however sound, would be excessive. To lend heavily to one class of borrower was to invite trouble."

Jamincorp provides a clear example. It was imprudent to invest so much in related companies.

I therefore find for the Petitioner in respect of grounds 1, 3 and 4 of this judgment.

In this event the petition is granted and a winding-up Order made.

A Provisional Liquidator is to be appointed and the Trustee in Bankruptcy who is the present appointee to continue until a new appointment is made.

Cost to Petitioner.