

# JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 37 OF 2005

**BEFORE: THE HON. MR. JUSTICE COOKE, J.A.  
THE HON. MR. JUSTICE HARRISON, J.A.  
THE HON. MR. JUSTICE DUKHARAN, J.A (Ag.)**

<b>BETWEEN:</b>	<b>PHJ LIMITED (in liquidation)</b>	<b>APPELLANT</b>
<b>AND:</b>	<b>NATIONAL COMMERCIAL BANK JAMAICA LIMITED</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND:</b>	<b>JAMAICA REDEVELOPMENT LIMITED</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND:</b>	<b>SCOTIABANK JAMAICA TRUST AND MERCHANT BANK LTD.</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>AND:</b>	<b>ADM MILLING CO. LTD.</b>	<b>4<sup>TH</sup> RESPONDENT</b>

**Dennis Morrison, Q.C. and Miss Jennifer Scott, instructed by Richard Ayoub of Clinton Hart & Co., for the Appellant.**

**Charles Piper, Maurice Manning and Miss Catherine Minto, instructed by Nunes, Scholefield, DeLeon & Co., for the Respondents.**

**The Third and Fourth Respondents were unrepresented.**

**May 21, 22, and 24 and July 27, 2007**

**COOKE, J.A.**

1. The appellant PHJ Limited (in liquidation) (PHJ) is a wholly owned subsidiary of Caldon Finance Group Limited (Caldon). The former owned two

blocks of stock units in the Jamaica Flour Mills Company Ltd. (J.F.M). The first block consisting of 69,515,972 was held by the first respondent National Commercial Bank Limited (N.C.B.) as security for the extension of credit facilities to Caldon. These credit facilities included those which the first respondent had inherited following the merger of Mutual Security Bank and itself. The other block comprised 31,000,000 units and was deposited with Citizens Merchant Bank Limited (C.B.L.) to secure indebtedness owed to it by Caldon. The principal and guiding hand of Caldon was Mr. Henry Fullerton.

2. The fourth respondent ADM Milling Co. Ltd. (ADM) wished to purchase all the stock units of J.F.M. That wish was realized and both blocks of stock units owned by PHJ were acquired by ADM. In the sale transaction the third respondent Scotiabank Jamaica Trust and Merchant Bank Ltd., was the transfer agent and registrar/broker.

3. The first and second respondents have similar interests in the subject matter of this appeal, the first respondent having effected in favour of the second respondent a legal assignment of all its rights, title and interest in the debt and securities of Caldon.

4. This appeal relates to the second block of stock units (31,000,000) and the issue is whether or not there was an equitable assignment of the proceeds of the

sale of that block to the first respondent. The appellant contends that there was no such assignment and challenges the order made by Donald McIntosh, J. on the 22<sup>nd</sup> December, 2004, to that effect. The learned trial judge had in that order made a similar declaration in respect of other block of stock units (69,515,972) but apparently that declaration has been accepted.

5. The ground of appeal was as follows:

"The Honourable Judge erred in law in finding on the evidence submitted that it was the intention of the parties to agree that the Appellant assign to the 1<sup>st</sup> Respondent the additional consideration payable by the 4<sup>th</sup> Respondent either by itself or through the 3<sup>rd</sup> Respondent for the purchase of each share of 31,000,000 JFM stock units of an amount equal to 80% of the insurance proceeds received by JFM relative to damages sustained by JFM as a result of Hurricane Gilbert."

The orders sought were:

- "(a) That the Judgment in favour of the 1<sup>st</sup> Respondent in relation to the 31,000,000 block of stock units in JFM be set aside.
- (b) A declaration that the Appellant is entitled to the additional consideration payable for each stock unit of the 31,000,000 block of stock units in Jamaica Flour Mills and the 4<sup>th</sup> Respondent is hereby ordered to pay to the Appellant, either by itself or through the 3<sup>rd</sup> Respondent, the additional consideration payable for each stock unit of the 31,000,000 block units in Jamaica Flour Mills.
- (c) The order for costs in the Court below be varied so that each party bear its own costs.

(d) The Appellant to have the costs of the Appeal.”

6. The approach of this judgment will be firstly to set out the principles of law which should inform the decision and then to analyse the evidence within the context of those principles. The relevant principles are those pertaining to equitable assignment (as there is no contention that there was a legal assignment). There is an authoritative statement from their Lordships’ Board in **Palmer v. Carey** [1926] A.C. 703 at 706. It reads:

“The law as to equitable assignment, as stated by Lord Truro in **Rodick v. Gandell** (1852) 1 D.M. & G. 763 at 777-778 is this:

‘The extent of the principle to be deduced is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers.’ ”

I further find instructive the exposition of Buckley, L.J. on an equitable assignment in his judgment in the English Court of Appeal in **Swiss Bank Corporation v. Lloyds Bank Ltd. and Others**. The judgment of the Court of Appeal was upheld by the House of Lords. [1982] A.C. 584. At pp. 595 – 596 of this report Buckley, L.J said (with apparent approval of the House of Lords):

“It follows that whether a particular transaction gives rise to an equitable charge of this nature must depend upon the intention of the parties ascertained from what

they have done in the then existing circumstances. The intention may be expressed or it may be inferred. If the debtor undertakes to segregate a particular fund or asset and to pay the debt out of that fund or asset, the inference may be drawn, in the absence of any contra indication, that the parties' intention is that the creditor should have such a proprietary interest in the segregated fund or asset as will enable him to realise out of it the amount owed to him by the debtor: compare **In re Nanwa Gold Mines Ltd.** [1955] 1 W.L.R. 1080 and contrast **Moseley v. Cressey's Co.** (1865) L.R. 1 Eq. 405 where there was no obligation to segregate the deposits. But notwithstanding that the matter depends upon the intention of the parties, if upon the true construction of the relevant documents in the light of any admissible evidence as to surrounding circumstances the parties have entered into a transaction the legal effect of which is to give rise to an equitable charge in favour of one of them over property of the other, the fact that they may not have realised this consequence will not mean that there is no charge. They must be presumed to intend the consequence of their acts.

In the present case the loan agreement contained no express requirement that I.F.T. should charge the F.I.B.I. securities or the fruits of the borrowing by way of mortgage to secure repayment of the loan. Such intention must be found, if at all, by implication.

A binding obligation that a particular fund shall be applied in a particular manner may found no more than an injunction to restrain its application in another way, but if the obligation be to pay out of the fund a debt due by one party to the transaction to the other, the fund belonging to or being due to the debtor, this amounts to an equitable assignment pro tanto of the fund: see **Rodick v. Gandell** (1852) 1 D. M. & G. 763, 777 and **Palmer v. Carey** [1926] A.C. 703, 706-707:"

7. I now turn to the evidence.

(a) There is a letter dated May 27, 1997 sent by PHJ under the hand of Fullerton to the third respondent stating that N.C.B. would be sending the first block of stock units (69,515,972 owned by PHJ) and that the proceeds of the sale of those units should be sent to N.C.B. By communication dated May 28, 1997 N.C.B. on the instructions of Fullerton N.C.B. sent to the third respondent the first block of stock units.

(b) By letter dated May 26, 1997 C.B.L. wrote to Caldon as follows:

**"ATTENTION: MR. HENRY FULLERTON**

Dear Sirs:

**COLLATERAL FOR YOUR CREDIT FACILITIES**

Further to our recent telephone conversation, we advise that Citizens Bank Limited (CBL) will release the security (JFM shares) which is now being held against your existing facilities of J\$54,854,500.00 (inclusive of overdraft) under the following conditions:-

- (1) Receipt of an unconditional irrevocable undertaking from the National Commercial Bank Limited to repay the facility of J\$54,854,500.00 plus interest, upon the sale of Caldon Finance Group's Interest in Jamaica Flour Mills Limited. The undertaking must state the date on which the payment will be made.
- (2) The security must be returned in the event that the JFM shares are not sold.

We trust that you will find the foregoing satisfactory.

Yours faithfully,  
CITIZENS MERCHANT BANK LIMITED"

(c) By letter dated 26<sup>th</sup> May, 1997 Caldon wrote to N.C.B. as follows:

"Dear Mr. Cobham:

This is to advise that Citizens Merchant Bank Limited is holding Share Certificates in Jamaica Flour Mills Limited in support of loan facilities as shown:-

<u>No. of Shares</u>	<u>Amount of Loan</u>
31,000,000	J\$44,854,500.00

As previously discussed, I would like National Commercial Bank to act as *collecting agents* for all of the funds being received by Caldon Finance Group. [emphasis supplied]

With this in mind, I ask that you provide Citizens Merchant Bank Limited with a Letter of Undertaking to liquidate the principal and interest from the sale of Caldon's interest in Jamaica Flour Mills.

It would be appreciated if you would advise us when the letter is prepared so that our bearer can collect the Certificates and hand them over to you for presentation by the closing date which is June 3, 1997.

Once again, please accept my thanks for the manner in which you have dealt with these transactions.

Yours sincerely,  
CALDON FINANCE GROUP LIMITED

Henry A. Fullerton  
EXECUTIVE CHAIRMAN"

(d) By letter dated May 29, 1997 N.C.B. wrote to C.B.L. in these terms:

"Re: Caldon Finance Group Limited –  
31 Million Jamaica Flour Mills Shares  
being held as Collateral for Credit  
Facilities totalling \$54,854,500.00

Our mutual customer, Caldon Finance Group Limited, has entered into agreement with ADM Milling Company to sell the thirty-one million (31,000,000) Jamaica Flour Mills (JFM) shares which are currently being held by you as collateral for credit facilities extended by you totalling \$54,854,500.00. *To facilitate the transaction*, we shall be pleased if you will let us have the said Certificate(s) for 31,000,000 JFM shares on our undertaking to pay you the sum of \$54,854,500 plus interest from proceeds of sale of these shares, which we expect to come to hand on or before the end of June, 1997. [emphasis supplied]

In the event that sale does not materialise, we hereby undertake to return the said Share Certificate(s) in full and final settlement of all our obligations hereunder. This undertaking will expire on June 30, 1997 but will be subject to extension, if necessary.

Yours faithfully

CHESTER C. GIDDARIE  
SNR. ASST. GENERAL  
MANAGER/MANAGER  
CCG/mmp"

HECTON HEMANS  
ACCOUNT EXECUTIVE

(e) On May 30, 1997 C.B.L. sent the second block of stock units to N.C.B. On that same day the latter wrote to the third respondent.

The letter read as follows:

"SALE OF JAMAICA FLOUR MILLS SHARES

At the request of Caldon Finance Group Limited, National Commercial Bank Jamaica Limited with offices at The Atrium, 32 Trafalgar Road, Kingston 10,



hereby forward Thirty-one Million (31,000,000) stock units in Jamaica Flour Mills, against your undertaking to forward the amount of **Three Million Nine Hundred & Fifty Thousand Two Hundred & Ninety-nine United States Dollars (US\$3,950,299.00)** representing sale proceeds of the enclosed stock units.

Sale is being calculated at a price of **US\$0.127429** per stock unit. Any increased value resulting out of any increased offer that may be made by the purchasers, should be forwarded in addition to the amount quoted above as the final sale price.

We list below, Share Certificates in the name of PHJ Limited:–

Certificates No.	932848 – 0	10,000,000 units
	932849 – 0	10,000,000 units
	932851 – 0	6,000,000 units
	932855 – 0	<u>5,000,000 units</u>
		31,000,000 units

Kindly acknowledge receipt of the Certificates, by signing and returning the attached copy of this letter.

In the event that the sale of these shares does not materialise, the said Certificates are to be returned to us.

Yours faithfully

CHESTER C. GIDDARIE  
SNR. ASST. GENERAL  
MANAGER/MANAGER  
CCG/mmp”

HECTON HEMANS  
ACCOUNT EXECUTIVE

- (f) On the conclusion of sale of both blocks of stock units to ADM the third respondent forwarded the proceeds of sale to PHJ. N.C.B.

nonetheless honoured its undertaking to C.B.L. and paid off Caldon's indebtedness in the sum of \$45,872,119.02. Perhaps, I should note that in financial terms this dispute concerns substantial funds which the third respondent is holding consequent on insurance proceeds received by J.F.M. relative to damages sustained by J.F.M. as a result of Hurricane Gilbert. The beneficiary of the proceeds of the sale of the 31,000,000 stock units would be entitled to a proportionate share of these insurance proceeds up to 80% thereof.

8. The appellant submitted that:

- “(12) The terms on which Citizens Merchant Bank Limited agreed to release the second block of stock units are set out in [sic] letter dated May 29 1997 from Chester Giddarie Senior Assistant General Manager of the 1<sup>st</sup> Respondent and Hecton Hemans Account Executive of the 1<sup>st</sup> Respondent addressed to Citizens Merchant Bank Limited. It is clear that the release of the second block of stock units *were released to facilitate the sale of same and for no other purpose...* [emphasis supplied]
- (13) Further by letter dated May 26, 1997 Caldon Finance Group Limited instructed the 1<sup>st</sup> Respondent that the 1<sup>st</sup> Respondent was to act as “collecting agents” for the funds being received by Caldon Finance Company in respect of the sale of the second block of stock units...
- (14) These letters show that it was the clear intention of the parties that the 1<sup>st</sup> Respondent was to collect the proceeds of the sale of the second block of stock units *as Caldon Finance*

*Group Limited's collecting agent and that those funds were held by the 1<sup>st</sup> Respondent for Caldon Finance Group Limited. [emphasis supplied]*

- (15) The correspondence which the 1<sup>st</sup> Respondent relies upon as evidence showing the equitable assignment of the second block of stock units relates expressly to the first block of stock units and nowhere avers or refers to the second block of stock units. The evidence clearly shows that the transactions pertaining to each block of stock units must be viewed as separate transactions and each must be assessed upon its own facts.
- (16) The 1<sup>st</sup> Respondent has not produced any contemporaneous evidence that would rebut the evidence of the letters referred to by the Appellant nor has the 1<sup>st</sup> Respondent brought any other evidence which would show the intention of the parties as to the reason the second block of stock units was released. In the absence of any evidence to the contrary, the evidence of the Appellant must be accepted on its face and it is clear from this evidence that there was no agreement between the parties that the proceeds of sale of the second block of stock units would be assigned to the 1<sup>st</sup> Respondent. The evidence in fact shows the opposite, that the reason why the second block of stock units was released was to facilitate the sale of same to the 3<sup>rd</sup> Defendant and that when this sale was completed, the 1<sup>st</sup> Respondent was to act as collecting agent for the funds on behalf of Caldon Finance Group Limited."

9. The first respondent contended that the letters relied on by the appellant do not tell the whole story. The opening chapter is related in para. 13 of the affidavit

of Paul Badresingh dated 16<sup>th</sup> December, 1999. Badresingh was at the relevant time a senior account executive employed to N.C.B. This is what is contained in para. 13.

“13. In or about December 1996 Henry Fullerton indicated to the Plaintiff that CFG and MCS intended to reduce the extent of their loan and credit facilities from the proceeds of sale of the JFM shares which he was negotiating to sell to ADM Milling Co. (ADM) a United States Corporation. At the completion of the sale of JFM shares which was anticipated in early 1997, it was intended that the existing facilities of CFG and MCS with the Plaintiff would be repaid leaving significantly reduced facilities. The precise extent of the reduction was never finalised it being understood between the Plaintiff and its customers that the extent of reduction and repayment of the loan and credit facilities would have to be in a manner acceptable to the Plaintiff who would be releasing its security and receiving the proceeds of sale.”

The first respondent emphasized that the evidence of Badresingh set out in para. 13 remained unchallenged. It was submitted that the correspondence pertaining to the sale of PHJ's stock units can only be fully appreciated if viewed within the context of the agreement between Caldon and N.C.B. that the proceeds from the sale of "J.F.M. shares" would be utilized to significantly reduce the indebtedness of Caldon and M.C.S. (a related Caldon company). It will be observed that the reference to "J.F.M. shares" does not distinguish between the first or second block of stock units owned by PHJ. It was submitted that, from the sequence of events and the conduct of the parties the reasonable inference to be drawn is that the

support of this stance the first respondent pointed to the fact that in respect of the second block of stock units (31,000,000) N.C.B. gave its irrevocable undertaking to settle Caldon's liabilities to C.B.L. from the proceeds of the sale of those stock units. This undertaking was satisfied.

10. It is clear that the funds that would be realized from the sale of the second set of stock units substantially exceeded the indebtedness of Caldon to C.B.L. The sale of the 31,000,000 stock units produced US\$3.9 Million which when converted at the then exchange rate, was approximately J\$136 Million. When the indebtedness of some J\$45 Million is deducted there is a balance of J\$91 Million. Fullerton must have been aware of this. Yet there was no instruction in any of the relevant letters to N.C.B. as to what was to be done with the funds that remained after the C.B.L. debt had been erased. I find it very, very curious as to why Fullerton did not direct C.B.L. to send the stock units to the third respondent and for C.B.L. to receive the proceeds of sale, then having put the requisite sum to the debt to hold the remainder on Caldon's behalf. To appreciate the extent of the indebtedness of Caldon to N.C.B. the evidence showed that on the 8<sup>th</sup> September, 1998 Caldon owed J\$501,675,741.00 and US\$216,341.00 while its related company M.C.S. owed J\$558,515,645.00 and US\$2,159,305.00. I am of the view that the unchallenged agreement evidenced in para. 13 of Badresingh's affidavit contemplated both sets of blocks of stock units. I am unable to agree with the appellant that the transactions in respect of N.C.B.'s involvement constituted separate transactions. These transactions can hardly be said to be meaningfully

separated in time. The inference I draw is that although not set out in one letter but through a series of letters involving all the relevant parties there was one single transaction with two component parts, as regards to each block of stock units. The import which the appellant seeks to place on the phrase "to facilitate the transaction" in the letter of May 29, 1997 (7(d) supra) or the words "collecting agents" in the letter of May 26, 1997 from Caldon to N.C.B. (7(c) supra) as indicative of a contrary intention that there was an agreement to apply the proceeds of the sale of the stock units to the indebtedness of Caldon with N.C.B. is misplaced. Neither that phrase nor those words in the context of the circumstances are possessed of any peculiar forensic consideration such as to detract from the inference that there was an agreement. Those were merely choices of expression.

11. I will therefore hold that there was an agreement between the debtor (Caldon) and the creditor (N.C.B.) that the debt owing or at least part of it should be paid out of a specific fund (the proceeds of the sale of both blocks of stock units) see **Palmer v. Carey** (supra). I have ascertained the intention of the parties by a true construction of the documents "in the light of any admissible evidence as to the surrounding circumstances" see **Swiss Bank Corporation** case (supra). There was an equitable assignment of the proceeds of the sale of the second block of stock units (31,000,000) to N.C.B. Accordingly I would dismiss the appeal and affirm the order of the Court below. The first and second respondents should have their costs to be agreed or taxed.

**HARRISON, J. A:**

1. This is an appeal from the judgment of Donald McIntosh J., delivered on December 13, 2004 in favour of National Commercial Bank Jamaica Ltd. ("the First Respondent"). I have read the draft judgment of my brother Cooke J.A., and entirely concur with it.

**The background to the appeal**

2. The background to this appeal is summarized below:

(a) The Appellant is a subsidiary of the Caldon Financial Group (CFG) and together with MCS Investments Limited (MCS) another member of CFG, borrowed money from Mutual Security Bank Limited which eventually merged with National Commercial Bank ("the First Respondent"). The Appellant was the vehicle by which CFG held two separate blocks of shares in Jamaica Flour Mills Limited (JFM). One block totalled 69,515,972 and the other block totalled 31,000,000. There is no appeal regarding the 69M shares. This appeal only relates to the second block of 31M shares. The primary challenge is that there was an equitable assignment in respect of the second block of shares. The liabilities of CFG and MCS to the First Respondent were secured by instruments of guarantee from the Appellant, CFG, MCS

(b) In or about December, 1996 Mr. Henry Fullerton, the principal shareholder of the companies comprising the Caldon Finance Group including the Appellant, indicated to the First Respondent that CFG and MCS intended to reduce the extent of their loan and credit facilities with the First Respondent, from the sale of JFM shares which he was negotiating to sell to the Fourth Respondent. It was the intention that, at the completion of the sale, the existing

facilities of CFG and MCS with the First Respondent would be repaid leaving significantly reduced facilities. Paragraph 13 of the affidavit of Paul Badresingh sworn to on September 16, 1999 is most crucial, and it states as follows:

"13. In or about December 1996 Henry Fullerton indicated to the Plaintiff that CFG and MCS intended to reduce the extent of their loan and credit facilities from the proceeds of sale of the JFM shares which he was negotiating to sell to ADM Milling Co. (ADM) a United States Corporation. At the completion of the sale of JFM shares which was anticipated in early 1997, it was intended that the existing facilities of CFG and MCS with the Plaintiff would be repaid leaving significantly reduced facilities. The precise extent of the reduction was never finalized it being understood between the Plaintiff and its customers that the extent of reduction and repayment of the loan and credit facilities would have to be in a manner acceptable to the Plaintiff who would be releasing its security and receiving the proceeds of sale."

(c) Henry Fullerton, as Executive Chairman of CFG, wrote on the 26th May, 1997 to the First Respondent's Managing Director, Mr. Jeffrey Cobham advising the latter that Citizens Merchant Bank Limited (Citizens) was holding 31,000,000 JFM shares to secure an indebtedness of CFG to Citizens in the sum of \$44,858,500.00. He requested the First Respondent to act as "collecting agent" for all funds being received by CFG in connection with the said 31,000,000 shares. The letter also requested the First Respondent to provide a letter of undertaking to liquidate the principal and interest from the sale of Caldon's interest in Jamaica Flour Mills". This letter was copied to the Manager of Corporate Finance of Citizens and it states as follows:



"May 26, 1997

Mr. Jeffrey Cobham  
 Managing Director  
 National Commercial Bank Ja. Ltd.  
 32 Trafalgar Road  
 Kingston 10.

Dear Mr. Cobham:

This is to advise that Citizens Merchant Bank Limited is holding Share Certificates in Jamaica Flour Mills Limited in support of loan facilities as shown:

<u>No. of shares</u>	<u>Amount of loan</u>
31,000,000	\$44,854,500. <u>00</u>

As previously discussed, I would like National Commercial Bank to act as collecting agents for all of the funds being received by Caldon Finance Group.

With this mind, I ask that you provide Citizens Merchant Bank Limited with a Letter of Undertaking to liquidate the principal and interest from the sale of Caldon's interest in Jamaica Flour Mills.

It would be appreciated if you would advise us when the letter is prepared so that our bearer can collect the Certificates and hand them over to you for presentation by the closing date which is June 3, 1997.

Once again, please accept my thanks for the manner in which you have dealt with these transactions.

Sgd. Henry Fullerton."

(d) There is also a letter dated May 26, 1997 from Ivan Farquharson of Citizens Merchant Bank to Caldon Finance Group (Page 100 of Record) and it states inter alia.

" Caldon Finance Group Ltd.

...

#### COLLATERAL FOR YOUR CREDIT FACILITIES

Further to our recent telephone conversation, we advise that Citizens Bank Limited (CBL) will release the security (JFM shares) which is now being held against your existing facilities of J\$54,854,000.00 (inclusive of overdraft) under the following condition:

(1) Receipt of an unconditional irrevocable undertaking from the National Commercial Bank Limited to repay the facility of J\$54,854,000.00 plus interest upon the sale of Caldon Finance Group's interest in Jamaica Flour Mills Limited. The undertaking must state the date on which the payment will be made.

(2) The security must be returned in the event that the JFM shares are not sold ..."

"(e) On May 30, 1997 Citizens sent the 31,000,000 shares to the first respondent on its undertaking "to pay to us the sum required to settle CFG's liabilities of \$54,854,500..." This is what the letter of May 30 states:

"National Commercial Bank Limited – Attention  
Chester Giddarie.

...

The enclosed Share Certificates (.....) for 31 million JFM stock units are being forwarded to you on your undertaking to pay to us the sum required to settle CFG's liabilities of J\$54,854,000.00, which as at the date hereof stands at J\$55,542,678.63 (principal and interest) with interest accruing at J\$36,084.66 daily.

The said Share Certificates are being forwarded to you in respect of the sale to ADM Milling Company

and for no other purpose. In the event that the transaction is aborted the said Share Certificates are to be returned immediately to Citizens Bank.”

(f) Following upon the receipt of the 31,000,000 share certificates the First Respondent sent same to the Third Respondent under cover of letter and it states:

“Scotia Bank Jamaica Trust & Merchant Bank  
...

At the request of Caldon Finance Group Limited National Commercial Bank Limited, NCB ... hereby forward Thirty-one Million (31,000,000) stock units in Jamaica Flour Mills, against your undertaking to forward the amount of Three Million Nine Hundred & Fifty Thousand Two Hundred & Ninety-nine United States Dollars. (US\$3,950,299.00) representing sale proceeds of the enclosed stock units.

Sale is being calculated at a price of US\$0.127429 per stock unit. Any increased value resulting out of any increased offer that may be made by the purchasers, should be forwarded in addition to the amount quoted above as the final sale price.”

(g) On June 10, 1997 the Fourth Respondent made a revised offer which had increased the unit price per share to US\$0.132177.

(h) On August 7, 1997 Citizens called upon the First Respondent to honour its undertaking and provided information of the balance which was due to settle the indebtedness of CFG to Citizens. The letter of the 7<sup>th</sup> August 1997 states:

"National Commercial Bank Limited

...

Attention: Mr. Hector Hemans

Further to your Letter of Undertaking dated May 29, 1997 in respect of our mutual client, Caldon Finance Group Limited, we have outlined below all the facilities which are due and payable today:

...

GRAND TOTAL: \$45,872,119.02."

(i) On the said August 7, 1997, the First Respondent satisfied its undertaking to Citizens by depositing the sum of \$45,872,119.02 to Citizens' account with the Bank of Jamaica. The letter states:

"The Manager

Jamaica Citizens Merchant Bank Limited

...

In settlement of our Letter of Undertaking, dated May 29, 1997, we confirm that your account #1058 at Bank of Jamaica was today credited the sum of Forty Five Million, Eight Hundred and Seventy-Two Thousand, One Hundred and Nineteen Dollars and Two Cents (\$45,872,119.02).

Please sign and return the attached copy of this letter in confirmation of the settlement of our said Undertaking."

(j) The records further indicate that the proceeds of sale of both the 69,515,972 and 31,000,000 blocks of shares exclusive of the portion of the insurance proceeds which is the subject of this appeal, were diverted from the First Appellant by Mr. Henry Fullerton and paid into an account opened in the Appellant's name at the First Respondent's Knutsford Boulevard, Kingston 5 Branch despite the fact that the head office at Trafalgar Road, Kingston 10 had conduct of the matter. The said proceeds were dissipated.

never reduced despite the expressed intention of Henry Fullerton to sell the shares with a view to reducing same. The Record of Appeal has shown that as at September 8, 1998 CFG's indebtedness to the First Respondent was \$501,675,741.00 and US\$216,341.00. As at 8<sup>th</sup> September, 1998 MCS was indebted to the First Respondent in the sum of \$57,899,316.00 and US\$2,159,305.00. (See page 17 para. 11 and pages 149-150 paragraphs 4 – 9 of the Record of Appeal).

(l) The First Respondent filed an Originating Summons in the Supreme Court and sought inter alia, a declaration that the block of 31,000,000 shares was assigned to secure an undertaking given by the First Respondent to Citizens.

(m) McIntosh J., held that there was an equitable assignment to the First Respondent of the 31,000,000 shares and directed that the proceeds arising from the assignment be paid over to the First Respondent.

It is against this background that a Notice and Grounds of Appeal were filed.

#### The Notice and Grounds of Appeal

3. The Appellant contends that the learned Judge erred in law in finding on the evidence submitted that it was the intention of the parties to agree that the Appellant assign to the 1<sup>st</sup> Respondent the additional consideration payable by the 4<sup>th</sup> Respondent either by itself or through the 3<sup>rd</sup> Respondent for the purchase of each share of 31,000,000 JFM stock units of an amount equal to 80% of the insurance proceeds received by JFM relative to damages sustained by JFM as a result of Hurricane Gilbert.

80% of the insurance proceeds received by JFM relative to damages sustained by JFM as a result of Hurricane Gilbert.

The following Orders are being sought:

“(a) That the judgment in favour of the 1<sup>st</sup> Respondent in relation to the 31,000,000 block of stock units in JFM be set aside.

(b) A declaration that the Appellant is entitled to the additional consideration payable for each stock unit of the 31,000,000 block of stock units in Jamaica Flour Mills and the 4<sup>th</sup> Respondent is hereby ordered to pay to the Appellant either by itself or through the 3<sup>rd</sup> Respondent, the additional consideration payable for each stock unit of the 31,000,000 block of stock units in Jamaica Flour Mills.

(c) The order for costs in the Court below be varied so that each party bear its own cost.

(d) The Appellant to have the costs of the Appeal.”

#### The Submissions

4. Mr. Morrison, Q.C., for the Appellant submitted that for the first Respondent to establish an equitable assignment of the proceeds of sale of the 31,000,000 shares, it must show a clear agreement between the parties establishing the assignment. He referred the Court to the cases of **Brown, Shipley & Co. v Kough** (1885) L.R. 29 Ch. D 848; **Bell v The London and North Western Railway Co.** (1852) 15 Beav. 548 and **Re Kent & Sussex Sawmills Ltd.** [1946] 2 All E.R. 638. He also submitted that the agreement may be fairly derived from a “course of dealings” (per Chitty J., in **Kough’s** case).

5. Learned Queen's Counsel further submitted that it is clear from a letter dated May 29, 1997 from the First Respondent to Citizens that the release of the second block of shares was done in order to facilitate the sale of same and for no other purpose. Further he submitted that by letter dated May 26, 1997, CFG had simply instructed the First Respondent to act as "collecting agents" for the funds being received by CFG in respect of the 31,000,000 shares.

6. Mr. Morrison, Q.C., then looked at what constituted a "course of dealings" and submitted that the dealings between the parties in relation to this single transaction could not establish a course of conduct or a course of conduct sufficient to allow the First Respondent to assert that an agreement for an equitable assignment had been made out between the parties.

7. Finally, learned Queen's Counsel submitted that there was no communication, act or course of dealings within the transaction from which it could be concluded that the Appellant had assigned the 31,000,000 shares to the First Respondent.

8. Mr. Piper, for the First Respondent, made a number of submissions. I have reproduced paragraphs 30 – 35 of his written submissions in my judgment.

He submitted as follows:

"30. The agreement which we have identified with respect to the 69,515,972 shares and in relation to which the Appellant has no contest, is one which is enforceable by specific performance. As appears from our submissions hereafter, we see no distinction in

principle between this transaction and that relating to the 31,000,000 shares because, in our view, they both form a part of the same transaction namely, the sale of JFM shares owned by the Appellant to reduce CFG and MCS' liability to the First Respondent.

31. The evidence reveals that:

- a) the request by the Appellant of the First Respondent to give an undertaking to Citizens for the release by Citizens of the 31,000,000 shares as security for CFG's liabilities to Citizens in exchange for the payment of CFG's liabilities to Citizens;
- b) Citizens request of the First Respondent for an irrevocable unconditional undertaking to repay the CFG facility; and
- c) the First Respondent's giving and honouring such undertaking to Citizens,

constitutes an agreement between the Appellant/CFG and the First Respondent which is enforceable by specific performance. It is enforceable not only because the First Respondent acted pursuant to a specific request of the Appellant/CFG Mortgagor and gave consideration therefore but also because the First Respondent acted on the expressed intention of CFG/MCS to reduce their liability to it and changed its position in relation to both blocks of shares in reliance on the stated expression of intention.

32. In changing its position, the First Respondent not only accepted the offer to liquidate the Appellant's JFM shares to reduce the liability of CFG and MCS but also gave valuable consideration in the form of releasing the 69,515,000 shares to the Third Respondent on expressed terms and also by undertaking to and in fact paying CFG's liabilities to Citizens.

33. The Appellant contends that the First Respondent's position is merely that of a "collecting agent" for the CFG. There is no evidence of the terms of this "collecting agents" agreement, including any terms of the



consideration for same. We submit that this term is used unilaterally by Mr. Fullerton/CFG and that, without more, it cannot reasonably be accepted as being a consummated contract between the parties.

34. But even if it is accepted that the use of the term "collecting agent" by CFG/the Appellant and the failure to protest same by the First Respondent gave rise to the alleged or any collecting agency contract, we submit that there is nothing on the evidence from which it can be said that the consideration can be anything other than the agreement to use the proceeds of the sale of the 31,000,000 shares to pay out the liabilities of CFG to Citizens and to use the balance if any remaining, to reduce the liability of CFG and MCS to the Appellant.

35. In summary therefore, we submit that on the totality of the evidence and having regard to all of the circumstances, the inevitable conclusion from a proper application of the law to the undisputed facts is that the Appellant by itself and its principals did assign, in equity, the proceeds of insurance which are the subject of this appeal."

What constitutes an equitable assignment?

9. The definition of an equitable assignment is best summed up in the well-known passage from the judgment of the Privy Council in *Palmer v Carey* [1926] AC 703 at 706–707, [1926] All ER Rep 650 at 651–652 delivered by Lord Wrenbury:

"The law as to equitable assignment, as stated by Lord Truro in *Rodick v. Gandell* (1852) 1 D.M. & G. 763 at 777–778, 42 ER 749 at 754), is this: "The extent of the principle to be deduced is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such

fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers.

An agreement for valuable consideration that a fund shall be applied in a particular way may found an injunction to restrain its application in another way. But if there be nothing more, such a stipulation will not amount to an equitable assignment. It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund. This is but an instance of a familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a court of equity will decree specific performance."

10. It is clear therefore that for an equitable charge to be created it must be found upon agreement. It matters not whether the agreement be to pay an existing debt, or a sum of money advanced at the time, or whether it be a bill of exchange, but it must be shown on the part of those who assert an equitable charge that they have obtained it by agreement. This agreement may be shown by producing a written document which is clear. The agreement may also be derived from a course of dealing. The language used is immaterial if the meaning is plain. See ***William Brandt's Sons & Co v Dunlop Rubber Company Limited*** [1905] AC 454 at page 462.

Was there an equitable assignment in this matter?

11. It is my view that the determination of this appeal depends on two things. One must first consider the letter of May 26, 1997 which Henry Fullerton sent to the First Respondent. Secondly, the evidence contained in paragraph 13 of the

affidavit of Paul Badresingh sworn to on September 16, 1999 must also be considered.

12. I do agree with Mr. Piper that the letter of May 26, 1997 had advanced an expression of intention first given in December 1996 by Fullerton to the First Respondent. The un-contradicted evidence of Badresingh is that Fullerton had indicated to the First Respondent prior to the letter of the 26<sup>th</sup> May that CFG and MCS had intended to reduce the extent of their loan and credit facilities from the sale of the JFM shares and that the First Respondent would be repaid leaving significantly reduced facilities.

13. The First Respondent had also given and honoured an irrevocable unconditional undertaking to pay the CFG facility and this in my view provided the necessary consideration for the agreement between the parties which could be specifically enforced.

14. In my judgment, the First Respondent was not just a "mere" collecting agent in order to secure the funds on behalf of the Appellant. It goes much further than that. On a totality of the evidence having regard to all of the circumstances, the inevitable conclusion after a proper application of the law to the undisputed facts is that an equitable assignment was created in favour of the First Respondent. McIntosh, J. was therefore correct in my view, when he directed that the proceeds arising from this assignment should be paid over to the First Respondent.

15. I would also dismiss the appeal with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**DUKHARAN J.A. (Ag.):**

This is an appeal from the judgment of D. McIntosh J. on the 22<sup>nd</sup> December, 2004 in favour of the 1<sup>st</sup> Respondent National Commercial Bank Jamaica Ltd. (NCB).

The appellant PHJ Ltd. was a wholly owned subsidiary of Caldon Finance Group Limited (Caldon). It was the owner of two blocks of stock units in the Jamaica Flour Mills Co. Limited (JF Mills) viz: - one block of 69,515,972 ('first block of shares') and 31,000,000 ('second block of shares'). In 1997 Caldon was indebted to Mutual Security Bank (MSB). The 1<sup>st</sup> Respondent (NCB) as successors to the business of MSB took over its operations. This indebtedness was as a result of certain loans and credit facilities which were extended to Caldon and its group of companies by NCB and MSB. The appellant acted as guarantor of those debts and deposited the first block of shares with MSB now part of NCB as security for the indebtedness of the Caldon Group of Companies. The second block of shares were held by Citizens Merchant Bank as security for the indebtedness of Caldon group to Citizens Merchant Bank Ltd.

The 4<sup>th</sup> Respondent ADM Milling Company Limited offered to purchase 100% of the shares in JF Mills for US\$0.132177 cents per share plus an additional consideration of 80% of the insurance proceeds received by the JF Mills for damage sustained to its property during Hurricane Gilbert.

In furtherance of the sale the appellant requested that NCB release the first block of shares and that they be sent to the 3<sup>rd</sup> Respondent (Scotia Bank Jamaica Trust and Merchant Bank Ltd. (Scotia Bank) as brokers in respect of the sale of the shares. This was followed by a letter from the appellant directing them to forward the proceeds of sale to NCB.

The appellant requested NCB to secure the second block of shares from Citizens Bank. The Appellant also requested that NCB give an unconditional and irrevocable undertaking to Citizens Bank that the debt owed to it would be settled from the proceeds of sale. This undertaking was provided by NCB to Citizens Bank as directed. NCB secured the shares from Citizens Bank and forwarded it to Scotia Bank. Scotia Bank was to forward the proceeds of sale to NCB which was to include any additional consideration since the sale price was to be finalized.

The sale of the shares having been concluded, Scotia Bank forwarded the proceeds of both blocks of shares to the Appellant. NCB nonetheless honoured its undertaking to Citizens Bank by settling the appellant's debts with its own resources.

By way of an amended Originating Summons, NCB sought a declaration that there was a legal or equitable assignment to the 1<sup>st</sup> Respondent of the interest of PHJ Ltd. in both blocks of shares. In addition, that the 4<sup>th</sup> respondent was liable to pay the 1<sup>st</sup> Respondent by

itself or through the 3<sup>rd</sup> Respondent the additional consideration payable for each share of JFM stock by means of a payment by the 4<sup>th</sup> respondent of an amount equal to 80% of the insurance proceeds received by "JFM" relative to damage sustained by "JFM" as a result of Hurricane Gilbert in 1988.

McIntosh J. found that there was an equitable assignment in respect to both blocks of shares. He directed that the additional consideration be paid to NCB and its assign (Jamaica Re-development Foundation) the 2<sup>nd</sup> respondent.

This appeal relates only to the second block of shares as there is no challenge to the first block of shares.

The ground of appeal is:

"The Honourable Judge erred in law in finding on the evidence submitted that it was the intention of the parties to agree that the Appellant assign to the 1<sup>st</sup> Respondent the additional consideration payable by the 4<sup>th</sup> Respondent either by itself or through the 3<sup>rd</sup> respondent for the purchase of each share of 31,000,000 JFM stock units of an amount equal to 80% of the insurance proceeds received by JFM relative to damages sustained by J.F.M."

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Counter Notice of Appeal that the decision of McIntosh J. should be affirmed on the following grounds:

"(1) The learned judge was entitled to find as he did, because the 31,000,000 stock units was (sic) being sold as part of a larger transaction which included the sale of 69,515,972 stock units which the Court found was also the subject of an assignment and which finding has not been appealed.

(2) The learned judge correctly exercised his discretion to award costs in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in that they were successful in their Claim in the Court below and the judgment is only being appealed in part.

The issue in this appeal is whether there was an equitable assignment to the 1<sup>st</sup> respondent.

Learned Queen's Counsel, Mr. Morrison for the appellants challenged the findings of any equitable assignment and submitted that NCB was only a conduit or collecting agent for the appellant, and this could in no way give rise to an assignment. He relied on relevant letters and correspondence (exhibited to the affidavit of Paul Badresingh) and submitted that they were mere directions and could not be properly construed as an assignment.

By letter dated 26<sup>th</sup> May, 1997 to Mr. Jeffrey Cobham, Managing Director, National Commercial Bank, 32 Trafalgar Road, signed by Henry Fullerton, "Executive Chairman of the Caldon Finance Group Ltd." the Respondent was directed as follows:

"Dear Mr. Cobham,

This is to advise that Citizens Bank Limited is holding Share Certificates in Jamaica Flour Mills Limited in support of loan facilities as shown:

<u>No of Shares</u>	<u>Amount of Loan</u>
31,000,000	J\$44,854,500.00

As previously discussed, I would like National Commercial Bank to act as collecting agents for

all of the funds being received by Caldon Finance Group.

With this in mind, I ask that you provide Citizens Merchant Bank Limited with a Letter of Undertaking to liquidate the principal and interest from the sale of Caldon's interest in Jamaica Flour Mills.

It would be appreciated if you would advise us when the letter is prepared so that our bearer can collect the Certificates and hand them over to you for presentation by the closing date which is June 3, 1997."

By letter dated May 26, 1997 from Citizens Bank to Caldon Finance Group:

**"ATTENTION: MR. HENRY FULLERTON**

**COLLATERAL FOR YOUR CREDIT FACILITIES**

Further to our recent telephone conversation, we advise that Citizens Bank Ltd. will release the security (JFM shares) which is now being held against your existing facilities of \$54,854,500.00 (inclusive of overdraft) under the following conditions:

(1) Receipt of an unconditional irrevocable undertaking from the National Commercial Bank Limited to repay the facility of \$54,854,500.00 plus interest, upon the sale of Caldon Finance Groups interest in Jamaica Flour Mills Limited. The undertaking must state the date on which the payment will be made.

(2) The security must be returned in the event that JFM shares are not sold..."

Mr. Morrison submitted that these letters show that it was the clear intention of the parties that NCB was to collect the proceeds of sale of the



31,000,000 shares as Caldon's collecting agent and that those funds were held by NCB for Caldon. It was impossible to infer that there was an intention that there should be an equitable assignment. He further submitted that the correspondence which NCB relies upon as evidence by showing the equitable assignment of the 31,000,000 shares relate expressly to the first block of shares and not the second block. The evidence pertaining to each block of shares must be looked at as separate transactions and be assessed upon its own facts.

Mr. Piper for the Respondents submitted that the proceeds of sale of the second block of shares was the subject of an equitable assignment to the Respondents and that the transaction between the parties created an equitable charge or security over the proceeds in favour of the Respondent. He contended that the assignment arose by virtue of an agreement between the parties that the debt owing by the appellant in relation to the second block of shares would be paid from the proceeds of the sale of these shares. This would be paid over to NCB in the light of its undertaking to Citizens Bank (see letter dated 26<sup>th</sup> May, 1997) (*supra*). He said that by giving an unconditional and irrevocable undertaking to Citizens Bank at the Appellant's request, NCB assumed Caldon's and the Appellant's obligations to Citizens Bank which was a contractual and enforceable obligation.

Mr. Piper further submitted that the agreement can be inferred from all the circumstances. The inference must be drawn that the proceeds would have been sent to NCB to enable them to discharge or satisfy the payment of the debt to NCB. The proceeds would have been pledged or charged to NCB in equity by the very nature of the transaction. The proceeds were designated for a specific purpose. Mr. Piper sought to rely on the dicta of Buckley, L.J. **Swiss Bank Corporation v. Lloyd's Bank Ltd.**

[1982] A.C. 584 at p. 595:

"If the debtor undertakes to segregate a particular fund or asset and to pay the debt out of that fund or asset, the inference may be drawn, in the absence of any contraindication, that it was the parties' intention that the creditor should have such proprietary interest in the segregation fund or asset as will enable him to realize out of it, the amount owed to him by the debtor."

Mr. Piper contends that with regards to intention, the only logical inference which could be drawn is that there could be no other commercial or business reason for NCB giving an undertaking to Citizens Bank that it would pay over the proceeds of sale on closing.

With regards to the Court's assessment of intention, Mr. Piper referred to the dicta of Lord Wilberforce in **Rearden v. Hanson Tangen**

[1976]3 All ER 570 at p.574:

"When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence as to what their intention was - and what must

be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. It is in this sense... that judges are found using words like 'knew or must be taken to have known'..."

In looking at the relevant correspondence between the parties as it relates to the 31,000,000 shares, is there evidence of an assignment? A Court would have to look at the documents and the intention and conduct of the parties to determine if an assignment exists.

**Halsbury's Laws of England 4<sup>th</sup> Edition** Volume 6, paragraph 13 defines an assignment as the transfer of a legal right to a debt or other chose or thing in action together with the legal remedies attached thereto including the right to sue in one's own name. To establish a legal assignment three conditions must be fulfilled:

- (1) It must be absolute and not by way of charge;
- (2) It must be in writing;
- (3) There must be express notice in writing to the final holder

The respondent would also have to show that the agreement is within the meaning of **Section 49 (8)** of the **Judicature (Supreme Court) Act** and that the assignment is in writing and without words of limitation. However, an assignment which does not satisfy the statutory requirements may be an equitable one.

In the case of **Brown Shipley & Co. v. Kough** (1885) LR 29 Ch D.848 the principle derived from it is that a party claiming to have an equitable charge must found their case upon an agreement and must be shown on the part of those who assert an equitable charge that they obtained the agreement. The agreement may be shown by producing a written document which is clear, or the agreement may be fairly derived from the course of dealings. Also in **Bell v The London and North Western Railway Co.** (1852) 15 Beav. 548 and in **Re Kent Sussex Sawmills Ltd.** [1946] 2 All E.R. 638 it was held that the agreement must be clear and the intention of the parties entering into the agreement must be clear.

In the instant case it is quite clear that it was Mr. Henry Fullerton on behalf of the Appellant who had discussions with Citizens Bank concerning the release of the 31,000,000 shares. He also requested NCB to provide the undertaking that the debt owed by the Appellant would be settled from the proceeds. NCB accepted the proposal and gave the undertaking to pay Citizens Bank Ltd. From the proceeds of the sale of the shares.

With regards to the first block of shares of 69,515,972 there is no challenge to the fact that there was an equitable assignment to NCB. In the letter of the 26<sup>th</sup> May, 1977 from Henry Fullerton to NCB it states:

"As previously discussed, I would like National Commercial Bank to act as collecting agents for

all of the funds being recovered by Caldon Finance Group..."( my emphasis)

In my view "all of the funds" include both blocks of shares and is not limited to the 31,000,000 shares.

**Halsbury's Laws of England Vol. 6** para. 30 states:

"No form of words is required for an equitable assignment; the only thing that is necessary is to make the meaning plain. The assignment may be by word of mouth... and no particular form of words is necessary so long as the words clearly show an intention that the assignee is to have the benefit of the chose in action ... An agreement amounting to an equitable assignment may be express and written or may even be made out from a course of dealing between the parties."

A proposal was put to NCB by the appellant through Henry Fullerton which NCB accepted. The consideration being the giving of the undertaking by NCB to Citizens Bank. It was this unconditional and irrevocable undertaking given by NCB which caused Citizens Bank to release the shares. This was an agreement which was expressed and written.

By releasing the shares to NCB, Citizens Bank was expecting payment from NCB from the proceeds of the sale of the shares. NCB therefore assumed Caldon's and the appellant's obligations to Citizens Bank.

In a letter dated 7<sup>th</sup> August, 1997 from Citizens Bank to NCB it is stated thus:

**"...CALDON FINANCE GROUP LIMITED**

Further to your Letter of Undertaking dated May 29, 1997 in respect of our mutual client, Caldon Finance Group Limited, we have outlined below all the facilities which are due and payable today:

....

Grand Total: \$45,872,119.02."

In response, to a letter dated the same day NCB wrote to Citizens

Bank:

**"...RE: CALDON FINANCE GROUP LIMITED**

In settlement of our Letter of Undertaking, dated May 29, 1997, we confirm that your account #1058 at Bank of Jamaica was today credited the sum of Forty Five Million, Eight Hundred and Seventy Two Thousand, One Hundred and Nineteen Dollars and Two Cents (\$45,872,119.02)

Please sign and return the attached copy of this letter in confirmation of the settlement of our said Undertaking..."

By these letters NCB honoured their obligations to settle the debts of the Appellant. This is further evidence that NCB assumed Caldon's and the Appellant's obligations to Citizens Bank.

I am of the view that, from the conduct and intention of the parties and the substance of the transactions, there is clear evidence that there was an equitable assignment of the proceeds of the sale of the second block of shares to NCB.

In my view McIntosh J. was correct when he found that there was an equitable assignment in favour of NCB and also when he directed that the proceeds arising from this assignment should be paid over to NCB.

Accordingly, I would dismiss the appeal with costs to the First and Second Respondents to be agreed or taxed.

**COOKE J.A.**

**ORDER:**

The Appeal is dismissed and the order of the court below affirmed.  
Costs awarded to the first and second respondents to be agreed or taxed.

