[2014] JMSC Civ 34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. CL 1993/E 083

BETWEEN	**RBTT BANK JAMAICA LIMITED**	**CLAIMANT**
AND	**YP SEATON**	**FIRST DEFENDANT**
AND	**EARTHCRANE HAULAGE LIMITED**	**SECOND DEFENDANT**
AND	**YP SEATON & ASSOCIATES COMPANY LIMITED**	**THIRD DEFENDANT**

CONSOLIDATED WITH

CLAIM NO CL 1993/S 252

BETWEEN	**YP SEATON**	**CLAIMANT**
AND	**RBTT BANK JAMAICA LIMITED**	**DEFENDANT**

IN OPEN COURT

Denise Kitson QC, Trudy - Ann Dixon Firth instructed by Grant Stewart Phillips for RBTT Bank Jamaica Limited

Pamela Benka Coker QC, Anna Gracie, David Parchment instructed by Rattray Patterson Rattray for YP Seaton, EarthCrane Haulage Limited and YP Seaton & Associates Company Limited

September 26, 27, 28, 29, 2011, November 10, 11, 14, 15, 2011, March 12, 13, 14, 15, 2012, September 3 and 4, 2013 and March 17, 2014

CONTRACT – WHETHER BANK ENTITLED TO TAKE MONEY FROM ACCOUNT OF CUSTOMER – ALLEGATION OF OVER-PAYMENT – QUISTCLOSE TRUST – MISTAKEN PAYMENTS – MONEY HAD AND RECEIVED - ABUSE OF PROCESS

SYKES J

A quick overview

[1] It was the year 1990. Jamaica was in the throes of an extreme shortage of foreign exchange. The Bank of Jamaica ('BoJ') had little or no foreign exchange. Those who needed foreign exchange in large quantities had to find those who had it and work out an exchange rate. Not even government companies could rely on the BoJ to provide them with needed foreign exchange to pay for goods and services from overseas. The Jamaica Commodity Trading Company ('JCTC') was one such company. So short was foreign exchange that JCTC entered into agreements to purchase milk powder with an overseas company which accepted Jamaican dollars thus relieving JCTC of the obligation to find foreign exchange to pay under the sale contract. Throughout, this case, no one has remotely suggested that BoJ had any foreign exchange to sell to anyone or to make available to government companies. Therefore even in this opening paragraph it can be stated with absolute certainty that

the contracts that have precipitated this dispute did not require JCTC or BoJ to provide foreign exchange to the seller. Any sentient reader would immediately ask, how then was the seller to be paid? This case is a story about paying the seller; the arrangements that were made to do so; the payment mechanism established for payment; how it was effected and the consequences of giving effect to the payment mechanism.

[2] JCTC was responsible for importing a number of goods. It had a recurring problem: lack of foreign exchange. The company now wanted to purchase milk powder but had no foreign exchange. It invited tenders from suppliers. Prolacto SA ('Prolacto'), a Belgian company responded and placed bids with JCTC. One of the attractive features of this company was that it was prepared to accept payment in Jamaican dollars. JCTC was delighted.

[3] Two contracts were concluded – the first in August/September 1990 and the second in December 1990. Under the first contract, Prolacto offered a cash price. This was available if JCTC paid, in full, the Jamaican dollar equivalent of the full purchase price. Prolacto offered an alternative: 180 days payment by an irrevocable letter of credit and the price went up by US$65.00 per metric tonne. It appears that even on these exceptionally favourable terms for an international sale JCTC was unable to take advantage of the offer. JCTC simply did not or could not pay the full cash price in Jamaican dollars.

[4] The second contract also offered a cash price per metric tonne provided that the full purchase price was paid in Jamaican dollars.

[5] Prolacto appointed EarthCrane Haulage Limited ('EarthCrane') as its agent. Mr Seaton is the major shareholder of EarthCrane. He is also the major shareholder in YP Seaton and Associates Company Limited ('YPSACL'). He is the major human persona in this case who was the alter ego of both companies.

[6] The relationship between JCTC and Prolacto deteriorated and both contracts were terminated. JCTC then demanded that Eagle Commercial Bank ('ECB'), now RBTT Bank Jamaica Limited ('RBTT'), return the sums outstanding from the deposits made under both contracts and such sums, according to JCTC, should include interest on the deposit. ECB baulked and JCTC filed two claims against the bank. The first claim was filed in August 1991 against ECB and Prolacto (JCTC v Prolacto and ECB, Suit No CL 1991/J244). This was in relation to the first contract. The second claim was against ECB alone (JCTC v ECB Suit No. 1991/J314). This was in relation to the second contract. By January 1992, ECB decided to settle both claims. In the settlement of both claims, ECB paid over approximately JA$32.5m.

[7] The bank then brought a claim against Mr Seaton, EarthCrane and YPSACL to recover the money it claims was overpaid, that is to say improperly withdrawn by EarthCrane, from the deposit in respect of the first contract. This is Claim No. 1993/E083. According to the bank, the terms of the first contract were that Prolacto would supply 3,000 metric tonnes at US$1,260.00.00 to JCTC. This would be a total of US$3,780,000.00.00. It is said that only 1,879.85 metric tonnes were delivered which means that on the contract terms and at the exchange rate contended for by JCTC, only US$2,368,611.00 should have been paid. RBTT's case is that, eventually, an additional US$65.00 per metric tonne was charged by Prolacto on the milk powder delivered which meant that an additional US$122,190.25 were paid in excess of the contracted price. The bank seeks to recover this sum from the defendants.

[8] RBTT further alleges that Prolacto charged an additional US$4.75 per metric tonne on the transportation and this meant that there was further overpayment of US$8,929.29 to Prolacto which ought not to have been paid. The bank is seeking to recover this as well. This figure when added to the US$122,190.25 allegedly overpaid on the price per metric tonne gives a total of US$131,119.54 and it is this combined figure that RBTT wishes to recover on the basis of it being an overpayment.

[9] RBTT also pleads that there was overpayment on interest (JA$3,771,615.17) and overpayment on the cost of foreign exchange exposure (JA$5,133,792.93) totalling JA$8,905,408.10. The bank is seeking to recover this sum from the defendants.

[10] The essence of the bank's case is that these sums were paid out of the deposits in error to Prolacto or its agents contrary to the instructions of the account holder, JCTC. It also pleads that these sums were not handed over by the defendants when the sums were demanded and therefore a claim had to be filed in order to enforce the demand.

[11] There was a second contract in December 1990 for 3000 metric tonnes of milk powder at US$1,450.00 per metric tonne. The total value of this contract was US$4,350,000.00. Under the second contract 494 metric tonnes were delivered. The invoice was US$716,300.00. According to RBTT, the Jamaican dollar equivalent was JA$9,131,034.25. In respect of this second contract, JCTC deposited JA$39,717.675.00. Of that amount it is alleged that JA$24,385,617.94 were paid to Prolacto or the defendants. Since no further shipments were made, only JA$9,131,034.25 should have been taken out. This meant that the defendants would have had JA$15,254,583.69 too much. This sum was taken from Mr Seaton's personal accounts at the bank.

[12] In summary the bank's claim in CL 1993/E083 is about (a) recovering the overpayments; (b) recovering interest it claims to be entitled to and (c) a declaration that the taking of the JA$15,254,583.69 from Mr. Seaton was lawful.

[13] Before launching its claim, the bank had frozen several of Mr Seaton's personal accounts. There is no evidence that EarthCrane or YPSACL had any accounts at ECB.

[14] Mr Seaton is having none of this. He is saying that there should be an accounting between himself and the bank on the basis that the bank froze his accounts and although he has received some of the money from the frozen accounts

he is not sure that he has received all that he should including interest. He also wants to recover the JA$15,254,583.69 taken from his accounts and further that interest should be paid on that amount. This is what CL 1993/S252 is about.

[15] The bank has abandoned its claim to JA$1,514,646.00 which represented mobilisation fees, opening and closing commissions on the first contract.

[16] Mrs. Benka Coker QC submitted that the court ought not to engage in trying to determine the terms of the contract between Prolacto and JCTC because none of the original contracting parties is involved in this present claim. The court does not agree with this submission. The court cannot control how a litigant chooses to present his or her case. The primary question is whether the litigant can establish by relevant and admissible evidence the case pleaded.

[17] Mrs. Benka Coker submitted that the entire claim should be dismissed as an abuse of process. This was her primary submission. If that failed then it was submitted that the evidence presented does not support the claim. This aspect of the response to the bank's claim will be addressed later.

[18] The court will examine, in detail, the evidence relating to each transaction with a view to deciding whether the basic terms of the contract can be identified. Before examining the evidence, the court will set out, at this early stage, three critical aspects of this case which will help to understand why the transaction was structured in the way it was. They are part of the matrix of fact against which the evidence is to be understood.

Background against which to interpret the contracts and understand the conduct of the parties

[19] The court will say that not all the documents are before the court and to that extent the court is hampered but not prevented from deciding what were the basic terms of the contract between the JCTC and Prolacto. It is important to come to some conclusion about the contract between Prolacto and JCTC because it is this contract that precipitated the agreement between ECB, Prolacto and JCTC. ECB's claim rests substantially on establishing what the terms of the sale contracts were

between JCTC and Prolacto on the one hand and then the terms of the payment agreement between JCTC, ECB and Prolacto. RBTT's case theory cannot succeed unless it can show what the payments which it seeks to recover in action E-083 ought to have been.

[20] The court will rely on Lord Hoffman's approach in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98. The court will also take into account the principle of autonomy of contracts in an international sale stated by Lord Diplock in **United City Merchants (Investments) Ltd v Royal Bank of Canada** [1983] 1 AC 168. The principles stated in this case are part of the matrix of fact which a reasonable person placed in the position as the parties were would take into account in determining the meaning of the contracts.

[21] The first important factor which is part of the background to this case is the severe shortage of foreign exchange in Jamaica at the time. As RBTT's own witness, Mr Keith Senior, a senior officer at ECB, testified that even though there was something known as the BoJ rate, in practice no one used it in the purchase and sale of foreign exchange because the BoJ rate was such that one could not purchase any significant amounts of the scarce commodity at that rate. He put forward the view that it was perhaps only government bodies such as customs which would use it for their purposes but certainly for commercial transactions between private citizens it was virtually ignored. From what he said, it was pure market forces that determined the exchange rate. He went as far as saying that if a person had significant amounts of foreign exchange commercial banks were willing to entertain discussions on the rate of exchange. The sense of his testimony was that these were well-known facts or as Lord Hoffman would say, facts which were reasonably available to the parties.

[22] The second important dimension to this case is that the purchase of the milk powder was an international sale. It is now accepted that the legal context and legal principles are part of the matrix of fact which a court can use to interpret a contract. JCTC, as a government company entering into the international arena for the

purchase of goods, must be taken to have known and was willing to abide by what was then and now considered to be the standard basic understanding of insisting on certainty of payment in an international sale. A fundamental principle in an international sale contract is that there must not be any uncertainty regarding payment. This court will be very inclined to favour the honouring of any payment mechanism agreement between JCTC and Prolacto and interpreting the payment arrangements in a manner that would make the contract efficacious.

[23] The court will outline how an international sale works in the normal course of things. In an international sale there are normally at least four contracts. The first is between the vendor and purchaser. In addition to the usual terms of a sale contract regarding the goods that are the subject matter of the contract, that contract usually has the mechanism by which the seller will be paid. The usual practice is that the seller will be paid by a letter of credit (loc). There may be cash sales or credit sales without a loc. The former is more likely to be found where the contracting parties do not have a long standing relationship and the insistence on cash often times reflects the seller's doubts about the buyer's ability to pay. The credit sale without a loc is more consistent with a long standing relationship that has not had a history of payment problem. The happy medium between these two is financing by a loc. Almost invariably, it is an irrevocable letter of credit that is required (iloc). The opening of an iloc is usually the responsibility of the buyer. However, as will be seen in this case, having regard to the severe foreign exchange shortage, these sales were anything but normal.

[24] The second contract is that between the buyer and his bank. He usually applies to his bank or a bank in his home country requesting that it opens the iloc in favour of the seller. If the bank accepts the application it issues the iloc. If the bank issues the iloc then that bank becomes known as the issuing bank. The seller is called the beneficiary since he is to benefit from the iloc.

[25] The third contract arises because in many instances the seller asks for a confirmed iloc (ciloc). What this means is that the issuing bank finds a bank, usually

in the seller's home country or some other country, to confirm its iloc. If this second bank adds its confirmation to the iloc then the iloc becomes a ciloc. If the iloc is confirmed then this is the third contract: one between the issuing bank and the confirming bank. This second bank is then known as the confirming bank. The rationale for the ciloc is that the seller is guaranteed payment from two sources: the issuing bank and the confirming bank. This reduces the risk of non-payment or put positively, increases the likelihood of payment.

[26] The fourth contract is between the confirming bank and the seller. The confirming bank contacts the seller and tells him that the credit has been confirmed. This is good news for the seller because he now has two possible sources of payment once he delivers conforming documents. This is separate and apart from his action against the buyer for the contract price if the buyer refuses to pay. The ciloc reduces the risk of non-payment and so an action for the contract price against the buyer is not common if everything works.

[27] It is important to appreciate that the banks, in an international sale, are not interested in knowing whether the goods in fact meet the contract stipulation. The banks get their information from documents. It pays against the presentation of conforming documents. The sale contract usually specifies what documents should be presented by the seller in order to be paid. Banks do not inspect goods to determine whether they conform to the sale contract. Banks do not go down to the water's edge to examine and poke the goods to see if they meet the contractual requirements. Their job is to examine the documents to see if they conform to what they are told to look for. Once conforming documents are presented to the confirming bank, the bank must pay. It matters not whether goods are delivered or the goods do not conform to the sale contract. Once the confirming bank pays then it presents the documents to the issuing bank. If the documents are conforming, the issuing bank must pay the confirming bank since the confirming bank is now out of pocket having paid on the conforming documents presented to it. When the issuing bank pays, its task is to recover from the buyer. There are various mechanisms for achieving this.

Those ways need not be explored here. The sole exception to this principle arises in cases of fraud. No fraud is alleged and no more needs be said about this exception.

[28] The third important factor in this case is that Jamaican currency was not legal tender outside of Jamaica and therefore would have had little or no intrinsic value for Prolacto. Prolacto had no rational reason to wish to have large amounts of Jamaican currency unless it could be converted to foreign exchange.

[29] The details of both contracts beginning with the first are now examined to determine what was agreed.

The first contract - contract no PKG 90/09/118

[30] By telex dated August 14, 1990, Prolacto indicated that it was offering 1800 metric tonnes of skimmed milk powder as specified with delivery between September 1990 until February 1991 at US$1,260.00.00 (bundle 3 page 2). The telex stated how many tonnes were to be delivered each month. That part of the telex is not clear, meaning that the copy that court has is illegible in parts. The telex stated that payment should be by ciloc confirmed by a first class Belgian Bank, payable cash against documents at first presentation. The telex added that if the 'irrevocable letter of credit should be at 180 days, costs of credit charges to be added to above price.' This telex from Prolacto was laying down as a term of the contract, quite properly for an international sale, that JCTC was to arrange for a ciloc.

[31] JCTC responded by fax dated August 21, 1990 (bundle 3 page 3). JCTC confirmed that it accepted the offer but stated that it wanted 3,000 metric tonnes for delivery between September 1990 and February 1991 in shipments of 500 metric tonnes per month. The prices of US$1,260.00.00 per metric tonne was confirmed but it was to be payable in Jamaican dollars. The fax said that detailed confirmation was to follow later.

[32] Prolacto sent a telex dated August 21, 1990 in which it 'confirm[ed] being able to offer the entire quantity of 500 tonnes per month (total 3000 tonnes) as per tender at the same price and payable in Jamaican dollars' (bundle 3 page 5).

[33] Prolacto sent a telex date-stamped September 3, 1990 and refered to JCTC's fax of August 21, 1990 (bundle 3 page 4). The communication accepted JCTC's proposal to purchase 3,000 metric tonnes at a price of US$1260.00 per metric tonne payable in Jamaican dollars. The letter also said that JCTC should bear the devaluation risk '*as this was a cash price offer for the entire amount of the contract i.e. one hundred percent (100%) must be deposited to the account of Prolacto at the Eagle Commercial Bank, 4 Duke Street, in order to secure the contract*.'

[34] As can be seen, Prolacto is asserting that the deposit is to be for Prolacto's account and JCTC was to absorb any losses arising from devaluation of the Jamaican currency.

[35] Prolacto then communicated with YPSACL in a telex dated August 29, 1990 and told it the terms of the sale contract (bundle 3 page 6).

[36] In a fax dated August 29, 1990, JCTC asked Prolacto to name the beneficiary since payment was to be in Jamaican dollars (bundle 3 page 7). This was needed to prepare final confirmation, according to the fax. Prolacto responded by telling JCTC that ECB at 4 Duke Street, Kingston, is the beneficiary (bundle 3 page 8). The response stated that Mr Michael Salmon would be the contact person. He was the senior branch manager at the time.

[37] From the evidence of Mr Bonnick (who had died by the time of trial and his witness statement was admitted into evidence), Mr Daley and Mr Seaton were present at meetings held in Jamaica between Prolacto, ECB, JCTC and EarthCrane in late August. It seems that further refinements were made during the meetings which were captured in a letter dated September 3, 1990 from ECB to JCTC (bundle 3 page 9).

[38] Normally in an international sale, the buyer completes an application form to the bank asking it to issue the iloc. There is no such application form for a loc from JCTC to ECB among the documents but this is not surprising for two reasons. First, the bank's witness Mr Senior testified that banks in Jamaica could not issue locs. Second, the burden was on Prolacto through its agent to convert the deposit to foreign exchange or use the foreign exchange to establish locs. According to Mr Senior, the Jamaican bank would have to ask an overseas bank to issue the loc. The unstated but necessary conclusion is that the overseas bank would have to be placed in position to honour the payment once conforming documents were presented to it since such a bank would not be in a position to recover the payment from the seller. There is a letter dated September 3, 1990 from ECB to JCTC which states that arising from the meeting held between JCTC and ECB the following arrangements were made (bundle 3 page 9):

(1) 3,000 metric tonnes of milk powder to be imported at 500 metric tonnes per month;

(2) price from supplier is US$1,260.00 per metric tonne on a cash basis but if loc is established on a 180 days basis then applicable price is US$1,325.00.00 per metric tonne;

(3) partial shipments were allowed;

(4) devaluation risk to be carried by JCTC during tenure of loc.

(5) local funds to be placed on deposit to meet drawdown under loc. However, interest that accrued against deposit will be for JCTC's account;

(6) an initial amount of JA$10m to JA$12m to be placed on deposit in order to mobilise the iloc; and

(7) interest rate on foreign exchange exposure would be 2% above the USA prime rate.

[39] Despite the fact that the letter closed with the words: '*trust that you will be in concurrence with the above and look forward to concluding the relevant matter'*, there is evidence from Mr Hugh Bonnick (deceased at the time of trial) and Mr Milton Daley that this September 3 letter captured the essence of what was agreed. The September 3 letter had the important term which was that if the sale was on a 180 days basis, that is to say, the cash price was not paid in full and the purchase price would be by loc, then the price would be US$1,325.00 per metric tonne. This increased price if the financing was done on credit is important. Until this letter there was no mention of the increased price in any previous document exhibited. This does not mean that there was none because it was conceded by all that the documentation in the agreed bundles is incomplete. What can be said is that this figure of US$1,325.00 must have arisen during the meetings between Prolacto, ECB and JCTC. This raises the possibility that the contract was partly oral and partly in writing. The court cannot say with certainty that the September 3 letter captured all the terms but it is perhaps fair to say that the substance of the contract as agreed at the meetings and by documents was captured in the letter.

[40] Mr Seaton said that he was not present at the meetings but the evidence of Mr Bonnick and the evidence in chief of Mr Daley was that he was present. Mr Daley later sought to say that Mr Seaton was not present. Mrs Kitson seized upon this to castigate Mr Seaton and Mr Daley and accuse them of prevarication on this issue. Learned Queen's Counsel sought to say that Mr Seaton ought not to be believed on this issue and neither should Mr Daley and they both should be rejected as persons whose testimony, like the chameleon, changed to match the exigencies of litigation. It was even suggested that they should be believed at all.

[41] The court should note that the letter of September 3 refers to the persons present as Messieurs Daley, Bonnick and Mr Salmon from ECB but does not mention Mr Seaton. The letter was sent by ECB to JCTC and not copied to Mr Seaton. This

provides some support for Mr Daley's later assertion that Mr Seaton was absent and also is consistent with Mr Seaton's assertion that he was not present. This is the closest contemporary record noting those who were present. The witness statements of Messieurs Daley and Bonnick were coming many years after the event. In matters of this nature, documents created when the parties were not contemplating litigation are more likely to reflect the true state of affairs than documents crafted with a view to litigation.

[42] Also the letter does not make reference to Prolacto being present but the evidence makes it clear that Prolacto was indeed present at the meetings. Whether all parties were present at the same meeting or at separate meetings is not known. What can be stated with some degree of confidence is that the letter of September 3 broadly reflected the outcome of the various meeting and had the essential terms of the contract between Prolacto and JCTC.

[43] So evident it was that this agreement was captured in the September 3 letter that in a letter dated September 5, 1990, JCTC is sending a cheque in the sum of JA$10m to be placed on deposit for the loc (bundle 3 page 11). The September 3 letter had asked for an initial deposit of JA$10m-JA$12m and JCTC responded by sending JA$10m. In this letter JCTC does not object to the increased price per metric tonne. The terms of the September 5 letter also suggest that JCTC had made the decision to opt for the 180 days loc. This September 5 letter is consistent with the election made by JCTC which was reflected in the September 3 letter. The basis for this conclusion that JCTC had elected the 180 days loc basis is that JCTC did not pay the full cash price in Jamaican dollars as was agreed if JCTC wanted the cash price of US$1,260.00 per metric tonne. The inevitable consequence of this was that JCTC was now exposed to the higher contract price of US$1,325.00 per metric tonne.

[44] It can safely be concluded that by September 3 and confirmed by JCTC's letter of September 5 that JCTC and Prolacto agreed that Prolacto is to sell 3,000 metric tonnes of milk powder at US$1,260.00 per metric tonne payable in Jamaican dollars

if paid for with cash in full. This was the cash price and the risk of devaluation would be for JCTC. Prolacto also asked that the full purchase price in Jamaican dollars be deposited at ECB. The contract price was US$3,780,000.00. It was also agreed that if payment was by 180 days locs then the price would be US$1.325 per metric tonne. Prolacto was seeking to manage the risk by having a higher price if JCTC did not pay the full cash price at once in Jamaican dollars.

[45] Therefore the first contract was concluded and the terms were both oral and written. The faxes and telexes exchanged in August 1990 obviously did not tell the whole story and seemed to have preceded the meetings held in late August 1990. Therefore despite the fact that none of the faxes and telexes before the September 3 letter mentioned the 180 days price of US$1,325.00 per metric tonne, this additional term must have arisen during the meeting that took place between Prolacto, ECB and JCTC.

[46] There is a letter from JCTC to Prolacto dated September 6, 1990 (bundle 3 page 12). It refers to the sale agreement for 3,000 metric tonnes at US$1,260.00 per metric tonne, cost of credit charges for 180 days loc payable in Jamaican dollars with delivery at 500 metric tonnes per month between September 1990 and February 1991. Partial shipment was permitted. The final bill of lading date was to be the end of each month from September 1990 to February 1991. The credit expired three weeks after the final bill of lading date for each month. Somehow this detailed letter from JCTC does not make reference the 180 days iloc price of US$1,325.00.

[47] Prolacto told JCTC in a telex dated September 10, 1990 that it had received confirmation of the sale contract (bundle 3 page 18). This could only be referring to the detailed confirmation letter dated September 6, 1990. The memorandum asked that 50% of the total value of the order be deposited in Jamaican dollars at ECB. This would enable Prolacto to start preparations for the first shipment. This statement by Prolacto is in accordance with the usual practice in an international sale that the buyer has to establish the iloc or some other reliable payment mechanism before the seller is obliged to perform. This necessity to establish the payment mechanism is

usually a pre-condition to performance and not a pre-condition to contract. Prolacto sent another memorandum dated September 11, 1990 warning of a possible increase in the price because of a crisis in the gulf and the approach of winter (bundle 3 page 18).

[48] This September 6 letter from JCTC to Prolacto coming as it did after the meetings in August and after the September 3 letter is seeking to alter the agreement by omitting the 180 days iloc price. This is an attempt by JCTC, post agreement with Prolacto in August and as reflected in the September 3 letter, to get out of the possible increased contract price of US$1,325.00 per metric tonne. The response from Prolacto does not make reference to the price. There is no response from Prolacto agreeing with this variation and thus this court is not prepared to accept the submission that Prolacto agreed to this variation. Prolacto simply said that it received the purchase confirmation. The court is not prepared to accept that such a fundamental change was accepted by Prolacto in the absence of clear evidence that it did. The court takes this view that such a change would be fundamental because it would mean that Prolacto was no longer putting forward the option of a cash sale at US$1,260.00 per metric tonne with the 180 days loc price of US$1,325.00 per metric tonne but would be agreeing to accept the cash price as the 180 days loc price. There is no commercial reason on the documentation indicating why Prolacto would climb down from its concluded position.

[49] JCTC sends a letter dated October 3, 1990 to ECB which is said to have replaced the September 3 letter (bundle 3 page 27). The letter stated that JCTC would pay the Jamaican equivalent of US$3,780,000.00 and no more. This meant that as far as JCTC was concerned the increased price of US$1,325.00 was not agreed. As noted earlier there is no clear evidence that Prolacto accepted this position advanced by JCTC.

[50] Regarding the funding of the contract, JCTC, as noted above had sent JA$10m in a letter dated September 5, 1990 (bundle 3 page 11). This letter said interest rate

was to be agreed. By another letter dated September 11, 1990, JCTC wrote to ECB saying that it enclosed a cheque in the sum of JA$5m (bundle 3 page 21). This was said to be security for loc financing. This second letter refers to the interest rate on both sums to be 26% per annum. ECB indicated by letter dated September 13, 1990, that it had received the September 5 letter with JA$10m which had been placed on deposit at a rate of 26% (bundle 3 page 22). Thus by September 11, 1990, JCTC had deposited JA$15m with ECB at an agreed rate of interest of 26%. JCTC, by letter dated January 29, 1991, deposited a further JA$7.2m with ECB (bundle 3 page 92). This letter stated that the interest rate on this JA$7.2m was to be 31%. These deposits now totalled JA$22,200,000.00 by January 1991.

[51] It is to be noted that nothing in the correspondence spoke to depositing the money in an account. Mr Senior was never able to produce to this court any bank accounting records showing that the deposit was actually in an account. In fact, he did not say that any such deposit was ever found. It does not appear to have been a chequing account or a savings account. From the total body of evidence, ECB did not issue any cheques to JCTC. Such cheques that existed were those where ECB would be paying, in Jamaican dollars, to those persons who were sent to ECB by Mr Seaton to either collect Jamaican dollars in exchange for US$ currency already given to Mr Seaton or they were to take the foreign exchange directly to ECB and given the Jamaican dollar equivalent at an exchange rate worked out between them and Mr Seaton. In many instances the bank was not told what the exchange was. The bank was simply told to expect the person and to hand over the Jamaican dollar equivalent of the foreign exchange. There is nothing in the evidence remotely indicating that ECB was alarmed or concerned with this mode of operation. This state of the evidence makes any overpayment claim difficult to sustain particularly in light of the fact that there is no evidence that ECB actually secured any foreign exchange. Mr Senior was brought to court by the bank to explain the effect of documentation. This witness said that from his understanding of the documentation, ECB did not provide any foreign exchange and he went as far as saying that all foreign exchange was provided through the effort of Mr Seaton acting as the human persona of EarthCrane.

[52] What then was the precise nature of the relationship between JCTC and ECB? It was not one of banker/customer as in JCTC opening a current account which obliged the bank to honour cheques or other bills of exchange drawn on it by JCTC but rather one where deposits were taken for the purpose of funding the locs which according to Mrs Kitson were in fact established. This way of putting the case raises enormous difficulties for the bank's overpayment thesis. If it is the case that banks in Jamaica could not issue locs and the banks overseas which issues locs in favour of Prolacto were to recoup their money, then obviously they would recoup from ECB who would have put forward the foreign exchange which was provided EarthCrane since ECB, JCTC and BoJ had no foreign exchange to establish any locs. This can only mean that the deposits were the source of funding the foreign exchange acquisition since the evidence does not raise any other source from which the foreign exchange could have been acquired.

[53] To decide whether JCTC was a customer of ECB at the time of these two contracts reference must be made to the common law. Two judgments of two masters of the common law assist in this. They are Lord Denning MR and Diplock LJ in **United Dominions Trust v Kirkwood** [1966] 2 QB 431. Lord Denning held at page 447:

> *There are, therefore, two characteristics usually found in bankers today: (i) They accept money from, and collect cheques for, their customers and place them to their credit; (ii) They honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly. These two characteristics carry with them also a third, namely: (iii) they keep current accounts, or something of that nature, in their books in which the credits and debits are entered.*

[54] Diplock LJ held at page 465:

Accordingly it is, in my view, essential to the business of banking that a banker should accept money from his customers upon a running account into which sums of money are from time to time paid by the customer and from time to time withdrawn by him by cheque, draft or order. I am inclined to agree with the Master of the Rolls and the author of the current edition of Paget on Banking, 6th ed. (1961), p. 8, that to constitute the business of banking today the banker must also undertake to pay cheques drawn upon himself (the banker) by his customers in favour of third parties up to the amount standing to their credit in their "current accounts" and to collect cheques for his customers

[55] In **N Joachimson (A firm) v Swiss Bank Corporation** [1921] 3 KB 110 it was held, following a long line of authority that the relationship between a bank and its customer was that of creditor and debtor, with the customer being the creditor and the bank the debtor. The practical import of this was fleshed out by Atkin LJ at page 127:

I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the

bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine. The result I have mentioned seems to follow from the ordinary relations of banker and customer, but if it were necessary to fall back upon the course of business and the custom of bankers, I think that it was clearly established by undisputed evidence in this case that bankers never do make a payment to a customer in respect of a current account except upon demand.

[56] What was described by Lord Denning and Atkin LJ was not the arrangement between JCTC and ECB. There is no evidence that either JCTC or Prolacto had an account through which transactions passed. There is no evidence that the bank opened a chequing account, issued a cheque book or was under any obligation to honour cheques or drafts drawn on the bank by either JCTC or Prolacto. In this case ECB was providing a service but neither was a customer of the bank. A deposit made by someone in a bank does not make that person a customer of the bank. The taking of the deposit is a service provided by the bank.

[57] This discussion has become necessary at this point because Mrs. Benka Coker urged throughout that the bank could not have exercised any common law right of

set-off or have a lien on the deposit which could only be exercised or arise, respectively, from a banker/customer relationship. This submission was made primarily in relation to the JA$15,254,583.69 under the second contract. However, it is mentioned here because counsel submitted that the claim under the first contract is not sustainable because the bank has not shown, even though it settled the case, that it was liable to JCTC and until this is done there is no basis for the bank to seek recovery from the defendants in CL1993/E083.The court understood the submission to be saying that what the bank is seeking is indemnity from the defendants. To get to this point, it would have had to be shown that Prolacto or its agent was liable to JCTC in some way and on some basis and the liability was made good by the bank which would place the bank in a position to claim from the defendants. If there is no direct liability to JCTC on the part of Prolacto then the bank has to show that Prolacto or its agent by some means created circumstance which would make the bank liable to JCTC and this liability is one where it could lawfully recover money from Prolacto or its agent. Mrs. Benka Coker says this has not been done.

[58] Mrs Benka Coker submitted that capitulating in the face of a claim is not proof of liability in law and fact. All it proves is that the defendant has surrendered rather than fight. That was a decision, it was submitted, made by the bank but that, without more, does not translate into legal liability.

[59] The court's understanding of Mrs. Benka Coker's submission is that the bank needs to lay out in painstaking detail why it believed that JCTC could have succeeded in the claim brought against it. This cannot be assumed, it has to be proved because the bank's case against the defendants is that it was in fact liable to JCTC and not that it simply paid JCTC to settle the claim. This is an additional reason for Queen's Counsel saying that this claim must necessarily be an abuse of process because the bank has not proven that it was liable to JCTC at the time it settled. The bank, in this case, has not pleaded any wrong doing on the part of Prolacto in relation to JCTC or even on the part of Prolacto in relation to the bank. In fact, learned Queen's Counsel submitted, the bank resisted JCTC's claim initially and filed a full defence to the claim then suddenly for unknown reasons the bank capitulated and

then is seeking to cover itself by launching a Henry Morgan-style operation on her client's personal account. This conduct of the bank smacked of the Jamaican saying, "Yuh cyan ketch Qwacu (Prolacto) so ketch him shut (Mr Seaton)". The English understanding is, the bank would not have been able to recover from Prolacto and since neither EarthCrane (Prolacto's agent) nor YPSACL (agent of EarthCrane) had any accounts at ECB the bank decided to take the money from Mr. Seaton's personal account.

[60] In all this, it is important to bear in mind Mr. Senior's evidence and that of Mr. Seaton on the issue of who provided the foreign exchange. Mr. Senior said explicitly in cross examination that the bank did not itself provide any foreign exchange for any of the contracts. He said quite clearly that it was EarthCrane with Mr. Seaton acting as the persona of EarthCrane who provided all the foreign exchange for both contracts. Mr. Seaton said the same thing but Mrs. Kitson sought to say otherwise in her cross examination of Mr. Seaton.

[61] The court will now look at the post-agreement events. By letter of October 1, 1990, ECB wrote to JCTC to say that loc '*has now been initiated'* (bundle 3 page 25). JCTC wrote to ECB by letter dated October 3, 1990 giving its undertaking to pay the Jamaican dollar equivalent up to an aggregate of US$3,780,000.00.00 '*at the exchange rate applicable on due dates for the captioned purchase*' (bundle 3 page 27). The letter goes on to say that '*payments under this transaction will be made upon your presenting to us the following documents containing the following specifications*.' It ended with these words '[t]*his form of handling the transaction on an acceptance basis replaced the originally agreed on letter of credit instrument*.'

[62] It seems that JCTC was seeking to change the payment mechanism. When it spoke to 'handling' on an acceptance basis and that this document was to replace the originally agreed on loc instrument, it is not quite clear what JCTC has in mind. Was JCTC saying that this payment arrangement to pay on acceptance was agreed by Prolacto or was it being said that ECB would be paid by JCTC once ECB presented conforming documents?

[63] The best result that this letter could achieve is that Prolacto changed payment arrangements regarding how ECB would recover its money from JCTC but this is not a possible hypothesis because part of the arrangement, despite the language of the telexes and faxes referring to ciloc, seems to have been that JCTC would deposit Jamaican dollars which would be used to purchase foreign exchange. The agreement with Prolacto was that the price would be paid in Jamaican dollars. Therefore any Jamaican dollars paid to ECB would be the price and therefore for Prolacto. Clearly, then, whatever ciloc that was to be established (at that time), it does not seem to have been contemplated by the parties that the cilocs would take care of all the payments for the milk powder. If this interpretation is wrong then at the very least the parties contemplated that the ciloc would be funded by foreign exchange secured by EarthCrane, acting as agent for Prolacto, using the Jamaican dollar deposits.

[64] ECB wrote to JCTC again on November 14, 1990 (bundle 3 page 35). The letter refers to documentation regarding shipment of 606 metric tonnes being sent to JCTC at a price of US$1,264.75 per metric tonne. This additional US$4.75 was the increased price per tonne that Prolacto indicated should be paid. ECB makes reference to the October 3 letter and asked that money be remitted to the bank to cover the Jamaican dollar equivalent. The letter told JCTC that it should use the average exchange rate applicable to BoJ transactions.

[65] It appears then that the first shipments under the first contract arrived in November 1990. ECB was telling JCTC to use the average rate for BoJ transactions to settle the total bill of US$766,438.00. Between September 1990 and November 1990 the evidence is that money was being taken from the deposit by Mr. Seaton.

[66] Mr Senior said that the bank had no foreign exchange in September 1990 or at any time to fund these transactions. It will be recalled that he was not at the bank until the summer of 1991 by which time the contracts were terminated. How then could he offer the view that he did? His evidence was that the bank's board asked for

a report and the documents available were pulled together. It would mean that what he was really saying was that on his review of the documentation available he saw no indication that the bank itself secured foreign exchange for any of the contracts. What he saw and from his understanding of the arrangements EarthCrane and EarthCrane alone provided all the foreign exchange used in these transactions.

[67] There is a request, for example, dated September 19, 1990 from ECB to the Bank of New York ('BNY') asking that BNY establish a US$1m iloc in favour of Prolacto which was to become a ciloc when confirmed by a Belgian bank (bundle 5 page 5). This request stated that it was for the account of EarthCrane. What this shows is that even in the establishment of the loc, EarthCrane had an integral role.

[68] This request from ECB to BNY is important for another reason. It demonstrates the point that BNY was in fact the issuing bank at the request of ECB with EarthCrane having a key role in this. The second page says that the loc was to be sent by courier to the beneficiary (Prolacto) and documents to be couriered from Prolacto to BNY who would send them to ECB.

[69] The request is important for another reason. By incorporating the Uniform Customs and Practice for Documentary Credit, ECB must be taken to have accepted article 3 which speaks to the fact that '*credits, by their nature, are separate transactions from sales or other contract(s) on which they may be based and are in no way concerned with or bound by such contract(s) even if any reference whatsoever to such contract(s) is included in the credit*.' Article 4 emphasizes that all parties deal in documents and not goods. Article 5 states that any amendment to the credit must be complete and precise. Article 6 says that a beneficiary cannot take advantage of any existing relationship between the bank and the applicant for the credit and the issuing bank. All these articles emphasize the independence of the sale contract and the loc even though they are connected. This way of looking at the matter is consistent with the court's inference that ECB had to put the overseas bank in funds in respect of the locs.

[70] It is convenient to deal with the other locs said to have been established. Mrs. Kitson insists that locs were established. For this she relied on the following documents:

(1) a telex from Prolacto to YPSACL dated March 25, 1991 where Prolacto stated that it was sending details of unused funds from the ilocs (bundle 5 page 31). Reference is made to four locs in the sums US$1m, US$400,000.00, US$623,031.74 and US$410,000.00 respectively. The first and third were through the BNY. The second was through BNS, Toronto and the fourth was Commercial Trust Bank, Miami and the Bank of Tokyo also in Miami;

(2) a letter from ECB to BNS dated November 20, 1990 (bundle 3 page 36). This letter indicated that ECB was sending JA$5m to cover the establishment of loc in favour of Prolacto in the amount of US$1m. This letter made explicit reference to the fact that the money was being sent at Mr Seaton's request;

(3) a cheque dated November 20, 1990 from ECB to BNS in the sum of JA$5m (bundle 5 page 1);

(4) a letter from ECB to BNS dated November 27, 1990 which stated that ECB was sending a further JA$3.5m (bundle 3 page 41). The letter also asked for correspondence relative to the establishment of loc;

(5) a letter from ECB to BNS dated December 11, 1990 with the caption letter of credit – importation of medium heat skimmed milk (bundle 3 page 44). ECB stated that Mr Seaton advised that BNS had been able to make US$400,000.00 available. The letter added that since that was the case the Jamaican dollars sent to BNS would not be fully utilised and therefore the unused portion should be returned to ECB; and

(6) a letter from BNS to ECB dated December 13, 1990 (bundle 3 page 46). In this letter BNS stated that (after explicitly referring to ECB's December 11 letter) it was returning, by cheque, the sum of JA$4,771,999.48 which was the residue of JA$8,500,000.00 forwarded to BNS on November 20 and 27, 1991.

[71] In cross examination, Mr. Seaton agreed that the money to purchase the US$850,000.00 and the money to establish the loc of US$400,000.00 came from the money deposited for the first contract. The cumulative effect of these documents, in particular, Prolacto's telex to YPSACL would be that at least four locs were established in relation to the first contract. It can be safely concluded that all these locs were in relation to the first contract because no deposit was paid under the second contract until April 1991.

[72] This evidence is consistent with Mr. Senior's evidence that Jamaican banks could not issue locs but had to work through an overseas bank. The Prolacto telex does not reference any Jamaican bank issuing any loc and even in the case of BNS which has branches in Jamaica, the referenced loc was from BNS Toronto, Canada.

[73] Also the evidence is consistent with the view that the Jamaican dollars were used to purchase the foreign exchange. Indeed, Mrs. Kitson on this part of the case explicitly suggested to Mr. Seaton that the money to establish these locs came from the deposit to which Mr. Seaton agreed. Again the question that arises is where would the foreign exchange come from to fund these locs? The overseas banks would be unlikely to have issued their loc without being put in funds so to do. What seems to have happened is that ECB asked these foreign banks to issue their locs with Prolacto as the beneficiary. The evidence does not suggest that these banks were confirming banks but issuing banks, that is to say, they seemed to have assumed the responsibility of payment when conforming documents were presented to them. How then would these banks recoup their expenditure if they paid on the documents? They certainly would not have been paid by JCTC; there is no hint of

that. The most reasonable conclusion would have to be that ECB would have had to have put the bank in funds because those banks would not be able to enter in the usual arrangements that issuing banks would enter into with the applicant for the loc, who would usually be the buyer. This is the more reasonable conclusion because it would not be reasonable for a bank issuing a loc at ECB's request would leave itself in the vulnerable position of having to pay on presentation of conforming documents without being able to recoup its money. It would not recourse against JCTC because JCTC is not its client. There would not be any contractual nexus between the issuing bank overseas and JCTC. ECB was not JCTC's agent for this or any purpose.

[74] There is no evidence that ECB was the issuing bank in respect of any of these locs. Why was this? The answer comes from Mr. Senior, the bank's sole witness. Mr. Senior explained that at the time banks in Jamaica did not or could not issue locs. In order to facilitate international sales the banks in Jamaica would ask a bank overseas to issue the loc. As a matter of commercial sense this would mean that the overseas bank that is issuing the loc would not want to be called upon to pay the seller without any means of recouping the payment from ECB. In this context, the case theory suggested by Mrs. Kitson to Mr. Seaton that these locs were funded by the deposit makes sense because these issuing banks would not wish to be out of pocket. The suggestion also means that somehow foreign exchange had to be found to send to the issuing banks. This leads to the question of who got the foreign exchange and at what exchange rate. The answer from Mr. Senior and Mr. Seaton is that only EarthCrane secured foreign exchange.

[75] The other significant point that arose of this way of putting the suggestion to Mr Seaton that the deposits funded the locs would be it would be inconsistent with a later suggestion that Mr Seaton took money from the deposit before the first invoices arrived under the first contract and since he did this he therefore had no legitimate reason to be taking money from the deposit. The inconsistency is this: at least one request by ECB to BNY to establish a loc for US$1m was made as early as September 19, 1990, a good six to eight weeks before the first shipments arrived.

The foreign exchange to establish the loc with BNY was purchased from the deposit, that is the JA$15m deposited between September 5 and 11, 1990. It was Mr Seaton who got this foreign exchange which means he in fact had a legitimate reason to be using the deposit well before the first shipments arrived.

[76] Even as late as December 7, 1990, Mr. Salmon is writing to Mrs. June Chuck of Phoenix Trade Finance Corporation in Miami saying that '*it was agreed that you would proceed to establish letter of credit for US$500,000.00 in connection with importation o*f' milk powder (bundle 3 page 42). The memorandum stated that the funds were acquired at a rate of JA$9.40 to the US dollar. This must have been in relation to the first contract because the second contract was not concluded until mid December 1990.

[77] On December 11, 1990, ECB wrote to BNS indicating that Mr. Seaton had told ECB that BNS had US$400,000.00 (bundle 3 page 44). Here again is the hand of Mr Seaton in securing foreign exchange. He found out that BNS had foreign exchange for sale. He informs ECB. Apparently, some money had been forwarded to BNS and ECB was asking to be paid back the unutilised portion. BNS responded by letter of December 13, 1990 saying that it was returning JA$4,771,999.48 being the residue of JA$8,500,000.00 which was sent to BNS by ECB on November 20 and 27. It is not clear whether this was ECB's own money or money from the deposit but the probabilities, in light of Mr Senior's testimony, favours the conclusion that it was money from the deposit. Importantly, the letter stated that the funds are being returned on the understanding that they are to be utilised to purchase or underwrite the prepayment of foreign exchange to establish loc in favour of Prolacto.

[78] The letter of November 14 from ECB to JCTC speaks to using the BoJ rate to settle the payment for the 606 metric tonnes that had arrived in early November but that does not necessarily mean that this was the exchange rate used to purchase foreign exchange to fund the locs. For example, the US$850,000.00 which, according to the bank's case theory, was part of the ECB/BNY US$1m loc was purchased in September 1990 at a rate of JA$8.33 by YPSACL from a private citizen and

apparently sold to ECB at JA$8.50 (bundle 5 page 3). The sum was purchased on September 10, 1990 for delivery on November 8, 1990. The document states that the local currency equivalent was JA$7,255,000.00. Where would this Jamaican currency equivalent come from? Mr. Seaton has not said that he put up this money. The bank has not asserted that it put up this money. This leaves the deposit which on September 10, 1990 was only JA$10m because the JA$5m did not arrive until September 11, 1990.

[79] There is a memorandum from ECB to Mr. YP Seaton dated September 11, 1990 (bundle 3 page 20). This memorandum states '[f]*urther to telephone discussions this morning, I hereby confirm information that was relayed to you. All foreign exchange that is purchased and relevant to the subject matter should be directed to the Bank of New York. Address 1 Wall Street, New York. The funds should be directed to the account of Eagle Commercial Bank, account number 890-004-7534*.' This was signed by Mr Michael Salmon.

[80] This memorandum raises the issue of which purchases. This would have to be in relation to seeking to try to establish the loc. It appears that ECB was obviously trying to put BNY in funds so that it could issue the loc.

[81] While this transaction was going on, Mr YP Seaton wrote to ECB (to Mr Salmon) in letter dated September 7, 1990 (bundle 3 page 15). Mr Seaton said that regarding the telephone conversation the bank was to deliver two sums of Jamaican currency to named persons and that these sums were to be charged for the account of Prolacto. It should be noted here that Mr Seaton is making explicit reference to the deposit being for Prolacto's account. There is no record from the bank refuting this understanding and it is in fact consistent with the bank's own letters which are referred to later on.

[82] Again, what this evidence shows is that the deposit was being used to secure foreign exchange. Thus far up to mid to late September the documentation shows that it was Mr. Seaton, not ECB or JCTC who was trying to secure foreign exchange

for the first contract. The US$850,000.00 which was purchased on the forward market was secured by YPSACL not ECB or JCTC.

[83] The first possible evidence of the bank itself securing foreign exchange is found in two memoranda dated September 17, 1990 and September 26, 1990 (bundle 3 page 23 and 24 respectively). In the first letter, Mr. Salmon is writing to Mrs June Chuck of Phoenix Trade Finance Corporation telling her to transfer US$100,000.00 to ECB's account at BNY. The second memorandum is an internal file memorandum with the remark that US$43,000.00 and US$16,000.00 were deposited at ECB's account at BNY and a further US$8,200.00 was to be deposited. This second memorandum speaks to an exchange rate of JA$8.30. However, this reading of the documents is not supported by any witness. Mr. Senior says EarthCrane got all the foreign exchange acquired for this contract.

[84] The bank's case is that all these sums came from the deposit. What this means is that in September 1990, the bank had already purchased foreign exchange whether immediately or on the forward market at an exchange rate of at least JA$8.30.

[85] This kind of purchase is indicative, as Mr. Senior insisted, of a serious foreign exchange shortage. This foreign exchange problem and delay in getting enough to send to BNY may explain why it was not until October 1, 1990, that ECB wrote to JCTC telling it that the iloc has been initiated (bundle 3 page 25). The practical consequence of this was that Prolacto was not obliged to perform until the iloc was in place and it was notified. Also, even if Prolacto was waiving the iloc requirement, JCTC had not paid the purchase price in full. Indeed, JCTC never ever paid the full purchase price. It is by no means clear that the two deposits in September totalling JA$15m was fifty percent of the purchase price; it all depended on what the exchange rate was. This concludes the evidence regarding efforts to fund the sale. The court now turns to shipment and payment under the contract.

[86] The November 14 letter already referred to (bundle 3 page 35) was really a follow up on the November 5, 1990 letter in which ECB wrote to JCTC telling it that it enclosed two invoices from Prolacto in the sum of US$513,488.50 and US$252,950.00 (bundle 3 page 32). The letter also told JCTC that the enclosed documents were to be used to clear the shipments which had arrived. Presumably, these documents were conforming documents and included the bill of lading which is a document of title.

[87] It is not clear when the US$1m loc issued by BNY in favour of Prolacto was issued. There is no clear documentation showing this. The implication of this is that it may well be that when Mr. Seaton said he had forwarded foreign exchange from his own supply to Prolacto in order to get it to begin performing the contract, he may well be correct. The documentation for the months of September and early October 1990 shows that ECB was endeavouring to lodge money to its account at BNY to get the loc off the ground. Eventually a request was made by ECB to BNY on or about September 19, 1990 to issue the loc. If this request was made then it may mean that sufficient funds were there. But where did this money come from? It certainly did not come from the US$850,000.00 because that was a forward market purchase for delivery in November 1990. There is no documentation showing clearly and unambiguously that ECB had put BNY in funds so as to enable it to make the request to BNY by September 19. Hence the question is where was the money coming from that would enable ECB to ask BNY to issue a US$1m iloc in favour of Prolacto? Mr. Seaton said he was sending money abroad and recovering what he sent from the account. ECB was asking Mr. Seaton to send money to ECB's BNY account.

[88] This evidence is consistent with the deposit being used to purchase foreign exchange even before the first shipment arrived in either late October or early November 1990.

[89] If this is correct then it is consistent with the legal position that unless stated otherwise the seller, in an international sale, has to be assured of his payment before he is obliged to perform. It seems that Prolacto elected to perform despite the fact

that JCTC had not paid the full purchase price in Jamaican dollars and neither was an iloc in place for the full purchase price. Prolacto then was putting itself at serious risk by beginning to perform (evidenced by the arrival of milk powder) without being fully assured of payment.

[90] It appears that there was a third shipment of 182 metric tonnes that arrived in November 1990. This was invoice was priced at US$229,320.00 using the US$1,260.00 per metric tonne (bundle 3 page 40). Therefore by mid November there were three shipments of 200, 406 and 182 metric tonnes respectively. JCTC settled these three invoices at the contract price of US$1,260.00.00 (bundle 3 page 40). This third invoice may well be the one referred to in the letter of November 20, 1990 (bundle 3 page 37).

[91] It should be noted at this point that when the contract broke down ECB was asked to account for the deposits. ECB, in relation to the first contract prepared a document headed 'Detailed Statement' (bundle 3 page 36). The document on the first page had two sets of calculations. The calculations proceeded on the basis that 1,879.85 metric tonnes were delivered. On the basis of the contract price being US$1,260.00 the total amount would be US$2,368,611.01. If the 180 days loc price was used (US$1,325.00) then the price would be US$2,490,801.25. The bank states, unequivocally, on this document that US$122,190.25 was due to Prolacto.

[92] Continuing with the payment for the three shipments. Two letters dated November 22, 1990 were sent by ECB to JCTC (bundle 3 pages 38 and 39). The first one indicated that payment should be made at US$1,264.75 per metric tonne (bundle 3 page 38). The reason given was that recent developments in the Gulf region precipitated this change. The second ECB letter of November 22 said that the original price US$1,260.00 should be used to settle invoices (bundle 3 page 39). The letter also said that ECB looked forward to getting JCTC's cheque to settle the invoices.

[93] In response to these letters, JCTC sent a letter dated November 26, 1990 to ECB (bundle 3 page 40). This letter said that a cheque in the amount of

JA$8,022,470.40 was enclosed to cover payments for 708 metric tonnes at US$1,260.00. This gave a total of US$992,880.00. The letter stated that the exchange rate was JA$8.08. It will be recalled that the previous correspondence from ECB to JCTC told JCTC to be guided by the weighted average applicable to BoJ transactions. This JA$8.08 seems to have been the weighted average.

[94] The letter referred to shipments the cheque was covering. These were

(1) 200 metric tonnes @ US$1,260.00.00 – US$252,000.00

(2) 406 metric tonnes @ US$1,260.00.00 – US$511,560.00

(3) 182 metric tonnes @ US$1,260.00.00 - US$229,320.00

[95] The quantities specified at (1) and (2) are breakdowns of the aggregate ECB had referred to in its letter of November 14, 1990 to JCTC requesting payment at US$1,264.75 per metric tonne. At the time of this payment by JCTC, the JA$15m had already been deposited by JCTC with ECB.

[96] To state clearly, where we are in late November 1990 in relation to the first contract the following is understood: by November 26, 1990, 782 metric tonnes had been shipped; also by mid November these were paid for by JCTC at the rate of JA$8.08 at US$1,260.00 per metric tonne; the JA$15m had not been used by JCTC to pay for these shipments; and JCTC paid for these three shipments by cheque in the sum of JA$8,022,470.40.

[97] The bank has not presented its case that the JA$15m deposited in September would be untouched. It was always its case that the deposit would be used by Prolacto. The case is built on the notion of overpayment, at some point based on erroneous contract prices, erroneous additional charges and absence of interest payments, as distinct from wrongful payment from the beginning. The bank's pleadings conceded that there would be access to the deposit but alleged that too

much money was taken out to pay for the foreign exchange rather than pleading that Prolacto should not have had access to the deposit at all.

[98] By January 29, 1991, JCTC had sent another deposit of JA$7.2 in respect of this first contract (bundle 3 page 92). This would make a total of JA$22.2m paid in deposits between September 5, 1990 and January 29, 1991. Add to this the amount paid for the three invoices just mentioned. It would mean that under the first contract, JCTC had paid a total of JA$22.2m in deposits and JA$8,022,470.00 giving a total of JA$30,222,470.40. As stated the JA$22.2m was contemplated to be used to get foreign exchange.

[99] The narrative now goes to the period of January 1991 to June 27, 1991 when JCTC ended the first contract (bundle 3 page 181). In a letter dated January 9, 1991, ECB informs JCTC that it is sending invoice number 154 in the amount of US$394,602.00 (bundle 3 page 71). This letter does not speak to the quantity of milk powder covered by this invoice. If the price was US$1,260.00 the quantity would be 313.2 metric tonnes but if the price was US$1,264.75 the quantity would be 312 metric tonnes. The detailed statement provided by ECB to JCTC when JCTC demanded an accounting from ECB shows the amount at 312 metric tonnes (bundle 5 page 36). There is a telex from Prolacto to JCTC dated December 25, 1990 which refers to 312 metric tonnes of milk powder at US$1,264.75 (bundle 5 page 15). In light of the telex from Prolacto the court will conclude that 312 metric tonnes were shipped under the first contract in December. This would mean that up to the January 9, 1991 letter the total shipped would be 1,100 metric tonnes.

[100] In a telex to JCTC dated January 7, 1991, Prolacto indicated that it understood that JCTC had only lodged 50% of the funds (bundle 3 page 68). Given that JA$15m had already been deposited to arrive at this 50% the exchange rate being used had to have been approximately JA$8.00 which gives US$1,875,000.00. This is just short of 50% of the value of the contract which was US$3,780,000.00.00 at US$1,260.00. This approximate exchange rate is a shade under the JA$8.08 which JCTC used to settle the three invoices paid in November 1990.

[101] Prolacto wrote again on January 19, 1991 to JCTC indicating that it had heard from Mr. Salmon that nothing had changed since the telex of January 7. Prolacto told JCTC that an agreement had been reached for 100% deposit of Jamaican dollars to be lodged at ECB (bundle 3 page 78).

[102] One can understand Prolacto's anxiety at this point. It had already shipped approximately 1,100 metric tonnes. This was just 400 metric tonnes short of 50% of the contract amount and just under half of the contract price had been paid in Jamaican dollars when the agreement was for payment of the full price if JCTC wanted a cash sale.

[103] There is a letter dated March 15, 1991 from ECB to JCTC in which the price per metric tonne is quoted at US$1,264.75 (bundle 3 page 123). This is the third mention of the increase of US$4.75 by ECB. This would be an increase of US$4.75 per metric tonne. The letter did make clear that JCTC was to settle at US$1,260.00 per metric tonne. The exchange rate to be applied, the letter continued, would be the US dollar selling rate applicable to BoJ related transactions. The letter requested a sum to cover US$294,840.00.

[104] These two letters from ECB to JCTC on the question of the US$4.75 are important because they show that despite Prolacto saying that the increased price should be paid, ECB actually stated to JCTC that it should pay at the contract price.

[105] The seeds of the current problem are clear to see with the benefit of looking back twenty three years. In November 1990, JCTC has settled three invoices at JA$8.08 to the US dollar, yet as early as September/October 1990 YPSACL is purchasing foreign exchange at JA$8.30/JA$8.50. Before and after this settlement there was frantic activity to secure foreign exchange. In an internal memorandum dated September 26, 1990, Mr Salmon is getting foreign exchange at JA$8.30. Despite this evidence, ECB wrote twice to JCTC urging it to settle the outstanding invoices at the weighted average of the BoJ rate which was less than these rates.

There was no agreement on the exchange rate to be used when converting the deposit to foreign currency. There could hardly be any such agreement because of the shortage of foreign exchange. It was true seller's market. Little wonder that when the contracts broke down JCTC was asserting the lower exchange rate and ECB a higher rate.

[106] ECB wrote to JCTC on January 2, 1991 saying that it had JA$15,000,000.00 placed on deposit as security for the first contract (bundle 3 page 63). The letter stated that since the transaction was half way through, the bank was of the view that an additional JA$13,350,000.00 should now be placed on deposit. ECB pointed out that in respect of JA$28,350,000.00, that is the total of the first deposit of JA$15,000,000.00 and the additional deposit of JA$13,350,000.00, the exchange rate of JA$7.50 to the US dollar was used. There is no explanation in the documentation or the oral evidence from RBTT explaining how this exchange rate was arrived in light of the fact that the correspondence before this letter, even from JCTC itself, spoke of rates in excess of JA$8.00 to the US dollars. This exchange rate of JA$7.50 is even more remarkable in light of the clearly established fact that ECB and YPSACL had in fact purchased foreign exchange at a rate in excess of JA$8.00. This rate was even lower than the rate JCTC used to settle the November 1990 invoices; those were settled at a rate of JA$8.08.

[107] ECB follows up the January 2, 1991 letter with another letter dated January 8, 1991 to JCTC (bundle 3 page 70). In that letter, ECB complained that it had not received any response from JCTC. The letter has this telling sentence: '*We should point out that identifying sources of foreign exchange is somewhat difficult, consequently, it is absolutely necessary for the additional funds to be placed with us so that we are in a position to continue handling the transaction on a timely basis thus ensuring that the shipments of skimmed milk are expedited.*' With this in mind it is all the more inexplicable why ECB would have written to JCTC in the January 2, 1991 letter speaking of an exchange rate of JA$7.50. It should also be borne in mind that this conundrum deepens when it is recalled that JCTC had already settled three invoices at a rate of JA$8.08. In effect, ECB was speaking to an exchange rate in

January that was lower than even JCTC's settlement rate of the three invoices dealt with in November 1990.

[108] There is a January 25, 1991 internal memorandum from Mr. Salmon to file (bundle 3 page 89). It says that JA$10,628,000.00 was taken from the deposit for the purpose of '*the provision of foreign exchange and commission paid for obtaining the foreign exchange*.' The funds were noted to have been deposited with BNY '*thus enabling the establishment of the letter of credit in favour of Prolacto*.' Let it be recalled that by September 11, 1990, JCTC had deposited JA$15m. Between September 1990 and January 1991, Prolacto through EarthCrane was using the deposit to purchase foreign exchange. There is no evidence of the total amount was used from the deposit before this utilisation of JA$10,628,000.00. The additional deposit of JA$7.2m had not yet arrived by January 25, 1991. This additional deposit came on January 25. It is also known that JCTC had, in November, paid JA$8,022,470.00 for the three invoices. If this letter of January 25, 1991 contains a reliable picture of the use of funds to which it spoke then the bank's claim is even less clear. The bank has sought to project the case as one of overpayment from the deposit. It has never claimed that the sums used by EarthCrane were those of the bank. If the bank had been using money to set out the locs (as suggested by Mrs Kitson), and if EarthCrane, acting through Mr Seaton, was taking money from the deposit to purchase foreign exchange and all this activity began in September 1990, how would JA$10,628,000.00 be available in January?

[109] To put what has just been said in context, the following must be noted. The bank's case theory is that only JA$15m was deposited between September 1990 and January 24, 1991. The JA$7.2m was not deposited until January 29. According to the bank's case theory JA$10,628,000 were taken out of the JA$15m in January 1991. This would have left JA$4,372,000, assuming no money taken out for the locs and for any other purpose. The bank has also said that of the JA$8.5m sent to BNS only JA$3,228,000.82 were used (JA$8.5 less the sum returned of JA$4,771,999.48). The bank also asserts that the various sums indicated by cheques and other documents were taken from the deposit at the behest of Mr Seaton. The bank also says that

sums were taken from the deposit for establishing the locs. If all these are totalled for the period September to January 24, 1991, it exceeds the total deposit upto that date which was only JA$15m. In short the deposit was exhausted even with the generous interest ECB agreed to pay, using JCTC's calculation. All the withdrawals upto January 24, 1991 would have exceeded JA$26m. If one adds the JA$7.2m deposited on January 25 there would be a total deposit of JA$22.2m. If one then adds the figures from January 25 then the figure is higher. This highlights the frail mathematical foundations of the bank's case. The bank has not presented its case on the basis that the bank itself gave its own money to Prolacto. The bank's case is that it is seeking to recover money from the defendants because it had to repay JCTC and use some of its own money to do so because Prolacto took too much from the deposits. Also what inflated the amount the bank repaid to JCTC was JCTC's claim for interest on the deposit.

[110] None of the oral evidence or the documentary evidence clearly show whether this loc referred to in the January 29 letter was the one ECB had asked BNY to establish in the September 19, 1990 communication from ECB to the BNY. It may be referring to another loc. Perhaps one of those identified by Prolacto in its March 25, 1991, telex to YPSACL. It will be recalled that the iloc established by the BNY was in the sum of US$1m.

[111] Things came to a head in respect of this first contract in a letter dated June 3, 1991 (bundle 3 page 160). Prolacto wrote to JCTC explaining that it could no longer procure the milk powder at the tender price. Prolacto also stated that even in respect of the product delivered payment was not being received in accordance with the agreement. Prolacto informed JCTC that it would increase the price to US$1,325.00 per metric tonne. There was also complaint that JCTC was insisting on using a BoJ rate '*while our bankers have not been successful in getting any funds from the Bank of Jamaica at those rate or at any other rate*.' The letter stated that no further shipments would be made under this first contract.

[112] JCTC wrote in a letter dated June 27, 1991, that it regarded itself as discharged from any further obligation under the contract (bundle 3 page 181). The letter also stated that JCTC had made payments in respect of invoices number 144, 147, 151 and 154 at the rate of exchange prevailing at the date of payment and at the contract price of US$1,260.00.00. These invoice numbers refer to the four shipments received between October 1990 and December 25, 1990.

[113] The June 27, 1991 letter referred to invoices number 103, 106, 107. The letter has the following information:

(1) invoice 103 – 234 metric tonnes at US$1,260.00.00 – US$294.840.00

(2) invoice 106 – 155.85 metric tonnes at US$1,260.00.00 – US$196,371.00

(3) invoice 107 – 156.0 metric tonnes at US$1,260.00.00 - US$196,560.00

[114] These shipments, if the documentation is correct on this point, would have been shipped after December 1990. In respect of these three invoices the letter said that they were paid from the sums deposited with ECB. Invoice number 103 was paid for at an exchange rate of JA$8.26. JCTC stated that the Jamaican dollar equivalent is JA$2,435,496.336 using an exchange rate of JA$8.2604. Invoices number 106 and 107 were paid for at an exchange rate of JA$8.4641. The Jamaican dollar figure for invoice number 106 using the four-decimal-place exchange rate is JA$1,662,103.781. The Jamaican dollar figure for invoice number 107 using the same exchange rate is JA$1,663,703.496. These two invoices, 106 and 107, give a total Jamaican dollar figure of JA$3,325,807.28. All three invoices, rounding off the decimal places to two, give a total of JA$5,761,303.62.

[115] This June 27 letter from JCTC is saying that the deposit was used to pay for the shipments. If this is correct then JCTC has accepted that the purpose of the deposit was to pay for the shipments and not a deposit to support the opening of ciloc by ECB with ECB using its own funds and having resort to the deposit only if

JCTC never paid for the product under the ilocs. At one point it appeared that this was part of the theory being advanced by the Mrs. Kitson on behalf of the bank. If this theory is accepted then the question is what is meant by being paid for from the deposit? It has already been noted that in cross examination Mrs. Kitson put to Mr. Seaton that money was taken from the deposit to establish the locs. The two themes appear inconsistent. This is understandable because of the nature of the evidence being relied on by the bank. It has no one who can speak to the precise arrangements between JCTC and Prolacto. In addition, as recently pointed out, the arithmetic is against the bank's case theory.

[116] The June 27 letter also said that JCTC had recently received:

(1) invoice 102 – 234 metric tonnes at US$1,260.00.00 – US$294,840.00

[117] The exchange rate for this invoice was stated by JCTC as JA$8.2604 which would give JA$2,435,496.34. JCTC told ECB that this invoice should be paid from the deposit. The letter closes with a request for a statement of account showing interest calculations and payments. ECB was requested to return the balance of the deposit. This would mean that JCTC is saying that four invoices should be paid from the deposit.

[118] Assuming the correctness of the documentation regarding quantities shipped on the first contract, it would be the case that 1,879.85 metric tonnes would have been shipped under the first contract. According to Prolacto's telex to YPSACL dated December 3, 1991, 1121.15 metric tonnes were left to be shipped under this contract (bundle 3 page 208). There is a discrepancy of one (1) metric tonne between the invoices and the December 3, 1991 telex but that is not significant.

[119] ECB wrote to JCTC by letter dated July 4, 1991 (bundle 3 page 186). The letter stated that the cost on all shipments was adjusted to reflect the 180 days price of US$1,325.00.00 per metric tonne. At this price, ECB advised that a further US$122,190.25 was due to Prolacto from JCTC.

[120] It appears to say (parts illegible) that the additional US$4.75 per metric tonne were added to the price. The justification for this addition of US$4.75 was said to be the Gulf War that had begun (bundle 3 page 107). This, it was said, had increased shipping costs. Thus the final price per metric tonne according to ECB would be US$1,329.75 that is the 180 days ciloc price of US$1,325.00 per metric tonne to which would be added the US$4.75 additional shipping cost per metric tonne. The letter also pointed out that adjustments were made to the exchange rate at which the respective invoices were settled. ECB stated that it had to acquire foreign exchange on the forward market. It chided JCTC for insisting on using the BoJ rate when it was well known that BoJ was not in a position to provide the required foreign exchange. ECB explained the various interest rate calculations on the foreign exchange exposure for the period August 21, 1990 to June 27, 1991. The rate of exchange used was JA$12.80 to US$1. A cheque in the sum of JA$3,667,897.07 was returned to JCTC representing the residue from the deposit totalling JA$22,200,000.00.

[121] JCTC by letter dated July 5, 1991 wrote to ECB acknowledging receipt of the cheque for JA$3,667,897.07 (bundle 3 page 189A). JCTC stated that it did not accept the adjustments and that ECB would be hearing from JCTC in due course.

[122] In another letter dated July 11, 1991, JCTC wrote to ECB in respect of first contract and the deposits (bundle 3 page 191). The letter demanded ECB return the sum of JA$13,133,468.69. JCTC arrived at this by calculating the interest which it claimed should have been paid at various times on the deposit. JCTC also deducted payment on invoices 102, 103, 106 and 107. The actual amount due according to JCTC was JA$16,801,365.76 less the sum returned. Hence the sum of JA$13,133,468.69. The letter explained that ECB's letter of July 5 did not address interest rates at all although the rates were agreed.

[123] ECB responded to this letter with its own letter of July 15, 1991 (bundle 3 page 194). ECB, while not setting out the details of its calculations, stated that JCTC owed the bank.

[124] For its part, Prolacto wrote to JCTC in letter of July 24, 1991. Prolacto took the view that JCTC was short billed because the wrong exchange was used. The rate should have been JA$15.40 and not JA$12.80.

[125] In respect of the first contract, JCTC ended the contract on June 27, 1991 (bundle 3 page 181).

[126] When JCTC asked that the deposit be returned, as just stated, the bank itself took the view that the proper contract price was US$1,325.00 which meant that when Prolacto was paid at US$1,260.00 per metric tonne rate Prolacto was underpaid. What has, in this claim, caused the volte face by the bank which is now saying, in effect, JCTC was right all along and that Prolacto was not owed an additional US$122,190.25? In respect of the additional US$4.75, the court concludes that based on the documentation Prolacto could not vary the contract and impose this increased price without JCTC's agreement. Prolacto does not appear entitled to this amount but that would not be the concern of EarthCrane. It would be obliged to act on Prolacto's instruction that the additional sum of US$4.75 per metric tonne unless it can be shown that EarthCrane new that Prolacto was not entitled to this additional amount. This has not been shown and to the extent that EarthCrane took the additional US$4.75 per metric tonne that taking was for Prolacto its principal. ECB should be looking to Prolacto to recover and not EarthCrane.

[127] The case put forward by the bank is that the defendants took out too much money when it paid an additional US$4.75 per metric tonne on the 1,879.85 metric tonnes shipped. This gives the sum of US$8,929.29. Thus on the overpayment aspect of the first contract the bank is seeking to recover from the defendants a total of US$131,119.54.

[128] The bank's pleaded case is that the defendants gave instructions to pay out this money in circumstances where the US$131,119.54 were not to be paid. The

bank pleaded that this sum was paid out in error and contrary to the instructions of JCTC.

[129] The bank has presented its case on the theory that Mr. Seaton and YPSACL were agents of Prolacto (para 6 of particulars of claim). In response to a request for further information from ECB to the defendants, the defendants pleaded that Prolacto authorised EarthCrane to act as Prolacto's agent '*to access and convert the Jamaican dollar deposit in Eagle Commercial Bank to meet the foreign exchange commitment under the contract with* [JCTC].' (answers to request for information dated September 9, 2005). In the same answers, EarthCrane made it plain that Mr. YP Seaton was acting as agent for EarthCrane.

[130] This position has never been challenged by the bank. The defendants also stated in the answers to the request for further information that Prolacto, ECB and EarthCrane agreed that EarthCrane as Prolacto's agent would use the deposit to provide ECB with the requisite foreign exchange to establish locs for Prolacto. This response was never challenged and this explains why the bank put its case as one of the defendants giving instructions to the bank to make the payments.

[131] The consequence of this is that the bank has accepted that none of the defendants in respect of this first contract was acting in their personal capacity. In fact the bank has not even alleged and could not allege that there was any contractual arrangement between itself and the defendants. The defendants never acted in any personal capacity, that is to say, intending to create legal relations between themselves and the bank. They acted at all material times in representative capacities. If it is accepted that (a) EarthCrane acted as agent for Prolacto; (b) Mr Seaton acted as agent for EarthCrane; and (c) the contracting party with JCTC was Prolacto on what factual basis can the defendants be liable to the bank in their personal capacities? The arrangement was for Prolacto to access the money through its agent. If this is so, how does the bank get to a case of personal liability against the defendant?

[132] In fact, in respect of the first contract there is no allegation that the defendants benefited personally. It appears that the bank even accepts that all the payments out of the deposit either went directly to establish the locs, or were disposed of at the behest of Prolacto. In other words, the defendants were acting to give effect to the understanding the bank had with Prolacto and those instructions resulted in Prolacto getting access to too much money.

[133] If further evidence were needed that the bank was acting on Prolacto's instructions regarding the price at which the milk powder was to be paid for and the additional transportation cost of US$4.75, reference is made to the letter of July 4, 1991 (bundle 3 page 186). ECB wrote to JCTC saying:

> *Reference is made to your letter of June 27, 1991 advising of your acceptance of the repudiation of the above contract.* ***In view of this and in keeping with the request of Prolacto as was outlined in their letter to you of June 3rd 1991, we have adjusted the cost on all shipments so far received to reflect the 180 days price of US$1,325.00 per ton.*** *It therefore means that based on the shipments that have been made the additional amount due to Prolacto would be US$122,190.25.* (emphasis added)
>
> *The crisis in the Gulf which resulted in the increase in oil prices necessitated an adjustment in transportation cost of US$4.75 per ton and although you were advised of this adjustment you nonetheless took the decision to settle the invoices presented at the old price of US$1,260.00 per ton. This adjustment as well as the change to reflect the 180 days price is reflected in the attached statement.*

[134] So there it is. The bank is saying that the additional sums paid out were done at Prolacto's request, which even if it came through the defendants could not be

attributed to them as their individual and personal representation. They were acting at all material times in a representative capacity.

[135] The question was posed earlier, what caused the volte face of the bank? There is no clear answer other than Mr. Senior's suggestion that when it paid out the money to JCTC and some of it came from its capital reserves, this raised the spectre of the bank being under-capitalised. The bank was then placed in the position where it had to get additional capital in a short time. There was evidence from Mr. Senior that the sum the bank is seeking to recover from the defendants was listed as a receivable. The accounting consequence of this is that it may be listed as an asset and since it has a dollar value then it gave the bank room to argue, in the event that the regulator questioned its capital base, that it was not under-capitalised. The taking of the JA$15,254,583.69 was done, it was suggested, as part of the effort to plug this hole in its finances. The court makes no finding about the propriety of this other than to say that it will determine whether the taking had any legal basis.

[136] On this understanding it seems to this court that the bank ought to have been seeking to recover from Prolacto directly since Prolacto was the beneficiary of its agent's actions.

[137] In the same answers to request for information the defendants pleaded that ECB was Prolacto's banker. There are many references by ECB in letters written to JCTC that it regarded itself as Prolacto's banker. This means that ECB felt itself obliged to carry out Prolacto's instructions which it received through its agent EarthCrane which in turn had Mr Seaton as its agent who was the human person most active in this transaction. For example, in a January 14, 1991 letter from ECB to JCTC, Mr. Salmon wrote, '*the quotation was a cash price which was accepted by [JCTC] [and] interest will be charged at the current rate of interest from the date of your acceptance until such time that the cash deposit is placed at [ECB] for our client's account*' (bundle 3 page 77).

[138] In another letter dated August 9, 1991 in relation to the second contract, ECB wrote to JCTC (bundle 3 page 198). The letter has in part, '[w]*e write on behalf of our client Prolacto*.' These last two paragraphs are directed at reinforcing a point made earlier that the bank regarded itself as 'looking out' for Prolacto's interest and not JCTC's. It regarded itself as being obliged to act at Prolacto's behest. In light of this and in light of Mr Senior's evidence regarding the taking of the money in the context of the risk of being found by the regulator as being under-capitalised, the bank, having taken the money from Mr Seaton's account had to find some justification for its actions.

[139] RBTT has relied on the cases of **Barclays Bank Ltd v Quistclose Investments Ltd** [1968] 3 All ER 561 and **Nunes Rent a Car Ltd v Union Bank of Jamaica** [2006] UKPC 4, on appeal from Jamaica, to say that a trust was established in the deposits and so the bank was under an obligation to return the money once the contracts were terminated. Presumably, this was to make the point that the bank was under a legal obligation to return the deposits to JCTC and therefore lawfully entitled to recover the money paid over from Mr Seaton. In **Barclays**, Rolls Razor Limited (RRL) was indebted to its bankers. It had exceeded its overdraft limit. RRL wanted to pay a dividend but had no money and the bank declined to assist. Quistclose decided to advance the money to pay the dividend. The bank was told that Quistclose had lent the money to pay the dividend. The money was lodged in an account that RRL had at the bank. Other loans to keep RRL afloat were not forthcoming and so it went into liquidation. The bank held on to the money to pay the dividends. Quistclose wanted to get it back. To get back the money, Quistclose had to establish that it had a proprietary interest in the loan amount. It argued that the money was advanced for a specific purpose which had failed so that it should get back the money. The House of Lords agreed. Lord Wilberforce who delivered the sole judgment held that the law and equity were flexible enough to permit an arrangement whereby money can be advanced for a specific purpose and under such circumstances that it does not become part of the general assets of the recipient. On the facts, it was understood

that the money was to be used to pay the dividend and should that fail then the money could be recovered by Quistclose because it was impressed with a trust.

[140] In **Nunes**, Nunes Rent a Car ('NRC') agreed to sell and Quality Car Rentals ('QRC') agreed to buy ten cars in two batches of five each. QRC was borrowing money from Eagle Merchant Bank ('EMB') to finance the purchase. QCR was EMB's customer. EMB loaned the total sale price to QCR. The evidence showed that QCR would have used only part of the loan facility to purchase the first batch of cars and the other part of the facility to purchase the second batch. Their Lordships concluded that property in the cars passed on payment of the money. Unfortunately, EMB told QCR that because some new regulations were to come into effect then QCR should take the whole loan at once. QCR took a single cheque with the total loan and took it to NRC's bankers, Jamaica Citizens Bank ('JCB'). Quality told JCB that it was to use part of the proceeds to pay for the five cars and put the balance on a deposit which would be used to pay for the second set. JCB, for various reasons, declined to do this. The end result was that the total sum of money was credited to NRC's account at JCB. Eventually, JCB appreciated the error and reversed the transaction from NRC's account. Incidentally, the subtext here was that NRC was, prior to this transaction, a debtor to JCB and this cheque if fully credited to NRC's account would have eliminated the debt. Any reversal would place NRC back in debt and make it liable for enforcement of JCB's security which is exactly what happened. This explains why NRC sued EMB and JCB.

[141] The Court of Appeal and the Privy Council held that the balance for the purchase of the second set of cars was held on trust for Quality. The Privy Council also held that JCB was entitled to correct the account of its customer in light of the error. ECB is relying on this case to say that it had the right to make the adjustment by taking the money from Mr Seaton's account.

[142] This court as it is bound to do accepts the principles established in these cases. This court sees no incompatibility between those cases and the instant case.

In the case before this court, the deposit at ECB was established so that Prolacto through its agent could use the Jamaican dollars to purchase foreign exchange to send to Prolacto. This was a sale contract, not a loan being advanced for a specific purpose. There was no understanding between JCTC and Prolacto that money would be returned if the purpose failed. Prolacto was to have full use of the money. It is not easy to see how a Quistclose trust arises on these facts.

[143] Mrs. Kitson sought to accuse Mr. Seaton of concocting a recent fabrication to explain why he had taken moneys from the account. Mr. Seaton said he took money to send overseas and to replace his own foreign exchange which he had used to send to Prolacto. Learned Queen's Counsel sought to say that since Mr. Seaton had not produced any account or any documentation from Prolacto then the court should conclude that it was not true. Counsel even went as far as saying that Mr. Seaton had breached the agency agreement with Prolacto.

[144] There are a number of things to observe. First, Prolacto has not accused Mr. Seaton of acting in breach of any agency agreement. Second, the agency agreement is not the business of RBTT which means that if Prolacto told Mr. Seaton to advance the foreign exchange and then get it back from the deposit that arrangement is no business of RBTT's. Third, the bank's pleaded case does not allege that there was any breach of agency agreement between EarthCrane/Prolacto or YPSACL and Mr. Seaton/EarthCrane. Fourth, as already concluded, based on the evidence of Mr. Bonnick and Mr. Daley, if the foreign exchange commission was going to be paid to Prolacto by JCTC then where else would the money come from to get the foreign exchange if not from the Jamaican dollar deposit?

[145] There is a further point to be made. The bank has produced no evidence of the details of the arrangement between Prolacto and its agent. Mr. Seaton has testified that the arrangement was that he would send foreign exchange to Prolacto and then use the Jamaican dollars which was made available to Prolacto to replenish his stock of foreign exchange. This court is quite unable to appreciate the legal basis on which Prolacto's agent, EarthCrane, should be held accountable for taking money from the

deposit. Worse, it is impossible to see how Mr. Seaton in his personal capacity should be held liable for money taken out of the deposit when at all times he was the human person giving effect to EarthCrane's agency agreement between Prolacto and EarthCrane. YPSACL, at best, was also an agent for EarthCrane with Mr. Seaton being the human actor.

[146] If the true agreement was that ECB agreed to pay interest on a deposit which to its certain knowledge would be made available to another then that is ECB's problem. If there is a loss then the bank must absorb that loss for making what was then and now an imprudent decision to pay interest on the deposit in the context of the case. ECB was simply a store house for the deposits.

[147] It is appropriate at this point to deal with the suggestion that Mr. Salmon's actions were not those of the bank. This is not accepted for the reasons given now. Mr. Salmon was not acting in a personal capacity. At all material times, based on the correspondence, he was acting as an officer of the bank. He was a very senior officer of the bank.

[148] In the important cases of **Meridian Global Funds Management Asia Ltd v Securities Commission** [1995] 2 AC 500 and **Lebon v Aqua Salt Co Ltd** [2009] 1 BCLC 549, the issue arose of whether knowledge of particular persons should be regarded as the knowledge of the company. It is well known that a company has no physical attributes or existence. It does not have the power of being or aseity in itself. It can only act and make decisions through the actions of humans. This means that rules of attribution have to be developed to decide, in any given circumstance, whether the action or lack of action, knowledge or lack of knowledge of a particular natural person should be regarded as that of the company. Lord Hoffman, who delivered the advice in both cases, has simplified the law considerably. His Lordship has avoided the difficulties that had arisen because of a misunderstanding of Viscount Haldane's use of the expression 'directing mind' in the case of **Lennard's Carrying Co Ltd v Asiatic Petroleum Co** [1915] AC 705. Lord Hoffman made it clear that it is not in every instance that there has to be the search for the directing

mind of the company. It all depends on what rule, law or principle is under consideration. If the person's knowledge or conduct in question was indeed the actual directing mind of the company then it necessarily followed that his knowledge or conduct was that of the company. However, there may be instances where the knowledge or conduct is not that of the director or the directing mind but there can be no doubt that the knowledge or conduct should be attributed to the company. Lord Hoffman stated that one begins by looking at whether the rule, law or principle in question was intended to apply to a company and if yes, then look at whose act or knowledge, was for the purpose of the rule, law or principle, that of the company. The simplification of Lord Hoffman was further refined by Moore-Bick LJ sitting as a trial judge in **Man Nutzfahrzeuge AG v Freightliner** [2005] EWHC 2347 (Comm) at **[154]**:

> *154. One point of importance which emerges clearly from these authorities, perhaps most clearly from El Ajou v Dollar Land Holdings Plc, is the need to distinguish between several quite distinct sets of rules. The first, to which Lord Hoffmann adverted briefly in the Meridian case, are the rules which relate to vicarious liability under which a person may be held liable for the acts and omissions of those he engages to act on his behalf. Liability in such cases depends on the wrongful act or omission of the agent or employee himself for which his principal or employer is held responsible. It does not depend on the attribution to the employer of another's state of mind. The second set of rules concerns the attribution to one person (natural or juridical) of the state of mind of another whom he has appointed to act as his agent. It is with that question that cases such as In re Hampshire Land Co., Belmont Finance v Williams and El Ajou v Dollar Land Holdings (insofar as it turned on the relationship between principal and agent) are concerned.* ***A***

> ***third set of rules which governs the attribution of the acts and omission of natural persons to juridical persons such as companies was the subject of discussion in the Meridian case. These rules do not involve so much the attribution of one person's state of mind to another as the identification of the natural person or persons who are to be regarded as representing the juridical person for the purposes of the substantive rule in question.*** (emphasis added)

[149] It is the third set of rules which is applicable in the present case. In the instant case the issue is whether the decisions and actions of Mr Salmon should be regarded as those of ECB. On the facts it is not easy to see why that should not be the case. Mr. Salmon was acting on behalf of the bank. Prolacto was dealing with ECB and the contact person was Mr Salmon. Everything that was done by the bank was done through Mr. Salmon or others working to give effect to the transaction as they understood it. The acts done by Mr. Salmon were certainly within his authority. Mr Senior's evidence did not raise the possibility that Mr. Salmon was acting outside of his authority.

[150] The point is that the bank agreed to make the payments based on the instructions given to it on behalf of Prolacto. If it decided to pay out what it now calls the overpayment based on Prolacto's instructions and then has come to the view that it ought to recover the alleged overpayments then the claim ought properly to be brought against Prolacto.

[151] Interestingly, when one examines Suit No 1991/J 244 (**JCTC v Prolacto and ECB**) one sees that JCTC pleaded in paragraph 5 of its statement of claim that JCTC and Prolacto agreed on a price of US$1,260.00 per metric tonne and if an iloc was established on a 180 days basis the applicable price would be US$1,325.00 per

metric tonne. This pleading was referred to Mrs. Benka Coker to illustrate her point about abuse of process.

[152] Mrs. Benka Coker submitted that it cannot be fair for the bank in the case against Mr. Seaton to seek to say that the agreement between JCTC and Prolacto was always and remained based on the price US$1,260.00 per metric tonne when JCTC itself in its claim against the bank accepted the increased price if the iloc was established on a 180 days basis. She also submitted that since JCTC never said that US$1,325.00 was inapplicable how now can the bank now rely on a position that JCTC never relied in a context where the bank in predicating its claim on what JCTC's position was in the 1991/J244 claim?

[153] Mrs. Benka Coker added that in Suit No CL 1991/J 244, even though JCTC accepted that the higher price was part of the agreement, JCTC claimed, in paragraph 18 of its particulars of claim, that ECB wrongfully calculated JCTC's liability at US$1,325.00 'being the price that would have been appropriate if a loc had been established on a 180 day basis.' Learned Queen's Counsel submitted that here was an issue joined between JCTC and the bank. The bank capitulated. It is only in this claim that the bank has unreservedly accepted JCTC's position with the modification that the contract price was always US$1,260.00.

[154] Mrs. Benka Coker is saying that what the bank is doing here is playing the role of a defective ventriloquist. It is mouthing and advocating the case of JCTC in a manner, in some instances, that JCTC never advanced and is asking this court to resolve the issue of whether the real contract price should have been the lower or higher price per metric tonne, when Prolacto and JCTC are not parties to this litigation. Counsel suggested that this must be inherently wrong because Mr. Seaton cannot effectively refute this aspect of the case because he was not a contracting party to the sale agreement. Mr Seaton can only go by what he understood EarthCrane's responsibilities were to Prolacto.

[155] Mrs. Benka Coker made the point that the bank's case for recovering the US$122,190.25 rests on the court making an explicit finding on the terms of the agreement between JCTC and Prolacto, a dangerous task in the circumstances here. She also adds that if that were not grave enough, there is another aspect to the dispute between JCTC and Prolacto which is, what was the exchange to be applied to the transaction? Counsel pointed out that in 1991/J 244, JCTC's case was that it was agreed that the exchange rate was the weighted average exchange rate applicable to BoJ transactions at the date of shipment. She says that this court is being asked to make findings on this and then move from that foundation to the current claim. This litigation by proxy, it was submitted, is wrong, wrong, wrong. Mr Seaton is unable to deal with this because he was an agent of EarthCrane who was an agent of Prolacto and as such he was obliged to act in Prolacto's interest. The upshot of this is that if Prolacto tells EarthCrane that a particular exchange rate is to be applied then EarthCrane must act on this. It cannot act otherwise because it would be in breach of its obligations to Prolacto.

[156] She said these are issues the bank should have litigated in the earlier actions (1991 J244 and 1991/J314) and have the court then make findings. She said Prolacto filed a full defence and so did the bank. On the face of it, Prolacto is not out of pocket. JCTC is no longer out of pocket. The bank was the one out of pocket because it surrendered rather than fight and then raided Mr. Seaton's personal accounts because he was the easiest and thought to be the weakest target. Learned Counsel submitted that this was high handed, abusive and reprehensible. It was submitted that Mr. Seaton did nothing wrong.

[157] Mrs. Benka Coker pointed out that what has been pleaded is mistaken payments. She submitted that there was no mistake. EarthCrane, as Prolacto's agent, was given lawful access to the deposit and acting through Mr. Seaton took money from the account to which it was entitled. If Prolacto chose to make Mr. Seaton retain that money that was a matter between Prolacto, EarthCrane and Mr. Seaton and no business of the bank.

[158] This leads to the question of whether the part of the claim based on the first contract is an abuse of process. Mrs. Benka Coker strongly submitted that the entire claim should be dismissed as an abuse of process. Learned Queen's Counsel submitted that what the bank has done is (a) settled JCTC's two claims against it; (b) not seek to contest the matter when it was possible to have the court determine the true agreement between JCTC and Prolacto who were in fact parties to one of the earlier claims; (c) paid out JCTC using money from its capital base; (d) created in its accounts a receivable from the defendants so that the regulators would not regard it as under-capitalised; (e) take the money from Mr. Seaton's account and is seeking more under the guise of overpayment; and (f) seels to justify its position by asking the court to declare its illegal act as legal. Counsel also submitted that when one reads JCTC's claim against Prolacto and the bank (1991/J 244) and the pleadings in this case, the bank has adopted JCTC's interpretation and is asking the court to adopt that interpretation.

[159] Mrs. Benka Coker submitted that there are many things wrong with that approach. First, none of the parties to the sale contract is before the court in this claim. Second, if the bank was caught between JCTC and Prolacto, it could have sought the court's directions on who to pay and how much. Third, having regard to the gaps in the documentation it is dangerous at this late stage to try to establish the agreement between JCTC and Prolacto because Prolacto has always said that the agreement between itself and JCTC was partly oral and partly in writing. Fourth, in light of what has just been said there is the risk of serious injustice to the defendants in the first claim. Fifth, all the claims based on overpayment depend on the agreement between JCTC and Prolacto which is now beyond knowing. Sixth, the bank is asking the court to accept the possible interpretations favourable to the bank arising from Mr. Senior's testimony but to jettison those parts of his evidence that are not favourable. Seventh, Mr. Senior's testimony is dangerous in that he is a professional man trying his best to give understanding to transactions about which he knew nothing. Eighth, when one examines the bank's answers to the request for

information one sees that the bank did not identify the documentation, when asked to do so, on which it relied to justify this pleading at paragraph 17 of its particulars of claim: *the sums of J$30,239,829.29 and US$131,118.54 above were paid in various instalments by virtue of directions from the defendants.* In fact the bank answered all the other questions in the request for information except the one that asked specifically about documentation. Ninth, when the bank was asked, in the request for information, to indicate how many instalments there were and the dates of the alleged overpayments, the bank's answers were as follows: *payments were made in excess of 35 instalments as detailed in the letter dated June 30th from Keith Senior to Mr Alfred Rattray* and *all dates on which a payment was made were detailed in the letter from Mr Keith Senior to Mr Alfred Rattray dated 30th June 1992 and in [t]he (sic) dated 29th July 1992 from Mr Keith Senior to Mr YP Seaton. Reference to these letters will reveal the dates of payment.*

[160] The view of the court on whether the bank has proved the 35 instances of overpayment is that the bank has failed to do this. It is also now known that the detailed information in the letters of June 30, 1992 and July 29, 1992 is not supported by any documentation before the court. What can be established is that the bank itself said that its final position was that it settled the payment for the 1,879.85 metric tonnes at US$1,325.00.

[161] The danger of Mr Senior speaking to conclusions in the letters without those documents being before the court was highlighted a few years ago when the defendants applied to Beckford J to strike out large portions of Mr Senior's evidence. The basis of that successful application was that the documentation necessary to support his conclusions was not before the court. Beckford J, in a written ruling on March 27, 2011, to struck out large portions of Mr Senior's statement on the ground that the offending paragraphs breached the hearsay rule and further, that his statement did not sufficiently identify the documents on which he based his calculations. With the benefit of hindsight this was the response to the bank's failure to identify the documents on which it relied when the question was posed in the

request for information referred to earlier. The proverbial chickens had come home to roost. The bank's case was always in trouble and with the passage of time and a full trial it must be said that it was very weak.

[162] Beckford J ruled:

> *Clearly then Mr Senior as an officer of the bank is competent to give evidence of the banker's books. What he is not permitted to do is, without producing these documents on which he relied (which is not the same as these documents being in an agreed bundle), make statements about his examination and tracing of them*

[163] Beckford J's ruling was not appealed or altered in any way so it stands and has had a significant impact on this trial. Her Ladyship ruled that parts of paragraph 25 of Mr Senior's statement should be deleted. Those parts deleted were details of calculations in relation to the first contract relating to (a) intransit interest due from JCTC; (b) funds purchased by Mr Seaton purporting to show dates of purchase, interest rate and Jamaican dollar equivalent; (c) funds purchased via BNS and (d) payment on various invoices at the rate of exchange. Her Ladyship held, in relation to the struck out parts, that 'to be admissible the witnesses (sic) must refer to the documents on which he based his calculations' (p 6). Mr Senior has not done this in the trial.

[164] Beckford J deleted paragraph 36 which dealt with Claim No CL 1993/S252, that is, Mr Seaton's claim against the bank. Her Ladyship said that the witness 'must state the records he used to do the tracing of the funds' (p 7). Her Ladyship granted a life line by permitting the bank to file a supplemental witness statement 'referring to the documents he traced in coming to his decision' (p 7). The bank has not done this.

[165] Sadly, despite Beckford J's indulgence the bank has not been able to take advantage of her Ladyship's munificence. This was the position at least from March

27, 2011 when judgment was delivered on the application to strike out portions of Mr Senior's statement. The bank was now between a rock and a hard place or, for those who prefer Greek mythology, between Scylla and Charybdis.

[166] Did all this amount to an abuse of process to such an extent that the remedy should be a striking out of bank's case? The Court of Appeal of Jamaica has approved of the reasoning of the House of Lords in **Johnson v Gore Wood** [2002] 2 AC 1. The court did this in **S & T Distributors Limited v CIBC Jamaica Limited** SCCA No 112/04 (unreported) (delivered July 31, 2007) and **Honourable Gordon Stewart OJ v Air Jamaica Acquisition Group Ltd** [2012] JMCA Civ 2. Lord Bingham, in **Gorewood**, stated that courts exist for the resolution of disputes and therefore litigants ought not to be turned out without a careful examination of all the circumstances. However, his Lordship did point out that that did not mean that the court must hear and decide on the merits of any claim or defence which a party may wish to put forward (p 22). The power to dispose of matters as an abuse of process is to prevent misuse of the court's procedure in a way which while not at variance with the rules would nonetheless be manifestly unfair to a party to the litigation or would bring the administration of justice into disrepute among right-thinking people. His Lordship stated that merely to say that a matter could have been raised in earlier proceedings is not of itself an abuse of process. His Lordship indicated his preference for 'a broad, merits-based judgment which takes account of the public and private interests and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before' (p 31). Finally, his Lordship said that the forms of abuse of process are so many that one cannot list all of them and so there cannot be any fixed rule to determine whether abuse of process exists in any given case (p 31).

[167] Lord Millett made the important point that relitigation of a point is one thing, denying the possibility of litigating a point not yet decided in any previous litigation

between the parties is another. The latter position is prima facie a denial of access to justice.

[168] This court takes the view that access to justice is a fundamental right guaranteed by the constitution. While procedural rules may control access to the court or indicate how litigation is conducted, the interpretation and application of the procedural rules should not be interpreted in such a manner that the litigant is deprived of the substance of the right. The precise terms of the contract and their meaning as between JCTC and Prolacto have not been litigated in any previous case. Admittedly, the way in which the matter has come before this court to be decided may be unsatisfactory but that is not itself a reason to conclude that it is an abuse of process. The fact that the bank chose to settle rather than to contest the previous claim and then rely on its opponent's case to ground this one is not necessarily an abuse of process. This court declines to say that on this basis alone there was an abuse of process.

[169] The court declines to strike out the claim on the ground of abuse of process.

The second contract – contract no PKG 90/12/168

[170] While the first contract was still on foot in December 1990 JCTC invited tenders for another contract to deliver milk powder. Prolacto responded by telex dated December 11, 1990 with four bids (bundle 3 page 45). The second bid was for 3,000 metric tonnes at US$1,450.00. The document indicated that the four bids were for cash payment but payment in Jamaican dollars is acceptable, wholly or partially, with credit up to 180 days subject to financing charges being for the account of the buyer. Under this contract and based on the available documentation it appears that there was no 180 days ciloc price per metric tonne.

[171] There is another communication from Prolacto to JCTC, dated January 7, 1991 which stated that in respect of the second contract the price is US$1,450.00 per metric tonne payable in Jamaican currency at the rate of exchange at time of shipment (bundle 3 page 68). The price per metric tonne was stated to be the cash

price and so the full purchase price in Jamaican dollars was to be deposited at ECB 'for credit to our account to secure purchase'. The total value of this contract was US$4,350,000.00.

[172] In a letter of January 14, 1991, ECB wrote to JCTC saying that it had been informed by Prolacto that a deposit of the Jamaican dollar equivalent of US$4,350,000.00 should have been made already. JCTC was told that this was a cash sale and that interest would be charged to JCTC at the current interest rate from JCTC's date of acceptance to the time money is paid into ECB.

[173] By memorandum dated January 19, 1991, Prolacto wrote to JCTC regarding the second contract. Prolacto was urging JCTC to 'effectuate the deposit mentioned in our fax from 7/1/1991.ECB' (bundle 3 page 78).

[174] ECB wrote to JCTC on January 21, 1991 in respect of the second contract (bundle 3 page 83). The letter stated that ECB understood that a new contract for the purchase of 3,000 metric tonnes was entered into at a price of US$1,450.00 per metric tonne with shipment at the rate of 500 metric tonnes per month. It also said that the devaluation risk was for JCTC during the tenure of the credit arrangement. The letter concluded with the statement that local funds were to be placed to meet draw downs under loc but interest against deposits shall be for JCTC's account.

[175] In another memorandum from Prolacto to JCTC dated January 22, 1991, Prolacto reminded JCTC that it received confirmation of the contract from JCTC on December 27 (bundle 3 page 87). Prolacto stated that its understanding was that the entire amount of the contract should be deposited in Jamaican dollars. Prolacto also stated that it had committed itself to procuring supplies to make the deliveries and thus the entire deposit should be paid immediately.

[176] Prolacto wrote to JCTC in a memorandum dated January 1991 (the specific date is not clear) in which it raised concerns about the deposits under both contracts and to settle the matter 'with our representative Mr Michael Salmon' (bundle 3 page

86). The language in quotation marks is significant. Prolacto thought of ECB as its representative. This corresponds with how ECB saw both transactions.

[177] In a letter dated February 5, 1991, ECB wrote to JCTC about the second contract asking for the full purchase price (bundle 3 page 94).

[178] JCTC eventually responded by letter dated February 8, 1991 (bundle 3 page 97). JCTC advised that they were in a position to pay the full deposit but its understanding was that the Jamaican dollar amount would be due and payable at the time of shipment. JCTC was insisting that the interest on the deposit should be for JCTC's account.

[179] ECB wrote to JCTC by letter dated February 19, 1991 stating that the amount under the contract should not be regarded as a deposit but rather as an amount to be paid on account for Prolacto (bundle 3 page 104).

[180] By letter dated January 14, 1991, ECB wrote to JCTC stating that Prolacto had informed ECB that JCTC should have deposited the Jamaican dollar equivalent of US$4,350,000.00 (bundle 3 page 77). The letter pointed out that as of the date of the letter no deposit had been received 'despite the fact that this was executed on December 27, 1990.' ECB wrote that 'the quotation was a cash price which was accepted by [JCTC] [and] interest will be charged at the current rate of interest from the date of your acceptance until such time that the cash deposit is placed at [ECB] for our client's account.'

[181] This letter reveals much. As stated earlier, in a normal international sale, it is the buyer who finds a bank to issue the iloc. In this case it is the bank that is regarding Prolacto, who would normally be the beneficiary of an iloc, as its client. It does not appear that ECB thought of JCTC as its client in the same way that it regarded Prolacto.

[182] Prolacto wrote in a letter dated February 26, 1991 to JCTC explaining that it understood that JCTC had refused to make payment in keeping with the contract 'dated December 27th and signed by your Mr Mattis' (bundle 3 page 106). Prolacto combined exhortation with sabre rattling with a view to prodding JCTC to perform its end of the bargain. It exhorted by telling JCTC that the contract was binding; that Prolacto had made commitments which it could not get out of in relation to getting the supplies and sabre rattled by stating that should the money not be paid in forty eight hours it would seek specific performance of the contract.

[183] Between March 5, 1991 and April 17, 1991 there was a flurry of exchange of letters between counsel for JCTC and counsel for Prolacto (bundle 3 pages 115 – 134).

[184] On April 19, 1991, ECB wrote JCTC informing that it understands that JCTC is to purchase 3,000 metric tonnes of milk powder at US$1,450.00 (bundle 3 page 138).

[185] By letter dated April 23, 1991, JCTC enclosed a cheque in the sum of JA$39,717,675.00 'representing deposit for 3,000 metric tons [spelling in original] … from Prolacto SA at US$1,450.00 per metric tonne converted at the Bank of Jamaica weighted average today at US$1.00 = J$9.1305' (bundle 3 page 139). This was the only deposit made in respect of the second contract. It appears to have been a certificate of deposit.

[186] From all the available documents it appears that there were two shipments totalling 494 metric tonnes at a price of US$716,300.00. Prolacto wrote ECB by letter of June 5, 1991 enclosing an invoice for 494 metric tonnes (bundle 3 page 155). It seems that there were two quantities comprising this amount: one for 44.325 kilos and another for 449.675 kilos. ECB wrote to EarthCrane by letter dated June 21, 1991, which spoke to two invoices (bundle 4 page 16). Among the documents is a telex from Prolacto to YPSACL dated June 26, 1991 which stated that the second and third shipments are available. Also there is telex from Prolacto to YPSACL, dated December 3, 1991, stating that under the first contract 1121.15 metric tonnes was left

to be supplied and 2506.00 metric tonnes on the second contract (bundle 3 page 189). The arithmetic supports the view that 494 metric tonnes were shipped under the second contract. Mr. Seaton stated that there was more than one shipment while Mrs. Kitson was insisting that there was one. From the court's perspective that is a minor issue. The real question is the total quantity shipped and at what times they were they shipped since the timing may have an impact on the exchange rate.

[187] From all the documentation, particularly that coming from Prolacto, it is reasonable to accept its own admission (against its interest) in the December 1991 telex that 2506 metric tonnes were to be shipped under the second contract which means that it shipped only 494 metric tonnes out of the contract amount of 3,000 metric tonnes (bundle 3 page 189).

[188] After this shipment, ECB wrote to JCTC, by letter dated June 24, 1991, telling it that the foreign exchange used to pay for this shipment was secured at JA$16.00 (bundle 3 page 158). ECB asked that JCTC reimburse the difference between the rate at the original deposit and the rate at which ECB got the foreign exchange.

[189] ECB wrote two letters to JCTC dated July 5 and 8, 1991 respectively. ECB again told JCTC that insisting on settling at the BoJ rate was not practical because BoJ had no foreign exchange and those wishing to purchase foreign exchange had to pay the rate the seller was asking (bundle 3 pages 168-9 and 171).

[190] As far as the second contract was concerned, ECB wrote to JCTC in a letter dated August 9, 1991 (bundle 3 page 179). JCTC was asked what rate would be used to settle the cost of the shipment already made. ECB suggested JA$16.00. ECB advised that unless this was done then Prolacto (described as our client) would not be making any further shipments. JCTC wrote back by way of letter dated August 12, 1991 stating that ECB did not have its agreement to settle at bank's forward rate (bundle 3 page 180).

[191] JCTC told Prolacto by letter dated August 26, 1991 that the contract had ended for failure to make shipments according to agreement (bundle 3 page 181). JCTC advised ECB by letter dated September 2, 1991 that the second contract would be terminated (bundle 3 page 182).

[192] The bank's claim under the second contract was put in this way by Mrs. Kitson:

(1) JCTC and Prolacto agreed that Prolacto would sell 3,000 metric tonnes at US$1,450.00 per metric tonne;

(2) JCTC deposited JA$39,717,675.00 in respect of the second contract;

(3) only 494 metric tonnes were shipped and this had an invoice price of US$716,300.00;

(4) under the applicable exchange rate (JA$12.7475 to the US dollar) Prolacto was due JA$9,131,034.25;

(5) the deduction of JA$9,131,034.25 would leave a net of JA$30,586,640.75;

(6) Mr. Seaton directed that ECB pay out JA$3,810,000.00, JA$1,000,000.00, JA$780,000.00, JA$30,000.00, JA$5,120,000.00 and JA$1,300,000.00;

(7) Mr. Senior's letter showed that Mr. Seaton authorised the removal of a total of JA$24,385,617.94; and

(8) since Mr. Seaton took out JA$24,385,617.94 and Prolacto was due only JA$9,131,034.25 Mr. Seaton was to refund the difference between the two figures which is JA$15,254,583.69.

[193] It was this JA$15,254,583.69 that RBTT has admitted was taken from Mr. Seaton's accounts.

[194] It is this court's conclusion that RBTT has not been able to make good the assertions that it is entitled to take money from Mr. Seaton's personal account because it had to pay back money to JCTC which it had to get back. It is one thing for the bank to say that it settled a claim with JCTC but quite another to say that arising from that settlement it had the legal right to take money from a customer when at all material times the bank accepts that the customer himself, never, had any contractual relations with JCTC or any duty towards JCTC which was breached and somehow the bank had to make good the damages flowing from that breach. There is no evidence that Mr Seaton has unjustly enriched himself at ECB's expense.

[195] One of the troubling things about this second contract and the monies claimed under it is that RBTT has not produced the evidence to show how it arrived at the conclusion that Mr. Seaton should repay JA$15,254,583.69.

[196] One of the difficulty tracing this money to Mr Seaton's accounts. Mr. Senior testified that the money was not in ECB but was eventually found in Eagle Merchant Bank ('EMB'). However, there are no records in the bundle before the court from EMB. The court is being asked to rely on Mr. Senior's letters written over two decades ago in a context where what he put in the letter was what was told and/or given to him by persons in the EMB. He could not vouch for the accuracy of the records.

[197] In light of the reasons just stated the following evidence from Mr. Senior is not reliable. This is not because of any inherent unreliability on the part of Mr. Senior but because it has turned out that he simply provided with information from EMB and none of that information is before the court. Also Beckford J's ruling referred to earlier must be borne in mind. Mr. Senior says that 'after tracing … I determined that these amounts were in fact paid from the funds deposited by JCTC.' They are listed as follows:

(1) ECB/Prolacto/EarthCrane		JA$01,637,000.00
(2) EarthCrane		JA$04,158,000.00
(3) EarthCrane		JA$00,591,000.00
(4) EarthCrane		JA$00,494,000.00
(5) YP Seaton	US$370,000.00 or	JA$08,191,000.00
(6) YP Seaton	US$9,000.00 or	JA$00,203,000.00
Total		**JA$15,254,000.00**

[198] Respectfully, this is a conclusion rather than a demonstration of the conclusion by reliable admissible evidence. What documents did Mr Senior use to conduct the tracing? What records did he look at? Where is the supporting documentation (cheques, withdrawal slips, internal memoranda from ECB) offered in support of this conclusion? These figures were arrived in mid to late 1992. RBTT filed this claim less than one year after Mr. Senior wrote to Mr. Seaton outlining the bank's claim. It should not be too much to ask that the documentation to ground these calculations be produced particularly as RBTT has admitted to taking money from Mr. Seaton's accounts and it is asking the court to grant a declaration that what it did was justified.

[199] When pressed (gently by the court) to give an example of how the transaction would work between ECB and EMB, Mr. Senior theorised that the communication may have been verbal or in writing. Mr. Senior was also asked whether there were any records showing the transactions between ECB and EMB in respect of the JA$39,717,675.00 deposit under the second contract, his response was:

> *There is nothing in the documents that I saw, went through several boxes and files given to me and shown to me, there*

is nothing there with that letter from Eagle Commercial Bank saying here is the $39 million, and I can't recall seeing a letter or a memo from the Commercial Bank to Eagle Merchant Bank saying can I have back $1.3 million or $2 million.

[200] This is part of the other evidence regarding this tracing effort by ECB. As will be seen in the exchange between the court, Mr. Senior and Mrs. Kitson QC (during examination in chief), there was a want of records:

HIS LORDSHIP: Okay. So, how would, ammm -- the person who would be bringing in the foreign exchange, the US dollar they would be going into the Commercial Bank?

WITNESS: That is indeed so.

HIS LORDSHIP: So, how would that be recorded, they come they say I am here with a $100,000.00 US, how would that be recorded now, in respect of contract number two?

WITNESS: Okay. Save and except as I said, using the memo of the 7th of June, in number 51, in Bundle 5, that speaks one, starts out by contract 9/168, so that is Prolacto's contract. And, then it's from Mr. Salmon to the file saying we have debited. The deposit tied with the subject contract. Now, the deposit again is somewhere, it is not in the Bank, it is not at NCB, it is not at BNS, it was Eagle Merchant Bank -- his memo says debit deposit, he can't get the deposit, because its cross institutions, but in using the term debit deposit means that it is access deposit. He couldn't physically deposit it. Its two separate legal institutions, but that's what the memory says and delivered the sum of X amount.

Q. So, the memo on Page 50, sir, the page before, could you just read that memo. Acting on the instructions of Mr. Y.P. Seaton we have today issued cheque in the amount of $60,000.00, payable to Hugh Bonnick, being purchase of $5,000 US, at rate of $12.00 to $1.00 US, amount credited to A account, what is that speaking to?

A. It speaks to being credited to an A account, it does not give account number and it does not give names, it says it is credited to an A account. So, I can't say it was credited to JCTC, Seaton, or I can't...

Q. So, when you indicated, sir, in your statement that you had traced funds to accounts in the name of Mr. Seaton, what were you speaking of?

A. I was referring in particular again back to Exhibit 51 and the dates that it refers to, because again the subject has to do with the contract, with today debited X amount of money and issued cheques. So, they debited one account and did something with the money, delivered the money to Valrie Cowan, to Mr. Reynolds and in turn received US dollars for. And in the case, the specific one, the one with the $88,000 the correlation -- both occurred on the same -- that's the extent of -- because the absence of being a party, being there present, a party to those debits and credits, I can't speak with the authority to say this is what Mr. Salmon did with it or didn't do with it, other than to say based on the documents re...

HIS LORDSHIP: Coincidence of dates?

WITNESS: Yes, and I am outside coming in post these transactions. I am saying this occurred, these occurred, here is a debit, here is a credit, how do they relate.

HIS LORDSHIP: The connecting factor would be the dates?

WITNESS: The connecting factor would one be the date and release of the money, the receipt of money and memos on the file. The memos...

HIS LORDSHIP: But the memo now at Page 51 of Bundle 5, it doesn't refer to the quantity of foreign exchange?

WITNESS: No, it doesn't, save and except that the release of those funds came from the deposit at Eagle Merchant Bank. This account at Eagle Merchant Bank, based on my best recollection was in the name of JCTC/Prolacto, this particular account, whereas the other account at the bank was in the name of Prolacto...

Q. Meaning the Commercial Bank?

A. On the contract one. On the contract one the funds came from JCTC to the Bank, 10 million, 5 million came to the bank and remained at the bank.

HIS LORDSHIP: That is the Commercial Bank?

WITNESS: That's the Commercial Bank, on contract one. On contract two the $39 million on receipt was forward to Eagle Merchant Bank where the certificate of deposit, term deposit was established and it was from that account that funds released from time to time. So Mr. Salmon again speaks to debiting the deposit account that is the only

account that could have been debited, there was no other funds.

Q. However, the reversal of the sum from Mr. Seaton's account which you authorized or you -- the one that you -- you first of all said that you froze the account?

A. The Board indicated that accounts should be frozen because it was in dispute.

Q. And then a sum which was in the vicinity of $15 million was or in excess of $15 million in value was removed from account number 101900561?

A. I won't speak to an account number...

[201] Though he stated these things none of the supporting documentation actually before the court showed any of this. As the evidence went on, Mr. Senior said that EMB confirmed that it had received the JA$39,717,675.00 but he had not actually seen any records from either EMB or ECB showing where the money was.

[202] The court will refer to another part of the evidence on this tracing issue. The bank sought to trace funds from the deposits which it says were deposited in Mr. Seaton's personal accounts. The evidence was weak. The attempted proof of this tracing the money commenced on November 11, 2011 in the morning and continued to November 15, 2011. On November 11 this happened. Mr. Senior was directed to the following:

(1) a letter dated May 7, 1991 from Mr. Seaton to Mr. Salmon at ECB directing him that Mrs. Valerie Cowan is to receive the equivalent of US$1,300,000.00 (bundle 3 page 144);

(2) an ECB cheque payable to Mrs. Valerie Cowan dated May 31, 1991 in the sum of JA$700,000.00 (bundle 3 page 152);

(3) an ECB cheque payable to Mrs. Valerie Cowan dated June 6, 1991 in the sum of JA$1.3m (bundle 3 page 152);

(4) an ECB cheque payable to Mrs. Valerie Cowan dated May 20, 1991 in the sum of JA$300,000.00 (bundle 3 page 151;

(5) a note from Mr. Salmon to Mr. Seaton dated May 28, 1991 saying he received from Miss Valerie Cowan a package said to contain US$88,000.00. There is a further writing on the document which says 'the above purchased at $15.50 to US$1.00' (bundle 5 page 35);

(6) an internal note by Mr. Salmon dated June 7, 1991, stating that deposit debited and delivered to Miss Valerie Cowan the sum of $2m re procurement of foreign exchange for importation of skimmed milk (bundle 5 page 51);

(7) an ECB cheque payable to Ricardo Reynalds dated June 7, 1991 in the sum of JA$700,000.00 (bundle 3 page 152);

(8) an ECB bank statement dated May 31, 1991 in the name of Mr. Seaton with account number 101900561 (bundle 10 pages 1, 2 and 3); directed to two deposits on page 3 in the sum of US$390.00 and US$87,610.00; and

(9) directed to June 30, 1992 letter written by Mr. Senior to the firm of Rattray, Patterson, Rattray (bundle 3 page 190).

[203] Mr. Senior was then asked if there was a correlation between cheques and his letter of June 30, 1992. He answered saying that the memorandum of May 7 might or might not have a relationship with the May 31 cheque. In relation to the memorandum speaking to the US$88,000.00, Mr. Senior said he was seeing it for the first time.

[204] The witness was also directed to an ECB bank statement for account number 101900579 in the name of Mr. Seaton (bundle 10 page 4). This showed that on May 28, 1991 there as a credit of US$87,610 and US$390. However page 3 of the same bundle (account number 101900561) also shows a credit of US$87,610 and US$390 on July 9, 1991.

[205] Mr. Senior said that this showed that Mr. Salmon had locked up the package in the vault or had somebody verify the contents and then deposited it to this account because they all occurred on the same day.

[206] The correlation was the memorandum from Mr. Salmon to Mr. Seaton dated May 28, 1991 and a deposit to Mr. Seaton's account in the sum of US$88,000.00 taking place on May 28. The problem with this analysis is that the memorandum speaks to receiving the foreign exchange and not giving it to Mrs. Cowan. Thus if Mr. Seaton's account received US$88,000.00 and the bank is saying that it received US$88,000.00 unless the argument is that Mr. Salmon got it and then placed in Mr. Seaton's account then the reality is that two sums of US$88,000 are being dealt with.

[207] Also the May 28 internal memorandum said purchased at $15.50 to US$1. This would suggest that Mrs. Cowan took the foreign currency to Mr. Salmon and got Jamaican dollars. No one has suggested that Mr. Salmon was making purchases on his own account. Following the bank's case theory, this would mean that Mr. Salmon was getting foreign exchange from Mr. Seaton for the milk powder purchase and the Jamaican dollar equivalent given to Mrs. Cowan to give Mr. Seaton.

[208] In respect of the memorandum for the JA$2m this was the evidence (bundle 5 page 51). There were these:

(1) a memorandum dated June 7, 1991 speaking to JA$2m being paid to Mrs. Valerie Cowan;

(2) an ECB cheque payable to Ricardo Reynalds dated June 7, 1991 in the sum of JA$700,000.00 (bundle 3 page 152);

(3) an ECB cheque payable to Mr. Seaton dated May 30, 1991 in the sum of JA$1,000,000.00 (Bundle 3/ page 151); and

(4) an ECB cheque payable to Mrs. Valerie Cowan dated June 7, 1991 in the sum of JA$1,300,000.00 (Bundle 3/ page 152).

[209] The problem here is that the time line is not consistent with the inference sought. The memorandum speaks to Mrs. Cowan getting the JA$2m on June 7 but the cheque in her name is dated June 7 and the one in Mr. Seaton's name is dated May 30. To get the JA$2m for June 7 one would have to add Mr. Reynald's cheque of JA$700,000.00 to Mrs. Cowan's JA$1.3m cheque. However this is inconsistent with the evidence. The evidence is that Jamaican dollars were being taken out of the deposit to purchase United States currency. The accounts of Mr. Seaton in view here are foreign currency accounts. There is no corresponding deposit into any of those accounts. The bank was seeking to take advantage of a mathematical coincidence of figures.

[210] Mr. Senior referred to an internal memorandum dated May 31, 1991. He said although it said credit money to an 'A' account he could not say whose account this was. In the final analysis Mr. Senior conceded that he could not speak with authority what became of the money taken from the deposit.

[211] Mr. Senior attempted to say that these sums of money came from EMB. He further theorised that since the memoranda were addressed to ECB then it must have been the case that the money came back from EMB to ECB. The problem is that there is no evidence to support this theory. It was intelligent speculation based on his experience.

[212] At first the impression was that Mr. Senior had actually seen the records from EMB. That turned out not to be the case. Mr. Senior ended up saying that the information he used to prepare the letter of June 30, 1991 setting out the calculations in respect of the second contract was supplied to him by EMB. He actually said:

> *I wouldn't have had access to it, They provided it. The tabulations in terms of dates, the amounts was not something I computed. It would have been Eagle Merchant Bank confirming receipt of the money, confirming the interest rate because those are the interest rates that they apply to the deposit and the gross interest that was also credited and the withdrawal from that account, and it is on that basis that this in then transported into this document.*

[213] In response to questions from the court Mr. Senior said that it was not the case that he got the records, did the examination, extracted the information and did his own independent calculations.

[214] There is this telling exchange between Mrs. Kitson and Mr. Senior during examination in chief. If nothing else it confirmed that Mr Senior did not see the original documents on which is letter on the second contract was based:

> *Q. However, what you say, sir, is that in order for you to have prepared this letter which appears at Page 190 and 191...*
>
> *A. That's correct.*
>
> *Q. ... you had records which enabled you to know how much the principal was and what was withdrawn?*
>
> *A. That would have been supplied to me by Eagle Merchant Bank, so they would have provided me with that*

information. 'Cause I wouldn't have had access to it. They provided it. The tabulations in terms of the dates, the amounts was not something I computed, it would have been Eagle Merchant Bank confirming receipt of the money, confirming the interest rate, because those are the interest rates that they apply to the deposit and the gross interest that was also credited and the withdrawal from that account, and it is on that basis that this is then transported into this document.

[215] Mr. Senior was relying on information provided to him by EMB in respect of the figures for the second contract. He never saw the records. He cannot speak to their accuracy. In fact he did not do the computations.

[216] Mr. Senior, in relation to the second contract, stated in the July 29, 1992 letter that an amount of JA$9,131,034.25 as the amount paid for the sole shipment which had an invoice price of US$716,300.00 (bundle 5 pages 40/41). When he was asked how he arrived at the exchange rate of JA$12.7475 he said that that was an imputed rate because ECB was not selling any foreign exchange at the time. After going through and identifying the documents Mr. Senior was asked by the court to demonstrate from the documents in evidence how he arrived at the exchange rate of JA$12.7475. Despite being taken again through various pages in the bundles the witness was simply unable to show how he arrived at the exchange rate.

[217] The consequence is that the bank has not demonstrated how it arrived at its calculations in relation to the second contract as stated in Mr. Senior's two letters of June 30, 1992 and July 29, 1992 (bundle 3 page 199 and bundle 5 pages 40/41 respectively).

[218] What may have provided some assistance for the bank is that Mr. Seaton said in his testimony that he replaced the foreign exchange he sent overseas to Prolacto

by using the Jamaican dollars to purchase foreign exchange to replace that which he had sent. However, the capacities in which Mr. Seaton had access to his accounts and that to which Prolacto has access were quite different. Mr. Seaton was an account holder in respect of his accounts. He held the accounts in his personal capacity. In respect of the deposit to which Prolacto had access, he was not the account holder. His access was either as an agent of EarthCrane or the human persona for EarthCrane. On this premise, it is not entirely clear what right the bank was exercising when it took the JA$15,254,583.69. It could not have a lien because the money in Mr. Seaton's account would be that of debtor/creditor with the bank being the debtor. The bank cannot have lien over its own money. It could not have been a set off because Mr. Seaton was not the holder of the account to which Prolacto had access.

[219] The bank has submitted that it paid out money under a mistake. From the evidence there is no mistake. Mr. Salmon at all material times regarded Prolacto as the bank's client. The bank thought that it was to act on Prolacto's instructions regarding withdrawals from the deposit. This was not a mistake; it was what was agreed. The deposits were the sale price under both contracts and were intended to be used to secure foreign exchange to be sent to Prolacto. Mr. Salmon's actions, as found above, were those of the bank. Mr. Salmon's understanding was that Prolacto would have access to the deposits through its agent EarthCrane. Mr. Salmon knew that Mr. Seaton was the leading figure in EarthCrane. At no time was it ever the position that Prolacto would not have direct access to the deposit. The problem, if any, was that the bank did not ask EarthCrane or any of its agents to say what the rate of exchange was when persons were sent to collect the Jamaican dollar equivalent of foreign exchange sourced by EarthCrane. This is not a mistake.

[220] As Mr. Senior said, it appears that there were no rigid rules governing the operation of the deposit. The bank at all material times accepted that it would grant access to the deposit on EarthCrane's representations. This is not what is meant by mistake in this area of law. The arrangements left it up to EarthCrane to procure

foreign exchange at the market rate. There was no stipulation that EarthCrane would operate within a particular band or not exceed a stated rate. Full discretion was given to EarthCrane to negotiate and get the foreign exchange. On examining Mr. Salmon's letters it is too plain that he did not see anything odd about the arrangements. After all, foreign exchange was scarce and so one simply paid what the market rate was if one wanted it. At all times, ECB intended Prolacto to have full and unrestrained access to the deposit.

[221] The court wishes to say that there is another basis on which it would be prepared to say that the agreement between Prolacto and JCTC must have included Prolacto's direct access to the deposit. If the court were to find that there was no express agreement that Prolacto would have access to the deposit, the court would be prepared to hold that it was a necessary term of the contract in **Attorney General of Belize v Belize Telecom** (2009) 74 WIR 203. Lord Hoffman in **Belize Telecom** held at paragraphs 17 – 22:

> *The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.*
>
> ***[18]*** *In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument*

may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.

[19] *The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 2 All ER 260 at 267-268, [1973] 1 WLR 601 at 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:*

> *'[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without*

saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.' (Lord Pearson's emphasis)

[20] *More recently, in Equitable Life Assurance Society v Hyman [2000] 3 All ER 961 at 970, [2002] 1 AC 408 at 459, Lord Steyn said: 'If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting.'*

[21] *It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer--the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on--but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*

[22] *There are dangers in treating these alternative formulations of the question as if they had a life of their own. Take, for example, the question of whether the implied term is 'necessary to give business efficacy' to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word 'business', is that in considering what the instrument would have meant to a*

reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which Equitable Life Assurance Society v Hyman [2000] 3 All ER 961, [2002] 1 AC 408 was decided. The second, conveyed by the use of the word 'necessary', is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.

[222] The court has set out this rather long passage to reinforce the point that when considering a contract it is not what the parties meant but what a reasonable person who had the relevant information and was in the position of the parties. The reasonable person would consider whether one interpretation would give effect to the contract or frustrate the business purpose. The court has already set out what it concludes were the terms of the agreement between JCTC and Prolacto and has indicated how the terms were arrived and the effect of them in terms of the price per metric tonne. The other part of the background is that this was an international sale and as stated already, having regard to that fact the court must insist on the payment mechanism being honoured and it is not open to the seller to change the terms without agreement from the buyer. Other background is the shortage of foreign exchange. The seller was to have his payment in foreign exchange. The seller agreed to accept Jamaican dollars. The commercial context meant that JCTC was under an obligation to provide Jamaican dollars so that the seller could buy foreign exchange which would be sent to him as payment for the goods shipped. The price was never quoted in Jamaican dollars and no one has suggested that the seller was to get Jamaican dollars with no possibility of getting foreign exchange. There is no

evidence that Prolacto had any other business in Jamaica that would make Jamaican dollars of value to the company and so it cannot be said that they would have simply taken the Jamaican dollars without trying to convert it to foreign currency. A necessary term of the contract had to be that the foreign exchange was going to be purchased from the Jamaican dollars deposited. It may be said that no document actually says this. This court would hold that this must be a necessary term of the contract if it was going to work. Parties do not make contracts with a view to them not working. There cannot be many persons who engage with each other by contract with the clear unstated intention not to perform. On the facts of this case and relying on **Belize Telecom** this court would hold that a reasonable person armed with the background knowledge reasonably available would have concluded that Prolacto would have had to have access to the Jamaican dollar to get paid.

[223] The court also concludes that the reasonable person would say that for the contract to work Prolacto would necessarily have to pay for the foreign exchange at market rates since part of the matrix of fact is that the BoJ had little or no foreign exchange to give to JCTC to make the payment for the milk powder.

[224] The conclusion then is that Prolacto had every right to use the Jamaican dollars to get the foreign exchange needed for it to be paid in foreign currency. This means that Prolacto had every right to permit its agent to use the money in accordance with Prolacto's instructions or within the boundaries permitted by Prolacto. RBTT has not established what these market rates were and indeed could not because it was never a party to the transactions between Prolacto's agents and the sellers of the foreign exchange. From the evidence Prolacto's agent was free to negotiate the exchange rate with whomever had foreign currency. In light of this it is difficult to see how RBTT can succeed in its overpayment claim. The court now turns to the theory of mistaken payments.

[225] The Judicial Committee of the Privy Council, on appeal from Jamaica, has laid down the legal ingredients necessary in a claim for recovery based on mistake of

fact. In **Dextra Bank & Trust Co Ltd v Bank of Jamaica** PCA 26/2000 (unreported) (delivered November 26, 2001), the Board held the claimant must identify (a) a payment made by him to the defendant; (b) a specific fact as to which he was mistaken and (c) a causal relationship between the mistake of fact and the payment of the money.

[226] From the analysis of the evidence, the bank did not make any payment that it considered it ought not to have made. The bank's understanding was that Prolacto would have access to the deposit. That was not a mistaken view. It was the correct view of the facts. If the bank acted on a correct understanding of the arrangement how then can it now be said that the bank was mistaken?

[227] The bank next advanced the proposition that the money in Mr. Seaton's account was recoverable on the basis of money had and received. The bank relied on **Bavins, Junr & Simms v London and South Western Bank Limited** [1900] 1 QB 270. The facts are that a railway company received payment by way of a document which was not a cheque under the Bills of Exchange Act. The railway company wanted to use this document to pay its debt to the claimant. The document was an order directed to a bank to pay the claimants the sum stated in the document on condition that it was signed. The document was stolen. At some point the document was presented to the defendant to be lodged to the account of one of its customers. The sum on the document was credited to the customer's account and the document was forwarded to the bank to which the order was directed. There was no evidence that the bank's customer knew that the document was stolen. The claimant notified the defendant that the document was stolen. At the time the bank was notified the money was still in the customer's account. The Court of Appeal held that the defendant received money that would properly have gone to the claimant and at the time the defendant received notice of the theft the defendant was still able to reverse the transaction from its customer's account. The defendant was therefore liable to pay over the face value of the document.

[228] In light of this court's finding of fact that Prolacto was intended to have access to the deposit through its agent EarthCrane then Prolacto cannot be held accountable to JCTC or ECB. The irony of the present position is that the bank, at one stage, hinted that Mr. Salmon's actions might not be attributed to the bank because he was acting contrary to what was understood. The bank has to advance this argument in order to recover the money. To get the benefit of **Bavins,** the bank has to say that JCTC was entitled to the money and ECB wrongly paid out the money contrary to JCTC's instructions. However, this position is completely contrary to the bank's understanding of the payment mechanism under the contracts as evidenced by Mr. Salmon's letters which consistently referred to and regarded Prolacto as its client. The **Bavins** case cannot help the bank. The claim for money had and received also fails.

[229] Factually, there is no proof that EarthCrane or any of the other defendants had any money taken from the account to which they were not permitted to take. The bank was acting on Prolacto's instructions as relayed by EarthCrane. There is also the testimony from Mr. Senior that the bank was not selling foreign exchange and so the exchange rates in the letters to Mr. Seaton from the bank outlining why the bank was demanding repayment of money were based on what Mr. Senior called the imputed rate. He simply divided Jamaican dollars by what he was told was the corresponding United States dollars to arrive at the exchange rate. He could not say whether the result of this division was in fact the exchange rate.

[230] Mrs. Kitson submitted that in respect of the sums paid under the second contract, the bank gave an undertaking to JCTC to pay over any money not paid to Prolacto and this money should attract interest. This undertaking meant, it was said, that ECB was under a duty to hand over the money when JCTC asked for it to be returned. However, that is not the totality of the evidence. The whole circumstance must be examined. The court has done that and cannot accept this submission.

[231] Mr. Seaton was busy converting the deposit to foreign exchange so that Prolacto would get its money whether it was sent directly by Mr. Seaton, or he would

advance his foreign exchange and then replace what was sent with purchases from the deposit or whether it would be used to establish a loc. Until the contract was terminated, Prolacto had full right of access to the deposit. The sale contract, as far as the documents go, did not say no payment until JCTC gave the go ahead. What has happened is that Mr. Seaton's enthusiasm for the task of converting to foreign exchange, perhaps, led to more money being taken out than milk powder arriving. On this basis, the bank's recourse is against Prolacto not Mr. Seaton or any of the defendants.

[232] The bank's claim in respect of the second contract fails.

Mr YP Seaton's claim - S252/1993

[233] It was in the cross examination of Mr. Seaton that the bank's case became somewhat clearer. A significant part of the cross examination was dedicated to saying to Mr. Seaton that he took money from the account when he had no legitimate reason for so doing. This has been dealt with earlier in the judgment and need not be repeated here.

[234] In answer to the court, Mr. Seaton stated that Prolacto would not ship any milk powder unless it had foreign exchange in hand. He stated he sent foreign exchange to Prolacto and would take money from the deposit to replace what he had sent. At another point he said that he took money from the deposits after the shipments arrived. Mrs. Kitson then put to Mr. Seaton that based on this explanation he would not need to be taking any money from the deposit until late November into December because the available evidence suggested that the first shipments under the first contract arrived in November. Learned counsel also suggested that based on his explanation there would be no need to be taking money from the deposit in September or October 1990 though he may have advanced money Mr. Seaton's position was that he only took money from the deposit after the shipments arrived in November.

[235] This suggestion by Mrs. Kitson has also been dealt with earlier and needs no repeating here.

[236] Learned counsel also suggested that Mr. Seaton requested money from the deposit whether or not shipments came. In the court's view, this suggestion was unfortunate because it is hinting that Mr. Seaton took money he knew he had no lawful authority to take. It hints at dishonesty. This was not the pleaded case of the bank. The pleadings did not raise dishonesty or anything of that nature. The suggestion was followed up with another which was that once the locs were established there would have been no need for Mr. Seaton to be taking any money from the deposit. This too has been dealt with earlier.

[237] The court accepts that Mr. Seaton's evidence is inconsistent in some respects particularly on how the deposit was utilised but the stubborn and undeniable fact is that it was he and he alone as the human persona of EarthCrane who provided any foreign exchange to fund the transaction. The implication of Mr. Senior's evidence is that even with the communication to Mrs. June Chuck regarding sending foreign exchange to ECB's account at BNY, there was in fact the unseen hand of Mr. Seaton securing the foreign exchange to make these transfers possible even if the documentation does not explicitly refer to his efforts. At the risk of repetition, Mr. Senior was the bank's witness.

[238] Mr. Seaton also kept insisting that ECB had no foreign exchange and that all the foreign exchange for both contracts were secured by him. Mr. Senior agrees with him. The bank cannot have it both ways. It cannot run with the hare and hunt with the hounds. It cannot rely on Mr. Senior when it's convenient and then wish to jettison him when his evidence undermines its case theory. The bank wanted the court to place a particular interpretation on the admittedly incomplete documentation. The bank insisted on taking Mr. Senior through all the documents in effort to enlist his assistance in advancing the desired interpretation. Mr. Senior did not do so on the question of how the foreign exchange was secured. Having failed there, the bank now wants to accuse Mr. Seaton of taking money from the deposit without reason; in

effect saying that he stole the money. In coming up with this suggestion the bank completely ignored Mr. Senior's testimony that it was EarthCrane acting through Mr. Seaton that got the necessary foreign exchange.

[239] Mr. Seaton has admitted to taking money from the deposit to replenish his stock of foreign exchange that he sent abroad. The bank sought to seize on this to assist in the tracing of the money. However, even on this basis, the bank cannot succeed in its effort to recover the alleged overpayments for the simple reason that Mr. Seaton's evidence is perfectly consistent with an explanation that Prolacto and he had the arrangement that led him to do what he did. The fact that he replenished his supplies is quite consistent with Mr. Seaton in his personal capacity taking his personal foreign exchange and handing it over to EarthCrane in its capacity as agent of Prolacto and Prolacto permitting EarthCrane to use the deposit to repay Mr. Seaton in his personal capacity.

[240] In addition, the burden of proof is on the bank to prove that the money was taken out without justification. It has been hampered in its proof because the bank has not proved, for example, the exchange rate at which the foreign currency was acquired under the second contract. The BoJ rate cannot be used because, as is common ground (now), the BoJ rate did not enable anyone to purchase foreign exchange. It was really a fig leaf which fooled no one.

The accounts

[241] Mr Seaton's claim concerns five accounts. The claim as pleaded in paragraph 7 of Mr Seaton's statement of claim is as follows:

102900024	US$39,608.24
101900579	£2,831.17
102900172	US$24,550.59

101900561	US$361,892.23
301900809 (CD)	US$65,880.22

[242] Mr Seaton also pleaded that the balances in the first four accounts were as at March 31, 1992 and the fifth was as at December 5, 1993. It is not clear the precise date these accounts were frozen. There is a letter from the bank's attorneys dated September 21, 1991 which made a demand for the sums sued for by the bank and added that the bank was advised that no further disbursements should be made from any account owned or controlled by Mr Seaton (bundle 5 page 44).

[243] In a letter dated July 31, 1996 Mr Seaton writes to the bank indicating that in respect of accounts number 102900024 and 102900172, he was informed lines were on the accounts and drafts could not be prepared (bundle 3 page 503).

[244] In another letter dated August 12, 1996, Mr Seaton is writing to the bank saying that he was informed on the same date that the funds previously withheld were now available. Despite this letter there is ample evidence showing that Mr Seaton got back most of the money by August 1996. There is a letter from Mr Seaton to the bank telling it that it should prepare drafts for account 102900024 in the sum of US$36,000.00 and account number 102900172 in the sum of US$29,000.00. He also received £3,000.00 from account number 101900579.

[245] Mr Seaton said he also got back the money on the certificate of deposit. The bank accepts that it took the money in account number 101900561 (US$361,892.23) and sum money from account number 102900024. As the court understands the case, it was the money taken from these accounts that made up the JA$15,254,583.69.

[246] Mr Seaton cannot recover all the money pleaded because he received some of it in 1996. He has not had returned to him US$361,892.23 and part of what was in account number 102900024. Mr Senior's evidence is that all of the US$361,892.23

(and at the time of the debiting the evidence was that the sum had risen to approximately US$369,190.62) were taken by the bank. Mr Senior's evidence raises the possibility that money was taken from other deposits held by Mr Seaton which were not pleaded. The case for the bank did not make any serious attempt to identify which accounts were debited and by how much. Mr Senior spoke of the bank taking the sum comprised of United States currency and Jamaican currency.

[247] Mr Senior testified that the sum taken by the bank in United States currency came from accounts 102900024 and 101900561. The sum taken from account number 102900024 was identified as US$9,173.50. He also said that even with these sums taken the bank was still approximately JA$6m short of the JA$15,254,583.69 that were taken. He was unable to say from the documentation before the court where the balance came from to make up the total taken from Mr Seaton's accounts. What he did say however is that he recalls that the JA$6m was taken from a certificate of deposit held by EarthCrane. However, EarthCrane has not brought a claim for recovery of money. In none of the communication available to the court did the bank identify which accounts were debited. The bank's pleaded case is that it debited the money from Mr Seaton's accounts on October 16, 1992 but did not plead which accounts were debited. It seems that based on Mr. Senior's evidence, EarthCrane should have brought a claim against the bank to recover the JA$6m. Mr. Senior was unable to say what exchange rate was used to convert the United States currency to Jamaican currency.

[248] In dealing with whether interest should be paid the Court of Appeal of Jamaica has dealt with the issue in **British Caribbean Insurance Company Limited v Delbert Perrier** (1996) 33 JLR 119. The court held 'where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld' (p 125 I – 126 A (Carey JA)). Carey JA approved the principle which stated that the rate should be that which the claimant would have had to borrow money in place of the money wrongfully withheld by the defendant (citing Forbes J in **Tate & Lyle Food & Distributions Ltd v Greater London Council** [1981] 3 All ER 716, 722, at p 126 A – E of **Perrier**).

Even though Forbes J's judgment was appealed all the way to the House of Lords no point was taken in either the Court of Appeal or the House of Lords on his Lordship's view regarding the way interest should be awarded.

[249] Mr. Seaton is to be awarded interest on the JA$15,254,583.69 certainly from the date it was taken to the date it is paid. The bank had admitted that it took the money from October 16, 1992 and to date it has not been repaid. Carey JA noted that the rate of interest should be a realistic one (**Perrier** p 127).

[250] The court has decided that there should be an accounting by the bank despite the fact that some of the money has been repaid. It has been noted that the documentary evidence placed before the court was incomplete. Even though it has been said by the bank that interest has been awarded on those sums which were returned to Mr Seaton it is not clear what rate of interest was used. It is also unclear which accounts the money was taken from by the bank to make up the JA$15,254,583.69. Mr. Senior spoke of money being taken from a deposit held by EarthCrane.

[251] Based on **Perrier**, Mr. Seaton is entitled to interest at a commercial rate on the accounts frozen even if they had interest paid on them because he was deprived of their use and would have had to borrow money to supply that which he no longer had access to because of the actions of the bank.

[252] Mr Seaton is also entitled to an accounting. At common law the remedy of account was limited to simple accounts. Equity took on the more complicated ones. By simple, it is meant those accounts that could be ascertained easily because the trial was before a judge and jury and so it was felt that very complicated accounts were unsuitable for a jury trial.

[253] Originally, an account in equity was only available in aid of an equitable right, that is, in the original jurisdiction of the Court of Equity. However, as time went on equity took on those accounts which arose in a common law context because the

Court of Equity's procedures were able to arrive at the true figure. When a bill was filed, the accounting party could be summoned before the Chancellor, examined on oath, asked questions, ordered to produce records which could then be examined in great detail by the Master and his clerks. This is shown by the case of **McIntosh v Great Western Railway Co** (1850) 2 Mac & G 74; 42 ER 29 where, despite the fact that the issues arose out of a common law action on a contract and not an equitable right, the court ordered an account because of the very complicated nature of the accounts.

[254] By 1848 Lord Cottenham LC could say in **North-Eastern Railway Co v Martin** (1848) 2 Ph 758 at 762; 41 ER 1136 at 1138:

> *The jurisdiction in matters of account is not exercised, as it is in many other cases, to prevent injustice which would arise from the exercise of a purely legal right, or to enforce justice in cases in which the Court of law cannot afford it; but the jurisdiction is concurrent with that of Courts of law, and is adopted because in certain cases, it has better means of ascertaining the rights of the parties. It is, therefore, impossible with precision to lay down rules or establish definitions as to the cases in which it may be proper for this court to exercise its jurisdiction. The infinitely varied transactions of mankind would be found continually to baffle such rules, and to escape from such definitions. It is, therefore, necessary for this Court to reserve to itself a large discretion, in the exercise of which due regard must be had, not only to the nature of the case, but to the conduct of the parties.*

[255] The power of the Supreme Court to grant the remedy of account in this case is found now in statute at section 48 (g) of the Judicature (Supreme Court) Act which states that:

> *The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms*

> *and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the parties respectively may be completely and finally determined, and multiplicity of proceedings avoided.*

[256] Since the fusion of the administration of law and equity the Supreme Court in the same claim can grant both equitable and legal remedies to which any party would be entitled if the claims were brought in the various common law courts and the court of equity before fusion. One of those remedies to which Mr Seaton would be entitled either at law or equity would be an account.

[257] The basis on which the remedy of account will be granted was stated by Dr Lushington in **Doss v Doss** (1843) 3 Moo Ind App 175 at 176 – 90; 18 ER 464 at 472:

> *…we cannot make a Decree, ordering them to account, without first determining that they are liable to pay if anything be found due, a decree for an account is not, as appears to have been assumed, a mere direction to inquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights, only leaving it to be inquired into, how much is due to him from the party accounting.*

[258] To receive the remedy of account, Mr Seaton has to establish that he is entitled to some money from the bank. That has been done. The bank has accepted that it took/ froze Mr. Seaton's deposits but it also says that it paid interest on the frozen accounts. It was not proved what rate of interest the bank used.

Apology and explanation for delay

[259] The number of the claim tells that it has been in the Supreme Court for twenty one years. The delay in delivering judgment since the evidence concluded nearly two years ago is regretted. It took nearly eighteen months to get all the transcripts which would have enabled counsel to prepare their submissions. Submissions were completed in September 2013 and the further delay arose because this court was assigned duties outside of Kingston for at least eight weeks. The delay is regretted and the court expresses its deepest regret to the parties.

Summary

[260] In respect of the bank's claim in CL 083/1993, the bank has failed to prove that it had any legal right to demand what has been described as overpayments from the defendants. There is no evidence that any of the defendants had any understanding with JCTC or the bank that any of them was acting in their personal capacity. EarthCrane was the agent of Prolacto. EarthCrane was at liberty to use Mr. Seaton or YPSACL as its agent to execute its obligations to Prolacto. The clear understanding was that Prolacto would have access to the deposit to purchase foreign exchange.

[261] There is no proof that there was any agreement indicating the exchange rate at which EarthCrane would purchase foreign exchange. None was set by JCTC under the sale agreement with Prolacto. Prolacto was therefore at liberty to use its best efforts through its agent to convert the deposit to foreign exchange.

[262] As far as the second contract goes there was no basis to take the JA$15,254,583.69 from Mr. Seaton's personal accounts. In relation to the deposits there was no relationship between Mr. Seaton and the bank that would support the view that the bank and Mr. Seaton had a regular banker/client relationship, that is to say, there was no evidence that in relation to the deposit Mr. Seaton had a debtor/creditor relationship. There was no evidence that Mr. Seaton placed any money in deposit and that the bank was obliged to receive cheques or bills of exchange for him or to honour drafts made by him. Therefore even if it could be said (and this is not being accepted) that the other accounts Mr. Seaton had at the bank were those of debtor/creditor that fact would not permit the bank to exercise any

common law lien or right of set off using the deposits for the simple reason that the deposit was not Mr. Seaton's personal deposit. He related to the deposits as agent of EarthCrane or the human face of EarthCrane.

[263] The Quistclose trust principles do not assist the bank because the deposits were actually being handled in accordance with what was agreed. The objective was met. The defendants were acting in accordance with what was understood regarding the use of the deposits.

[264] The bank did not make any mistaken payments. The bank clearly understood that Prolacto was to have access to the accounts. The bank understood that EarthCrane was the agent of Prolacto. The bank understood that Mr. Seaton would be the primary mover on the Jamaican end of the transaction regarding the deposits.

[265] The case of money had and received against the defendants has not been established. No evidence has been adduced to show that any of the defendants took out money which ought not to have been taken out. The best case for the bank is that Prolacto was not entitled to have access to the deposit. In respect of the tracing of money from the deposit to Mr. Seaton's accounts (which has not been satisfactorily proved), the bank has not shown that the agreement between Prolacto and EarthCrane was one that did not permit Mr Seaton to take money and get foreign exchange and place in his account in order to replace the foreign exchange he said he sent abroad to Prolacto. Mr. Seaton testified that that was method by which Prolacto received foreign exchange.

[266] The bank cannot simply say that there is money from deposit in Mr. Seaton's personal account so it is going to take it. The bank would need to show that Mr. Seaton was not entitled to the money having regard to EarthCrane's agency agreement with Prolacto. It may well have been the case that EarthCrane took Mr Seaton's personal foreign exchange and sent it to Prolacto or to establish locs and then permitted Mr. Seaton to replace that foreign exchange using money from the

deposit. If this is what EarthCrane did then until shown otherwise nothing is unlawful about this arrangement.

[267] Unfortunately the bank took an oversimplified approach to the issue and totally ignored that it had to carefully distinguish between the capacities the defendants were acting in relation to Prolacto, EarthCrane, to the bank and, very important, in relation to the deposit.

Disposition

[268] RBTT's claim against the defendants in CL E083/1993 is dismissed in its entirety and judgment entered for the defendants. There is no basis in fact or law for the claim for overpayment of any kind. There is no basis in fact or law to grant the declaration that the taking of the JA$15,254,583.69 was justifiable. The bank is to repay Mr. Seaton the full sum at an appropriate rate of interest which the parties are to make submissions on. The court desires a single rate of interest applicable over the entire period rather than multiple rates of interest over the twenty three years since the money was taken. The court is also inviting submissions on the period of time the interest should be paid.

[269] In respect of Claim S252/1993 judgment is entered for the claimant against the defendant. Mr Seaton is asking that this court grant the remedy of an account. He submitted, through his counsel that even though he has gotten back some of the monies initially frozen, he is not clear on the rate of interest the bank alleged that it used to calculate interest. He does know whether the rate of interest varied over the time. In respect of the JA$15,254,583.69 the bank admits that it took it is not entirely clear whether the bank took Jamaican dollars or United States currency and then converted it to Jamaican dollars.

Order

[270] The order of the court is as follows:

(1) Judgment for the defendants in Claim No CL1993/E083. Costs to the defendants to be agreed or taxed. The declaration sought by the bank is

refused. The JA$15,254,583.69 is to be returned to Mr Seaton with interest which is to be determined after further submissions;

(2) Judgment for the claimant in Claim No CL 1993/S252 with costs to the claimant to be agreed or taxed. The court will hear further submission on the basis of the costs.

(3) It is also ordered in respect of Claim No CL 1993/S252:

(a) The sum of JA$15,254,583.69 to be repaid to the claimant with interest from October 16, 1992 to date of repayment. Further submissions are to be made on whether the interest should be simple interest or compound interest;

(b) In respect of the accounts numbered

102900024

101900579

102900172

101900561

301900809 (certificate of deposit)

it is hereby ordered that:

(i) a mutual account of all dealings between the claimant and the defendant be taken by the Registrar in respect of each account starting with the balances as stated in 3 (b) (ii) (which were the sums pleaded) in order to determine:

a. whether interest was paid on each account and what that interest was and how the interest was arrived at and for what period of time;

b. whether the claimant received all the interest to which he was entitled between the time the account was frozen and the time he had access to it;

c. whether the claimant removed any of the monies standing in those accounts and if it did, when it did this and whether interest was paid on those accounts from which it removed the money from the time they were frozen up to the time the monies were removed.

(ii) the balances in respect of each account as of May 7, 1992 are:

102900024	US$39,608.24
101900579	US$2,831.17
102900172	US$24,550.59
101900561	US$361,892.23
301900809 (CD)	US$65,880.22

(iii) the claimant and the defendant are to produce before the Registrar all books, record of accounts, papers and writings in their custody or under their control including those books,

records of accounts, papers and writings regarding the accounts listed at 3 (b) and 3 (b) (ii);

(iv) in respect of paragraph 3 (b) (ii) the books, record of accounts, papers and writings referred to there may be in any form including but not limited to electronic form;

(v) in conducting this account the Registrar has the discretion to order the parties to produce any book, record of accounts, papers and writings as she sees fit in order to enable her to arrive at an accurate account;

(vi) the Registrar also has the discretion to order the parties to produce any other material that she in her discretion thinks may be of assistance in carrying out the taking of accounts;

(vii) the Registrar has the authority to make requests in writing to third parties who may have relevant books, records of accounts, papers and writings regarding the accounts listed at 3 (b) and 3 (b) (ii);

(viii) the claimant and the defendant are at liberty to agree any sum for any purpose of this account including the final due to Mr. Seaton and where the parties agree any sum for any purpose their agreement is final and conclusive and the Registrar cannot enquire into the accuracy of the figure agreed;

(ix) any sum arrived at by the Registrar whether as a result of agreement under 3 (b) (viii) or otherwise, shall be paid without any further order from the court.

(4) In respect of paragraph 3 (a) the parties, if not agreed, are to make further submissions on the rate of interest and whether interest should be simple or compounded.

(5) Liberty to apply

(6) Mr. Seaton's attorneys at law are to prepare, file and serve this order.