JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 100/99

COR: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	UNION BANK OF JAMAICA LTD formerly known as JAMAICA CITIZENS BANK LTD	FIRST DEFENDANT/ APPELLANT
AND	EAGLE MERCHANT BANK OF JAMACIA LTD	THIRD DEFENDANT/ APPELLANT
AND	NUNES RENT A CAR LTD	PLAINTIFF/ RESPONDENT

Michael Hylton, Q.C., Hilary Phillips, Q.C., Dmitri Singh and Nesia Warner instructed by Myers, Fletcher & Gordon for Appellants

Hugh Small, Q.C., and Raphael Codlin instructed by Raphael Codlin & Co. for Respondent

6th, 7th, 8th, 9th, 12th, 13th,14th, 15th, 16th, 19th June, 2000
& 6th April, 2001

FORTE, P:

I have read in draft the judgment of Langrin, J.A. and agree with his reasons and conclusion stated therein. Nevertheless, I add a few words of my own.

The issue revolves around the legal status of the proceeds of a cheque paid into the Jamaica Citizens Bank ("JCB") by Quality Car Rentals Ltd ("Quality"), the cheque having been issued by Eagle Merchant Bank ("Eagle") as a loan to "Quality" to purchase a number of motor cars from Nunes-rent-a-car, ("Nunes") the respondent. As detailed in the judgment of Langrin, J.A. JCB was instructed orally by Mr. Vaz the Chief Executive Officer of Quality as well as Mrs. Nunes to apply the sum of $225,000 to the purchase of five cars which were to be delivered immediately, and to place the balance of $220,000 on a fixed deposit with interest at 21%. If there was any doubt as to the instructions, the letter signed by Mrs. Nunes, a Director of Nunes, and the subsequent amended letter signed by Mr. Nunes, the Chief Executive Officer of Nunes made it absolutely clear that $220,000 was mandated to be put on a fixed deposit to await the delivery of the other cars. These cars, apart from two which were returned because of their unworthy condition, were never delivered and so Nunes, in the end, was never entitled to receive the $220,000 which JCB deposited to the loan account of Nunes. This action arose, obviously because JCB thereafter having called on Nunes without success to return the money, debited the account of Nunes which resulted in a debit balance in the account of the said amount ($220,000). As a result of Nunes' refusal to pay the amount, JCB thereafter exercised its powers of sale in a

mortgage held on property belonging to Nunes. This resulted in allegations of conspiracy between JCB, Eagle Merchant Bank and "Quality", an allegation which for the reasons advanced by Langrin, J.A. is not supported either on the facts of the case, nor on the law applicable thereto. In my view, the remaining five cars not having been delivered to "Quality" the balance of $220,000 became the subject of a resulting trust to the benefit of "Quality" who in the meantime was responsible for the payment back to Eagle Merchant Bank. As Nunes had no entitlement to the funds, it should never have benefited by the wrongful deposit of that sum into its account. Consequently JCB was entitled to recover the sum through debiting its account (See *Bavins & Sims v. London & South Western Bank, Limited* [1900] 1 QB 270). No acceptable argument has been advanced to suggest that JCB was not aware of the transactions between Nunes and "Quality" and the purpose of the loan by Eagle to "Quality": the circumstances clearly indicating that JCB had to have knowledge as it held the cars and the title to the property as security for amounts owed to it by Nunes. Mrs. Nunes and Mr. Vaz on their first visit to the Bank informed the Bank as to how the proceeds of the cheque should be applied and for what purpose. Instead, on its own insistence and with the apparent unilateral agreement of Mr. Nunes, the Bank applied

the balance of $220,000 of the funds to Nunes' account which was clearly inconsistent with the directions of Eagle and Quality.

I would therefore allow the appeal, vacate the order of the Court below and enter judgment for the appellants with costs to be taxed if not agreed.

BINGHAM, J.A:

I have read the judgment prepared in this matter by Langrin, J.A., as also the supporting comments made by Forte, P. I wish to state that I am in agreement with the views expressed in the reasoning of my learned brother and the conclusions reached by them.

I would however, because of the nature of the issues which the learned judge below had before him and, as this court is differing from the decision to which he came, to add a contribution of my own.

From the arguments advanced before us by counsel it became apparent that no issue was being raised as to the question in whom did the proprietary interest in the sum of Two Hundred and Twenty Thousand Dollars ($220,000.00) reside? The arrangement between Quality Car Rentals Limited ("Quality") and Nunes Rent a Car Limited, ("Nunes") was for the supply of ten cars in roadworthy condition for $445,000.00; this sum to be payable on delivery of all the cars. Five cars were to be delivered initially at a cost of $225,000.00; the remaining five cars to be delivered at some future date.

Quality was obtaining the financing for the purchase of these cars from Eagle Merchant Bank by a lease/loan agreement.

Both Eagle as the lender and Quality/Vaz as the borrower fixed with the obligation to repay the loan would have a beneficial interest in the proceeds of the cheque up to the moment in time that all the cars contracted for in the agreement were delivered in a roadworthy condition. As only five cars were

delivered, Nunes had no lawful entitlement to the balance of $220,000.00 unless and until they delivered the remaining five cars to Quality. The cheque was drawn in the manner in which it was, as Jamaica Citizens Bank had a lien on the cars which was to be removed once the payment for the five cars delivered was made to the bank. The cheque had been drawn and presented to Jamaica Citizens Bank on the clear understanding that it was to be used as payment for ten cars being acquired by Quality from Nunes.

The cheque was handed over to an officer of Jamaica Citizens Bank by Daryl Vaz and Mrs. Nunes on the clear instructions that $225,000.00 was payment for the five cars delivered and that the balance of $220,000.00 was to be held on deposit pending the delivery of the remaining five cars.

In light of these instructions to Jamaica Citizens Bank, and having regard to the bank's policy not to accept deposits on call, the proper course they ought to have taken was to have refunded the balance left over from the payment of the five cars to Eagle Merchant Bank as they were fully aware of the specific purpose for which the cheque was issued. What they had no authority to do was to utilize the money in paying off the outstanding loan on the Nunes Rent-A-Car account and enriching Nunes with the balance left over after the payment of the loan. This was so as the proprietary interest of Nunes in the proceeds of the cheque was limited to the $225,000.00 due as payment for the five cars delivered to Quality. Whereas it is arguable that the cheque having been made out to Jamaica Citizens Bank on the account of Nunes Rent-A -Car Limited, that the

legal ownership in the proceeds of the cheque was vested in Nunes, the beneficial entitlement was vested in Quality for the $220,000.00 representing the five cars yet to be physically delivered. At no time did the disputed funds belong to Nunes, based on the case as presented and as the learned judge below so found. The surrounding circumstances were such that it was indicated that the intention of the parties was that the balance of $220,000.00 from the proceeds of the cheque was fixed with a trust from the very moment that it came into the hands of the officer at Jamaica Citizens Bank. The money was presented to Jamaica Citizens Bank for a specific purpose, it was for a specific account, but was otherwise used. The Bank was fixed with actual notice of the circumstances surrounding the transaction, despite the written instructions on the cheque itself.

The learned judge below accepted the contentions of the appellants in finding that a trust was created in favour of Vaz/Quality and that there was a breach of trust committed by the Jamaica Citizens Bank contrary to the expressed wishes of the respondent. He found, however, that Nunes was in no way responsible for this breach.

As the case of **Barclays Bank Limited v *Quistclose* Investments Limited** [1968] 3 All E.R. 651 shows it is quite possible for legal and equitable remedies to co-exist in the same transaction, as in this case. Nunes had a legal right to $225,000.00 from the proceeds of the cheque and Vaz/Quality had an equitable or beneficial interest in the remainder ($220,000.00). When Jamaica Citizens Bank sought therefore to dispose of the entire proceeds of the cheque in the manner as

was requested by Nunes, (both the Bank and Nunes being trustees only of this sum), the effect of this action was to enrich Nunes unjustly at the expense of Quality. It would therefore be unconscionable for Nunes to deny the beneficial interest claimed by Quality. It would also have been wrong in those circumstances for the learned trial judge to conclude that Nunes was in no way responsible for the breach of trust committed by the bank when it was with his acquiescence that the entire proceeds of the cheque was utilized in the manner that it was.

Given the situation in which Jamaica Citizens Bank found itself they were now obliged to refund to Eagle Merchant Bank the $220,000.00 wrongly applied to the benefit of Nunes. As the Nunes were fully aware that they had no lawful entitlement to this money they were duty bound upon a lawful demand being made by their Bank to disgorge themselves of the sum in question. When they refused to do so, the Jamaica Citizens Bank was well within their rights under the relationship of banker and customer, to debit Nunes' account; and, upon Nunes defaulting to realize the security held on the mortgage of the respondent's premises at Lady Musgrave Road, putting up the security for auction.

On the premise that Nunes had no lawful entitlement to $220,000.00, when Jamaica Citizens Bank purported to act as they did in using part of the proceeds of the cheque to liquidate the loan owed by Nunes to the Bank and, to pay over the balance to Nunes, as there was no legal basis for this action, no

valid discharge of the debt due from Nunes flowed from the bank's action. The Bank was therefore fully justified in retaining and realizing the security.

Although the pleadings alleged a conspiracy between all the defendants to injure Nunes, the learned judge found that the predominant purpose of the conspiracy was to obtain a refund of the sum of $220,000.00 to Quality or Eagle.

He correctly applied the principle established by the decided cases that "if the real purpose of the conspiracy is to protect some legitimate interest of the conspirators it is not actionable unless unlawful means are used."

In **Crofter Hand Woven Harris Tweed Co. Ltd. v Veitch** [1942] A. C. 443 at 445; [1942] 1 All E.R. 142 **Viscount Simon L.C.** expressed it in the following manner:

> "It is enough to say that if there is more than one purpose actuating in combination, liability must depend on ascertaining the predominant purpose. If the predominant purpose is to damage another and damage results, that is tortuous conspiracy. If the predominant purpose is the lawful interest of the combiners (no illegal reasons being employed) it is not a tortuous conspiracy even though it causes damage to another person. (Emphasis supplied)

The learned trial judge referred to three acts which he found unlawful. These are all interrelated. If I am right in my reasoning that there was no valid discharge of the loan owed by Nunes to the Jamaica Citizens Bank by virtue of the fact that Nunes had no lawful entitlement to the sum of $220,000.00 then, as the decided cases show, a payment made to a customer's account in error (and in

this case to the full knowledge of Nunes he was not entitled to this money) can be corrected by the Bank by reversal of the entry in the loan account thereby reopening the loan account: (Vide in support ***Bavins and Sims v London and South Western Bank, Limited*** [1900] 1 Q.B. 270). See also Practical Banking and Building Society Law by ***Anu Arora*** [1997] at page 275 where the learned authors state:

> "A bank statement does not constitute a settled account and the bank is only estopped from reversing a payment credited to the account if the customer has changed his position relying on the statement. Hence so long as the credit entry remains capable of reversal, any money paid by mistake should be recoverable."

As the debt owed by Nunes to the Bank was therefore not lawfully discharged, Nunes was not entitled to a return of his securities from the Bank. It follows that upon his failure to comply with the Bank's notice to discharge the debt, the Bank's action in realizing the security was lawful.

I would for these reasons, concur with my learned brother that the appeal ought to be allowed in terms of the order proposed by the learned President.

LANGRIN, J.A:

This is an appeal against an award of $485,171,075.00 to the respondent for loss of cumulative profits in its business during the years 1985 to 1996 together with interest at 37% on the whole of the said sum from the 1st January, 1987 until the day when judgment was given - July 28, 1999. The respondent was awarded in addition the sum of $17,000,000.00 as compensation for the wrongful sale of its premises on October 28, 1986 on the ground that this sum represented the current value of the premises which had been sold for $265,000.00 in 1986.

In May, 1985 the respondent Nunes Rent A-Car Ltd. ("Nunes"), whose chief executive officer was Mr. Wayne Aspinal Nunes, carried on a car rental business at 27 Lady Musgrave Road, Kingston. Nunes had a loan account with Jamaica Citizens Bank ("JCB") secured by a mortgage registered under the Registration of Titles Act over the said premises and a lien on some cars. "Quality" Car Rentals Ltd. ("Quality"), whose Chief Executive Officer was Mr. Daryl Vaz, also carried on a car rental business and was a customer of Eagle Merchant Bank Ltd. ("Eagle"). "Quality" was the second defendant in the action but has not appealed.

At the material time, May, 1985, Mr. Nunes and Mr. Vaz on behalf of their respective companies arrived at an agreement for the sale by Nunes to "Quality" of ten (10) Toyota motor cars belonging to Nunes and pledged as security with JCB, for a purchase price of $445,000.00. It was further agreed between the parties that five cars

would be delivered and paid for right away in the sum of $225,000.00, the other five cars would be delivered at a later date and paid for on delivery.

"Quality" negotiated a loan with its bankers, Eagle to the extent of $445,000 with $225,000.00 to be disbursed in the first instance and a further $220,000.00 to follow when the remaining five cars were delivered.

Eagle's representative, Mr. Salmon advised that "Quality" should take a loan from the beginning for $445,000.00 because in view of the prevailing credit restrictions the balance of the funds required for the total transaction might not be available when they become due. Accordingly, Eagle gave Mr. Vaz a cheque for $445,000 payable to JCB for the account of Nunes Rent-A-Car.

Mr. Vaz took this cheque to Nunes explained why it had been issued for the amount of $445,000.00 and both agreed that it should be handed to JCB with instructions to place $225,000.00 to the credit of Nunes' loan account and the remaining 220,000 on a fixed deposit at call. Mr. Vaz accompanied by one Mrs. Carol Nunes, a director of Nunes took the cheque to JCB. There Mr. Vaz and Mrs. Carol Nunes spoke with an Assistant Manager, Mr. Phillip Bent. They explained the nature of the transaction between the parties and requested that the sum of $225,000.00 be appropriated to Nunes' account and $220,000 placed on fixed deposit.

Mr. Bent, the Assistant Manager indicated that this could not be done because the policy of the Bank was not to accept deposits on call. Therefore the entire amount would have to be credited to Nunes' account and the parties should make arrangements for the delivery of the cars. The parties were not satisfied. On the 1st July, 1985 Mr.

Nunes attended on Mrs Tucker Brown the Manager, who reiterated the policy of the Bank and added that her Bank had an obligation to release the securities for the cars to Eagle. She maintained her position and Mr. Nunes agreed to the disposal of the proceeds of the cheque as she had indicated. As a result the loan account of Nunes was closed and a cheque drawn for $99,793.49 being the balance remaining of the cheque for $445,000.00 was issued to Nunes.

The evidence is quite clear that Nunes did not complete the transaction. The first five cars were defective. Two more cars were delivered but were found to be unroadworthy and were returned. It should be observed that the judge gave judgment in favour of the second defendant, "Quality", on its counterclaim on the basis that the first five cars were defective requiring "Quality" to expend funds in repairing them.

In view of the fact that no other cars were delivered, "Quality" claimed recovery of the $220,000 that had been advanced. Eagle also claimed repayment from "Quality" of that portion of its loan on the ground that the agreed security of a lien on the five additional cars had not been provided. Initially, JCB through its Attorneys resisted the claim for the return of the amount of $220,000.00 to "Quality" on the ground that it had acted correctly in appropriating that amount to Nunes' benefit. Subsequently, however, JCB recognised that its actions in that regard was wrong.

JCB's change of position resulted from two letters dated October 10, 1985, one signed by Carol Nunes and the other by Mr. Nunes himself which were sent to JCB's attorney by Mr. Clough, "Quality"'s attorney.

On October 10, 1985 Mr. Vaz visited the offices of Nunes. He found Mrs. Nunes there. He had with him a letter which his attorney had prepared which he asked her to sign and she did. The contents of the letter were as follows:

> "Shop 14
> 35c Constant Spring Road
> Kingston 10
>
> Mr. Daryl Vaz
> "Quality" Car Rental Ltd.
> 7 Surbiton Road
> Kingston 10
>
> Dear. Mr. Vaz
>
> This is to confirm that your instructions to the Jamaica Citizens Bank were:-
>
> > 'To take $225,000.00 from the cheque of $445,000.00 as payment for five cars and put the remainder of the funds of $220,000.00 on deposit for eight days at 21%'.
>
> We gave Citizens Bank the same instructions as outlined above and at no time gave any other instructions. We are surprised that they have not refunded the amount of $220,000.00 plus interest to you as requested.
>
> Yours truly
>
> Nunes Rent-a-Car"

On seeing this letter, Mr. Nunes took objection to the last paragraph. He went to his own attorney who had another letter prepared. The last paragraph was deleted and a new sentence added which reads: "We are surprised they did otherwise". For clarity I set out below the full terms of the letter:

"Shop 14
35c Constant Spring Road
Kingston 10

Mr. Daryl Vaz
"Quality" Car Rental Ltd.
7 Surbiton Road
Kingston 10

Dear Mr. Vaz

This is to confirm that your instructions to the Jamaica Citizens Bank were:-

> 'To take 225,000.00 from the cheque of $445,000.00 as payment for five cars and put the remainder of the funds of $220,000.00 on deposit for eight days at 21%'.

We gave Jamaica Citizens Bank the same instructions as outlined above and at no time gave any other instructions. We are surprised that they did otherwise.

Yours truly

Nunes Rent-a-Car"

On the 11th October, Raymond Clough, "Quality's" Attorney, wrote to Mr. Jones, Attorney-at-Law for the first applicant's bank in the following terms:

"Mr. Derek Jones
Myers, Fletcher & Gordon
Manton & Hart
Attorney-at-Law
21 East Street
Kingston

Dear Derek

Re: "Quality" Car Rental Ltd.

I refer to our telephone conversation this morning.

I omitted a copy of the Affidavit originally signed by Mrs. Nunes,and enclose a copy herein.

When Mr. Nunes learnt that Mrs. Nunes had signed this letter he asked Mr. Vaz to bring it back. He then proceeded to strike out the words in the last paragraph:-

> 'We are surprised that they have not refunded the amount of $220,000.00 plus interest to you as requested',

and had a new letter typed which he took to his Attorney-at-law, a Miss Marie Miles, and signed same in her presence and the presence of our client.

I have the original of the letter signed by Mrs. Nunes, a copy of which is enclosed.

Yours sincerely
CLOUGH, LONG & Co.

Raymond A. Clough

c.c. Mr. Daryl Vaz
Dr. Paul Chen-Young"

The significant point of both letters emanating from Nunes is that having recited the instructions given by Mr. Vaz to JCB as to how the funds were to be appropriated they went on to indicate in the second paragraph:

> "we gave Citizens Bank the same instructions as outlined above and at no time gave any other instructions".

The learned trial judge's findings that these letters were obtained by an attempt to trick the plaintiff in authorizing a refund by JCB of $220,000.00 to "Quality" is not substantiated by the evidence.

In any event, regardless of the purpose for which the letter was obtained, JCB's reaction was reasonable. What matters is the effect the letter had on the persons to whom it was sent and whether that effect was reasonable or not.

In my view the letters serve to confirm the statements made to JCB when the cheque from Eagle was handed over. Any contrary view advanced by Nunes cannot be supported by the evidence.

Eagle wrote to JCB pointing out that contrary to the instructions of Eagle and Mr.Vaz, the full amount was credited to the account of Nunes and demanded that the matter be rectified immediately and if they did not hear from them in seven days they would have no alternative but to refer the matter to their attorneys.

Nunes was also threatening to institute legal proceedings against JCB. Nunes wrote to JCB indicating that the loan had been discharged and demanded that the collateral be released and they be given the registered title for the premises.

On December 18, 1985 a meeting was held involving Eagle, JCB, Quality and their respective attorneys, apparently in an attempt to decide how to proceed in resolving the matter.

In view of Nunes' admission in the letters of October, that JCB had received no instructions from either Nunes or "Quality" to appropriate the totality of the funds to

the benefit of Nunes, JCB was further advised by their legal representative that it was entitled to recover these funds from Nunes.

JCB therefore took the following steps:

(1) Reversal of the entry to the loan account in the amount of $220,000.00.

(2) Placed the said sum in a suspense account.

(3) Advised Nunes accordingly and requested payment of the sum secured by the mortgage.

(4) On the failure of Nunes to respond to the said demand, JCB exercised its rights under the registered mortgage by the sale of the premises.

The broad nature of the respondent's claim was that the original sale agreement was for the sale of ten (10) cars for the sum of $445,000.00 the cars to be delivered over a period of time. It was not an agreement for the sale in two stages with five (5) cars to be delivered and paid for and the other five (5) cars paid for when delivered. Further there was a valid discharge by JCB of the debt of the plaintiff. The plaintiff/respondent also argued before us that Mr. Vaz had no *locus standi* to give instructions to JCB pertaining to the cheque of $445,000.00. It was Eagle's money which was paid over and the cheque had no other qualification. He also argued that it was Nunes' evidence that a representative of JCB spoke to the Credit Manager of Eagle who had affirmed the transactions.

At the trial the judge made substantial findings; some of which I will state for clarity:

"Mr. Salmon of Eagle issued a cheque for the full amount of $445,000.00 payable to J.C.B. for the account of the plaintiff. This was done because of the prevailing credit restrictions which might have resulted in the unavailability of the balance of the funds if the transaction was done in two stages. He gave this cheque to Mr. Vaz who went with Mrs. Nunes to J.C.B. on 28th June, 1985 where they explained the nature of the transaction between the parties and requested that the sum of $225,000.00 be appropriated to the plaintiff's account and $220,000.00 placed on fixed deposit. Mrs. Bond, the Assistant Manager indicated that this could not be done because the policy of the bank was not to accept deposits on call. Therefore the entire account (sic) would have to be credited to the plaintiff's account and the parties should make arrangements for the delivery of the cars. The parties were not satisfied. On 1st July, 1985 Mr. Nunes attended on Mrs. Tucker-Brown the Manager who reiterated the policy of the bank and added that her bank had an obligation to release the securities for the cars to Eagle. She maintained her position and Mr. Nunes agreed to the disposal of the proceeds of the cheque as she had indicated.

As a result the loan account of the plaintiff was closed and a cheque for $99,793.49 being the balance of the cheque for $445,000.00 was issued to the plaintiff see Ex. 1 (39) which indicated that the loan was closed.

Mr. Salmon did not give any oral or written instructions to J.C.B to vary the written instructions on the cheque itself. The bankers indicate that the proper procedure would have been to send written instructions. J.C.B acted according to its policy. There was a valid discharge of the debt of the plaintiff. The duty of J.C.B was to release the collateral. This they refused to do. In response to a demand by Mr. Nelson, the plaintiffs attorney in Ex. 1(44) J.C.B. indicated by Ex. 1(51) that the refusal was due to the absence of the chassis numbers corresponding to the licence numbers of the cars sold to "Quality" as it had observed switching of licence plates by the plaintiff and not only among the cars in which it had lien. It is difficult to appreciate the interest of J.C.B

once the loan had been repaid. It was the duty of "Quality" to ensure that the numbers on the cars corresponded with the documentation. Eagle demanded a refund of $165,000.00 and then $225,000.00 from J.C.B.

"Quality" demanded a refund of $220,000.00

J.C.B instructed their Attorneys. Mr. Jones resisted the demands. A meeting was held on the 9th October, 1985 in an effort to resolve the dispute. It was not resolved. On the following day the 10th October, 1985, Mr. Vaz attended at the plaintiff's office with the Ex. 1 (68) indicating that "Quality" should be refunded the sum $220,000.00. Mrs. Nunes signed the letter in Mr. Nunes' absence but he was contacted and had the reference to a response deleted by his attorney, Ms. Miles who prepared another letter Ex.1(68) which Mr. Nunes signs. Mr. Vaz takes both letters to his attorney.

This was an attempt to trick the plaintiff into authorizing a refund by J.C.B of $220,000.00 to "Quality". The letters were sent to Mr. Jones by Mr. Clough, "Quality"'s attorney who correctly interpreted the letters. He said:

> 'This would seem to confirm the fact that Jamaica Citizens Bank acted contrary to the instructions of not only our client, but Mr. & Mrs. Nunes'.

Mr. Jones however interpreted the letters to mean that the plaintiff wished its account to be debited with the sum of $220,000.00 with interest. Mr. Nelson, plaintiff's attorney refuted this and pointed out that the letters stated what transpired at J.C.B on the Friday.

Mr. Jones said that the letters rendered the position of J.C.B. untenable. It had been relying on an understanding that the entire amount of $445,000.00 was to be paid to the plaintiff's account but Mr. Nunes had now said that the plaintiff should not have got the entire amount. It is difficult to appreciate this conclusion. His instructions ex. 1 (56) stated:

Miss Bond spoke with Mrs. Nunes and Mr. Vaz and indicated that the Bank was not accepting deposits on

> call, that the entire cheque would have to be credited to the account of its customer that both Mrs. Nunes and Mr. Vaz agreed to this procedure.
>
> Both letters ex.1 (66) and (68) state that your (Mr. Vaz) instructions to JCB were:
>
> > 'To take $225,000.00 from the cheque for $445,000.00 as payment for five cars and put the remainder of the funds of $220,000.00 on deposit for eight days at 21%.
> >
> > We gave J.C.B the same instructions as outlined above... we are surprised that they did otherwise".

The defendants now appeal from the judgment.

Mr. Hylton Q.C. and Miss Hilary Phillips Q.C., counsel for the appellants in the course of their helpful arguments submitted with force that the judge found correctly that the disputed funds belonged to the second defendant, "Quality" and there was a trust in its favour. It was also submitted that the judge erred in law in ruling that the payment of those funds into the plaintiff's account constituted a valid discharge of the debt and that the first defendant acted wrongly in reversing that entry and in exercising the power of sale.

As counsel for the appellants contended the mortgage could only have been validly discharged if J.C.B was entitled to appropriate the whole amount of $445,000.00 to the use of Nunes at the time when it purported to do so. If J.C.B was not entitled so to do but nevertheless did, whether through a misunderstanding of the facts or a misapprehension of the law, then there was no valid discharge of the debt. J.C.B. would

be entitled to reclaim the erroneous payment made for Nunes' benefit and to rectify Nunes' account in its books accordingly.

I accept these contentions. The evidence clearly established how the funds represented by the cheque of $445,000.00 were to be treated. The effect in law is that Nunes received the cheque for $445,000.00 and subject to it being applied in a particular way. The amount of $225,000 to be retained by Nunes while the remaining $220,000 to fall into its beneficial ownership at the time when the remaining five cars were delivered by Nunes and accepted by "Quality". If however, Nunes should fail to comply with its obligations it would have lost any claim to the beneficial ownership of the said sum and "Quality" would be entitled to reclaim the sum of $220,000.00 from J.C.B. The latter would in turn be entitled to recover the said sum from Nunes, to whose benefit it had been wrongly applied. Accordingly, a resulting trust has been created.

The above principle is clearly illustrated by the House of Lords decision in ***Barclays Bank Limited v Quistclose Investments Limited*** [1968] 3 All E.R 651. Here, the bank received funds from ***Quistclose*** for the account of a customer. The bank knew that the funds were on loan to the customer for the specific purpose of paying dividends in the customer's company. The company went into voluntary liquidation before the dividend was paid and while it was heavily indebted to the bank. ***Quistclose*** brought an action for recovery of the money from the bank. The House of Lords held that the bank held the funds on a resulting trust for ***Quistclose*** and the trust having failed, they were entitled to recover it. The fact that the money was in the customer's

name and account did not make it belong to the customer. The lender was entitled to recover the money from the bank as the terms on which the loan was made was such as to impress a trust in ***Quistclose*** in the event the dividend was not paid. Lord Wilberforce also pointed out that legal and equitable rights of remedies can co-exist in one transaction and there was no reason why the law should not give effect to the clear intention to create a secondary trust for the benefit of the respondent which would arise if the primary trust failed. The Court held:

> "(i) ...
> (ii) even if it were necessary to show that the appellants had notice of the trust, or of the circumstances giving rise to it, at the time when they received the money, the letter of July 15 and the prior phone conversation constituted sufficient notice, and they accordingly had such notice of the trust as to make it binding on them".

In the instant case the fact that J.C.B had knowledge of the purpose of the funds which was confirmed by the letters of October 10 and that purpose had not materialized, J.C.B was bound to regard "Quality" as the true owner of the remainder of the funds.

The trial judge sought to distinguish this case on the basis that in the instant case the breach of trust was committed by J.C.B contrary to the expressed wishes of Nunes who was in no way responsible for the breach. This apparent distinction is misconceived. A trust creates a right of property which is good against the whole world except a bona fide purchaser for value without notice. The fact that Nunes did not initiate the breach of trust cannot entitle Nunes to benefit from the trust. The purpose of the trust was well known to Nunes and JCB and neither could claim to be a bona

fide purchaser for value without notice. In any event there could be no enforceable agreement between Nunes and J.C.B. in relation to the application of the disputed funds since those funds did not belong to either of them. A significant factor would be the absence of any consideration due to the problem of delivery concerning the other five cars.

Mr. Hugh Small Q.C. examined the ***Quistclose*** case and submitted that in ***Quistclose*** there was a notice of specific purpose for which the money was to be applied. Specific instructions were given orally and then in writing and it was in those circumstances that the Court found that monies were impressed with a trust. He cited the case of ***John Frederick Law v Australian Elizabeth Trust*** 102 ALR 681 and adverted to the fact that the ***Quistclose*** case had been subjected to some amount of criticism. He observed that if the principles of trust were to be applied in this case then the settlor would have to be Eagle and, on the evidence and, on the findings of the learned trial judge, there was no communication by Eagle to JCB in relation to the cheque prior to the issuing of the cheque and the position ultimately taken by Eagle was taken long after the proceeds of the cheque had been disposed of in keeping with the written instruction on the cheque itself. The cheque was a mandate from Eagle for proceeds of cheque to be paid to JCB for the account of Nunes. There was, he concluded a valid discharge of debt owed to JCB on the loan account to Nunes.

I cannot accept these submissions. It is clear from the evidence and accepted by the judge that statements were made to JCB at the time when the cheque was being

delivered. However, there were written instructions subsequently, in the form of the letters of October 10 which made it abundantly clear that a trust was created.

In *W .P. Greenhalgh & Sons v Union Bank of Manchester* [1924] 2KB 153, a customer inadvertently instructed a bank to apply certain bills contrary to the terms of a private contract and the bank did so. The bank was later advised of the customer's error, but took no steps to rectify the accounts; the money was applied to clear the customer's overdraft. The court held that the bank, having received notice of the assignment under the private contract and instructions for a specific appropriation, ought to have rectified the account. At page 161 Mr. Justice Swift said:

> "If a person making a payment of money... states definitely that such payment is to be used for a particular purpose, and the person to whom it is made does not dissent, he accepts it for the purpose and must use it (unless and until otherwise instructed by the person who makes it to him) for the purpose for which he receives it; and if the purpose for which he receives it is to pay the money to a third party and that third party to whom he is told to pay it is informed of the fact that the payment has been made and that the payee is instructed to pay it to him, the third party is in law entitled to recover the money from the person into whose hands it has been put as money had and received for his own benefit. [Secondly] where two parties have contracted that money... of one in the hands of a third party shall belong to the other, there is an equitable assignment and such assignment of that money, is binding upon any third party who takes that money knowing of the equitable right..."

This case demonstrates quite clearly that where a bank on receiving funds is put on notice of the existence of third party rights, those rights are binding upon it.

In *Chase Manhattan Bank v Israel - British Bank (London) Ltd.* [1979] 3 All ER 1025 the Plaintiff bank mistakenly paid the sum of US$2,000,687.50 to another bank for the account of the Defendant, a bank in England. Before the error could be corrected in full, the Defendant bank was put in liquidation. The Court held that the Plaintiff was:

> "entitled in equity to trace the mistaken payment and to recover what currently represented the US$2,000,687.50 because (i) under English Law it had the right to do so since a person who paid money to another under a mistake of fact retained an equitable property in it and the conscience of the payee was subjected to fiduciary duty to respect the continuing proprietary interest."

It is clear that even if the payment was mistaken it could in equity be traced and recovered.

Again in ***Re Kayford Ltd .(2 Liquidator)*** [1975] 1 All AER 604. The Court went even further. The case concerned a mail order company whose customers paid in advance for goods when ordered. The company which was in financial difficulties decided to open up a special account (named Customers Trust Deposit Account) into which the money received with orders was paid. When the company went into liquidation, it was held that the money in this account was held on trust for the customers and did not form part of the company's assets available to meet the claims of other creditors. Megarry J noted at page 607:

> " I feel no doubt that the intention was that there should be a trust. There are no formal difficulties. The property concerned is pure personalty, and so writing, though desirable is not essential. There is no doubt about the so-called 'three certainties' of a trust. The subject matter to be held on trust is clear and so are the

> beneficial interest therein, as well as the beneficiaries. As for the requisite certainty of words, it is well settled that a trust can be created, without using the words 'trust' or 'confidence' or the like. the question is whether in substance a sufficient intention to create a trust has been manifested" (emphasis supplied).

Against this background Nunes was not entitled to have the mortgage discharged. But even if JCB had not reversed the entry and the mortgage had remained, discharged Eagle and Quality would have been entitled to claim an equitable charge over the property. They could have done so by relying on the equitable principles of tracing and subrogation.

Prima facie therefore, JCB was bound to reverse the entry in which it credited Nunes' account with the funds, and also not to release the securities to the plaintiff. It is standard banking practice that if funds are paid into an account in error it is lawful and proper for the reversal of the entry of these funds to be made. If securities are held in respect of an account in which a debt is still owed then these securities would not be released. It follows that if the securities are not released and the debt remains unpaid, then the powers of sale under the mortgage on the property can thereafter be exercised.

In ***Bavins and Sims v London and South Western Bank Limited*** [1900] 1QB 270, the Court of Appeal had to consider a case where a bank had credited a sum to the customer's account, which the customer was not entitled to. The person entitled to the funds sued the bank. Collins LJ said at page 276:

> "I am clearly of opinion that the defendants are liable for the amount for which judgment has been given against

> them upon the count for money had and received. They have wrongfully so dealt with a document belonging to the plaintiffs that they have received its full face value; and I think that the result is that the money so received by them by reason of that wrongful user of the plaintiff's document can be treated as money received by them to the use of the true owners of the document. That being so, what is the answer which the defendants set up to the claim of the plaintiffs for the money belonging to them which the defendants have in their hands? The only answer which they set up appears to be the fact that they have credited their customer with the amount of it. Apart from any other arguments, the answer which the plaintiffs' counsel made to this appear to me conclusive, namely, that a credit so given to a customer by a bank is in its nature provisional only, and depends upon the question whether the cheque or other document finally results in a right to recover and retain the money. The customer is only credited with the amount subject to the risk of that afterwards turning out not to be so. There does not appear in this case to have been any settlement of account between the defendants and their customer which debarred them from recovering from their customer the amount with which they had credited her. Consequently there does not seem to me to be anything which prevents the plaintiffs from recovering that amount from the defendants".

Reversal of an entry was not an unusual practice as demonstrated by the evidence in relation to the prevailing banking practice.

A payment made due to a mistake of fact or a mistake of law that results in the unjust enrichment of the recipient may be recovered. See ***Kleinworth Benson Ltd. V City Council*** [1998] 4 All ER 513.

Nunes having executed the two letters of October 10, which were clear and unambiguous he must be estopped from denying its content which formed the basis for the reversal of the entry: See ***Greenwood v Martins Bank Ltd.*** [1933] AC 51.

Further, Nunes' conduct in failing to respond upon being told of JCB's interpretation of the letters and the steps that would be taken amounted to acquiescence on his part.

In my judgment, JCB having had notice of the specific purpose for which the $220,000.00 was intended, namely the payment for the rest of the cars, it should hold the funds in trust for that purpose. When the trust failed in part they were obliged to return the funds to its rightful owners. As it stood Nunes was enriched unjustly at the expense of "Quality". It would therefore be unconscionable for Nunes to retain the benefit of the funds he received in light of his state of knowledge as to the purpose of the funds.

If my conclusion about the resulting trust is wrong it remains to be considered whether there was a conspiracy.

In ***Lohrho plc v Fayed and Others*** [1991] 3 All E.R 303, Lord Bridge reviewed the authorities on conspiracy. At page 308 he cited ***Sorrel v Smith*** [1925] A.C. 700 at 712; [1925] All E.R. Rep. 1 at 5 where Viscount Cave L.C. said :

> "... I deduce as material for the decision of the present case two propositions of law which may be stated as follows:
>
> (1) A combination of two or more persons willfully to injure a man in his trade is unlawful and, if it results in damage to him is actionable.
>
> (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues..."

He added (see pages 714 and 6 of the of the respective reports:

> "The second proposition of course, assumes the absence of means which are in themselves unlawful such as violence or fraud."

In ***Crofter Hand Woven Harris Tweed Co. Ltd. & Others v Veitch & Another,*** [1942] AC. 435 Viscount Simon LC said at page 445:

> "It is enough to say that if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortuous conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed) it is not a tortuous conspiracy even though it causes damage to another person."

The learned trial judge having rightfully found that the predominant purpose was to obtain a refund of the sum of $220,000 to "Quality" or Eagle there cannot in law be any conspiracy. JCB pursued its own legitimate interest to obtain the return of the monies which were credited to Nunes' loan account in error, and which formed the basis of a demand from Eagle and "Quality". The learned trial judge therefore fell in error when he concluded that there was a conspiracy to injure the plaintiff in its business.

There was a lively debate about the damages flowing from such a breach but in view of the conclusion to which I have come, it is not necessary for me to deal with that matter.

Accordingly, for the foregoing reasons the appeal should be allowed and the judgment of the Court below set aside with costs to the appellants to be agreed or taxed.

ORDER:

FORTE, P:

Appeal allowed. Order of the Court below as to the plaintiff's claim is set aside. Costs to the appellants both here and in the Court below to be taxed if not agreed.