Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. U-005 OF 1996

IN THE MATTER OF UNIVERSAL INVESTMENT BANK LIMITED [IN VOUNATARY LIQUIDATION]

A N D

IN THE MATTER OF THE COMPANIES ACT.

| | | |
|---|---|---|
| BETWEEN | UNIVERSAL INVESTMENT BANK [IN VOLUNTARY LIQUIDATION] | APPLICANT |
| A N D | LUDLOW LAWLA (on his behalf and on behalf of persons in Schedule) | FIRST RESPONDENT |
| A N D | MELVIN CHUNG | SECOND RESPONDENT |
| A N D | SANDRA CHUNG | THIRD RESPONDENT |
| A N D | SOCIAL DEVELOPMENT COMMISSION | FOURTH RESPONDENT |
| A N D | GODFREY KAWASS | FIFTH RESPONDENT |

Mr. Gordon Robinson and Miss S. Moss instructed by Nunes, Scholefield, DeLeon and Company for Applicant.

Mr. R. Henriques Q.C., and P. Bailey for first Respondent.

Mr. R. Henriques Q.C., and Miss D. Gentles for second and third Respondent.

Miss Hillary Phillips and L. Pusey for fourth Respondent.

Mr. J. Vassell and Miss C. Aina for fifth Respondent.

HEARD: 18th and 23rd July, 1996
28th October, 1996, 5th
6th, 7th March, 1997 and
5th December, 1997.

IN CHAMBERS

**ELLIS, J.**

By an Originating Summons of 3rd May, 1996 the applicant (in liquidation) seeks the Court's directions on and the determination of the questions set out below.

It is not necessary to set out the questions 1, 2, 3, 9 and 12 they having been settled by prior orders. I am required to consider paragraphs 4, 5, 6, 7, 8, 10 and 11 of the Originating Summons listed below.

4. A Determination of the respective rights and interest of the Creditors, Investor Clients in the available assets available for distribution.

5. Directions for the resolution of any proprietary claims against any available assets or any part or parts thereof by the Creditors, Investor Clients or by any other parties.

6. Directions as to the status and effect on the liquidation of the following Orders made in Suit No. C.L.078/1995.

Godfrey Kawass vs Universal Investment Bank Limited

(i) The Mareva injunction granted on the 7th December, 1995.

(ii) The Judgment entered on the 29th December, 1995 in the sum of $34,398,747 with interest.

(iii) The Order for Sale of Lands made on the 5th February, 1996 in respect of 25 Hopefield Avenue, registered at Volume 1282 Folio 471 and premises known as Strata Lot numbered 27 registered at Volume 1285 Folio 569.

(iv) The Writ of Attachment issued against Eagle Commercial Bank Limited on the 26th March, 1996.

(v) The Writ of Attachment issued against Glen Abbey Limited on the 26th March, 1996.

7. Directions for the distribution of any assets available for distribution after the expenses of liquidation and of this application.

8. If so and so far as necessary, administration of any trusts affecting any available assets available for distribution.

10. That the following questions be determined:-

(i) Whether the available assets are held on trust for the investors and unsecured creditors or any and (if so) what trusts;

(ii) Whether the available assets are held on trusts for the benefit of the general body of creidtors of the applicant.

(iii) Whether the available assets are held on trust for any and (if so) what other person or persons, and on what terms.

11. That there be direction for the realisation and distribution of the available assets in accordance with any trusts determined herein.

Mr. Henriques Q.C., on behalf of the first, second and third respondents in his submissions invited the court to consider the legal aspects of the relationship concerning the rights and interest of creditors and investor client. One of two situations can be

concluded from such a consideration. It may be a relationship of banker and customer or that of a manager of clients' funds.

If a situation of banker and customer is concluded, the investors moneys would become the assets of the company and would be available to creditors in case of liquidation. In a situation of manager of clients' funds the moneys of those investors would not be assets of the company and would not be available to creditors upon a liquidation.

Mr. Henriques for the respondents whom he represents argues for the second situation. The 4th respondent supports the arguments advanced by Mr. Henriques Q.C.,

The 5th respondent through Mr. Vassell contends that he is a creditor of the Bank (in liquidation) and as such is entitled to be treated differently from the other respondents.

The Applicant operated a business of accepting funds from clients for investment. It had no licence to operate neither under the Banking Act nor under the Financial Institutions Act. It was therefore not an institution which took deposits. The relationship between the applicant and its clients was governed by an Investment Management Agreement.

How did the Investment Management Agreement affect the funds of the clients?

The respondents 1-4 say that the Investment Management Agreement made the applicant a trustee of the funds and was thereby charged with the obligation of investing the trust funds for the benefit of the investors.

They cite in support of their argument the cases of **Barclays Bank Ltd. v. Quistclose Investments Ltd. [1968] 3 W.L.R. 1097** and **Carreras Rothmans Ltd. v. Freeman Matthews Treasure Ltd. (in Liquidation) [1985] 1 All E.R. 155**.

In the Barclays case, a loan was made to a company for the specific purpose of paying dividends. The loan was paid into a special account in the Bank which had full knowledge as to the purpose of the loan. Before the purpose of the loan was effected the company went into voluntary liquidation. The Bank and the debtor company were suded by the lender who claimed that the amount loaned was held on trust for the purpose of paying dividends. That trust having

failed, the funds were held on a resulting trust on behalf of the lender.

The lender's claim was upheld in the House of Lords.

The Carreras case, although factually different from the Barclay's case, was decided on the principle that the money being held for a specific purpose it was held on trust and not for the defendant beneficially.

Each of the clients, those who placed money with the applicant simply said to the applicant here is my money to be invested according to the Investment Management Agreement.

I find that the investment of the funds according to the Investment Management Agreement is the particular purpose common to the decided cases and I also find that the Applicant/Bank had full knowledge of that particular purpose.

In those circumstances I am constrained to hold that the Investment Management Agreement affected the clients' funds by impressing them with trusts to invest those funds accoring to the Agreement and for the benefit of the clients.

The fifth respondent claims that his relation with the applicant was not governed by the Investment Management Agreement. He says that he had an intention to invest $57,000,000 under the Investment Management Agreement which would be subjected to mutually agreed variations. A guarantee from a commercial bank that the $57,000,000 would be repaid to the fifth respondent was one such variations. The amount of $57,000,000 was left with the applicant on the understanding that no investment or other dealing with it should take place until the guarantee was obtained. The fifth respondent did not sign the Investment Management Agreement and the guarantee sought was not obtained.

When he left his money with the Bank/Applicant it attracted a trust in his favour. The Bank/Applicant in spending his money as it did, was in breach of trust and entitles him to trace those funds.

He relied on **Barclays Bank Ltd. v. Quistclose Investment**; **Re: Brown exparte Plitt (1889) 60 L.T. 397** and **Taylor v. Plummer (1815) 3M and S.562** in support of his argument.

The fifth respondent argued that the cases of **Barlow Clowes International Ltd. v. Vaughn (1992) 4 A.E.R. 22** and **Re Eastern Capital Future Ltd. (In Liquidation) (1989) B.C.L.C. 371** are not to be held applicable to the present situation. He so argued because the investors in those cases knew that they entered into collective investment pools but in this case the investors were acquiring individual rights under the trust relative to the individual investment.

I am not able to agree with the fifth respondent's argument. I find that the conduct of the applicants business is not conducive to a finding that any contract was for the benefit of any particular client.

That finding allows me to conclude that each client including the fifth respondent takes from the mixture of the funds.

The case of **Brinks Ltd. v. Abo Saleh (1995) 1 W.L.R. 1478** emphasizes the point that mixed investors funds belong to the trust. I adopt and place reliance on the dictum of Mr. Justice Jacob cited by Mr. Henriques which is" "It is settled law that if a trustee mixes trust assets with his own in such a way that they cannot be sufficiently distinguished and treated separately, to the extent that it is not possible to distinguish them, they belong to the trust and the onus lies on the wrongly acting trustee to distinguish his money."

The arguments of the fifth respondent do not convince me that his funds can be distinguished from the mixture of funds.

Re: Property at 25 Hopefield Avenue

The first, second and third respondents through Mr. Henriques and the fourth respondent through Miss Phillips contend that the purchase of the above property was by the user of investors money as purchase price. Moreover, the purchase of the property was effected some time before the fifth respondent placed his money with the applicant.

The argument of these respondents is that the purchase money being trust funds could only be used to buy the property in trust for the investors. The applicant is not competent to use that property or the proceeds of its sale to liquidate his indebtedness

to fifth respondent.

Mr. Vassell for the fifth respondent, in opposition, relies on an exhibit "GK 3" attached to an affidavit of the fifth respondent and also paragraph 5 of Ogle's affidavit dated 20th February, 1997. He says the exhibited document shows that the purchase price of the Hopefield property came from fifth respondent's money and therefore the fifth respondent has a right to trace that money to the property.

I do not find that fifth respondent's argument has done any violence to the first, second, third and fourth respondents' contention.

There has been no challenge to the statement that the investors funds were used to the purchase of 25 Hopefield before fifth respondent placed funds with the applicant Bank. The fifth respondent has no right to trace as he contends.

The fifth respondent submits that in the light of his argument the court should direct the liquidation to the following effect:

1. That the fifth respondent is beneficially entitled to recover $34,000,000 from the Banks assets. It is entitled to trace $5,748,395 to the Hopefield property and $16,000 into shares purchased on behalf of the Bank and $8,240,211.24 into shares purchased by Paul Chen Young and Company. A fortiori, the fifth respondent with regards to a balance of $10,000,000, has a charge over the assets of the Bank and is thus entitled to be paid that amount in priority to the investors.

2. That the fifth respondent tracing rights to Hopefield property and the shares would exist separate from the investors trust property but he should be allowed to trace, the balance due to him, into the remaining assets of the Bank rateably with the investors.

3. The secured creditors should be allowed either to realize their security or to surrender the security and prove their claims as unsecured creditors. And in all they should be dealt with in the manner advocated by Mr. Henriques.

distribute the assets available for distribution according to the law of trusts. In so doing the liquidator may make such declarations, take such accounts, make such enquiries and give such directions as may be conducive to the proper process of liquidation. This statement deals with paragraphs 7-10 of the Originating Summons.

The liquidator is directed to realize any available trust property wherever situate and to distribute such property in keeping with the trust.

Liberty to apply.

I must reject the submissions by Mr. Vassell at 1 and 2. I do so in reliance on the cases of **Space Investments Ltd. v. Canadian Imperial Bank of Commerce Trust Company (Bahamas) Ltd. (1986) 3 All E.R. 75; Re Eastern Capital Futures Ltd. (In Liquidation) (1989) B.C.L.C.** and **Brinks Ltd. v. Abo Saleh (1995) 1 W.L.R. 1478**.

In the relation to paragraph 4 of the Originating Summons it is my decision that the applicant Bank held money of the investor clients on trust for the investor clients under the Investor Management Agreement. The liquidator with regard to these persons, is to accord them priority in payment of their money over other creditors.

Where there are secured creditors they are not beneficiaries under any trust and rank after the investment creditors in the distribution of assets by the liquidator.

These secured creditors cannot avail themselves of securities which were acquired by trust funds unless they had no notice of the trust.

Other creditors not investors, can only share in the Bank's assets after claims of investors under the Investor Management Agreement have been satisfied.

The determination on paragraph 5 of the Originating Summons is contained in the above. But to be absolutely clear as regards to the fifth respondent he has no proprietary claim and is a creditor and is to prove as such on liquidation.

The directions as to paragraph 6 are as follows:

(a) The Mareva Injunction of 7th December, 1995 is only of efficacy if it is attachable to property owned by the Bank.

(b) The factual situation in this case suggests quite strongly, that all property and funds are impressed with a trust for investor clients.

(c) In that case the Mareva Injunction is of no avail.

(d) All the consequences which flow from Mareva Injunction therefore fail.

The liquidator after payment of expenses and costs, is to