

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV NO. 2010 -02290

**IN THE MATTER OF THE SECURITIES INDUSTRY
ACT, CHAP. 83:02 OF THE
LAWS OF TRINIDAD AND TOBAGO**

AND

**IN THE MATTER OF SECTIONS 53(1), 64(2), (65) 1, 69, 82(b),
140 (2) and 144 OF THE SECURITIES INDUSTRY ACT, CHAP. 83:02**

BETWEEN

TRINIDAD AND TOBAGO SECURITIES AND EXCHANGE COMMISSION

Claimant/Applicant

AND

LAWRENCE COLE

First Defendant

ALPHA SAVINGS AND TRUST LIMITED

Second Defendant

FLAGSHIP FINANCIAL INVESTMENTS CO-OPERATIVE SOCIETY

Third Defendant

SAFE HOLDINGS AND TRUST LIMITED

Fourth Defendant

CHRISTIAN CREDIT UNION CO-OPERATIVE SOCIETY LIMITED

Fifth Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances

Mr. C. Kangaloo instructed by Ms. M. Regrello for the Claimant.

Mr. D. Hannays for the Defendants.

JUDGMENT

1. The Claimant, the Trinidad and Tobago Securities and Exchange Commission, “the Commission” is a body corporate established under **Securities Industry Act Chap. 83:02** “ the Act”. The Commission's functions include:

- (i) the maintenance of surveillance over the securities market and ensuring orderly, fair and equitable dealings in securities in Trinidad and Tobago: **section 5(b)**; and
- (ii) the registration, authorisation or regulation, in accordance with the Act, of self-regulatory organisations, securities, companies, brokers, dealers, traders, underwriters, issuers and investment advisers, and the control and supervise their activities with a view to maintaining proper standards of conduct and professionalism in the securities business: **section 5(c)**.

2. By **section 6** of the Act, for the purpose of discharging its functions, the Commission is empowered to:

- (i) take action against persons registered under the Act for failing to comply with the terms of the Act;
- (ii) monitor the insolvency of the persons registered under the Act.
- (iii) take measures to protect the interests of customers when the solvency of any person registered is in doubt; and
- (iv) all such things, which may be necessary or expedient or incidental or conducive to the discharge of any of its functions and powers under the Act.

3. This action was commenced by a fixed date claim. Pursuant to an interim relief sought the Commission obtained an order authorising it, by its officers, employees and authorised agent, PricewaterhouseCoopers, to examine the records and financial affairs of the Defendants herein. The order also provided for disclosure by the Defendants of information relating to the investment of funds on behalf of members of the public. Injunctions were also granted, which among other things, prevented the Defendants from soliciting investors for the purpose of investing in unregistered securities and dealing with selling or distributing such securities. As well by the said order the Defendants were required to file affidavits disclosing the value and location of their assets in Trinidad and Tobago.

4. In support of the claim the Commission has filed two affidavits of Raphael Romany, the Adviser-Enforcement in the Legal Advisory and Enforcement Division of the Commission. The first affidavit refers to complaints made by members of the public against the Defendants; annexes documents presented to the Commission by members of the public and indicates the results of searches made in various registries in Trinidad and Tobago with respect to the Defendants. As a result of the information presented to it and disclosed by the said affidavit the Commission concludes that:

- (a) the First, Third and Fourth Defendants are in contravention of section 53(1) of the Act in that they are not registered to effect transactions in securities for the accounts of others and/or to carry on the business of trading in securities on behalf of others and /or the Defendants;

- (b) the Second Defendant is in contravention of section 53(1) of the Act since it is not registered with the Commission as a broker to engage in the business of effecting transactions in securities for the account of others;
- (c) the Third and Fourth Defendants are in contravention of section 64(2) of the Act since they have issued “Certificates for Bond Market”, “Certificates for Investments” and “Certificates for Loan Investment” to members of the general public in Trinidad and Tobago and in Suriname;
- (d) the Third and Fourth Defendants are in contravention of section 65(1) of the Act since “Certificates of Bond Market”, “Certificates for Investments” and “Certificates for Loan Investment” issued by them are not registered with the Commission as securities;
- (e) the First, Second, Third and Fourth Defendants are in contravention of section 69 of the Act which requires that the prospectus or block distribution circular be filed with the Commission and the receipt of such filing issued by the Commission in order for a person to distribute a security;
- (f) the First, Second, Third and Fourth Defendants are in contravention of section 82(b) and/or 82(c) of the Act since persons were guaranteed the principals invested and interest at agreed rates but have had difficulty in recovering same on maturity and there is no evidence that investor’s money were invested in shares, and on the bond

market as indicated by the First Defendant thereby suggesting that the investments were never made;

(g) there is some material interconnection between the Fifth Defendant and the other four Defendants and the Fifth Defendant may therefore be engaging in activities in contravention of the Act.

5. The second affidavit revealed the results of a public advertisement inviting a response by members of the public who may have invested or had any financial dealings with any of the Defendants herein. Among other things this second affidavit reveals that sums in excess of \$36,000,000.00 had been invested with the Second to Fifth Defendants. Of that sum only approximately \$64,000.00 had been recouped by the investors. As well these investigations revealed that approximately \$200,000.00 had been borrowed from Defendants Three and Five and there were 13 judgments registered against one or the other of the Defendants, save the Third and Fifth, for sums well in excess of \$23,000,000.00 TT.

6. By this action the Commission alleges that the Defendants have contravened sections 53(1); 64(2), 69, 82(b) and/or 82(c) of the Act. **Section 53(1)** of the Act provides that, subject to the Act, no person shall carry on business or hold himself out as a broker; an investment adviser; a dealer in securities; a trader in securities; an underwriter of securities or a securities company, unless registered as such with the Commission in accordance with the Act and except in the case of an underwriter or an investment adviser that person is the holder of a valid license by a self-

regulatory organization ie an association of securities companies, a clearing agency or a securities exchange, including the Stock Exchange.

7. **Section 64(2)** of the Act requires a person who proposes to issue securities to the public to register with the Commission as a reporting issuer and file a registration statement in the prescribed form within the prescribed time. **Section 69** provides that, subject to section 70, no person shall distribute a security unless a prospectus or a block distribution circular has been filed with the prescribed fee and the receipt therefor has been issued by the Commission.

8. By **section 82(b) and (c)** of the Act no person shall directly or indirectly in connection with the purchase or sale of any security engage in any act, practice or course of business which operates or would operate as a fraud or deceit on any person: **section 82(b)** or make an untrue statement of a material fact or omit to state a material fact with the intention to mislead: **section 82(c)**.

9. On the 16 June 2010, pursuant to an order made in this regard, a statement of case was filed by the Commission. By and large the statement of case alleges the facts and repeats the contentions contained in the first affidavit of Romany. In addition by the statement of case the Commission certifies that on 17 May 2010 it (i) considered the facts of the complaints received concerning the Defendants (ii) considered that the Defendants were in contravention of sections 53(1); 64(2), 65(1),and 82(b) of the Act and(iii) concluded that it was necessary in the public interest and for the protection of investors to prevent the Defendants from dealing with the property under their control or direction , namely the investments and or deposits obtained from

investors and or the proceeds thereof; and (iv) agreed to apply to the courts for relief pursuant to sections 140(2); 144 and 145 of the Act.

10. As well, pursuant to orders of this court two reports by the accounting firm of PricewaterhouseCoopers were also filed in this action. These reports referred to and identified among other things possible areas of infringement of the Act by Defendants Two to Four and some level of interconnectivity between Defendants One to Four.

11. Despite being given ample opportunity to do so the Defendants have not, by way of affidavit or at all, disputed any of the facts placed before the court. The allegations of fact contained in the affidavits of Romany and the reports of PricewaterhouseCoopers are therefore undisputed. As well the Defendants have failed to file any defence to the action.

12. In defence of the claims against them the Defendants submit however that:

- (i) no allegations have been made against the Second Defendant or the First Defendant in the statement of case;
- (ii) the report provided by PricewaterhouseCoopers makes no mention of any breaches of the Act by any of the Defendants; and
- (iii) the Third and Fifth Defendants being co-operative societies registered under the Co-operatives Societies Act the Commission has no jurisdiction over them;

13. Insofar as the First Defendant and Second Defendants are concerned the statement of case alleges that:

- (i) both Defendants are in contravention of section 53(1) of the Act since they are not registered to effect transactions in securities for the accounts of others and/or to carry on the business of trading in securities on behalf of others and/ or the defendants;
- (ii) the Second Defendant is in contravention of section 53(1) since it is not registered with the Claimant as a broker to engage in the business of effecting transaction in securities for the account of others;
- (iii) both Defendants are in contravention of section 69 of the Act which requires that the prospectus or block distribution circular be filed with the prescribed fee and the receipt of such filing be issued by the Commission in order for a person to distribute a security;
- (iv) both Defendants are in contravention of section 82(b) and/or 82(c) which prohibits the use of any act, practice or course of business which operates as a fraud or deceit on any person and/or which prohibits a person from making any untrue statement of a material fact or omit to state a material act with the intention to mislead since persons were guaranteed the principals invested and interest at agreed rates but have had difficulty in recovering same on maturity. Further there is no evidence that the investors' money was invested in shares and on the bond markets as indicated by the First Defendant.

14. Insofar as the reports provided by PricewaterhouseCoopers is concerned in my opinion both reports merely seek to place before the court facts upon which the court is asked by the Commission to determine whether there have been breaches of the Act by any of the Defendants. The fact that the reports may not specifically refer to the provisions of the Act is in my opinion therefore immaterial. It is for me to determine, on the evidence presented by the reports and otherwise, whether breaches of the Act by the Defendants have been disclosed.

15. It is not in dispute that both the Third and Fifth Defendants are credit unions duly registered under the Co-Operatives Societies Act Chap. 81:03. While the Co-operatives Societies Act establishes the office of the Commissioner of Co-operative Development and gives that Commissioner general powers of supervision of the affairs of societies, including credit unions, registered under the Act, the Act does not provide for the Commissioner of Co-operatives Societies to have exclusive jurisdiction over such societies save in one instance.

16. **Section 67 of the Co-operative Societies Act Chap.81:03** gives the Commissioner of Co-operatives the exclusive jurisdiction to deal with disputes touching the business of the society between members, past members and persons claiming through members and the society its board or any officer of the society; the society or its board and any officer of the society; the society and any other society or the society and any of its creditors. In my view, not only does the instant case not fall within the definition of a dispute, but the Co-operatives Societies Act does not purport to exclude a statutory jurisdiction which is regulatory in nature and in particular the jurisdiction of the Commission exercising any of its functions pursuant to section 5 of the Act.

17. In my opinion therefore the submissions of the Defendants have no merit.

18. What then is this court to do? **The Civil Proceedings Rules 1998, as amended**, (“the CPR”) allows a court to give summary judgment on a claim if it considers that the defendant has no realistic prospect of success on his defence to the claim: **Part 15.2**. While this rule provides for an application in this regard to be made by the claimant, by **Part 15.4** of the CPR, the court may exercise its powers without such application at any case management conference. In any event, this action was commenced by fixed date claim. It seems to me that it is open to a court on a fixed date claim to make a final determination at an adjourned date without necessarily going to trial. In the circumstances, it is open to me at this stage to consider whether I ought to grant the reliefs sought by the Commission on the claim before me.

19. There has been no defence filed by any of the Defendants challenging the allegations made in the statement of case. In accordance with the Court of Appeal decision in **M15 investigations Ltd v Centurion Protective Agencies Ltd. Civ. App No. 244 of 2008** I am entitled to treat the allegations made in the statement of case as undisputed or the defence as containing no reasonable defence to these allegations.

20. The question that remains to be answered is to what relief is the Commission entitled in the circumstances. There has been no challenge to the evidence filed on behalf of the Commission including the information placed before the court by the reports of PricewaterhouseCoopers. I accept the submissions of the Commission that the documents issued by the Defendants by whatever named called are securities under the Act. The undisputed allegations contained in the

statement of case apart I find that there is evidence before me of (a) breaches of sections 53 (1), and 82(b) of the Act by the First, Second, Third and Fourth Defendants; and (b) breaches of sections 64(2) and 65(1) of the Act by the Third and Fourth Defendants.

21. Insofar as section 69 is concerned while there is no evidence from the Commission as to breaches, given the failure to dispute that allegations in this regard made in the statement of case I am prepared to make the declaration sought with respect to this section. The Commission is therefore entitled to declarations in this regard. Given the wording of section 82(c) of the Act I am however not prepared to make the declarations sought with respect to breaches of this section on the evidence before me.

22. In addition the Commission seeks a declaration that the documents called “Certificate for Loan Investment”; “Certificate for Investment”; “Certificate for Bond Market” and “Certificate for Security Investment” issued by the Third and the Fourth Defendants, are illegal, null and void and contrary to section 65(1) of the Act. In my opinion on the evidence before this court the Commission is entitled to such a declaration. As well I am of the opinion that on the evidence the Commission is entitled to a declaration that the Defendants have not complied with, and are not complying with the Act with respect to investment business activities with members of the public.

23. I am satisfied that in furtherance of the declarations the Commission is entitled to an order that the issuance of a security by any of the Defendants be cancelled and an order rescinding any transaction entered into by any of the Defendants relating to trading in securities, including the issuance of any security.

24. In addition the Commission seeks an order that the Defendants be required to disgorge all profits from any “loan investment”; “investment”; “bond market”; “savings deposit” or “deposit account” in the name of any investors and an order that Defendants disgorge to the Commission all profits obtained as a result of the non-compliance with the Act. It would seem to me that given the evidence presented by the reports of PricewaterhouseCoopers an order in these terms is appropriate.

25. Although not one of the original reliefs sought the Commission also seeks the appointment of a receiver pursuant to section 145(1) of the Act. Section 145(1) allows for the appointment of a receiver where the Commission considers that it is necessary in the public interest or for the protection of investors to prevent a person who has contravened the Act or any by law or whose registration under the Act, has been suspended or revoked, from dealing with property under his control or direction. The section further provides that the court may appoint a receiver of the property if it is satisfied that it is in the interests of investors or persons whose property is controlled by that person, creditors or security holders of that person, or members of that person to do so.

26. Despite being given the opportunity to object to the appointment of a receiver there has been no objection by any of the Defendants to such an order. It seems to me that in all the circumstances of the case, particularly given the fact that to date the Defendants have failed to comply with the order for the disclosure of their assets, this is a suitable case for the appointment of a receiver.

27. In all the circumstances of the case therefore the Commission is entitled to the following declarations and orders:

1. a declaration that the First, Second, Third and Fourth Defendants are in breach of section 53(1) of the Act;
2. a declaration that the Third and Fourth Defendants are in breach of sections 64(2) and 65(1) of the Act;
3. a declaration that the First, Second, Third and Fourth Defendants are in breach of section 69 of the Act;
4. a declaration that the First, Second, Third and Fourth Defendants are in breach of section 82(b) of the Act;
5. a declaration that the certificates for loan investment, the certificates for investment, certificates for bond market, and certificates for security investment issued by the Third and the Fourth Defendants are illegal, null and void and contrary to section 65(1), of the Act;
6. a declaration that the Defendants have not complied and are not complying with the Act with respect to investment business activities with members of the public;
7. an order that any issuance of a security by any of the Defendants be cancelled;

8. an order rescinding any transaction entered into by any of the Defendants relating to trading in securities, including the issuance of any security;
9. an order that the Defendants be required to disgorge all profits from any “loan investment”, “investment”, “bond market”, “savings deposit” or “deposit account” in the name of any investor and an order requiring the Defendants to disgorge to the Commission all profits obtained as a result of the non-compliance with the Act;
10. an order that a receiver be appointed by the court over the property of the Defendants, whether in their names or otherwise, with the following powers and authorization:
 - (a) to receive the income from any “loan investment”, “investment”, “bond market”, “savings deposit” or “deposit account” in the name of the Defendants, to preserve and get in and protect same but not to distribute or part with same until further order;
 - (b) to discharge rents, salaries and other expenses and liabilities of the business of the Defendants as they pertain to the securities markets;
 - (c) take such reasonable steps to reduce the current expenses and other liabilities and expenses referred to in 10(b) above, including but not limited to, in the exercise of the receiver’s sole discretion, the power to dismiss employees in the name of any of the Defendants and to reduce telephone charges and

property rentals to prevent the dissipation of the property of any “Loan Investment”, “Investment”, “Bond market”, “Savings Deposit” or “Deposit Account” or any other securities issued by any of the Defendants;

- (d) to operate the bank accounts or any accounts held at any financial institution in the name of any of the Defendants for such purposes as the court may direct;
- (e) take such steps as are prudent and necessary to ensure commercially acceptable returns on the property of the Defendants, including but not limited to selling the real property of the First Defendant and investing any monies realised in those sales or otherwise in an interest bearing or income bearing account at any financial institution in Trinidad and Tobago;
- (f) to be at liberty to appoint an attorney at law or attorneys at law and other agents to assist him in the performance of his duties;
- (g) to engage accountants and/or auditors to investigate the affairs and/or operations of the Defendants with regard to any securities issued by any of them and to prepare accounts from any persons or corporations from whom an accounting is due;
- (h) To liaise with the Commissioner for Co-operative Development, as regards the affairs and/or operations of the Third and Fifth Defendant to verify and/or ascertain whether there has been a contravention by them of the Act

11. An order that the receiver provide an account of all monies invested in the investments referred to at 8 above and thereafter restitution of those monies to the individual investors;
12. an order that the fees and disbursements be paid to the receiver out of the income and property of the Defendants as it pertains to the securities market and/or paid by the Defendants and in such amounts as may be approved by the court on the submission of his account;
13. an order that the Defendants comply with the Act with respect to investment business activities with members of the public;
14. an order restraining the breaches of section 53(1), 64,(2), 65(1),69,82(b) and 82(c) of the Act by the Defendants;
15. an order requiring the Defendants to rectify any past non-compliance with the Act to the extent that such rectification is practicable;
16. an injunction preventing each of the Defendants and/or their servants and/or agents, from dealing with, distributing and/or selling unregistered securities and/or in particular dealing with, selling, distributing and/or selling securities described as “Certificate for Loan Investment” and/ or “Certificate for Investment” and/or “Certificate of Bond Market” and/or accepting monies and/or funds from the public

for the purpose of dealing with selling, distributing and/or selling unregistered securities and or “Certificates for Loan Investment” and/or “Certificates for Investment” and/or “Certificates of Security Investment” and/or “Certificates of Bond Market”;

17. an injunction preventing Lawrence Cole whether his own name and/or the name of Flagship Financial Investment Co-operative Society Ltd and/ or Safe Holdings and Trust Limited and/ or Alpha Securities and Trust Limited and/or Christian Credit Union Co-operative Society Ltd and/or his servants and/or agents from soliciting investors for the purpose of investing in unregistered securities and or, in particular from investing in securities described as “Certificate for Loan Investment” and/or “Certificate for Investment” and/or “Certificate for Bond Market” and/or “Certificate of Security Investment” by any manner or means whatsoever and in particular by hosting any promotional meeting or any meeting at all.

Dated this 20th day of April, 2011.

Judith Jones
Judge