

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. NO.3400 OF 1999

Claim No. CV 2009 –03844

BETWEEN

NH INTERNATIONAL (CARIBBEAN) LIMITED

Claimant

And

CLICO INVESTMENT BANK LIMITED

ICS (GRENADA) LIMITED

NATIONAL STADIUM PROJECT (GRENADA) CORPORATION

Defendants

Claim No. CV 2006 – 01205

BETWEEN

NH INTERNATIONAL (CARIBBEAN) LIMITED

Claimant

And

CLICO INVESTMENT BANK LIMITED

NATIONAL STADIUM PROJECT (GRENADA) CORPORATION

Defendants

**Appearances:**

**Mr. Alvin Fitzpatrick S.C, Ms. Lesley Ann Lucky Samaroo, Mr. Shiv Sharma instructed by Mr. Byrne for the Claimant.**

**Mr. Neil Bisnath instructed by Ms. Lydia Mendonca for the First named Defendant.**

**Oral Judgment**

1. The claimant claims an injunction in the following terms:

*An Injunction restraining the Defendant by its Manager, Carl Hiralal, or by its servants and/or agents or howsoever otherwise from in any way dealing with, alienating or disposing of any of its assets until:*

*(i) The sum of US\$93,174.54 is paid by the Defendant to the Claimant; and*

*(ii) The sum of EC\$6,982,100.67 is paid by the Defendant into account number \*\*4767-005 at the Trinidad and Tobago Unit Trust Corporation*

*in accordance with the orders of the High Court of Justice made on the 28<sup>th</sup> January, 2011 and 18<sup>th</sup> February, 2011 in High Court Action CV 2009-03844,*

2. The bases of the injunction sought are the decisions and orders of this court on January 28<sup>th</sup> 2011 and its subsequent assessment of interest on 18<sup>th</sup> February, 2011 pursuant thereto. Those orders are set out hereunder.

### **PREVIOUS ORDERS**

3.

1. *A declaration is granted that the sum of EC \$7,430,724.70 (“the said EC sum”) was held by the First Defendant [CIB] on trust for the sole purpose of applying the same in payment of suppliers and other providers of goods and services in relation to the Project.*

2. *A declaration is granted that*

*(i) the Deposited Amount and*

*(ii) the Additional Sum and*

*(iii) Interest accumulated thereon,*

*are held on trust (for the sole purpose of applying the same in payment of suppliers and other providers of goods and services in relation to the Project).*

3. *A Declaration is granted that the sum of EC \$7,430,724.70 (“the said EC sum”) was held on trust for NH the First Defendant [CIB].*
  
4. *A declaration is granted that the sum of US\$2,682,719.24 (“the Deposit Amount”) paid by the First Defendant [CIB] into Account No. 0447657-005 at the Trinidad and Tobago Unit Trust Corporation (UTC) [the Account] pursuant to the order of Mr. Justice Tam dated 23<sup>rd</sup> July 2004 (made in the High Court Action 3400 of 1999) together with any interest accumulated thereon, is held on trust for NH.*
  
5. *A declaration is granted that the sum of US \$93,174.54 (“The Additional sum) is held by CIB on trust for NH.*
  
6. *It is ordered that the Deposited Amount and all interest accumulated thereon be paid out to NH and that there be payment out to NH of the monies held in the Account.*
  
7. *It is ordered that CIB do pay to NH the Additional Sum of US\$93,174.54 owed by CIB as a result of the 2005 Order together with interest thereon from May 26 2005 at the rate of 12%*

*per annum.*

8. *It is ordered that interest on the said EC sum from November 30 1999 to April 26 2005 be assessed.*

4. The application is resisted by the defendant on the following bases:

1. The application is prohibited by sections 361, 362, and 364 of the Companies' Act. Accordingly there is no issue even to be tried and the action ought to be struck out at this stage.

2. The injunction sought is disproportionate in its effect in that it would effectively restrain the continuation of the liquidation when only a miniscule proportion of the defendant company's assets are in dispute.

3. The balance of convenience/justice is weighted against the claimant and in favour of the defendant.

4. That damages would be an adequate remedy in that the liquidator/judicial manager must be permitted in the event a winding up order is made to consider all claims to assess their priority and to present his assessment to the court supervising the liquidation.

5. Further, that there is no danger that he would not do so as the orders of other courts, including those of this court and the Honourable Justice Tam would be given effect.

6. Further, that the claimant is seeking in effect to steal a march on other unsecured creditors and confer priority on itself when the status of that priority stands or falls upon the orders of the court previously made.

**Section 361** of the Companies' Act is as follows (emphasis added):

*Where any company is being wound up by the Court, any attachment, sequestration, distress or execution put in force **against the estate or effects of the company** after the commencement of the winding up is void.*

**Section 364** of the Companies' Act -

*When a winding up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.*

## **Principles**

**Whether the risk of injustice would be greater in granting the injunction or in refusing it.**

## **Whether a serious issue to be tried**

5. I am satisfied that there exists a serious issue to be tried, that is whether or not the funds declared to be the subject of a trust and comprising trust property in the possession of the defendant are “effects of the company” or in other words “assets” of the defendant. Sufficient authority has been presented to establish that it is strongly arguable that those funds, in so far as they comprise trust property, are not **assets of the defendant**. See the case of **Space Investments Limited v. Canadian Imperial Bank of Commerce Trust Company (Bahamas) Limited [1986] 1WLR 1072** where Lord Templeman stated:

*“A bank in fact uses all deposit money for the general purposes of the bank. Whether a bank trustee lawfully receives deposits or wrongly treats trust moneys as on deposit from trusts, all the moneys are in fact dealt with and expended by the bank for the general purposes of the bank. In these circumstances it is impossible for the beneficiaries interested in trust money misappropriated from their trust to trace their money to any particular asset belonging to the trustee bank. But equity allows the beneficiaries, or a new trustee in place of an insolvent bank trustee to protect the interest of the beneficiaries, to trace the trust money to all the assets of the bank and to recover the trust money by the exercise of a general equitable charge over all the assets of the bank. Where an insolvent bank goes into liquidation that equitable charge secures for the beneficiaries and the trust priority over the claims of the customers in respect of their deposits and over the claims of all other unsecured creditors. This priority is conferred because the customers and other unsecured creditors voluntarily accept the risk that the trustee bank might become insolvent and unable to discharge its obligations in full. On the other hand, the settler of the trust and the beneficiaries interested under the trust, never accept any risks involved in the possible insolvency of the trustee bank. On the contrary, the settler could be*

*certain that if the trusts were lawfully administered, the trustee bank could never make use of trust money for its own purposes and would always be obliged to segregate trust money and trust property in the manner authorized by law and by the trust instrument free from any risks involved in the possible insolvency of the trustee bank. **It is therefore equitable that where the trustee bank has unlawfully misappropriated trust money by treating the trust money as though it belonged to the bank beneficially, merely acknowledging and recording the amount in a trust deposit account with the bank, then the claims of the beneficiaries should be paid in full out of the assets of the trustee bank in priority to the claims of the customers and other unsecured creditors of the bank:**...if a man mixes trust funds with his own, the whole will be treated as the trust property, . . . that is, that the trust property comes first; . . ." per Sir George Jessel M.R. in *In re Hallett's Estate* (1880) 13 Ch.D. 696, 719, adopting and explaining earlier pronouncements to the same effect. Where a bank trustee is insolvent, H trust money wrongfully treated as being on deposit with the bank must be repaid in full so far as may be out of the assets of the bank in priority to any payment of customers' deposits and other unsecured debts.*

*Equity thus protects beneficiaries against breaches of trust. But equity does not protect beneficiaries against the consequences of the exercise in good faith of powers conferred by the trust instrument.*

***Although as a general rule, a trustee is not allowed to derive a benefit from trust property, that general rule may be altered by the express terms of the trust instrument.***

*One illustration is an express provision in a settlement which permits a trustee to charge and deduct from trust money remuneration for the services of the trustee. A settlement may also confer on a trustee power to make use of trust money in other ways. Certain of the*

*settlements of which Mercantile Bank and Trust Co. Ltd. ("M.B.T.") was appointed trustee conferred power on M.B.T.:*

*"To open and maintain one or more savings accounts or current accounts . . . with any bank . . . even if ...such bank . . . shall be acting as trustee ... to deposit to the credit of such account or accounts all or any part of the funds belonging to the trust fund C whether or not such funds may earn interest from time to time . . . [and] to withdraw a portion or all of the funds so deposited ..."*

*The trial judge, da Costa C.J., sitting in the Supreme Court of the Commonwealth of the Bahamas held, the Court of Appeal (Luckhoo P., Smith and Zacca JJ.A.) agreed and it is not disputed that: "The effect of that clause was clearly to empower M.B.T. as trustee to deposit with M.B.T. as banker moneys that they received in trust."*

*The effect of the clause was also to empower M.B.T. to treat trust money so notionally deposited as if M.B.T. were beneficially entitled to the trust money, just as M.B.T. was entitled to treat customers' money deposited with M.B.T. as if M.B.T. were beneficially entitled to that money. Trust money deposited with M.B.T. as banker and customers' money deposited by customers with M.B.T. as banker were alike lawfully available to M.B.T. for payment of M.B.T.'s expenses, for making investments for the benefit of M.B.T. and in any other manner for the benefit of M.B.T. as money belonging absolutely and beneficially to M.B.T., to be disposed of without regard to the interests of beneficiaries or customers.*

*When a customer deposited money with M.B.T. and the amount of the customer's money was credited to a customer's deposit account, the customer did not become entitled to any interest in any asset or in all the assets of M.B.T. The sole right of the customer was to be paid*

*at his request a sum equal to the amount standing to the credit of his deposit account. There was nothing to trace.*

*When M.B.T. as trustee lawfully deposited trust moneys with M.B.T.as banker pursuant to the authority in that behalf conferred by the settlement and the amount of the trust fund so deposited was credited to a trust deposit account, the beneficiaries interested under the trust did not become entitled to any interest in any asset or in all the assets of M.B.T. The sole right of the beneficiaries was for a sum equal to the amount standing to the credit of the trust deposit account, to be applied by M.B.T. in any manner authorised or required by the settlement or by law as and when M.B.T. decided to make such application in the proper exercise and discharge of its discretionary powers and duties in the due course of administration of the trust. If M.B.T. ceased to be trustee and a new trustee were appointed then it would be for the new trustee to decide whether to close the trust deposit account with M.B.T. and to require M.B.T. to pay to the new trustee the amount standing to the credit of the trust in the MBT trust deposit account. There would be nothing to trace.*

*When M.B.T. became insolvent and went into liquidation the beneficiaries were entitled to obtain and have obtained the appointment of a new trustee in the place of M.B.T. The new trustee can only prove in the winding up of M.B.T. for the amount standing to the credit of the trust with M.B.T. in the trust deposit account at the date of liquidation. The claim of the new trustee will be as an unsecured creditor ranking pari passu with the claims of a customer proving for the amount standing to his credit with M.B.T. in the customer's deposit account. "*

***There is no justification for the intervention of equity. The settlor has allowed trust money to be treated as if it were customers' money. The settlor has allowed M.B.T. to appropriate trust money and to treat the trust money as belonging absolutely and beneficially***

*to M.B.T. By depositing money with M.B.T. a customer accepted the risk of M.B.T.'s insolvency. By allowing M.B.T. to treat trust money as a deposit with M.B.T. the settlor accepted the risk of M.B.T.'s insolvency. In these circumstances it would be inequitable if the trust were in a better position than the customer.*

*Da Costa C.J., supported by the Court of Appeal, held that when M.B.T. transferred trust money "into its banking business that money does not cease to be impressed with a trust." But the trust money did cease to be impressed with the trust. The trust money became the property of M.B.T. in law and in equity and M.B.T. was entitled to use that money for the purposes of M.B.T. in any manner that M.B.T. pleased. The trust fund did not continue to be the money transferred into the banking business of M.B.T. The trust fund became the obligation of M.B.T. to treat the trust deposit account with M.B.T. as banker in the same manner as M.B.T. would have dealt with a deposit account credited with trust money lawfully transferred and deposited by M.B.T. as trustee with another independent bank as banker. On the insolvency of that independent bank the trustee M.B.T. could only rank as unsecured creditor for the amount of the deposit account. Similarly, on the insolvency of M.B.T. which lawfully appropriated trust money to itself and credited the amount of the moneys so appropriated to a trust deposit account, the new trustee of the trust can only rank as an unsecured creditor on behalf of the trust.*

6. See also **Re David Lloyd & Co, Lloyd –v- David Lloyd and Co (1877) CD 339** where the Court held that a mortgagee who had commenced an action against a company to realize his security prior to a winding up order ought to have leave to proceed with his action. James L.J. stated:

*“These sections in the Companies Act, and the corresponding legislation with regard to bankrupts, enabling the Court to interfere with actions, were intended, not for the purpose of harassing, or impeding, or injuring third persons, but for the purpose of preserving the limited assets of the company or bankrupt in the best way for distribution among all the persons who have claims upon them. There being only a small fund or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase the claims against the company and diminish the assets which ought to be divided among all the creditors. **But that has really nothing to do with the case of a man who for the present purpose is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property. The position of a mortgagee under such circumstances is, to my mind, exactly similar to that of a man who says, “You the company have got property which you have taken from me; you are in possession of my property by way of trespass, and I want to get it back again.”** A landlord might say, “You have property under lease from me; you have broken the covenants of the lease, and I have a right of re-entry in consequence of that breach.” The company ought not, because it has become insolvent or has been minded to wind up its affairs, to be placed in a better position than any other lessee with regard to his lessor. So with regard to a mortgagee. The mortgagee says, “There is some property upon which I have a certain specific charge, and I want to realize that charge. **I have nothing to do with the distribution of your property among your creditors, this is my property.**” Why a mortgagee should be prevented from doing that I cannot understand. Power was given to the Court to interfere with actions by*

*restraining them or not allowing them to proceed, but this power was given because it was understood that the Court would exercise it with a due regard to the rights of third persons, persons who were not members of the company, and who had not to come in and claim to share in the distribution of the company's assets among the creditors, and who were not therefore quasi parties to the winding-up proceedings. The Court would have due regard to the rights of independent persons. A mortgagee is, to my mind, such an independent person, and his rights ought not to be interfered with because his mortgagors have chosen to become insolvent and to have a winding-up. I am of opinion that the action ought to proceed, unless, indeed, the whole thing being under the control of the Court, the court is able to say, We on behalf of the company which is being wound up, will without further litigation of any kind give you all which you are entitled to have. **The Court may say on behalf of the company, we accede to your terms and will give you your right at once. It is competent to the Court to do that, but it is not, as it appears to me, right for it to interfere with a mortgagee's taking the proper legal means for realizing that which is his own property**" (see page 344 -345).*

7. In so far as it was suggested that the **Space Investments** case established that it was for a liquidator to determine priority of trust funds in relation to debts of unsecured creditors, that case established no such thing. It reiterated the general principle that "*On the other hand a trustee has no power to use trust money for his own benefit unless the trust instrument expressly authorises him so to do*" (See page 1073) but found that by the express terms of the trust instrument in that case the trust funds had been expressly permitted by the settlor,
- a. to be deposited with the bank,

b. to be utilised by the bank,

c. to not necessarily earn interest thereon.

8. By that clause the trust funds in that case were equated with normal deposit funds of unsecured creditors. The trust in the instant case is a Quistclose type trust resulting as a matter of law based upon the special purpose for which those funds were provided. No aspect of the documentation underlying the trust creates any exception to the general principle as set out above, with the result being that neither the bank nor any other unsecured creditors would be entitled to derive the benefit from that trust property.

9. Further as stated in **Re Hallett's Estate** (1880) 13 Ch.D. 696 "*if a man mixes trust funds with his own the whole would be treated as the trust property... that is, the trust property comes first*".

10. These cases dispose of the suggestion that the subject funds ever became part of the assets of the defendant. Accordingly, s 361 of the Companies Act would not apply to those funds.

11. An analogous situation arose in the Lloyd Case and the same result was arrived at. This disposes also of the argument that the claimant is attempting to steal a march on unsecured creditors. On the authorities the claimant is seeking, as it is entitled to do, to enforce its rights over its own property.

**Whether it just in all the circumstances that the claimant should be confined to his remedy in damages**

12. It was contended that the sums involved, being liquidated sums, fell squarely within the principle that an injunction would not be granted if damages would be an adequate remedy. In fact however the amount of the defendant's assets [\$6,386,656,975.00] is significantly outweighed by the amount of its liabilities. [\$11,080,011,313.00].

13. Further it was indicated to the court that a winding up order had been sought and could potentially be granted on Wednesday 16<sup>th</sup> March 2011 at which point the disposition of all claims would become the responsibility of the court appointed liquidator.

14. The necessity for the claimant to present its claim to its own property within that process has not been established persuasively. The defendant itself has contended that there is no urgency as the defendant's assets encumbered though they be, significantly outweigh the sums in dispute. I consider that that argument [if accepted] demonstrates that the balance of

convenience/justice does not weigh against the defendant as the majority of its assets would remain available to any liquidator for distribution.

### **Balance of Justice – Consequences for the claimant if injunction not granted**

15. It is clear on the evidence that the defendant's liabilities far outweigh its assets.[See paragraph 37 Elias Affidavit]

16. The assurance was given in submissions that the liquidator could be expected to do the appropriate thing in law to give appropriate priority to the claimant's claim, but that the claimant needed to await the outcome of that process and the liquidator's determination.

17. The evidence however, is that the defendant has ignored the request to have these funds put aside. The judgment and orders of both the Honourable Justice Tam and of this Court were available to it, and the defendant via its attorneys, attended both the trial of this action and the assessment. The necessity for the claimant to now rely on the determination by the defendant or a liquidator to give effect to existing court orders including the order of the Honourable Justice Tam made several years ago, has not been demonstrated.

18. The prejudice/injustice to the claimant, if after prolonged and protracted litigation, it is required by the liquidator to prove in a winding up as an unsecured creditor despite those

existing orders of the court, carries the potential to bring the administration of justice into disrepute.

19. The opportunity to set aside these funds voluntarily, recognizing that they are trust funds, and not the property of the defendant but the property of the claimant, was ignored. Further it was not prepared to provide any undertaking. In the circumstances the only option left is an order of this Court.

### **Balance of Justice**

#### **Balance of Justice – Consequences for defendant if injunction granted**

20. In fact if the sums are set aside and the claimant does not succeed in the instant litigation then no injustice is done to the defendant or its creditors. The subject amounts remain available for distribution and would fall back into the general pool available for unsecured creditors. This in no way would compromise the statutory regime provided under the Companies Act for a company being wound up, and would in no way prematurely confer upon the claimant any priority.

21. Further apart from the assertion that this injunction is in aid of execution against the defendant's assets and should not be permitted, [which argument I do not accept], the defendant

has not demonstrated that there would be any inconvenience to it if the injunction is granted which would outweigh the inconvenience to the claimant if it is not granted. I note its contention that the injunction in the form sought would restrain the liquidation and interfere with ongoing proceedings before another court. If that were so that would be a highly undesirable outcome. The claimant contends however that that is not so as compliance with the order for payment, affecting as it does a miniscule percentage of the value of assets available to the defendant, once complied with, would not restrain any liquidation. It is only non compliance with the order sought, if granted, which would have that effect. I consider that this argument blends into the argument concerning proportionality which is a source of considerable concern to this court.

### **Proportionality**

22. Even the possibility of non compliance triggering the possible interference with a potential order by another court must be avoided. I consider that the order sought has as its converse the payment of the sum in dispute. Although prohibitory in form it approaches being mandatory in substance. I consider that to order payment to the claimant directly at this stage might be premature. I consider that there would be no injustice done if the injunction is granted in a modified though necessarily mandatory form. I accept that every dealing with the assets of the Defendant other than in payment of the Claimant's debt is in breach of the Claimant's proprietary right.

23. Accordingly even though the claimant is entitled on this court's assessment of its claim to an injunction in the form it seeks which is prohibitory rather than mandatory, in fact an order in

mandatory form would be in the circumstances of this case

a. less draconian and

b. would avoid the possibility of being disproportionate in effect.

24. I consider that nothing in the case of **Jetpak Services Limited v B.W.I.A. 55 W.I.R. 362** is incompatible with a grant of a mandatory injunction.

25. I find as follows:

1. There is a serious issue to be tried. This action is not prohibited by the Companies Act and it is not an abuse of process.
2. The balance of justice arrived at taking into consideration the relevant factors as set out in **Jet Pak** favours the claimant.
3. That the injunction sought, if complied with, would not be disproportionate in its effect as its effect on the potential liquidation would not be triggered unless there was non compliance.

**Whether an injunction is mandatory in effect.**

26. I consider that the injunction sought is mandatory in effect in that at the end of the day it requires payment of the sums in dispute. That being so I accept that, as stated in Jet Pak the test is still “which carries the higher risk of injustice, granting the injunction or refusing it”.

27. In the case of a mandatory injunction however the court must feel “a high degree of assurance” that the plaintiff would be able to establish his right at a trial. As indicated above based on the authorities this court does feel a high degree of assurance that the claimant would be able to establish its right at a trial (without making any finding at this stage on the incomplete state of the evidence and authorities.)

## **DISPOSITION**

### **28. Orders**

**UPON** the Claimant by its Attorney at Law undertaking to abide by any Order this Court may make as to damages in case this Court shall hereafter be of the opinion that the defendant shall have sustained any by reason of this Order which the Claimant ought to pay.

**AND UPON RECORDING** the usual undertaking in damages by the Claimant.

## **IT IS ORDERED AND DIRECTED THAT**

1. The sum of US Ninety Three Thousand, One Hundred and Seventy Four Dollars and Fifty One Cents ( US \$93,174.51) and the US equivalent of the sum of Six Million, Nine Hundred and Eighty Two Thousand, One Hundred Dollars and Sixty Seven Cents ( EC \$6,982,100.67) converted at the rate prevailing at the date of deposit be paid within fourteen days (14) into an interest bearing account at the Unit Trust Corporation to be

held in the joint names of instructing Attorneys at Law for the Claimant and the Defendant to abide the outcome of:-

- a) the liquidator's decision as to the status of these funds;
  - b) the instant action;
2. Costs of this application be costs in the cause;
  3. Liberty to apply.

**Dated this 15th day of March, 2011**

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**Peter A. Rajkumar**

**Judge**