

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV2009-03844  
No. 3400 of 1999**

**Between**

**N.H. INTERNATIONAL (CARIBBEAN) LIMITED**

**Plaintiff**

**AND**

**CLICO INVESTMENT BANK LIMITED**

**I.C.S. (GRENADA) LIMITED**

**NATIONAL STADIUM PROJECT (GRENADA) CORPORATION**

**Defendants**

**Claim No. CV2006-01205**

**Between**

**N.H. INTERNATIONAL (CARIBBEAN) LIMITED**

**Claimant**

**And**

**CLICO INVESTMENT BANK LIMITED**

**NATIONAL STADIUM PROJECT (GRENADA) CORPORATION**

**Defendants**

**BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR**

**APPEARANCES:**

Mr. Alvin Fitzpatrick S.C, Ms. Lesley Ann Lucky Samaroo, Mr. Shiv Sharma for the claimant.

Ms. Francine Wilson for Clico Investment Bank.

### **ORAL DECISION**

1. I have been asked to assess, pursuant to this court's earlier order, the appropriate rate of interest that would have been attractable by the funds in the possession of CIB over the period from the date of the Honourable Justice Tam's order- freezing the remainder of the sums left under the Facility ("the frozen sums") - and the date of its payment into a joint interest bearing account in the Unit Trust. That period stems from the date of Justice Tam's order dated November 30<sup>th</sup> 1999 up to 26<sup>th</sup> of April 2005.
2. Over that period it is contended that those funds, being trust funds, would have attracted interest for which CIB as trustee needed to account. To the extent that no proper accounting has taken place by CIB for any interest that it would itself have received on those funds, it is for the court to assess what that interest would have been.

### **THE EVIDENCE**

3. CIB has produced no accounts in relation to those funds though correspondence has been produced. That is the extent of its compliance with this court's earlier order. By affidavit of February 11<sup>th</sup> 2011 Mr. Elias, the principal of the claimant, has provided a witness statement in which he has referred to several potential bench marks for interest rates over the relevant period.

4. I take into account the case of **General Communications Ltd v Development Finance Corporation of New Zealand Ltd [1990] 3 NZLR 406** which was referred to by Counsel for the claimants at the trial of this action - in particular at page 436 of that judgment, a decision of the Court of Appeal of New Zealand, under the heading “**The interest question**”

*“As **Burdick v Garrick** shows, the test is whether the trustee, making the best use one would expect him to make of the money, may properly be presumed to have earned compound interest himself; interest being awarded not as punishment but by way of an accounting for profits made. In the National Bank case, where the bank was in the position of fiduciary towards DFC, compound interest was not awarded. In the present case there was evidence from an officer of DFC that the moneys repaid by Brookfield Prendergast were pooled in DFC’s general account to become part of its investment funds, to be used for lending or investment or trading in the money market or the share market. On that evidence we think the Judge was fully entitled to award compound interest.”*

5. In the instant case we have no evidence from CIB as to what interest rates would have been charged over any of the period in question. What we do have is evidence that CIB published that it earned an average shareholders’ equity in the year 1999 of the amount of 25.36%, in the year 2000 in the amount of 27.07%, and in the year 2001 in the amount of 30.94%. The average rate of interest over that period as calculated by Counsel is **27.8%**.

6. I take into account that The Honourable Justice Tam's order was to the end of November, therefore the amount of 25.35 % in respect of 1999 would only apply in respect of one month. I accept the submission by senior Counsel for the claimant that, with the appropriate weighting, the **average** interest over that period would give a reflection of a fair rate of return, the return actually earned by CIB up to the period ending 2001. I therefore assess the interest rate awardable on the funds in question at **27.8% for the period November 30<sup>th</sup> 1999 to December 31<sup>st</sup> 2001.**
  
7. In respect of the year 2002 subsequently, the next best evidence is a publication from the web site of the Central Bank of Trinidad and Tobago showing the interest rates charged by Commercial Banks for the years 2001 to 2004. Counsel has suggested that a fair and conservative rate be used, and therefore in those circumstances the lower of each of the rates suggested for those years is what is suggested, that is, the basic prime lending rate by Commercial Banks.
  
8. For 2002 that rate is **12.42%**, and interest is therefore assessed at that rate for the **year 2002.**
  
9. For the year 2003 that interest rate is 11.17%, and **interest is therefore assessed at the rate of 11.17% for the year 2003.**

10. For the year 2004 that rate is 9.31% and **interest is assessed at the rate of 9.31% for the year 2004.**
11. Thereafter it has been suggested that an average of the rates over the entire period be used as reflective of the appropriate interest rate, following the test repeated in **General Communications**, and that calculation has produced a figure of 19.38%.
12. What would have been a useful interest rate as well which I might have taken into account is the rate actually earned on the Unit Trust account for the first year of the deposit, but I don't have that information before me.
13. I am inclined to continue with the 2004 rate up to 2005 because the trend shows a reduction in the rates. Therefore for the **period January 1<sup>st</sup> 2005 to the date of deposit into the Unit Trust account which was on the 6<sup>th</sup> of April 2005, the rate of interest applicable would be the basic prime lending rate of 9.31%**, which was the rate in 2004.
14. In my view that provides the indication closest in time of what interest rates were like in that period. I do take into account the fact that these interest rates are on TT dollar funds but I accept Counsel's submission that even if the TT dollar interest rates were higher

than foreign currency rates at that time one can presume that CIB would have made the highest return that it could on funds in its possession with which these funds were commingled and of which they formed part.

(I accept counsel's submission that the affidavits of Mr. Archer exhibited to the witness statement of Mr. Elias provide unrebutted evidence that the funds under the Facility, which were trust funds, were not kept separate from CIB's own funds and in fact were commingled with CIB's funds ).

15. On a side note I take into account that the return on shareholders' equity for the period for which it is available is significantly higher than the Commercial Banks lending rate but that is explained by one aspect of Mr. Elias' evidence, which shows that that for specific transactions CIB was in a position to attract a far higher interest rate than it would have by simply lending these funds at the minimum lending rate. The transaction in respect of Martins Plumbing shows that there could have been individual transactions that would allow CIB to make a return on equity that in fact was way in excess of the minimum lending rate.

16. Finally I note that CIB has suggested that it earned 2% interest on the funds in its possession for a period calculated from the 1<sup>st</sup> of August 2004 to the 2<sup>nd</sup> January 2005. That interest will be deductible from the interest calculated above.

17. I accede to Counsel's submission that that is not an interest rate that binds the court in circumstances where there is evidence of a significantly higher rate of return on funds to CIB, but that the interest actually paid for that period should be credited and deducted from the interest as assessed .

Dated this 18<sup>th</sup> day of February 2011.

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**Peter A. Rajkumar**

**Judge.**