COMMONWEALTH OF THE BAHAMAS 2000

IN THE SUPREME COURT No. 585

Equity Side

B E T W E E N:

SECURITIES COMMISSION OF THE BAHAMAS

Plaintiff

AND

ALASTAIR-PRESCOTT LTD.
AND
THIRTY-FIVE (35) OTHER DEFENDANT COMPANIES

Defendants

AND

Equity Side **98/2001**

IN THE MATTER OF ARCADIA MUTUAL FUND INC.

AND

IN THE MATTER of Section 26 of the Mutual Funds Act

AND IN THE MATTER of Section 92 of the International Business Companies Act, 2000

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Appearances:

Mr. Maurice Glinton and **Mr. Raynard Rigby** for the Applicants/the Defendant Companies.

Mr. Michael Barnett and **Ms. Paula Adderley** for the Securities Commission.

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J U D G M E N T

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OSADEBAY, Sr. J.:

Before me are two applications, one made in Equity action No. 585/2000 by the defendant companies in that action, and the other made in Equity action No. 98/2001 by the Petitioner, the Securities Commission of the Bahamas. In the first application under Equity Action No. 585/2000, the defendant companies seek an Order of this Court pursuant to Order 32 r. 6 of the Rules of the Supreme Court **(R.S.C.)** or otherwise under the inherent jurisdiction of the Court that the Receivership Order made on the 7th July, 2000, as extended by another Order dated 16th August, 2000 whereby George Clifford Culmer Esq. was appointed Receiver over the assets of all the defendant companies be set aside or varied or amended (as the case may be) mainly on the grounds:

a) that assuming that the Court has jurisdiction to make such an Order there was no legal or equitable basis for the exercise of such jurisdiction by the Court

b) that the Receivership Order was procured for an otherwise irregular, improper (if not ultra vires) purpose.

c) that there was otherwise material non-disclosure to the Court on the part of the Securities Commission of the Bahamas **(Securities Commission).**

In the second application, under Equity Action 98/2001 the Securities Commission having filed a Petition for the winding up of the defendant companies in Equity Action 585/2000, seeks an Order that the said George Clifford Culmer be appointed provisional liquidator of the said defendant companies pending the hearing of the Petition.

Having heard both applications I have decided to deal with them together in one decision since they relate to the same parties and the two applications have a common nexus.

The Securities Commission of the Bahamas (the Commission) is a Statutory body established by section 3 of the Securities Commission Act, 1999 and it is a continuation of the Securities Board established by the Securities Board Act, 1995.

The main functions of the Commission, inter alia, is to maintain surveillance over the securities market ensuring orderly, fair and equitable dealings: (section 3 of the Securities Board Act, 1995.) The Commission is

also charged with the duty of ensuring that no mutual fund operates in the Bahamas unless it has received a licence to do so or has been exempted from having such a licence granted by the proper authority under the Mutual Funds Act, 1995.

By an Originating Notice of Motion filed on the 31st May, 2000, the Securities Commission sought an Order that George Clifford Culmer of BDO Mann Judd, a firm of International Accountants be appointed a Receiver Manager of the defendant companies on the grounds (a) that the defendant companies were carrying on or were attempting to carry on mutual fund business in the Bahamas without a Mutual Fund Licence granted under the provisions of the Mutual Funds Act, 1995, (b) that the defendant companies were conducting mutual fund business to the detriment of their creditors and that the appointment of a Receiver and Manager was necessary to preserve the assets of the defendant companies and to protect the interests of the creditors of the defendant companies, (c) that the defendant company, Equivest Premier Holdings, Inc., was facilitating the conduct of mutual fund business in or from the Bahamas contrary to the provisions of the Mutual Funds Act, 1995, and contrary to the interest of creditors of the companies. The application by the Commission was made Ex Parte and was supported by an affidavit of Hilary H. Deveaux, Secretary

to the Commission, filed on the 5th June, 2000. In that affidavit Hilary Deveaux deposed that the need to appoint a Receiver and Manager as requested was infact encapsulated in a letter dated 30th March, 2000, written by Ms. Nancy Lake, the Trustee of the Tenesheles Trust "the beneficial owner of the voting share capital of a number of the defendant companies" to the Commission. That letter, which I consider as very important, was exhibited in the said affidavit as **"Exhibit 1"**. In my view any attempt to summarize the letter would infact do an injustice to the content so I shall reproduce the letter. It reads as follows:

"THE TENESHELES TRUST
PO Box N-7511
55 Frederick Street, Nassau, Bahamas
Telephone: 242 356 4414

The Securities Commission of The Bahamas **30 March 2000**
3rd Floor, Charlotte House
Charlotte Street
Nassau
Bahamas

Dear Sirs

I am writing to you in my capacity as Trustee of The Tenesheles Trust. The trust is the beneficial owner of the voting share capital of a number of corporations.

In April 1999 BDO Mann Judd was appointed by the trust to produce a combined statement of net assets of the above-noted corporations. At that point they informed the corporate administrator that the corporations were effectively operating as a manual fund in contravention of the Mutual Funds Act, 1995 and that a plan of reorganization should be presented to the Securities Commission in order to obtain the necessary

licensing for the corporations to continue to operate in compliance with the Act. They also informed us that steps should be taken to ensure that any relevant US legislation was also complied with. As a result of this advice BDO Mann Judd was appointed to advise on the steps necessary to comply with the Act, and Curtis Mallet-Prevost, Colt & Mosle were appointed in the US to advise on the various aspects of US legislation. A number of events subsequently occurred that have to date delayed the presentation of the plan of reorganization and license applications to the Commission.

During July 1999, the corporate administrator, Woods & Associates, resigned under circumstances that indicated the possibility of embezzlement. This precipitated the need for a time-consuming forensic investigation by BDO Mann Judd. As a result of their report an insurance claim has been filed.

Delays were incurred in receiving US counsel's opinion. Consequently it was not until December 1999 that advice was received on the measures to be taken to ensure that any proposed Bahamian reorganization would comply with US securities and other relevant legislation.

At this point work commenced in earnest on the plan of reorganization in the Bahamas, in order that an application for the necessary manual fund licenses could be made.

However, almost immediately, BDO Binder, the accountants appointed by the trust in the Isle of Man to account for and administer the operations of the corporations subsequent to July 1999, resigned and it became apparent that they had failed to carry out their contractual obligations. As a result of this, in February 2000, BDO Mann Judd was appointed to perform a second forensic investigation. This investigation revealed that the books and records handed over by BDO Binder to the Trust's Isle of man attorneys did not contain any evidence of the maintenance of a double entry accounting system or investor records for the period subsequent to 18 July 1999. As a result of that information the trust requested the commencement of an exercise to reconstruct those accounting and investor records.

However, I have been advised by BDO Mann Judd, that as a result of the current lack of accounting records and the time that it will take to bring them up to date, significant and unacceptable further delays will be incurred in presenting the

plan of reorganization and licence applications. Further, I am informed that BDO Mann Judd consulted Messrs Callenders & Co, attorneys, who advised that these matters be immediately reported to the Securities Commission, and their urgent intervention be sought to assist in the restructuring of the fund, by way of a court-appointed protective receivership. The alternative would appear to be uncontrolled investor litigation, which would result in the collapse of an otherwise solvent and profitable fund.

I would therefore request that you make application to the courts to appoint a receiver for the corporations until such time as the accounting records can be brought up to date, the plan of reorganization implemented and the necessary mutual fund licences obtained.

In the event that you require any clarification of these matters please contact either Michael Scott or Colin Callender at Messrs Callenders & Co.

Yours faithfully

(Sgd.) _____
Nancy Lake
Trustee"

Hilary Deveaux went on to state that a review of the corporate documents delivered to the Commission revealed that:

a) there were more involved than the 30 companies identified in Ms. Lake's letter.

b) twenty nine (29) of the first 30 defendant companies were international business companies (IBCs) incorporated under the International Business Companies Act, 1989. Kennilworth Mutual Fund Inc. was incorporated under the laws of the Virgin Islands. Mrs. Lake had in her letter to the Commission, described all of the companies as "Bahamian Corporations". That was incorrect.

c) the other defendant companies 31 to 34 were also companies which appeared to be operating mutual fund business and were also incorporated under the International Business Companies Act of the Bahamas. The defendant company No. 35 Montague Mutual Fund Inc. appeared to have been incorporated in the British Virgin Islands.

d) As far as the documents show, Mrs. Nancy Lake was the sole director of each company.

e) the Private Placement Memoranda of with respect to 15 of the companies contain the following statements —
"The fund will fall within the definition of a mutual fund in terms of the Mutual Funds Act, 1995 of the Bahamas (the Act) and accordingly will be regulated in terms of that Act.
As a regulated mutual fund, the Fund will be subject to the supervision of the Securities Board . . . . . ."

That statement cited above appeared to be an acknowledgement by those responsible and who operated these companies that these companies were intended to carry on mutual fund business in the Bahamas. (see paragraph 10 of the Deveaux affidavit).

Hilary Deveaux concluded in the affidavit that in the opinion of the Commission, these defendant companies were carrying on mutual fund business **illegally** as none of them had been licensed or exempted from having a licence by the relevant authority under the Mutual Funds Act, 1995.

They were carrying on mutual fund business without a licence in contravention of section 3 of the Mutual Funds Act, 1995.

In the opinion of the Commission it was in the interest of the creditiors of the companies **"to place the assets into the hands of an independent Receiver and Manager answerable to the Court and to the Commission. This will enable the Commission to determine the correct state of affairs of the mutual funds and determine whether the best interest of creditors would be served by granting mutual fund licences or by the winding up of the companies."**

It was for the above-stated reasons that on the 7th June 2001 the Court, pursuant to its power under **section 21 of the Supreme Court Act, 1996**, made the Order appointing a **Receiver** in the interim with limited powers and with an expressed understanding and an assurance from Counsel for the Commission that the Receiver was not to be a "Manager" of the alleged mutual fund business in that the defendant-companies were not licensed to carry on such business. The **Receiver** was not to operate as a **Liquidator.** He was appointed to safeguard and preserve the assets of the defendant-companies for the benefit of those who may be entitled to them pending the decision of the Commission as to whether to grant them operating licences or take any other step inaccordance with the law. The

Order appointing the Receiver was not intended to be a **final** Order as it was made ex parte. The defendant-companies now oppose the appointment of the Receiver hence the application now before me.

By a Summons filed on the 2nd February, 2001, the Commission, after filing a Petition on 23rd of January, 2001 to wind-up the defendant companies, applies for an Order of this Court that the **Receiver**, Mr. George Clifford Culmer be appointed provisional liquidator pending the hearing of the winding up petition.

The basis for the Winding-up Petition is that the Commission has decided that no mutual fund licence should be granted to these companies and that it is in the best interest of the investors and creditors and also just and equitable that the defendant-companies be wound-up, and that Mr. George Clifford Culmer be appointed the Official Liquidator.

The defendant-companies, oppose the Winding-up Petition and the appointment of Mr. Culmer as the provisional liquidator.

Submissions:

Mr. Glinton's submissions and arguments on behalf of the defendant companies against the appointment of a Receiver may be summarized as follows: **Firstly,** Mr. Glinton submits that the Order of the Court appointing the Receiver was infact an ex parte order notwithstanding the letter from Ms.

Nancy Lake to the Securities Commission dated the 5th June 2000, and nothwithstanding the fact that Ms. Nancy Lake wrote that letter in her capacity as the Trustee of the Teneshele Trust, which trust is the owner of the voting share capital of a number, if not all, of the defendant companies. He argues that the Receivership Order having been made ex parte, is essentially provisional in nature; and not solely because of the interim nature and accordingly it can be reviewed by the judge whose order it is in the light of evidence and arguments adduced by the opposing party. And such evidence and arguments, if accepted, may lead to either a discharge or a variation of the Order: **Order 32 r. 6 of the Rules of the Supreme Court (R.S.C.).**

Secondly, Mr. Glinton submits that the Court lacked the jurisdiction in the circumstances to appoint a Receiver notwithstanding Ms. Lake's request and concurrence exhibited in her said letter of 30th March, 2000, to the Securities Commission for, as he puts it, "it is legally incompetent for private persons (by agreement or otherwise) to confer or impose jurisdiction on the Court in respect of any matter which itself lies beyond the competence or authority of the Court: **In Re Aylmer, Ex parte Brischoffsheim (1888) 20 Q.B.D. 258 at 262 per Lord Esher M.R.** He argues that Mrs. Lake was coerced into writing the letter. It was not done

voluntarily. A number of other authorities are also cited by him in support of this proposition but in the circumstances I think it is sufficient to cite just one of them. Mr. Glinton argues that the facts or evidence presented to the Court by the Commission could not satisfy the "just and convenient" test required by section 21 of the Supreme Court Act, 1996, for the appointment of a Receiver.

Thirdly, Mr. Glinton submits that neither section 26 of the Mutual Funds Act, 1995, nor any other provision of the Act has the effect of vesting the Court with jurisdiction so as to enable the making of the Order in question. He argues that the effect of section 26 of the Mutual Funds Act, 1995, is simply to enable the Commission to apply to the Court for an appropriate Order. There was no existing or pending action at the time of the application. The section does not in the absence of an independent cause of action admit a "freestanding" Order: **Salter Vs. Salter (1895) P. 261 Gasson & Hallagan Vs. Jell (1940) Ch. 248.**

Fourthly, Mr. Glinton submits that there was no evidence that the defendant-companies were carrying on or attempting to carry on mutual fund business in the Bahamas and there was no evident necessity for the Commission to act to preserve the assets of the investors represented in the defendant-companies or to protect creditors from jeopardy. The

Commission was obliged to satisfy the Court of the existence of these conditions before such order can be obtained. He relies on **Lloyds Bank Ltd. Vs. Medway Upper Navigation Co. (1905) 2 K.B. 359** and **Westhead Vs. Riley (1884) 25 Ch. D. 413** for this submission. He submits that no creditors were pressing and no such allegations were made. The appointment of a Receiver being "an extraordinary and drastic remedy to be exercised with utmost care and caution and only where the Court is satisfied there is imminent danger of loss if it is not exercised." The circumstances did not warrant or justify the appointment of a Receiver either on ex parte basis or atall: **Bond Brewing Holdings Ltd. Vs. National Australian Bank Ltd. (1989-90) 1 ACSR 445 at 458.** Mr. Glinton, referring to the Hilary Deveaux's affidavit, states that the only thing the Securities Commission did not like was the manner in which the companies accounts were kept. There was the complaint or allegation that the assets of the defendant companies were treated as a pool of assets, a fact of which the Commission was aware since 1997. In his submissison, even if those facts are true, that allegation was insufficient to justify the appointment of a Receiver, as it is not against any law. For the above reasons, Mr. Glinton submits that the Order appointing of the Receiver should be set aside and the Receiver, Mr. Culmer, discharged.

The gist of Mr. Glinton's submissions with regard to the Winding-up petition and the application for the appointment of a provisional liquidator is that the Securities Commission, in the circumstances of this case, has no locus standi to present a Winding-up petition and consequently cannot request the appointment of a provisional liquidator. In support of his submissions on this issue, Mr. Glinton argues as follows:

> "(i) The winding up of IBC Act Companies is governed by the Winding-Up provisions under the *IBC Act* and the *Companies (Winding-up) Rules*. Specifically *Section 94* of the *IBC Act* prescribes, and thereby limits, the categories of persons having standing to apply to the Court "for the winding up of a Company under this Act". *Rule 23* of the *Winding-up Rules provides* for the appointment of a Provisional Liquidators only "upon the application of a creditor, or of a contributory, or of the Company."
>
> (ii) Since at least the decision in H. L. Bolton Engineering Co. Ltd [1956] Ch.D. 577, which recognized that the (English) equivalent provisions *(Section 224* of the *Companies Act, 1948)* provided "an exhaustive list of those persons who are entitled to present a petition for compulsory winding up", Courts have consistently applied the provision on a construction that "the list of persons who may present a petition appears to be exhausted": In re William Hockley Ltd. [1952] 1 W. L. R. 555, 558 (per Pennyquick J.)
>
> (iii) There is no inherent winding up jurisdiction in the Court to be exercised on the application of a person not qualified within the listed category in *Section 94* of the said Act: Western Interstate Pty Ltd. v. Deputy Commissioner of Taxation (1996) 14 A.C.L.C. 216.
>
> (iv) Based on dicta of Megarry V.-C. in n re Highfield Commodities Ltd. [1985] 1 W. L. R. 149, 158, the

Commission is not be (sic) regarded as having a proprietary interest in or in relation to any of the Applicant Companies, including Equivest in particular, or as otherwise occupying a special position that entitles it to present a Petition in its own capacity and not *qua* creditor, or to apply for the appointment of a Provisional Liquidator.

(v) **The Commission being otherwise a stranger to the Applicant Companies, therefore any power in it to present a Winding-up Petition must be expressly conferred by statute."**

Mr. Glinton submits that for the above reasons, the application for appointment of a Provisional Liquidator ought to be refused and the petitions presented for the winding-up of the defendant-companies set aside.

In reply to Mr. Glinton, Mr. Michael Barnett, Counsel for the Securities Commission submits and argues as follows: **Firstly**, that the Receivership Order was not made ex parte as alleged by the defendant-companies. He argues that an Ex Parte Order is an Order obtained without notice to the other party in the matter and without giving that other party an opportunity to he heard on the application. "The Receivership Order was sought by the Commission at the specific request of Nancy Lake as trustee of the Tenesheles Trust and sole director of the Defendant-companies." Mr. Barnett refers the Court the letter of 30th March, 2000, written by Mrs. Nancy Lake to the Securities Commission, a letter exhibited in the Hilary Deveaux's affidavit as **Exhibit 1,** to which I have already referred earlier in

this decision. Mr. Barnett also refers the Court to the letter dated June 5, 2000, written to the Securities Commission and signed by Mrs. Nancy Lake, which letter is exhibited in the joint affidavit of Mrs. Nancy Lake and Ian Renert filed on 18th October, 2000, in this matter and therein marked **"Exhibit L & R 8."** That letter reads as follows:

"THE TENESHELES TRUST
P.O. BOX CB-13039
55 Frederick Street, Nassau, Bahamas
Telephone: 242 356-2093

June 5, 2000

The Securities Commission of The Bahamas,
3rd Floor, Charlotte House,
Charlotte Street,
Nassau, Bahamas.

Dear Sirs,

Re: Equity Action #585/2000

I write further to my letter of the 30th of March, 2000 requesting your urgent assistance to "...make application to the Courts to appoint a Receiver for the Corporations ..." In this connection I have now had the opportunity to read the Originating Notice of Motion filed in the Registry of the Supreme Court of the Commonwealth of The Bahamas on the 31st of May, 2000 together with the draft of the Order proposed as an annexure.

Further, I have also seen in draft the supporting Affidavit of Hillary Deveaux, Secretary to the Commission and the exhibits referred to in the Affidavit.

In my capacity as Trustee of Tenesheles Trust and as Director of the Companies listed as Defendants in the Action, I

consent to the Order proposed which conforms with my original request to the Commission.

I consent to this letter being shown to the Court.

Yours faithfully,

(Sgd.) *Nancy Lake*
Nancy Lake
Trustee

cc: Mr. Michael L. Barnett
Graham, Thompson & Co."

Mr. Barnett construes this letter as evidence that the defendant companies were given notice of the originating Notice of Motion for the appointment of a Receiver and to appear at the hearing of the said motion.

Secondly, Mr. Barnett submits that the Court has jurisdiction to make the Receivership Order which it made on the 7th June, 2000 appointing Mr. Culmer as the Receiver. For this submission Mr. Barnett relies on the provisions of **section 26 of the Mutual Funds Act, 1995** and also **section 21 of the Supreme Court Act, 1996.** He argues that the grounds for the request for the Receivership Order are set out in the affidavit of Hilary Deveauz filed in this matter and the said letters of Ms. Nancy Lake to which I have referred in this decision. He also lays much emphasis on paragraph 19(e) of that Deveaux's affidavit which reads:

> **"that it is in the interest of the creditors to place the assets into the hands of an independent Receiver and Manager, answerable to the to the Court and to the Commission.**

This will enable the Commission to determine the correct state of affairs of the mutual funds and determine whether the best interest of creditors would be served by granting mutual fund licences or by the winding up of the companies."

Thirdly, Mr. Barnett submits and argues that the defendant-companies were carrying on mutual fund businesses without licences in clear violation of the **Mutual Funds Act, 1995, section 3.** The letters written by Ms. Nancy Lake cited above together with the report of Mr. Culmer exhibited in the affidavits of Hilary Deveaux all show that the defendant-companies were carrying on mutual business in the Bahamas without a licence from the proper Authority under the Mutual Funds Act, 1995.

For the above reasons Mr. Barnett submits that Mr. Glinton's submissions that the Court has no jurisdiction to make the Receivership Order ought to fail.

Fourthly, Mr. Barnett submits that "Ms. Nancy Lake and Ian Renert and the Defendant-Companies have no locus standi to make this application." "As against Nancy Lake and the defendant-companies, they are estopped from asserting that the Court had no jurisdiction as they expressly sought the Order and expressly consented to making the Order."

I pause here for a moment to briefly comment on and dispose of this fourth point of Mr. Barnett. Mr. Barnett seems to have forgotten that the Securities Commission relied very much on the letters of Ms. Nancy Lake to obtain the Receivership Order, in that the Plaintiff—Securities Commission impliedly accepted that when she wrote those letter, she spoke for the defendant-companies. If she spoke for the defendant-companies then, and was accepted by the Securities Commission as such, there is no reason why she cannot now have the locus standi to speak for the same companies, and certainly there is no evidence before me that she has ceased to occupy that position which she occupied when she spoke for, and was accepted as speaking for, the defendant-companies.

I therefore do not accept the submission that "Nancy Lake and Ian Renert and the Defendant-Companies" have no locus standi to make this application or applications now before me.

I take this opportunity to mention that the issue of the conduct of the Receivership was not pursued by Mr. Glinton, Counsel for the defendant-companies before me although it may have appeared in the written submissions of the parties delivered to the Court. There is therefore no reason for me to deal with any allegations regarding the conduct of the

Receivership. I shall therefore concern myself with the issues regarding the appointment of the Receiver as stated above.

On the issue of the Winding-up petition and the appointment of a provisional liquidator, Mr. Barnett submits as follows:

a) Mr. Barnett concedes that the locus standi to present a petition to wind-up a company may be conferred by statute other than the Companies Act, 1992 or the International Business Companies Act, 2000 (IBCA. 2000), as submitted by Mr. Glinton e.g. section 14(5) of the Banks and Trust Companies Regulation Act, 2000, which confers on the Governor of the Central Bank the standing to present such a petition, Section 41 of the Insurance Act which confers on the Registrar of Insurance the standing to present a winding-up petition etc.

He argues that in the present case such standing to present a petition for the winding-up of a company carrying on mutual fund business is conferred on the Securities Commission by **section 33(11) (b) of the Mutual Funds Act,** and in respect of companies carrying on mutual funds business without a licence in breach of section 3 of that Act, such standing is conferred by section 26 of the Mutual Funds Act, 1995.

b) He submits that the issue for the Court is whether section 26 of the Mutual Funds Act is sufficient to confer on the Securities Commission the standing to present a petition for the winding-up of a company carrying on mutual fund business in breach of section 3 of the Mutual Funds Act, 1995.

The fact that the Securities Commission is not a contributory, creditor or director of the company does not deprive the Securities Commission of the necessary standing to present a winding-up petition in circumstances such as in this case.

The Securities Commission — Locus Standi to present Winding-Up petition.

I now deal with the first question of law as to whether the Securities Commission has any locus standi to present the petition for the winding-up of these defendant-companies, including **Arcadia Mutual Fund Inc.** If I should determine that the Securities Commission has the locus standi to do so, then I shall proceed to determine whether on the facts as presented, the Court has ground or jurisdiction to wind-up these companies. But should I determine that no such standing exists in the Securities Commission, then in that case I need not go further on that issue.

It is common ground between the parties in this matter that most of the defendant-companies, including **Arcadia Mutual Fund Inc.**, are International Business Companies incorporated under the International Business Companies Act of the Bahamas (IBCA. 2000).

The Securities Commission has petitioned the Court to wind-up these companies on the ground that it is **just and equitable** as provided in section 92 of the IBCA 2000 to do so based on the facts that they have carried on mutual fund business without a licence in contravention of section 3 of the Mutual Funds Act, 1995.

Section 92 of the IBCA. 2000 provides as follows:

"92. A company under this Act may be wound up by the court in the following circumstances –

(a) when the company has passed a resolution requiring the company to be wound up by the court;

(b) when the company does not commence its business within a year from its incorporation, or suspends its business for a period of one year;

(c) when the members are reduced in number to less than two;

(d) when the company is unable to pay its debts;

(e) if the court is of the opinion that it is just and equitable that the company should be wound up."

(Emphasis — Provided)

Section 94 of the said IBCA. 2000 also provides:

"94. Any application to the court for the winding up of a company under this Act shall be by petition; and such petition may be presented by the company, a director, or by any one or more creditors, a contributory of the company, or by all or any of the above parties, together or separately; and every order which may be made on any such petition shall operate in favour of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory."

(Emphasis — Provided)

It seems to me therefore that the Court has no inherent power to wind up a company. Such power or jurisdiction is conferred by the provisions of

section 92 of the IBCA. 2000, or by the provisions of section 197 of the Companies Act 1992 and may be exercised on the application of a person who is qualified under section 94 of the IBCA. 2000 or section 199 of the Companies Act, 1992 to apply for such an Order. The standing to apply for winding up of a company is also **expressly conferred** by statutes other than the IBCA. 2000 or the Companies Act, 1992. Examples of such conferment may be found in section 14(5) of the Banks and Trust Companies Regulation Act, 2000, section 41 of the Insurance Act and section 23 of the External Insurance Act. **It is to be noted that section 33(11) of the mutual Funds Act, 1995, also confers such a power on the Securities Commission in respect of a "Regulated Mutual Fund."**

In a widely cited article, **"The Inherent Jurisdiction of the Court"** Sir Jack I. H. Jacob, at one time a Senior Master in the High Court of England, said:

> **"... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent" ... the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused Such a power is intrinsic in a superior court; it is its very life blood, its very essence, its immanent attribute . . . The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of**

> **administering justice according to law in a regular, orderly and effective manner."**
>
> **(1970) Current Legal Problems p. 23)**

Sir Jack I. H. Jacob continues:

> **"... The term 'inherent jurisdiction of the court' is not used in contradiction to the jurisdiction conferred on the court by statute. The contrast is not between the common law jurisdiction of the court on the one hand and its statutory jurisdiction on the other. For the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision."**

The above passages have been quoted with approval. (see: e.g. **Taylor Vs. Attorney General (1975) 2 NZLR 675 at page 680).** The power or jurisdiction to wind up a company is not derived from the Inherent jurisdiction of the Court.

Under the Mutual Funds Act, 1995, a **"regulated mutual fund"** is defined in **section 2(1)** as follows:

> **"regulated mutual fund" means a mutual fund that is carrying on or attempting to carry on a business in or from The Bahamas and is doing so in compliance with subsection (1) or (3) of section 3;"**

Since it is alleged by the Securities Commission that the defendant companies have been carrying on mutual fund business without a licence issued under the Mutual Funds Act and therefore are in breach of section 3 of that Act, it follows that the defendant companies cannot be classified or

regard as regulated mutual funds under the Act **and as they are not regulated mutual funds, the Securities Commission cannot act under section 33(11) of the Mutual Funds Act, 1995, to present a petition to wind up the defendant companies.** Mr. Barnett submits, but Mr. Glinton disagrees, that the statutory authority to apply to the Court to wind-up the defendant-companies is found in **section 26** of the **Mutual Funds Act.**

Section 26 of the Mutual Funds Act provides as follows:

> **"26. If it appears to the Board that –**
>
> **(a) a mutual fund is carrying on or attempting to carry on business in or from The Bahamas; and**
>
> **(b) the mutual fund is doing so in breach of subsection (1) of section 3,**
>
> **the Board has power to apply to the Court for such order as it thinks fit to preserve the assets of the investors in the mutual fund or to protect the creditors of the mutual fund and the Court has power to grant such orders."**

If one is to accept Mr. Barnett's submission, one would have to imply that **such order as the Court thinks fit** includes an Order to wind up such company carrying on or attempting to carry on mutual fund business in breach of section 3(1) of the Mutual Funds Act.

Mr. Glinton on the other hand argues that since the power or jurisdiction to order the winding up of a company is not an inherent power or jurisdiction, such a power or jurisdiction must be **expressly** conferred by

statute, not by implication. He argues that section 26 of the Mutual Funds Act is no more than a provision enabling the Securities Commission to apply to the Court for such Order which the Court has jurisdiction to make in the circumstances — not just any Order asked for by the Securities Commission. The question is therefore whether **section 26 of the Mutual Funds Act** is sufficient to confer on the Securities Commission the standing to present a petition for the winding up of a company carrying on mutual fund business in breach of section 3 of the Act, and whether the Court has the jurisdiction in the circumstances to grant such an Order.

In construing the provisions of section 26 of the Mutual Funds Act I bear in mind that an Act or other instrument must be read as a whole as the meaning of a section may be controlled by other individual provisions of the same Act. I am not unmindful of the words of Lord Loreburn in **Vickers, Sons & Maxim Ltd. Vs. Evans (1910) A.C. 444 at 445** when he cautioned that "we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

Section 3(2) of the Mutual Funds Act, 1995, provides that the operator of a mutual fund shall ensure that the mutual fund does not carry on or attempt to carry on business in or from The Bahamas contrary to section 3(1)

of the Act i.e. an operator of a mutual fund must ensure that such mutual fund is not operated without a licence. Section 39(1) of the Act provides punishment of a $10,000 fine and imprisonment for 2 years or both fine and imprisonment for anyone found guilty of carrying on or attempting to carry on mutual fund business in or from the Bahamas without a licence issued under the Act.

I notice, however, that Parliament has **expressly** in section 33(11) of the Act conferred on the Securities Commission the locus standi to present a winding up petition in appropriate cases in respect of those companies licensed to operate under the Mutual Funds Act, 1995, i.e. "regulated mutual funds." I am of the view that if Parliament intended by the provisions of section 26 of the Mutual Funds Act to confer on the Securities Commission the standing or authority to petition for the winding up of companies carrying on mutual fund business without a licence and in breach of section 3 of the Mutual Funds Act, it would have done so in clear and express words in view of the provisions of section 94 of the IBCA. 2000 which has stipulated the category of persons on whom the standing to present a winding up petition against a company has been conferred. I accept therefore the submissions of learned Counsel, Mr. Glinton, on behalf of the defendant-companies that section 26 of the Mutual Funds Act, 1995, is not

an all purpose omnibus provision and does not operate to confer a standing on the Securities Commission to present or to maintain the present petitions for the winding up of the defendant companies. It seems to me that section 26 of the Mutual Funds Act is an enabling provision which merely confers on the Securities Commission the authority or standing to seek any Order which the Court is empowered by law or by its inherent jurisdiction to make having regard to the circumstances of the case.

For the reasons which I have given I hereby dismiss the petitions of the Securities Commission now before me for the winding up of the defendant companies. The winding-up petitions having been dismissed it follows that the applications for the appointment of a provisional liquidator made pursuant to section 97 of the IBCA 2000 must also fail. I also dismiss the applications for the appointment of a provisional liquidator.

Objection to the appointment of the Receiver:

I now turn to the application on behalf of the defendant companies for the setting aside of the Receivership Order made on the 7th July, 2000, and also the Extension Order made on the 16th August, 2000.

Much time has been spent by the parties in arguing whether the order appointing the Receiver was an ex parte Order or not. Earlier I explained the circumstances and facts leading to the Receivership Order. It was an Order

made which was not intended at the time of its making to finally dispose of the rights of the parties. In that sense it is an Interlocutory Order which the parties are at liberty to apply to discharge or vary. The Receivership Order was not a pre-winding up order nor was it intended by the order to achieve a winding up through the backdoor. This was made clear to Counsel for the Securities Commission by the Court at the time the Order was made. The reasons for the Securities Commission approaching the Court for the Order are clearly set out in Ms. Nancy Lake's letter to the Securities Commission dated the 5th June, 2000. The salient and relevant parts of that letter read as follows:

> **"Dear Sirs**
>
> **I am writing to you in my capacity as Trustee of The Tenesheles Trust. The trust is the beneficial owner of the voting share capital of a number of corporations.**
>
> **In April 1999 BDO Mann Judd was appointed by the trust to produce a combined statement of net assets of the above-noted corporations. At that point they informed the corporate administrator that the corporations were effectively operating as a mutual fund in contravention of the Mutual Funds Act, 1995 and that a plan of re0rganization should be presented to the Securities Commission in order to obtain the necessary licensing for the corporations to continue to operate in compliance with the Act.** . . . . . .
> . . . . . .
> . . . . . .
> **However, I have been advised by BDO Mann Judd, that as a result of the current lack of accounting records and the time that it will take to bring them up to date, significant and unacceptable further delays will be incurred in presenting the plan of reorganization and licence applications. Further, I am informed that BDO Mann Judd consulted Messrs Callenders &**

> **Co., attorneys, who advised that these matters be immediately reported to the Securities Commission, and their urgent intervention be sought to assist in the restructing of the fund, by way of a court-appointed protective receivership. The alternative would appear to be uncontrolled investor litigation, which would result in the collapse of an otherwise solvent and profitable fund.**
>
> **I would therefore request that you make application to the courts to appoint a receiver for the corporations until such time as the accounting records can be brought up to date, the plan of reorganization implemented and the necessary mutual fund licences obtained.**
>
> **In the event that you require any clarification of these matters please contact either Michael Scott or Colin Callender at Messrs Callenders & Co."**
>
> **(Emphasis — Provided)**

There is no evidence before me that Ms. Nancy Lake was coerced into writing the letter which was presented by the Securities Commission to the Court as evidence of her consent for the Order. The Court was informed at the time that the application by the defendant companies for licences to carry on mutual fund business in and from the Bahamas was under consideration. (see also the affidavit of Hilary Deveaux dated 5th June, 2000 and filed in this matter).

Section 21 of the Supreme Court Act, 1996, which wording is similar to the wording of section 37(1) of the Supreme Court Act, 1981 of England provides that the Court may by an Order **(whether interlocutory or final)** appoint a receiver in all cases in which it appears to the court to be just and

convenient to do so. **Section 37(1)** of the Supreme Court Act, 1981, succeeds section 25(8) of the Supreme Court of Judicature Act, 1873, which provided similar jurisdiction for appointment of receivers except that by the 1981 Act, the appointment order may be **"interlocutory or final."** In construing and applying the provisions of section 37(1) of the Supreme Court Act, 1981, of England, the Courts in England have adhered to the general rule that the application for the appointment of a receiver "must, in general, be made in a properly constituted **action**." In other words "the Court has no jurisdiction to appoint a receiver to preserve properties unless an **action** is pending." See:

Topping Vs. Searson (1862) 6 L.T. 449
Salter Vs. Salter (1896) P. 291.
Gasson & Hallagan Ltd. Vs. Jell (1940) Ch. 248.

In my view that expression of the law as it is in England is consistent with, and accurately expresses, the law as it is in the Bahamas on this point. Certain statutes, such as the Companies Act, 1992, provide for the appointment of a receiver under particular circumstances.

It seems to me that section 26 of the Mutual Funds Act is merely a provision to enable the Securities Commission to apply to the Court for any appropriate order which the Court has jurisdiction to make. Section 26 of

the Mutual Funds Act, 1995, does not, in the absence of a pending action, admit of a **freestanding** order appointing a receiver.

I accept that submission by Mr. Glinton. It seems to me that since the petition for the winding up of the defendant companies has been dismissed, the existence or continuation of the receivership order and its extension cannot be justified in law.

As I have already stated, there is no evidence before me, except by way of Counsel's submission, which is not evidence, that Ms. Nancy Lake was coerced into writing that letter dated 30th March, 2000 relied on by the Securities Commission in obtaining the Order for the appointment of the Receiver. Ms. Nancy Lake is a woman of full age and wrote that letter in her capacity as Trustee of the Tenesheles Trust, which trust is said to be the beneficial owner of the voting share capital of a number, if not all, of the defendant companies.

In **Saunders Vs. Anglia Building Society (1970) 3 All E. R 961** the House of Lords gave their approval to the broad general principle stated by Lord Denning M.R. when he said:

> **"When a man of full age and understanding, who can read and write, signs a legal document which is put before him for signature — by which I mean a document which, it is apparent on the face of it, is intended to have legal consequences — then, if he does not take the trouble to read it, but signs it as it is, relying on the word of another as to its character or contents or effect, he cannot be heard**

to say that it is not his document. By his conduct in signing it he has represented, to all those into whose hands it may come, that it is his document; and once they act on it as being his document, he cannot go back on it, and say it was a nullity from the beginning."

(at (1970) 3 All E.R. page 977)

That broad principle applies in this case. Neither Ms. Nancy Lake nor the companies she represents can now seek to gain an advantage by Ms. Lake's default:

Societe des Arteliers Vs. New Zealand Shipping (1919) A. C. 1
Torquay Hotel Co. Vs. Cousins (1969) 2 Ch. D. 106 at 13".
Hong Kong Fir Shipping (1962) 2 Q.B. 29 at 66.

In addition I have been informed by Counsel for the Securities Commission that after consideration, the Commission has decided not to grant to the defendant companies licences to carry on mutual fund business in or from the Bahamas. In the circumstances since the objective which the Securities Commission and the defendant companies had hoped for by the appointment of the receiver can no longer be achieved, it is therefore just and equitable that the receivership should come to an end.

For the reasons I have given, I hereby set aside the Receivership Order and its Extension Order. The Receiver is hereby discharged. But if it should be that the receivership order and its extension order have infact expired, then I order that the receivership order be not further extended.

I thank both counsel in this matter for the admirable way in which they have presented their in-depth submissions from which I have derived much help. I invite counsel to address me on costs.

Dated the 11th **day of** April, **2001**

E. E. Osadebay

Emmanuel E. Osadebay
Senior Justice