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## ESSENTIALS OF INVESTOR PROTECTION IN THE COMMONWEALTH CARIBBEAN AND THE UNITED STATES

STEPHEN J. LEACOCK\*

The limited liability company has proved itself a most effective instrument for promoting commercial prosperity in a free society . . . <sup>1</sup>

The law and practice relating to the protection of investors is of paramount importance in both developing and developed societies. In recent times, the limited liability company has emerged as the dominant form of business operation, and the public company has provided the best opportunity to the investing public for participating financially in the business operations of its community. In order to win and retain the confidence and trust of the investing public, therefore, effective measures of investor protection are crucial. This article treats investor protection primarily in relation to the purchase, sale and other dealings in the securities of companies.

### COMMONWEALTH CARIBBEAN<sup>2</sup>

There is no counterpart to the United States Securities and Exchange Commission in any territory of the Commonwealth Caribbean. The Company Laws in the Commonwealth Caribbean are patterned on the English Companies Acts of 1862 or earlier,<sup>3</sup> 1908,<sup>4</sup> 1929,<sup>5</sup> and 1948;<sup>6</sup> as a result, the sources of investor protection in the territories are to be found primarily in the Companies Acts<sup>7</sup> operating therein. The Companies Acts deal particularly with matters concerning the issuance of securities, such as the requirements of prospectuses, the allotment of shares and the issue of shares and debentures. There are very strict

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provisions in many of the territories on civil and criminal liability for misstatements in prospectuses making promoters, directors and other persons who participated in the issue liable unless they can discharge the onus of proving that they have not acted dishonestly or negligently.

## UNITED STATES

Under the United States Constitution, all the powers which the individual states have not delegated to the Federal Government remain vested in the individual states.<sup>8</sup> Incorporation has not been delegated by the individual states to the Federal Government, thus incorporation is a privilege granted by each state according to its own laws. However, the individual states do not have absolute power in relation to corporations, the Constitution itself imposes restrictions on corporations which engage in interstate and foreign commerce. Article 1, section 8 of the United States Constitution enacts that "...the Congress shall have power...to regulate commerce with foreign nations, and among the several states..." The regulation of interstate and foreign commerce is therefore reserved to the Federal Government, and if, for example, a state attempts to hinder a corporation in the execution of interstate business, such hindrance would be unlawful, being an infringement of the commerce clause.<sup>9</sup>

## STATE LAWS

As incorporation is governed by the laws of the individual states, the jurisdiction over the organisation and operation of companies is primarily exercised by the several states, but there is no unanimity between the company laws of the several states. These company laws range from simple enabling Acts to complete statutes which introduce varying responsibility in relation to corporate acts, and varying measures of investor protection. Incorporators therefore tend to shop around in order to find the state with the most advantageous laws, from their point of view, since a company incorporated in one state can do business in other states without too much trouble.

In fact, the various state company laws are not primarily concerned with the rights of investors and the obligations of issuers and dealers in company securities. The establishment and safeguarding of investors' rights are usually left to statutes other than the company law statutes. There is also wide variation in the strictness of the measures laid down in these

other statutes, and they vary from simple penal provisions designed to punish deceit, to comprehensive measures designed to really protect the investor. These statutes are commonly referred to as Blue Sky Laws, because they deal with the representations and schemes of promoters, which the court in an early case found had no more basis than so many feet of "blue sky".

Despite substantial growth in the field of local control and administration, state regulation has not proved effective in many areas. The state administrators and judicial officers are unable to cope with offenders who do not comply with local requirements and make offers, by the use of the mail system, telephone system or other means of communication in interstate and foreign commerce, from states and foreign jurisdictions in which their activities are lawful. The conflicts of law and other problems have hindered investors in one state from obtaining redress from sellers in other states, and have tended to render state attempts at investor protection ineffective.

#### FEDERAL LAWS

The ineffectiveness of state regulation led to suggestions for comprehensive statutes authorising federal incorporation of companies engaged in interstate and foreign commerce; these suggestions have not been fully implemented, but have led to the enactment of federal security laws. The federal scheme of investor protection is mainly found in seven statutes covering the general field of securities and finance, and they are administered by a federal body known as the Securities and Exchange Commission.

Authority for the enactment of the Securities Legislation by the Federal Government, and the jurisdiction for its application, is based upon the constitutional grant of authority to the Federal Government over the mails and the means of communication and transportation in interstate and foreign commerce which was mentioned earlier.<sup>10</sup> This federal legislation was passed after a fierce debate between those who argued that preventive legislation was not feasible nor wise, and those who considered that there should be federal regulation based on a comprehensive model of Blue Sky regulatory legislation. Neither of those views was accepted, and in the end, the fundamental idea of the disclosure philosophy on which the English Companies Act 1929 was based formed the basis of the federal legislation.

*INVESTOR PROTECTION IN COMMONWEALTH CARIBBEAN*

When a public company proposes to raise money, it usually does so by inviting the investing public to subscribe for shares or debentures in the company. The issue of application forms for shares or debentures to the public is prohibited unless the forms are accompanied by a prospectus which complies with the statutory requirements.<sup>11</sup> Section 2(1) of the Jamaica Companies Act 1965 defines a prospectus as:

any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company.<sup>12</sup>

This is the meaning of a prospectus as far as Section 40<sup>13</sup> of the Jamaica Companies Act 1965 and all other sections of the Act that refer to the term "prospectus" are concerned.<sup>14</sup>

The information required to be given in accordance with the Companies Acts is contained in section 40 of the Jamaica Companies Act 1965 and in the Third Schedule<sup>15</sup> to that Act. The principle is that a prospectus should give to the public a full, accurate and fair picture of the current position, as well as the future prospects of the company. It should therefore disclose every material<sup>16</sup> fact and contract in relation to the company.

Those who issue prospectuses are under an obligation to comply with what has been referred to in England as the "golden rule" as to framing prospectuses. This rule was laid down in 1860 by *Kindersley V-C*,<sup>17</sup> and was referred to by *Page-Wood V-C*<sup>18</sup> as a "golden legacy".

Those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality, of the privileges and advantages which the prospectus holds out as inducements to take shares.

The first prospectus issued in relation to the shares of any company has to state the minimum subscription,<sup>19</sup> being the sum which, in the opinion of the directors, is necessary to provide for the purchase of any property which shall be purchased out of the proceeds of the issue, to pay any preliminary expenses, to repay any monies borrowed by the Company

in respect of any of the foregoing matters, and to provide the working capital of the company. Section 47(2)<sup>20</sup> of the Jamaica Companies Act 1965 states that the amount so stated in the prospectus shall be reckoned exclusive of any amount payable otherwise than in cash. This is a precautionary provision which ensures that the full sum representing the minimum subscription is paid in to the company.

Part II of the Third Schedule<sup>21</sup> requires reports to be set out in the prospectus by the auditors of the company respecting the profits or losses of the company in each of the three preceding financial years. The rates of any dividends paid by the company must be shown for each class of shares, as well as information on any class of shares for which no dividends were paid for any of those three years. The report must give information as regards the assets and liabilities of the company as shown in the last balance sheet, and if the company has any subsidiaries, the auditors report must also deal with the profits and losses of the subsidiaries, treating the total assets and liabilities of the group as a whole.<sup>22</sup> If any of the proceeds of the issue of the shares or debentures is to be applied directly or indirectly to the purchase of any business or shares in any other body corporate, a report by accountants, who must be named in the prospectus, has to set out similar matters to those applying to the company.<sup>22a</sup>

No misrepresentation of any material fact, nor any deception nor ambiguous statements should be included in a prospectus. Members of the public invited to join in any venture by a company through the issue of a prospectus, should have the same opportunity of judging everything which is material to the venture in the same manner as the promoters of the company, or anyone else acting in its behalf.<sup>23</sup> Under section 39<sup>24</sup> of the Jamaica Companies Act 1965, no prospectus may be issued unless a copy of it is delivered to the Registrar for registration.

### *STATEMENT IN LIEU OF PROSPECTUS*

A company which did not issue a prospectus when it was formed must not allot any of its shares or debentures unless it files a statement in lieu of prospectus with the Registrar.<sup>25</sup> The Jamaica Companies Act 1965 allows statements in lieu of prospectus when a public company having a share capital has been formed, and it has issued a full prospectus but has not obtained its initial working capital on the strength of the full prospectus.<sup>26</sup> Secondly, when a private company has been converted into a public company<sup>27</sup> (unless it prefers to issue a full prospectus).

In Jamaica a public company having a share capital which has not obtained its initial working capital on the strength of a prospectus is governed by the Fourth Schedule<sup>28</sup> when it issues its statement in lieu of prospectus. The information required to be given is almost as full as that required in a full prospectus. The statement must be signed by every person who is named in it as a director or a proposed director or by his agent, and must be duly authorised in writing.

When a private company is converted into a public company, it must, unless it issues a prospectus, deliver to the Registrar a statement in lieu of prospectus for registration, within fourteen days from the date of the special resolution of the general meeting deleting the three requirements of section 30(1)<sup>29</sup> of the Jamaica Companies Act 1965 from its articles.<sup>30</sup> This statement has to comply with the requirements of the Second Schedule.<sup>31</sup> If unissued shares or debentures of the company are to be applied in the purchase of a business, or in the purchase of shares in a body corporate, the reports required by Part II of the Second Schedule must be attached to the statement.<sup>32</sup> The other statutory requirements and provisions are similar to those which apply to a statement in lieu of prospectus in the form laid down in the Fourth Schedule.<sup>33</sup>

### *ABRIDGED PROSPECTUSES*

Where the circumstances do not require the strictness of compliance with the Third Schedule<sup>34</sup> of the Jamaica Companies Act 1965, section 40(5)<sup>35</sup> reduces the requirements, and allows abridged prospectuses which need not comply with section 40<sup>36</sup> of the Jamaica Companies Act 1965 and the Third<sup>37</sup> Schedule to that Act. Abridged prospectuses are allowed where the issue is restricted to existing members or debenture holders of the company, with or without the right to renounce in favour of other persons.<sup>38</sup>

### *APPLICATIONS AND ALLOTMENTS*

A company which is inviting the public to subscribe for its shares for the first time cannot make any allotments until the minimum subscription has been taken up by the applicants, and the sums payable by them for the shares have in fact been paid.<sup>39</sup> Section 50(1)<sup>40</sup> of the Jamaica Companies Act 1965 provides that no securities shall be allotted in pursuance of a prospectus issued generally until the beginning of the third day after that on which the prospectus is first issued, or a later time (if any) as may be specified in the prospectus. This is intended to give the press time to

comment on the merits or demerits of the issue, and thus to give the public an opportunity not only to apply for the securities, but also to obtain expert advice before doing so. Unfortunately none of the other territories have such a provision, and therefore investors in the other territories do not enjoy this safeguard.

### CIVIL SANCTIONS

An allottee who was induced to apply for shares or debentures offered in a prospectus by a misstatement therein may have a claim against the company, the directors, promoters, persons who have authorised the issue of the prospectus, experts or against all of them together. Taking the company first, it is only liable to pay compensation to those who subscribe for any of the shares or debentures on the faith of the prospectus for the loss or damage they suffer as a result of any untrue statement in that prospectus,<sup>41</sup> if it can be shown that the company is a person who authorised the issue of the prospectus. Further, if the Company can be shown to be responsible, the allottee may be able to rescind his contract.<sup>42</sup> The allottee may perhaps also sue the company on the tort of deceit.<sup>43</sup>

The allottee may sue the directors on the tort of deceit,<sup>44</sup> but it must be proved that they have been fraudulent in misrepresenting facts stated in the prospectus. If fraud can be established, they would be liable in damages.<sup>45</sup> The allottee may also sue the directors under section 43(1)(a) and (b)<sup>46</sup> of the Jamaica Companies Act 1965 for compensation for his loss. The equivalent section in the English Companies Act was passed after the unfortunate decision in *DERRY v PEEK*,<sup>47</sup> and under this section the present legal position<sup>48</sup> is that the director is *prima facie* liable once the statement is proved to be untrue. The onus then rests on the director to show that he had reasonable grounds to believe that the statement was true, and that he did in fact believe in the truth of the statement up to the time of the allotment of the shares or debentures in question. By shifting the burden of proof in this way, the legislature has armed the investor with a potent weapon for redress. Section 43<sup>49</sup> may also be used against an expert who has given his consent to a statement in a prospectus, if the untrue statement was made by him as an expert.

### CRIMINAL SANCTIONS

Directors and other persons who publish fraudulent or misleading reports with the intention of inducing the public to take shares can incur



criminal as well as civil liability. At common law, they could be indicted and tried for conspiracy.<sup>50</sup> In the Jamaica Companies Act 1965, section 44<sup>51</sup> deals with criminal liability. An untrue statement<sup>52</sup> in a prospectus constitutes *prima facie* evidence that a criminal offence under this section has been committed. This section completely reverses the rules of criminal liability, for under the section the accused is guilty unless he can plead one or more of the defences admitted by the section<sup>53</sup> to the satisfaction of the court. Section 365<sup>54</sup> of the Jamaica Companies Act 1965 provides that a person shall be criminally liable if he wilfully makes a false statement in any material particular, knowing it to be false, in any of the documents listed in the Eleventh Schedule<sup>55</sup> to that Act.

Section 26 of the Jamaica Larceny Law<sup>56</sup> provides *inter alia* that if a director, manager, or public officer of a company makes an untrue statement knowing it to be false with the intention to deceive or defraud any of the persons mentioned in the section, he shall be liable to imprisonment for a maximum of seven years.<sup>57</sup>

#### IMPROPER USE OF INSIDER INFORMATION<sup>58</sup>

There are no enactments prohibiting the improper use of insider information in the Commonwealth Caribbean. In the United States there are such enactments.<sup>59</sup> In the Commonwealth Caribbean therefore, any curbs on the improper use of insider information are to be found in the general law. This is a particular weakness in the measures of investor protection in the Commonwealth Caribbean.<sup>60</sup>

The fundamental principle is that neither directors, nor, *a fortiori* any other company officer, owes a fiduciary duty to any individual shareholder.<sup>61</sup> Fiduciary duties are owed to the company. The result of this is that a director who, by reason of his office, acquired in confidence a particular piece of information materially affecting the value of the securities of his company, will incur no liability to the other party if he buys and sells such securities without disclosing that piece of information. In the United States both a personal and a corporate action may lie in similar circumstances.<sup>62</sup>

A fiduciary duty is however, owed to the company by its directors, and it is submitted that any profits made by them from the use of insider information in dealings in the company's securities must be disgorged to the company. This fiduciary duty is very strict, so that in one case where the directors acting in good faith and intending to act for the benefit of

the company subscribed for shares in a subsidiary company formed with a view to expanding the business of their company, and sold these shares later at a profit, they were accountable to their company for the profit.<sup>63</sup>

At common law and in equity, the principles governing fiduciaries acting in the course of their fiduciary relationship are perfectly clear and immutable. In the words of Lord Porter<sup>64</sup>

... the principle that a person occupying a fiduciary relationship shall not make a profit by reason thereof is of such vital importance that the possible consequence in the present case is in fact as it is in law an immaterial consideration.

In fact there are two grounds on which directors or other officers in a fiduciary relationship towards the company have to account. First, the fiduciary is not allowed to retain any profit made in a situation where there was any potential conflict between his own interests and those of the company.<sup>65</sup> Secondly, if the fiduciary, directly or indirectly, makes a profit from the use of the company's money, property, information or advantages, he has to deliver up this profit to the company.<sup>66</sup> Unless, of course, there is full disclosure to the company and the company allows him to keep it.

Where there is a situation of potential conflict of interest, the fact that the company could not have availed itself of the opportunity does not prevent the company from successfully suing to recover the profit made by the fiduciary. This is true whether the company has not taken the opportunity because it does not have the money,<sup>67</sup> or because the third party was not willing to deal with the company<sup>68</sup> or for some other reason. On the other hand, where there is a legal bar to the company's capacity to avail itself of the opportunity, then, it is submitted that the company could not recover the profit in reliance upon these principles.<sup>69</sup> The principle to be relied on in such a situation is that of appropriation of corporate property, namely the appropriation of the company's confidential information, or the misuse of its confidential information. It amounts to use of the company's property to make a personal profit. The fiduciary who uses information in such circumstances is a constructive trustee of the profit and holds it in trust for the company.<sup>70</sup> The basis on which a fiduciary has to account in these circumstances, is that of use of corporate property to make a personal profit.<sup>71</sup>

The basis of the principle does not rest on considerations of unjust enrichment,<sup>72</sup> The rationale of the decisions is that a fiduciary will not be allowed to keep a profit which he makes through the use of his beneficiary's property. The beneficiary might be perfectly unaware of the poten-

tial of the particular property, in fact he might even be unaware of the existence of his property right. Nevertheless, if the fiduciary turns it to a profit, he has to account to the beneficiary for that profit.<sup>73</sup> In this respect, the courts in the United States and Canada seem to have relaxed the rigidity of these principles in particular cases on grounds of policy.<sup>74</sup>

Of course, if the information is made public by the company, it is submitted that such action would constitute a gift of the information to whosoever wished to receive it. This is a perfectly sound conceptual possibility. Anyone could then turn this gift to his own profitable account, without incurring liability to the company.

#### *TAKE-OVER BIDS<sup>75</sup>*

In Jamaica, where a small minority of shareholders in the offeree company have not accepted a take-over offer, they are liable to have their shares compulsorily acquired<sup>76</sup> by the offeror company under section 195(1)<sup>77</sup> of the Jamaica Companies Act 1965. The minority have a corresponding right to call upon the offeror to buy them out under section 195(2)<sup>78</sup>. This right may be exercised only if the offeror is a company, but not if he is an individual.<sup>79</sup> This is because these provisions were designed to facilitate mergers of companies and it was thought unreasonable to give the right of compulsory acquisition to an individual, or to allow the dissentient minority to have the right to be bought out, exercisable against an individual.

The right to be bought out provided by section 195(2) of the Jamaica Companies Act 1965 may be exercised only if the result of the offer is that the offeror company holds or can call for the transfer of 90 per cent of the shares concerned.<sup>80</sup> Similarly, the right of compulsory acquisition can only be exercised if there has been a 90 per cent approval of the offer.<sup>80a</sup> Time limits are imposed upon the power conferred by section 195(1) of the Jamaica Companies Act 1965, and time limits are also imposed on the corresponding right conferred by section 195(2) of the Jamaica Companies Act 1965. Thus, notice of compulsory acquisition under section 195(1) of the Jamaica Companies Act 1965 may be given only if there has been a 90 per cent approval within four months after making the offer, and such notice may be given only during the period of two months after the end of the four months already mentioned; and under section 195(2) of the Jamaica Companies Act 1965, the offeror must inform the minority shareholders of their right to be bought out within one month after the date of the transfer by virtue of which their

right arose. The minority holders may also give notice requiring the offeror to buy them out within three months of the giving of the offeror's notice.

The court has power under section 195(1) of the Jamaica Companies Act 1965 to order or not to order that the shares of a dissentient shareholder be compulsorily acquired, and under section 195(2) of the Jamaica Companies Act 1965, the court has power to vary the terms on which the dissentient shareholders are bought out. The court also has the power to order that the dissentient shareholder shall have the right to elect where two or more alternative sets of terms have been included in the offer, and this right of election remains intact even where one of the alternatives was for a limited period of time and emanated from a third party.<sup>81</sup> The court will act to prevent the misuse of these compulsory acquisition procedures, and in one case in England the use of the equivalent section in the English Companies Acts was refused as the offer had not been made by a genuinely independent company.<sup>82</sup> There are no similar provisions in the Federal Investor Protection Laws of the United States, and in this respect it may be said that three territories in the Commonwealth Caribbean<sup>83</sup> are ahead of the United States. There, the protection of the remaining minority in a take-over situation is based on the general law; the approach has been to attempt to establish a fiduciary duty owed by the majority shareholders to the minority to ensure equality of treatment, or alternatively to establish liability in tort.<sup>84</sup>

#### *POWERS OF THE MINISTER<sup>85</sup>*

In Jamaica the Minister<sup>86</sup> has power to appoint an inspector to investigate the conduct of a company's affairs under sections 157<sup>87</sup> and 158<sup>88</sup> of the Jamaica Companies Act 1965. Under section 157, an inspector may be appointed, but any application for such an appointment "... shall be supported by such evidence as the Minister may require for the purpose of showing that the applicants have good reason for requiring the investigation."<sup>89</sup> Under section 158(a), the Minister must appoint an inspector upon a special resolution of the company concerned or on order by the Court to that effect.

#### *REGISTRAR OF COMPANIES<sup>90</sup>*

In section 39(3)<sup>91</sup> of the Jamaica Companies Act 1965, the Registrar is statutorily empowered to exercise his discretion as to whether or not to

register a prospectus submitted to him for registration. First, he may refuse to register a prospectus if he considers that on the face of it, it is misleading;<sup>92</sup> and secondly, he may refuse to register a prospectus if he considers it necessary or expedient for him to carry out an investigation in order to ascertain whether the prospectus in question is misleading or not.<sup>93</sup> Where the Registrar refuses to register a prospectus, within fourteen days, he has to inform the company or any other person who delivered the prospectus for registration.<sup>94</sup> He has to inform them by notice in writing that in his opinion the prospectus is misleading, or that he considers it necessary to investigate whether it is misleading, and he has to state in the notice his reasons for forming this opinion. The Registrar has power within the section to prescribe a longer period than fourteen days within which to give the said notice in writing.

Where the Registrar has given notice that he considered it necessary or expedient to carry out an investigation as to whether the prospectus is misleading, or not, he then has six weeks to carry out his investigation, but he has power to prescribe a longer period. Within this six weeks, or longer period if he has so prescribed, if in the Registrar's opinion the prospectus is not found to be misleading it will be registered. If in the Registrar's opinion it is found to be misleading, then he has to give notice in writing to the company or any other person who delivered the prospectus for registration, that the prospectus is misleading, and the reasons for this opinion have to be stated in the notice.<sup>94a</sup>

Where the Registrar uses the power given by section 39(3) and refuses to register a prospectus, the company or other person who has delivered the prospectus for registration can apply to the Court for an order to have the Registrar effect registration.<sup>95</sup> The Court may then order registration or dismiss the application. Jamaica is the only territory in the Commonwealth Caribbean that has these provisions, and is therefore far in advance of the other territories.<sup>96</sup>

On the other hand, in relation to memoranda of association and articles of association, the Registrar of Companies in Jamaica is not empowered statutorily to exercise any discretion in accepting or rejecting these documents when they are delivered to him for registration,<sup>97</sup> although a certificate granted by him is conclusive evidence that all the statutory requirements have been complied with.<sup>98</sup> In practice, the Registrar would not accept blindly any documents delivered to him for registration, and would not register documents which he noticed did not comply with the statutory provisions.<sup>99</sup> However, the absence of statutory discretion in this

respect is a weakness in the registration system, and compares unfavourably with the United States' system where in the several States the power to refuse registration on the basis of non-compliance with the statutory requirements is normally conferred by statute.<sup>100</sup>

## INVESTOR PROTECTION IN THE UNITED STATES

### *FEDERAL SECURITIES ACT 1933*

#### 1. *Influence of English Company Law:*

Disclosure is the cornerstone of the Federal Securities regulations; it is the great safeguard that governs conduct of corporate management in many of their activities; it is the best bulwark against reckless corporate publicity and irresponsible recommendation and sale of securities.

This quotation from the Securities and Exchange Commission Report to Congress in 1963<sup>101</sup> shows clearly the underlying philosophy of investor protection in the United States. It is a philosophy based almost wholly on the disclosure philosophy of the English Companies Act of 1929 to which American jurists looked when framing their Federal laws governing investor protection. In the Federal Securities Act 1933, the government enacted statutory provisions which ensure that such fair and effective disclosure be made as will permit informed investment decisions by the investor himself, or by his advisers. The later statutes, also based essentially upon the doctrine of disclosure as the best form of investor protection, provide for such matters as the regulation of the market places for securities,<sup>102</sup> the regulation of those who play an important professional role in those markets,<sup>103</sup> as well as the regulation of certain types of holding and investment companies.<sup>104</sup>

#### 2. *Registration Procedures:*

The Securities Act is concerned essentially with securities offered for sale to the public, directly or indirectly, by the issuing company or by a person in a control relationship with the issuer. The objectives of this Act are to provide investors with material financial and other information concerning such securities and to prevent misrepresentation, deceit or any other fraudulent practices in the sale of securities. These objectives are achieved by requiring, in connection with a public offer which is not exempt from registration, the filing with the Securities and Exchange Commission of a registration statement by the issuer.<sup>105</sup> This statement

includes a form of prospectus setting out information regarding the issuer, the security, and the offer which will enable the investor to make an independent appraisal as to the merits or demerits of the security offered, and to reach an informed investment decision.

The term "securities" is given a very wide definition.<sup>106</sup> The definition embraces the usual forms of security such as stocks, bonds, as well as investment contracts, certificates of interest or participation in profit-sharing arrangements and any right to subscribe for any of them. Thus, the United States Supreme Court has held that schemes for the sale of small orange groves to investors resident in other states who are unable and did not intend to manage the groves, combined with contracts for the care of these groves and the transmission to the investor of the proceeds less a charge for these services, amounted to securities within the definition in section 2 of the Act.<sup>107</sup>

Registration is effected by filing with the Commission, forms specified in the Schedules of the 1933 Act, and in this respect, there is great similarity to the Commonwealth Caribbean procedures. However, all the Federal measures of investor protection are administered by a single body, the Securities and Exchange Commission whereas in the Commonwealth Caribbean they are administered by different persons such as the Registrar of Companies,<sup>108</sup> and the Minister.<sup>109</sup>

Information such as the property and business carried on by the issuer, significant features of the security to be offered and its relationship to the capital structure of the business, the system of management, and proposed use of the proceeds of the offer must be included in the statement.<sup>110</sup> Financial statements certified by independent accountants must also accompany the statement.<sup>111</sup> The registration statement then becomes public immediately upon filing, but sales or contracts for sale of the securities by the issuer or his underwriters to dealers or investors must not be entered into before the effective date of the registration statement, which occurs twenty days after the registration statement, or any later amendments are filed.<sup>112</sup> The Commission can, however, provide for an earlier effective date in accordance with the Act.<sup>113</sup> The basic period here is longer than under section 50<sup>114</sup> of the Jamaica Companies Act 1965. However, the Commission has the power to grant a shorter period which gives greater flexibility to the United States system.

There are exemptions from registration for certain types of securities or transactions such as private offerings to a limited group of persons who either have access to any relevant information or can look after them-

selves;<sup>115</sup> certain offers which are limited to the residents of a particular state by an issuer organised and doing business in that state;<sup>116</sup> municipal, state and federal issues, and other U.S. government securities,<sup>117</sup> as well as charitable organisations<sup>118</sup> and co-operatives.<sup>119</sup>

The 1933 Act also provides that the Commission may institute administrative proceedings to refuse or to suspend effectiveness of the registration statement if it appears to be materially incomplete or inaccurate.<sup>120</sup> Thus, every registration statement is examined before and after registration. Administrative proceedings are in fact rare, but the power exists nevertheless, and is available for use if and when the occasion arises. Jamaica alone has procedures of similar quality. Although the registration procedures may not insure investors as to the accuracy of the information contained in the registration statement, the whole process of examination and amendment if necessary, is similar to the procedures of the Registrar of Companies in Jamaica towards prospectuses, and introduces a substantial element of reliability. The other territories ought to adopt these procedures as a matter of urgency.

The statutory scheme of registration under the Federal Securities Act, 1933, places the issuer virtually in the position of an insurer of the accuracy and adequacy of the registration statement, and subjects the others, particularly the directors, underwriters, certifying accountants, and other experts, to the very strict burden of proof that they have acted carefully and diligently.<sup>121</sup> The standard is that "required of a prudent man in the management of his own property."<sup>122</sup> It is submitted the shifting of the burden of proof in the Companies Act of the Commonwealth Caribbean as already done<sup>123</sup> closely approximates this test, and in this respect the investor protection measures are of similar effectiveness. All those involved in the preparation and the filing of the registration statement are subject to penalties and are liable for false statements or half-truths, or the omission of required information.<sup>124</sup> In a suit for damages in respect of any material misstatement in or omission from the registration statement and prospectus, the plaintiff need not establish reliance or causation in order to succeed, it is enough that he has been misled. This goes somewhat further than the Commonwealth Caribbean position because there inducement has to be established. The plaintiff has to establish that he relied on the statement, although the statement need not be the only inducement.<sup>125</sup> Once reliance is established, the fact that the statement is misleading is prima facie evidence of liability.<sup>126</sup> As far as the Commission is concerned, it has no authority to control the nature or quality of a security to the extent of amounting to approval of the issue.<sup>127</sup> In fact, it is a



criminal offence to represent that the Commission has found the registration statement true and accurate.<sup>128</sup> Section 24 of the Act imposes criminal penalties for wilful violation of any of its provisions.

### *SECURITIES EXCHANGE ACT 1934*

This Act provides for the regulation of exchanges of securities by registration of the Stock Exchanges with the Securities and Exchange Commission,<sup>129</sup> and for the registration of all broker-dealers, except those who have exclusively intrastate dealings, those whose business is transacted entirely on a national securities exchange and those whose entire business is in exempted securities, commercial paper, bankers' acceptances or commercial bills.<sup>130</sup> The Commission also supervises their rules and practices. Over-the-counter broker-dealers are also required to register with the Commission.<sup>131</sup> The disclosure principle is extended to the matters dealt with in this Act so that issuers to whom the Act applies are required to register<sup>132</sup> listed or equity securities and to file<sup>133</sup> annual and periodic reports with the Commission, as well as with the Stock Exchanges in which they are listed. The Act applies to all corporations whose securities are listed on a national stock exchange, but the Securities Act Amendments in 1964<sup>134</sup> extended the provisions of the Act to all corporations engaged in, or whose securities are traded in interstate or foreign commerce, with assets in excess of \$1 million, and whose equity securities are held by at least 500 persons.<sup>135</sup>

#### *1. Stock Exchange Securities*

Issuers who wish to list their securities for trading on a registered stock exchange must first come to an agreement with that particular stock exchange, and are required under the 1934 Act, to file an application for registration with the Commission and the exchange.<sup>136</sup> The application for registration must contain information which is essentially similar to that required in a registration statement under the Federal Securities Act 1933. In fact, where an application for listing coincides with a public offer, the same documents are usually sufficient for both purposes. Trading in the securities may not begin until the application becomes effective, which occurs thirty days after the Commission receives from the stock exchange certification that the security has been approved for listing and registration. A period shorter than thirty days may be allowed by the Commission, for it has power to make such a determination. The issuer is also under an obligation to file with both the Commission and the stock exchange,

annual, periodic and current reports necessary to keep the information originally filed up to date, as well as giving notice of any significant changes in the business operations.<sup>137</sup>

The forms for registration under the 1934 Act, as well as those under the 1933 Act are administered by the same staff. This gives the Commission an opportunity for comparison which is invaluable in the discovery of any inaccuracies or dishonesty. The Commission has power to suspend the effective date of any security, or to withdraw registration of a security if it is discovered that the issuer has failed to comply with any provision of the law or any rule or regulation made pursuant to the Acts. The Commission may, if the public interest requires such action, suspend trading in any registered security for a period of ten days; or if the President of the United States so approves, the Commission may suspend all trading on any national securities exchange for a period of ninety days. There are also penalties for filing false statements with the Commission and the stock exchange, and investors have rights of recovery if they suffer damage in the purchase and sale of listed securities in reliance on the false information.<sup>138</sup>

## 2. *Takeover Bids and Control of Proxy Solicitation*

The 1934 Act controls proxy solicitation under section 14, which lays down that there shall be no solicitation “. . . in contravention of such rules and regulations as the Commission may prescribe.” The Commission makes such rules and regulations as are considered necessary or appropriate in the public interest and for the protection of investors. Thus comprehensive regulations governing the solicitation of security-holders in relation to the election of directors or for the approval of other corporate action have been adopted. The Proxy Statement must contain the information required by Schedule 14A. If it is a management proxy for a meeting where directors are to be elected, the proxy must be accompanied by a Report showing the financial position over the last two years, and all other material facts concerning the proposals upon which such holders are required to vote; the security holders must be afforded an opportunity to vote ‘yes’ or ‘no’ upon each proposal.

These requirements for the full disclosures of all relevant information are based on the disclosure philosophy<sup>139</sup> underlying all these enactments, and are a very effective means of compelling those who stand to benefit from the proposals to give an account of their stewardship in the management of the company. The form of the proxy is set out in detail in Rule

14a-4 of the Commission, and preliminary and definitive copies of the proxy statement and Reports must be filed with the Commission before the material is sent out to the shareholders.<sup>140</sup>

Rule 14a-8 requires the circulation of security holders' proposals by the management if the proposal is "a proper subject for shareholder action."<sup>141</sup> Under Rule 14a-7 shareholders may demand certain information, as for example, the number of security holders and the cost of mailing a communication to them. The prohibition of false or misleading information is governed by Rule 14a-9.<sup>142</sup> If the rules are not complied with, the Commission may obtain an injunction to prevent the use of the mails by the wrongdoers,<sup>143</sup> and if the violation is wilful, the Commission can initiate a criminal prosecution against those responsible. In addition to the sanctions which the Commission has, it has become established that the security holders themselves have civil remedies against those in breach of the Rules, so that damages can be awarded, if appropriate.<sup>144</sup>

Where a contest for control of, or representation on the board of directors of a corporation is involved, the Rules require full disclosure of the names and the interests of all those who are participating in the proxy contest.<sup>145</sup> The Rules are very wide, and make provision for effective communication among the security-holders themselves. This is done by compelling the management to furnish reasonably current lists of security-holders,<sup>146</sup> or to mail the security-holder's proxy material for him at his expense.<sup>147</sup>

The rules require that proposed material which will be used for proxy-soliciting must be filed with the Commission prior to use,<sup>148</sup> so that detailed examination can take place in order to ensure that the disclosure provisions have been complied with. Although there is no provision for administrative proceedings to test the accuracy or propriety of suspicious documents or practices, all these documents are public and are considered to be communications subject to the fraud provisions of the proxy regulations.<sup>149</sup> The Commission is also empowered to apply to the courts to prohibit illegal or improper acts, and to compel compliance with the statutes.<sup>150</sup> These provisions are designed to guard against the disenfranchisement of security holders by the use of improper practices. Further, if the Commission refuses to act in order to prevent malpractices from occurring, any aggrieved person may apply to the courts for an appropriate equitable remedy.<sup>151</sup> He must show that the statement or omission claimed to be misleading amounted to a statement that would influence the stockholders' vote,<sup>152</sup> and in order for civil liability to result from the

violation, it must be shown that the violation of the statute resulted in the damage claimed.<sup>153</sup> It is a criminal offence to wilfully violate any of the provisions of the Securities Exchange Act 1934.<sup>154</sup> Similar provisions do not exist in any Commonwealth Caribbean territory.

### 3. *Improper Use of Inside Information*<sup>155</sup>

One of the primary purposes of the Securities Exchange Act 1934 was to outlaw the use of inside information by corporate officers and principal holders for their own financial advantage to the detriment of uninformed public security holders.<sup>156</sup>

Section 10 of the 1934 Act and Rule 10b-5 of the Commission's Rules require an insider, that is, any officer or director of the company, who uses material<sup>157</sup> undisclosed corporate information for personal gain by trading in the corporations' securities, to surrender his profit.<sup>158</sup> Not only must the insider himself surrender his profit, but anyone to whom the information was given by the insider who used the information for his gain can also be made to surrender his profits.<sup>159</sup> These provisions go much further than the position in the Commonwealth Caribbean which is governed entirely by the rules of common law and equity. First, the principle in Commonwealth Caribbean law that a director owes no fiduciary duty to individual shareholders laid down in the decision in *PERCIVAL v WRIGHT*<sup>160</sup> has no application in United States Federal Securities law. Further, in the United States, the managing director, the solicitor of the two companies and Miss Geering in *REGAL (HASTINGS) v GULLIVER*<sup>161</sup> would have had to surrender the profits which they made in that transaction. This would be so because, as mentioned earlier, the surrender provisions relate to the insider as well as anyone to whom he gives the information and who makes use of that information and makes a gain.<sup>162</sup> Rule 10b-5<sup>163</sup> applies to any person and any security, it states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

- (1) to employ any device, scheme, or artifice to defraud,
- (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

- (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

Rule 10b-5 has a number of advantages over the common law, for it is free of some of the technicalities of common law fraud. Substantively it is free from the need to prove reliance, deliberate or reckless falsehood, or a loss; and procedurally, the 1934 Act<sup>164</sup> in Section 27 gives extra-territorial service of process. Actions may be brought in any district where the act or transaction occurred, or where the defendant is found, or where the defendant transacts business. The Federal Courts have exclusive jurisdiction over violations of the 1934 Act or the Rules and Regulations of the Commission.

The other section which is directed at corporate insiders is Section 16 of the 1934 Act which is aimed at “. . . preventing the unfair use of information . . . obtained by such beneficial owner, director, or officer by reason of his relationship to the insider . . .”<sup>165</sup> Each officer and director of a company whose equity securities are listed on an exchange and each person owning beneficially more than 10% of such securities, must file initial and monthly reports with the Commission and the exchange, showing his holdings of each of the company's equity securities and any changes in those holdings.<sup>166</sup> In addition, section 16(b) provides that profits obtained by persons mentioned in that section from purchases and sales, or sales and purchases, of such securities within any six-month period may be recovered by the company, or by any security holder on behalf of the company.<sup>167</sup> Section 16(b) thus gives a corporate cause of action; and the right to recovery must be asserted in an appropriate court.<sup>168</sup> A wrongdoer who infringes this section may therefore expose himself to double liability, for first there is the corporate action which may be brought under section 16(b), and secondly, the buying<sup>169</sup> or selling shareholder may obtain personal recovery for failure of the insider to make full disclosure under Rule 10b-5. There are no similar provisions in any Commonwealth Caribbean territory.

#### 4. *Regulation of Brokers and Dealers*

The 1934 Act requires registration of brokers and dealers who conduct over-the-counter securities business in interstate commerce.<sup>170</sup> National securities exchanges are required to register with the Commission,<sup>171</sup> associations of brokers and dealers may register if they wish to do so, but are not required to register.<sup>172</sup> Registered brokers and dealers

must conform their business practices to the standards prescribed in the 1934 Act, as well as the Rules made by the Commission for the protection of investors.<sup>173</sup> If the Commission discovers that a broker or dealer has not complied with the provisions of the Securities Act 1933 or the Exchange Control Act of 1934, if, for example, he has filed false statements or if he has been convicted of a wrong in relation to the purchase or sale of a security, the Commission may refuse to register the wrongdoer if he has not yet been registered,<sup>174</sup> or it may revoke his registration if he has been registered.<sup>175</sup>

Stock exchanges must also be registered with the Commission, unless they are exempted from registration.<sup>176</sup> Before registration is granted to a stock exchange, it must agree to comply with the provisions of the Statutes and the Rules made by the Commission, also it must show that it is capable of complying with those provisions and that it is able to enforce compliance with the provisions as far as its members are concerned.<sup>177</sup> Further, it must be shown that the rules of the stock exchange itself are just and adequate to ensure fair dealing and to properly protect investors.<sup>178</sup> The Commission has power to alter or supplement the rules of the stock exchanges if it considers such alterations necessary to give effect to the statutory obligations.<sup>179</sup> The Commission has also the authority to suspend the registration of a national securities stock exchange for a period of up to twelve months if it is found that the exchange has infringed the statutory provisions or the Rules of the Commission; or if it is found that the stock exchange has failed to enforce as far as it could, the compliance with the above provisions, of any of its members, or an issuer of a security on that exchange. Notice<sup>180</sup> has to be given to the offending stock exchange, and an opportunity for it to be heard.<sup>181</sup>

##### 5. *Securities and Exchange Commission*

The Securities and Exchange Commission was set up under section 4 of the Securities Exchange Act 1934. The Commission has the power to make rules, regulations and forms, to exercise administrative controls, and to take certain enforcement action. The Commission is required to report to Congress annually. Section 4 of the 1934 Act sets the Commission up as an independent agency of the Federal Government. It is composed of five Commissioners appointed by the President, only three of whom may be from any one political party. The Commissioners hold office for five years at a time and retire in rotation. The Commission has a salaried full-time staff organized into four divisions, namely Corporate Finance,

Trading and Exchanges, Corporation Regulation, and Administration and Management. The staff of the Commission is composed of lawyers, accountants, engineers, security analysts, examiners, and administrative employees in order to give as broad a base as possible to its operation.

The Commission is vested with authority to investigate complaints and any other indications that the law of investor protection is being violated. This authority is conferred by each of the statutes administered by the Commission in relation to matters dealt with in that particular statute.<sup>182</sup> In the execution of these powers, the Commission can conduct examinations of witnesses under oath, it can issue subpoenas ordering witnesses to attend and give evidence or demanding the production of documents<sup>183</sup> and the Commission is entitled to apply to the proper United States District Court in order to enforce compliance with the subpoenas which it issues.<sup>184</sup> It can also accept sworn statements relating to any matters under investigation.<sup>185</sup>

Whenever it appears to the Commission that anyone has committed or is about to commit an offence in relation to any of the Federal Securities Acts, the Commission may in its own name, bring an action in the United States District Court to penalise the wrongdoer if he has already committed the offence,<sup>186</sup> or to restrain him from committing the offence if he has not yet done so; and if the Commission has enough evidence, the court is authorized to issue a permanent or temporary injunction or restraining order.<sup>187</sup> The Commission also has the power to apply for, and the court may grant, if it is a proper case where it should be granted, a mandatory injunction compelling the party to whom it is directed to comply with statutory requirements and appropriate rules or orders of the Commission made under the statutes.<sup>188</sup> In order to give effect to any injunction or other order of the court, a receiver may be appointed to preserve assets or to act as may be necessary or appropriate in the circumstances.<sup>189</sup>

All of the statutes impose criminal penalties for any wilful violation of the statutory provisions, or the Commission's Rules made pursuant to the said statutes.<sup>190</sup> The Commission may also lay such evidence as is available concerning any act or practice before the Attorney-General, who may, in the exercise of his discretion, institute criminal proceedings against the wrongdoer.<sup>191</sup>

Under each of the statutes, the Commission has power, and in some instances is under an obligation, to adopt rules and regulations which are considered necessary for the implementation of the statutory requirements and provisions.<sup>192</sup> These rules and regulations may involve the classifica-

tion of issues, of the issuers or other persons and transactions, and the power to define or clarify terms used in the Act. The form and presentation of financial and other information may also be prescribed under the rules and regulations of the Commission.

The statutes provide that no penalties lie against anyone who places bonafide reliance on any of the rules or other measures of the Commission, even if the rules on which reliance was placed, are later rescinded or found to be invalid.<sup>193</sup> This statutory immunity in the case of bona fide reliance on the rules is necessary for the fair, just and proper operation of these rules.

The rules, regulations and procedures of the Commission are continually under review, and every effort is made to keep them abreast of current developments in the changing patterns of securities flotation. In order to ensure that changes should be realistic and functional, any proposed new rules and proposals for important amendments of the rules are usually published before enactment in order to obtain the comments, views and suggestions of those affected and of the public in general. Conferences may be held where appropriate, and if the situation requires it, public hearings may be held.<sup>194</sup>

The Federal Securities Statutes contain specific civil liability provisions which give investors rights of recovery against those who infringe the statutory provisions.<sup>195</sup> Strictly, these rights are to be pursued in the Federal Courts.<sup>196</sup> but additionally, private actions under all the statutes except the Securities Exchange Act 1934 may be asserted in the state courts as well.<sup>197</sup> Any contracts made in violation of these investor protection laws are void,<sup>198</sup> and any condition, stipulation, or provision binding anyone to waive compliance with any provision of the Acts or any rule of the Commission is similarly void.<sup>199</sup>

In addition to the remedies laid down in the Acts, the courts have shown an increasing readiness to imply civil remedies as well as the statutory ones when breaches of the statutory provisions occur.<sup>200</sup> This recent development of implied liability is linked to the common law tort doctrine that a private right of action arises where there is a violation of a statutory provision of an anti-fraud nature, the disregard of the command of the statute is a wrongful act and a tort. The private right arises as a result of the moral turpitude associated with fraudulent activity.<sup>201</sup>



## CONCLUSION

The Commonwealth Caribbean and the United States have both relied upon the same philosophy in relation to the protection of investors. That philosophy is disclosure. It is the philosophy first adopted in England.<sup>202</sup> However, the implementation of this philosophy has not reached the same stage of development in the Commonwealth Caribbean and the United States.

In the Commonwealth Caribbean, Jamaica has by far the most comprehensive set of provisions for investor protection. Jamaica is also the only territory that has a stock exchange. This is primarily because Jamaica is the most industrialised of the territories and is the most developed commercially. The protective measures in Jamaica are more satisfactory in relation to the issue of securities, but less so in relation to dealings in securities once they have been issued. Any protection after issue is afforded by the general law and reliance would have to be placed on actions based on fraud, for example, with all its attendant difficulties.

The territories of Barbados, Belize, Grenada, Guyana, St. Lucia and Trinidad and Tobago have a number of provisions regulating the issue of securities, but dealings in securities once they are issued are also left to the general law. Protective measures in the other territories are feeble. This is deliberate in those territories that have decided to assume the role of the tax haven in order to attract commercial activity where otherwise there would probably be none. In others, the absence of comprehensive protective measures seems to be a reflection of the low level of commercial activity.

The United States on the other hand have established a comprehensive and complete statutory body of rules for the protection of investors; there is also some voluntary regulation.<sup>203</sup> Of course the industrial and commercial development of the United States is far in advance of all the Commonwealth Caribbean territories. The evolution of the United States system has been influenced by a number of factors. First, in 1933 when it was realized that the security laws needed strengthening there was no nation-wide machinery, and there was no single stock exchange with nation-wide power similar to that which, for example, the London Stock Exchange had in the United Kingdom. Further, the majority of new securities in the United States are not listed, and the size of the United States and the existence of some fifty different legal units leading inevitably to conflict of laws problems, meant that strong central control was

necessary. Thus the Securities and Exchange Commission was established to exercise centralised control.

The adoption of a centralised system based on the United States model, however, go far beyond what is necessary for any single territory in the Commonwealth Caribbean. In the wider context of CARICOM,<sup>204</sup> however this might well be feasible and desirable. This much is certain, in the light of the rapid industrial and commercial development taking place in the Commonwealth Caribbean, and in the interests of promoting and sustaining this development, the investor protection measures in almost all the territories are desperately in need of improvement.<sup>205</sup>

### NOTES

<sup>1</sup>Stated in the conclusion of the United Kingdom Department of Trade & Industry White Paper on "Company Law Reform" July 1973 Cmnd. 5391 para 65.

<sup>2</sup>Abbreviations for the territories will be used throughout. The territories referred to and the abbreviations used are as follows; the independent territories of: The Bahamas (Bah.), Barbados (Bds.), Grenada (Gren.), Guyana (Guy.), Jamaica (Jam.), Trinidad & Tobago (TT); the Associated States of: Antigua (Ant.), Dominica (Dom.), St. Kitts, Nevis, Anguilla (KNA), St. Lucia (St.L.), St. Vincent (St.V.); and the Colonies of: Belize (Blz.), Bermuda (Berm.), the Cayman Islands (Cay.), the Virgin Islands (Virgs.), and Montserrat (Mont.).

<sup>3</sup>Ant. Berm., Cay., Dom., Mont., KNA, St.V., Virgs.

<sup>4</sup>Bah., Bds., Blz., Gren., Guy., St.L.

<sup>5</sup>TT.

<sup>6</sup>Jam.

<sup>7</sup>R/E means Revised Edition, and Cap. means Chapter. Ant. Cap.358 R/E 1962; Bah. Cap.184 R/E 1965; Bds.1910-7 Vol. 3 R/E 1942; Blz.Cap.206 R/E 1958; Berm. Vol. iv Title 17 Items 5-11, and 14 R/E 1971; Cay. Cap.22 R/E 1963; Dom. Cap.318 R/E 1961; Gren. Cap.47 R/E 1934; Guy. Cap.328 R/E 1953; Jam. Law 7/65; Mont. Cap.308 R/E 1962; KNA Cap.335 R/E 1961; St.L. Title iv Cap. 244 R/E 1957; St.V. Title xxiii Cap.6 R/E 1966; TT Cap.31 R/E 1950; Virgs. Cap.243 R/E 1961.

<sup>8</sup>United States Constitution, Xth Amendment.

<sup>9</sup>ELI LILLY v SAV-ON-DRUGS 366 U.S. 276, (1961).

<sup>10</sup>United States Constitution Art. 1, s.8.Cl.2,7.

<sup>11</sup>Ant. s.76; Bds. ss.79, 80; Blz. ss.80, 81; Dom. s.76; Gren. ss.81, 82; Guy. ss.78, 79; Jam. ss.39, 40; Mont. s.76; KNA s.77; St.L. Arts.142, 143; TT ss.36, 37; Virgs. s.76.

<sup>12</sup>Bds. s.2(1); Blz. s.2(1); Gren. s.2; Guy. s.247(1); Jam. s.2(1); KNA s.237(7); TT s.2(1).

<sup>13</sup>Ant. s.76; Bds. s.80; Blz. s.81; Dom. s.76; Gren. s.82; Guy. s.79; Mont. s.76; KNA s.77; St.L. Art.143; TT s.37; Virgs. s.76.

<sup>14</sup>GOVERNMENT STOCKS & OTHER SECURITIES INVESTMENT CO. LTD. v. CHRISTOPHER (1956) 1 WLR 237, an English decision on the equivalent section in the English Companies Act 1948. The English Common Law being the same as the Common Law of the Commonwealth Caribbean. See generally Professor Patchett—"Reception of Law in the West Indies" 1972 J.L.J. 17, 55.

<sup>15</sup>TT fourth schedule.

<sup>16</sup>Dr. Robert Pennington does not share this view. See particularly his book "Company Law" 3rd Ed., London 1973.

<sup>17</sup>NEW BRUNSWICK CO. v MUGGERIDGE (1860) 1 Dr. & Sm. 363, 383.

<sup>18</sup>HENDERSON v LACON (1867) L.R.Eq.249, 262.

<sup>19</sup>Bds. s.80(1)(d); Blz. s.81(1)(d); Gren. s.82(1)(d); Guy. s.79(1)(d); Jam. s.47(1); St.L. Art.143(1)(d); TT s.41(1).

<sup>20</sup>TT s.41(2).

<sup>21</sup>Bds. s.80; Blz. s.81; Gren. s.82; Guy. s.79; St.L. Art. 143; TT Fourth Schedule. The details vary from territory to territory as the sections and Schedules show.

<sup>22</sup>The balance sheet details have to be given in Jamaica alone. Of all the territories Jamaica therefore requires the greatest disclosure in the prospectus.

<sup>22a</sup>Refers to note 21 in text.

<sup>23</sup>CENTRAL RAILWAY OF VENEZUELA v KISCH (1867) L.R. 2 H.L. 99, 123.

<sup>24</sup>Bds. s.79(2); Blz. s.80(2); Gren. s.81(2); Guy. s.78(2); Jam. s.39(2)(a); St.L. Art.142(2); TT s.36(2).

<sup>25</sup>Bds. s.81(1); Blz. s.82(1); Gren. s.83(1); Guy. s.80(1); Jam. s.48(1); St.L. Art. 107; TT s.42(1)

<sup>26</sup>Jam. s.48(1); TT s.42(1).

<sup>27</sup>Bds. s.119(2); Blz. s.120(2); Gren. s.121(2); Guy. s.117(2); Jam. s.31(1); St.L. Art.173. TT s.29(1).

<sup>28</sup>Bds. second schedule s.81(1); Blz. second schedule s.82(1); Gren. second schedule s.83(1); Guy. second schedule s.80(1); Jam. s.48(1); St.L. Form 'D' in the Appendix to the Code Art.107; TT. fifth schedule s.42(1).

<sup>29</sup>Bds. s.119(1); Blz. s.120(1); Gren. s.121(1); Guy. s.117(1); St.L. Art.168; TT s.28(1).

<sup>30</sup>*Supra*, note 27.

<sup>31</sup>Bds. s.81(1); Blz. s.82(1); Gren. s.83(1); Guy. s.80(1); Jam. s.31(1); St.L. Form 'D' in the Appendix Art.107; TT third schedule s.29(1).

<sup>32</sup>Jamaica alone has this provision and is therefore in advance of all the other territories.

<sup>33</sup>TT fifth schedule.

<sup>34</sup>*Supra*, note 21.

<sup>35</sup>Bds. s.80(7); Blz. s.81(7); Gren. s.82(7); Guy. s.79(7); St.L. Art.143(7); TT s.37(5).

<sup>36</sup>*Supra*, note 13.

<sup>37</sup>*Supra*, note 21.

<sup>38</sup>*Supra*, note 35.

<sup>39</sup>Bds. s.84(1); Blz. s.85(1); Gren. s.86(1); Guy. s.83(1); Jam. s.47(1); St.L. Art.105(1); TT s.41(1).

<sup>40</sup>The other territories do not have this provision, and again lag behind Jamaica.

<sup>41</sup>Bds. s.83(1); Blz. s.84(1); Gren. s.85(1); Guy. s.82(1); Jam. s.43(1)(d); St.L. Art.145(1)(d); TT s.39(1)(d). The subsection in the Guyana Act says "everyone" rather than "every person." All the Acts in the other territories use the term "every person," and therefore theoretically include the company. Guyana presumably intended to exclude the company by using the term "everyone" thereby restricting liability to human beings; this might well have been the intention of the English legislature when it passed the Companies Acts in England. See: Gower, *Modern Company Law* 3rd. ed. 1969 p.332.

<sup>42</sup>NATIONAL EXCHANGE CO. OF GLASGOW v DREW (1855) 2 Macq.103.

<sup>43</sup>Since the company is liable in tort for wrongful acts of the persons who control the management of its undertaking when they are acting as such. See: LENNARD'S CARRYING CO. v ASIATIC PETROLEUM CO. LTD. (1915) A.C. 705, 713. Of course the company if held liable may then be able to sue its directors for breach of their duties. Unfortunately for the allottee, as a result of the decision in HOULDSWORTH v CITY OF GLASGOW BANK (1880) 5 App.Cas.317, the allottee cannot recover damages from the company unless he also gets rescission, he cannot retain the shares and also sue the company on the tort of deceit. In England an action under the Misrepresentation Act 1967 may also lie, but similar legislation has not yet been enacted in any of the Commonwealth Caribbean territories.

<sup>44</sup>DERRY v PEEK (1889) 14 App.Cas.337. Fraud is however notoriously difficult to prove at common law.

<sup>45</sup>AKERHIELM v DE MARE (1959) A.C. 789.

<sup>46</sup>Bds. s.83(1); Blz. s.84(1); Gren. s.85(1); Guy. s.82(1); St.L. Art.145(1)(a), (b); TT s.39(1)(a), (b).

<sup>47</sup>(1899) 14 App. Cas.337.

<sup>48</sup>In both the Commonwealth Caribbean and England.

<sup>49</sup>*Supra*, note 41.

<sup>50</sup>SCOTT v BROWN, DOERING, McNAB & CO. (1892) 2 Q.B.724.

<sup>51</sup>This section appears only in the Jamaica Companies Act. It first appeared in the English Companies Act 1948.

<sup>52</sup>A statement is deemed to be untrue if it is misleading in the form and context in which it is included, s.46(a) Jam. Act 1965. This subsection endorses the reasoning adopted in the decisions of: R v KYLSANT (1932) 1 K.B. 442; R v BISHIRGIAN (1936) 1 All.E.R.586.

<sup>53</sup>In the Commonwealth Caribbean, Jamaica alone has adopted this enlightened approach.

<sup>54</sup>Bds. s.7(b) Perjury Act 1963 which repeals and reenacts s.229 Bds. Companies Act 1910; Blz. s.254; Gren. s.231; Guy. s.249; TT s.313.

<sup>55</sup>Bds. fourth; Blz. fourth; Gren. fifth; TT tenth.

<sup>56</sup>Bds. s.68 Larceny Act 1868; Blz. Art.171 Criminal Code Cap.21 Title xii Laws of British Honduras R/E 1958 Vol.1; Gren. Art.285 Criminal Code Cap.76

Laws of Gren. R/E 1958 Vol.1; Guy. s.205 Cap.10 Criminal Law (Offences) Laws of Guy. R/E 1953 Vol.1; Jam. s.26 Larceny Law Cap.212 Laws of Jam. R/E 1953 Vol.v.

<sup>57</sup>R v KYLSANT (1932) 1 K.B.442; R v BIRSHIRGIAN (1936) 154 L.T. 499.

<sup>58</sup>Insider information in this context may be defined as information which (1) is important in relation to the true value of the particular securities being dealt in, and (2) is of a secret and confidential nature. It is submitted that the nature of the information is the governing factor rather than the circumstances in which it was obtained, or the status of the person who has the information. So that if someone places a microphone in the room where a meeting of the board of directors is taking place and obtains information about plans for a take-over bid or about a new important discovery of minerals or an impending disaster, such information is insider information. Similarly, if someone overheard the meeting and acquired the information in that way. An insider would therefore be a person employed by the company who owes fiduciary duties to the company, or who holds an office of trust or confidentiality.

<sup>59</sup>Sec. 10, 16, Securities Exchange Act 1934, and particularly Rule 10b-5 of the S.E.C.

<sup>60</sup>The same applies to England. See: Report of the Company Law Committee Cmnd.1749 paras.88-91 and 99; Dept. of Trade and Industry White Paper on Company Law Reform Cmnd.5391 paras.15-20; JUSTICE Report on "Insider Trading" London 1972 paras.20-26; Aaron Yoran: "Insider Trading in Israel and England" Jerusalem 1972. For some Canadian proposals see: "Proposals for a New Business Corporations Law for Canada" Vol. 1 Ottawa 1971 pt. 10.00; also Securities Act 1966 (Revised Statutes of Ontario, 1970 c.420) s.113, s.109, s.1(1) para.2 (repealed and substituted 1971, Vol. 2, c.31, s.1(1); see also; GREEN v CHARTER-HOUSE GROUP CANADA LTD. (1973) 2 OR.677.

<sup>61</sup>PERCIVAL v WRIGHT (1902) 2 Ch. 421. Nor will a fiduciary duty be owed to anyone from whom a director or other officer buys shares, or to whom a director or other company officer sells shares when that person is not a shareholder at the time of the sale.

<sup>62</sup>Sec. 10, 16 Securities Exchange Act 1934 S.E.C. v TEXAS GULF SULPHUR CO., 5 CCH. FED. SEC. L.R. 9225 (1968).

<sup>63</sup>REGAL (HASTINGS) v GULLIVER (1942) 1 ALL.E.R. 378.

<sup>64</sup>Ibid. p.394.

<sup>65</sup>ABERDEEN RY. v BLAIKIE (1854) 1 Maco. H.L.461 (H.L.Sc.) per Ld. Cranworth L.C.: "... it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

Ld. Russel of Killowen in REGAL (HASTINGS) v GULLIVER (1942) 1 All. E.R. 378, 386. "The liability arises from the mere fact of a profit having in the stated circumstances been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

Ibid. per Viscount Sankey at p.381. "In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect."

Guth v Loft, Inc. 23 Del. Ch.255 at 270, 5 A. 2d 503, at 510 (1939). "The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground

of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.”

James L.J. PARKER v McKENNA (1874) L.R. 10 Ch. 96, 124 “. . . that rule is an inflexible rule, and must be applied inexorably by this court, which is not entitled, in any judgment to receive evidence or suggestion or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealings of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an injury as that.”

<sup>66</sup>BOSTON DEEP SEA FISHING & ICE CO. v ANSELL (1888) 39 Ch.D.339; COOK v DEEKS (1916) A.C. 554; REGAL (HASTINGS) v GULLIVER (1942) 1 ALL.E.R.378. BOARDMAN v PHIPPS (1967) 2 A.C. 46.

<sup>67</sup>REGAL (HASTINGS) v GULLIVER (1942) 1 ALL.E.R. 378.

<sup>68</sup>INDUSTRIAL DEVELOPMENT CONSULTANTS v COOLEY (1972) 2 ALL.E.R.162.

<sup>69</sup>The basis of decisions like DIAMOND v OREAMUNDO 24 NY 2d.494 (1969) in the United States is really that of placing, or allowing oneself to be placed, or being in a situation of potential conflict of duty and interest. This is because in the U.S.A. a company can buy its own shares. In the Commonwealth Caribbean on the other hand, it is illegal for a company to buy its own shares: TREVOR v WHITWORTH (1887) 12 App.Cas.409. No question of conflict of duty and interest arises therefore when it is a question of a purchase of the particular company's own shares in the territories of the Commonwealth Caribbean, for the company is legally barred from making such a purchase.

<sup>70</sup>BROPHY v CITIES SERVICE CO. 70 A2d. 5 (1949).

<sup>71</sup>It is submitted that a similar argument is the real basis of the decision in: BOSTON DEEP SEA FISHING & ICE CO. v ANSELL (1888) 39 Ch.D.339. The actual post of director is corporate property, and if turned to personal profit, that profit has to be disgorged to the company on the basis of the principles governing the obligation on fiduciaries to surrender secret profits.

<sup>72</sup>One learned writer has argued cogently that it should. See: Gareth Jones (1968) 84 L.Q.R.472.

<sup>73</sup>*Supra*, note 66.

<sup>74</sup>In this modern day and country when it is accepted as commonplace that substantially all business and commercial undertakings, regardless of size or importance are carried on through the corporate vehicle with the attendant complexities involved . . . I do not consider it enlightened to extend the application of these principles beyond their present limits. That the principles and the strict rules applicable to trustees upon which they are based are salutary cannot be disputed, but care should be taken to interpret them in the light of modern practice and way of life.” per BULL J.A. PESO SILVER MINES LTD. v CROPPER (1966) 56 D.L.R. (2d.) 117, 154; affirmed (1966) 58 D.L.R. (2d.) 1; CRITTENDEN & COWLER CO. v COWLER, 72 N.Y.S. 701, which runs perfectly counter to KEECH v SANFORD (1726) Sel. Cas.Ch.61. There is some support for this approach in an earlier case. See: KAY J. RE FAURE ELECTRIC ACCUMULATOR CO. (1888) 40 Ch.D. 141 at p.151. “. . . it is quite obvious that to apply to directors the strict rules of the Court of Chancery with respect to ordinary trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent.”

<sup>75</sup>The Companies Acts in the Commonwealth Caribbean except for Jam., TT, and St.L. have no provisions governing take-over bids.

<sup>76</sup>In this take-over situation, the directors of an offeree company owe a duty to their shareholders which includes the duty to be honest and not to mislead. The minority shareholders in the offeree company can complain if they are wrongfully subjected to the power of compulsory purchase by the offeror company under these compulsory purchase provisions, as a result of a breach of duty on the part of the board of directors of the offeree company. See: *GETHING v KILNER* (1972) 1 ALL.E.R. 1166 on the equivalent provisions in England.

<sup>77</sup>St.L. Art.167C(1); TT s.153(1). The courts in England seem to have accepted that the existence of the approval of so large a majority as the holders of nine tenths in value of the shares in question is at least *prima facie* evidence that the scheme or contract is fair. See: *HOARE & CO., IN RE* (1934) 150 L.T. 374; *EVERTITE LOCKNUTS* (1954) Ch.220; *PRESS CAPS* (1949) Ch. 434.

<sup>78</sup>St.L.Art.167C(2). In England this protective measure was introduced for the first time in the Companies Act 1948, and is designed to protect shareholders who might be left out of such a scheme or contract, and might consider themselves trapped. They may wish to get out of the company since the new majority shareholders will be almost certain to bring in new management, and to run the company as they see fit. Unfortunately only Jam. and St.L. have this provision. TT has given the offeror company the right to buy out the minority but have not given the minority the corresponding right to have the majority buy them out. It is submitted that the weakness of not having these measures is clear; they prevent internal strife, and the other territories would do well to follow the lead of Jam. and St.L.

<sup>79</sup>*Ibid.*

<sup>80</sup>*RE SIMO SECURITIES TRUST LTD.* (1971) 3 ALL.E.R.999 on the equivalent provisions in the English Companies Acts.

<sup>80a</sup>*Ibid.*

<sup>81</sup>*RE CARLTON HOLDINGS LTD.* (1971) 2 ALL.E.R.1082; an English decision on the equivalent provision in the English Companies Acts. See: J.B.L. Apr. 1971, p.138.

<sup>82</sup>*RE BUGLE PRESS LTD.* (1961) Ch.270.

<sup>83</sup>Jam., St.L., TT.

<sup>84</sup>*PERLMAN v FELDMAN* 219 F. 2d 173 (1955) also Hill, Sale of Controlling Shares 70 Har. L.R. 986, 1019.

<sup>85</sup>In Ant. The Administrator; Bds. Governor-in-Executive Committee; Blz. The Court; Berm. The Member; Cay. The Court; Dom. The Administrator; Gren. The Governor-in-Council; Guy. The Governor-in-Council; Jam. The Minister; Mont. The Administrator; KNA. The Administrator; St.V. The Governor; TT. The Governor-in-Council; Virgs. The Administrator.

<sup>86</sup>The Minister for Trade, Industry & Commerce.

<sup>87</sup>Ant. s.95; Bds. s.107; Blz. s.108; Berm. Item 5 s.42; Cay. s.61; Dom. s.95; Gren. s.109; Guy. s.106; Mont. s.95; KNA. s.96; St.V. s.50; TT. s.133; Virgs. s.95.

<sup>88</sup>In the territories other than Jam. the company itself appoints the inspectors by special resolution. See: Ant. s.99; Bds. s.108(1); Blz. s.109(1); Cay. s.64; Dom. s.99; Gren. s.110(1); Guy. s.107(1); Mont. s.99; KNA. s.100; St.V. s.54(1); TT. s.135(1); Virgs. s.99.

<sup>89</sup>See: *PERCAMON PRESS LTD.* (1970) 2 ALL.E.R.449; affirmed (1970) 3 ALL.E.R.535. This case deals with the principles and procedures to be followed in relation to the equivalent provisions in the English Companies Acts.

<sup>90</sup>Only Berm. Item 14 s.2(1), Cay. s.3(1), and Jam. s.333 have a separate Registrar of Companies. In the other territories the Registrar General also serves as

the Registrar of Companies: Ant. s.207(a); Bah. s.14(1); Bds. s.214(1); Blz. s.219(1); Dom. s.207(a); Gren. s.218(1); Guy. s.219; Mont. s.207(a); KNA. s.208(a); St.V. s.138; TT. s.285; Virgs. s.207(a); Dr. Robert R. Pennington in his "REPORT ON THE REVISION OF COMPANY LAW IN TRINIDAD AND TOBAGO" May 1967 at p.2 criticised the present position in TT. and his criticisms were echoed by Mr. Justice J. Braithwaite in "COMPANY LAW—SOME SUGGESTIONS FOR REFORM" a paper delivered at the First Law Conference of Trinidad and Tobago 23-27 July, 1973. Dr. Pennington urged:

... the following changes are essential:

- (i) The appointment of a Registrar of Companies who is independent of the Registrar General so that his work is in no way regarded as merely a branch of the general duties of the Registration office;
- (ii) The appointment of a Registrar of Companies who is professionally qualified as a barrister or solicitor;
- (iii) The establishment of a sufficient and competent staff to assist the Registrar of Companies: I would suggest at least one barrister or solicitor and one accountant, with a statistician if funds available make this a possibility; a suitable number of typing and clerical assistants would also be required.

It is submitted that the implementation of these reforms would go a long way towards eradicating any delays in the registration department and in enforcing the obligations on companies to file annual returns and other documents, thus ensuring investor protection.

<sup>91</sup>No other territory in the Commonwealth Caribbean has similar provisions.

<sup>92</sup>Jam. s.39(3)(a).

<sup>93</sup>Jam. s.39(3)(b).

<sup>94</sup>Ibid.

<sup>94a</sup>Ibid.

<sup>95</sup>Jam. s.39(4).

<sup>96</sup>Indeed Jamaica is also in advance of England, for the Report of the Company Law Committee in England Cmnd. 1749 recommended that "... the Registrar of Companies should be expressly empowered to refuse to accept any documents delivered to him for registration if it appears to him to be manifestly unlawful or ineffective; there should be a right of appeal to the Court against the Registrar's decision but subject to such appeal his decision should be final." See: para.495(k) of the Report. This recommendation has so far not been acted upon by the English Legislature.

<sup>97</sup>Ant. s.42; Bah. s.14; Bds. ss.17, 18; Blz. s.15; Berm. Item 14 s.13; Cay. s.25; Dom. s.42; Gren. s.17; Guy. s.15(3); Jam. s.14; Mont. s.42; KNA. s.43; St.L. Art. 81(1); St.V. s.15(1); TT. s.14; Virgs. s.42. Yet the Registrar has discretion in relation to registering a company with a particular name, his refusal to register being subject to examination to the Court on application for mandamus ordering him to register the company by the particular name. See: Ant. s.12; Bah. s.18; Bds. s.10; Blz. s.9; Berm. Item 14 s.8; Cay. s.29; Dom. s.12; Gren. s.10; Guy. s.9; Jam. s.19; Mont. s.12; KNA. s.12; St.L. Art.77; St.V. s.18; TT. s.19 as amended by Law 5/1950 s.2; Virgs. s.12; see also: R v REGISTRAR OF COMPANIES ex. p. BOWEN (1914) 3 K.B.1161 on equivalent position in English Company Law. It is submitted that a discretion similar to the one now enjoyed in relation to the registration by a particular name should be given to the Registrar.

<sup>98</sup>Ant. s.43; Bah. s.15(3); Bds. s.19(1); Blz. s.17(1); Berm. Item 14 s.15; Cay. s.26(3); Dom. s.43; Gren. s.19(1); Guy. s.17(1); Jam. 17(1); Mont. s.43; KNA. s.44; St.L. Art.81(6); St.V. s.16(3); TT. s.17(1); Virgs. s.43.



<sup>99</sup>R v REGISTRAR OF JOINT STOCK COMPANIES (1931) 2 K.B.197; where the Registrar of Companies in England refused to register a company whose objects were illegal. The Court of Appeal of England held that the Registrar was right in refusing to register the company. The danger in those territories that do not have a separate Registrar of Companies is that irregularities such as this might well go unnoticed.

<sup>100</sup>PEOPLE ex. rel. BARNEY v WHALEN 56 MISC. 278, 106 N.Y.S. 434 (1907), affirmed 104 N.Y.S. 555 (1907), 82 N.E. 1131 (1907); MATTER OF STEWART v DEPARTMENT OF STATE, 22 N.Y.S. 2d 164 (1940), affirmed 23 N.Y.S. 2d 226 (1940); PEOPLE ex. rel. SIEGEL v LYONS 194 N.Y.S., 484 (1922).

<sup>101</sup>Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess. (1963).

<sup>102</sup>Securities Exchange Act 1934 (hereinafter Sec. Ex. Act).

<sup>103</sup>Ibid.

<sup>104</sup>Public Utility Holding Company Act of 1935 (hereinafter Holding Co. Act). The Investment Company Act of 1940 (hereinafter Inv. Co. Act.)

<sup>105</sup>S.6 Securities Act 1933 (hereinafter Sec. Act).

<sup>106</sup>Ibid. S.2.

<sup>107</sup>S.E.C. v W. J. HOWEY CO. 328 U.S. 293 (1946). This is the most widely used case on the definition of securities.

<sup>108</sup>*Supra*, note 90.

<sup>109</sup>*Supra*, note 85.

<sup>110</sup>Sec. Act s.7 and the Rules and Regulations of the S.E.C., e.g. Securities Act Release No. 4936, Regulation C.

<sup>111</sup>Item 23 of Securities Act Release No. 4936.

<sup>112</sup>Sec. Act S.8(a).

<sup>113</sup>Ibid.; also Rule 460, 461 of the S.E.C.

<sup>114</sup>*Supra*, note 40.

<sup>115</sup>Sec. Act S.4; S.E.C. v RALSTON PURINA CO. 346 U.S. 119 (1953). These provisions are similar to those in the Commonwealth Caribbean. See: *supra*, note 38.

<sup>116</sup>Sec. Act S.3(a)(11).

<sup>117</sup>Ibid. s.3(a)(2).

<sup>118</sup>Ibid. s.3(a)(4)

<sup>119</sup>Ibid. s.3(a)(g).

<sup>120</sup>Ibid. s.8(b), (d). This corresponds to the discretionary power of the Registrar of Companies in Jamaica. Refers to note 90 in text.

<sup>121</sup>Ibid. s.11; See ESCOTT v BARCHRIS CONSTRUCTION CORP., 283 F.Supp. 643 (1968).

<sup>122</sup>Ibid. s.11(c); see also Cohen "Investors' Protection in the United States," 960 J.B.L. 105, 113.

<sup>123</sup>Sec material immediately following note 48 in text.

<sup>124</sup>*Ibid.* s.11; *ESCOTT v BARCHRIS CONSTRUCTION CORPORATION*, 283 F.Supp. 643 (1968), also s.12(2); s.17.

<sup>125</sup>*EDGINTON v FITZMAURICE* (1885) 29 Ch.D. 459.

<sup>126</sup>Refers to note 48 in text.

<sup>127</sup>Rule 425 of the S.E.C. The following statement has to be set out on the front cover page of every prospectus in large capital letters:

"THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE."

<sup>128</sup>*Ibid.* s.24.

In *Jam.* the Registrar of Companies has discretion as to whether or not to register a prospectus under s.39(3), but the *Jam.* Companies Act 1965 does require a rubric to be placed on the prospectus once issued. It is a matter of speculation whether an action for breach of statutory duty would lie against the Registrar of Companies by someone who suffered loss as the result of a misleading prospectus. However, it is submitted that such an action was not intended by the Legislature, since what was intended was the strengthening of the investor protection provisions rather than affording a new means of redress to investors who suffer loss as a result of a misleading prospectus.

<sup>129</sup>Sec. Ex. Act ss.5, 6.

<sup>130</sup>*Ibid.* s.15. In *Jam.* the Registrar has no power to suspend registration once it has been effected.

<sup>131</sup>*Ibid.* s.15A (added by the Maloney Act of 1938). In fact, only one association of over-the-counter broker-dealers has registered, that being the National Association of Security Dealers Inc. (NASD). Practically all broker-dealers doing general securities business in the U.S.A. are members of this Association. See 2 *Loss, Securities Regulation*, 1365 (2d ed. 1961).

<sup>132</sup>*Ibid.* s.12.

<sup>133</sup>*Ibid.* s.13.

<sup>134</sup>Act of August 20, 1964, Public Law 88-467.

<sup>135</sup>Securities Exchange Act Release No. 7425, Sept. 15, 1964.

<sup>136</sup>*Ibid.* s.12.

<sup>137</sup>*Ibid.* s.13.

<sup>138</sup>Rule 106-5; *FISCHMAN v RAYTHEON Mfg. Co.* 188 F.2d 783 (1951); *KARDON v NATIONAL GYPSUM CO.*, 69 F.Supp. 512 (1946); *SPEED v TRANS-AMERICA CORPORATION*, 71 F.Supp. 457 (1947) 99 F.Supp. 808 (1951), affirmed, 235 F.2d 369 (1956); *OSBORNE v MALLORY*, 86 F.Supp. 869 (1949); *PARKER v BALTIMORE PAINT & CHEMICAL CORP.* 244 F.Supp. 267 (1965); *WEBER v C.M.P. CORP.* 242 F.Supp. 321 (1965); *ELLIS v VARTER* 291 F.2d 270 (1961).

<sup>139</sup>*Supra*, note 101.

<sup>140</sup>Rule 14a-6(a); 3 preliminary copies of the proxy statement and form of proxy, plus other soliciting materials to be distributed along with them must be filed with the S.E.C. at least 10 days before the final material is used.

<sup>141</sup>Proposals submitted by the security holder primarily to promote general economic, political, racial, religious, social or similar causes are not proper; *PECK v GREYHOUND CORP.* 97 F.Supp. 679 (1951); whether a proposal is proper is determined by the laws of the issuer's domicile: Rule 14a-8(c) (1).

<sup>142</sup>*KAUFMAN v SHOENBERG* 154 F.Supp. 64 (1954).

<sup>143</sup>Shareholders may also bring an action to enjoin violation of the proxy rules: *SHERMAN v POSNER* 266 F.Supp. 871 (1966); *UNION PACIFIC RY. CO. v CHICAGO & NORTH WESTERN RY. CO.* 226 F.Supp. 400 (1964); *KAUDER v UNITED BOARD & CARTON CORP.*, 199 F.Supp. 420 (1961). See: 2 Loss, Securities Regulation, 932-956 (2ed. 1961); the corporation itself may also bring such an action: *STUDEBAKER CORP. v GITTLIN*, 360 F.2d 692 (1966); *STUDEBAKER CORP. v ALLIED PRODUCTS CORP.*, 256 F.Supp. 173 (1966).

<sup>144</sup>*J. I. CASE CO. v BORAK* (1964) 377 U.S. 426 (1964) 1555.

<sup>145</sup>Rule 14a-11; Schedule 14B.

<sup>146</sup>Rule 14a-7(c).

<sup>147</sup>*Ibid.*

<sup>148</sup>*Supra*, note 145.

<sup>149</sup>Rule 14a-9.

<sup>150</sup>Sec. Ex. Act s.21(e).

<sup>151</sup>*Supra*, note 149.

<sup>152</sup>*EVANS v ARMOUR & CO.* 241 F.Supp. 705 (1965); *PHILLIPS v UNITED CORP.*, 5 SEC Jud. Dec. 445, 460 CCH Fed. Sec. L. Rep. 90, 395 (1947); *S.E.C. v OKIN*, 58 F.Supp. 20, 24 (1944); *GRUBER v CHESAPEAKE & OHIO RY. CO.* 158 F.Supp. 593, 611 (1957).

<sup>153</sup>*BARNETT v ANACONDA CO.*, 238 F.Supp. 766 (1965).

<sup>154</sup>s.32(a). The shifting of the burden of proof to the accused in relation to a criminal prosecution in respect of certain clauses in the Sec. Ex. Act has been held to raise no constitutional difficulties: *UNITED STATES v GUTERMA*, 189 F.Supp. 265, 275 (1960). This interesting and intriguing point can well be taken in the independent territories of the Commonwealth Caribbean, but has not yet been so taken.

<sup>155</sup>*Supra*, note 58.

<sup>156</sup>*LEAHY J. in SPEED v TRANSAMERICA CORPORATION DEL.* 99 F.Supp. 808 (1951).

<sup>157</sup>"The proper test is whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact." To this there probably should be added: ". . . and the defendant should have realized that he would be so influenced." See: Securities Regulation by Richard W. Jennings and Harold Marsh, Jr. 2nd ed. New York 1968 at p.910, and their footnote 24 at p.910.

<sup>158</sup>*S.E.C. v TEXAS GULF SULPHUR*, 5 CCH. FED. SEC. L.R. 9225 (1968); The fiduciary relationship exists once the person is an insider of the company: *ROGEN v ILIKON CORP.*, 361, F.2d 260 (1966); *ROSS v LICHT* 263 F.Supp. 395 (1967).

<sup>159</sup>*Ibid.*

<sup>160</sup>[1902] 2 Ch. 421.

<sup>161</sup>[1942] 1 ALL.E.R. 373.

<sup>162</sup>S.E.C. v TEXAS GULF SULPHUR, 5 CCH. FED. SEC. L.R. 9225 (1968).

<sup>163</sup>This rule was enacted in 1942 some 8 years after the Securities Exchange Act 1934. It was intended to protect sellers of securities against fraudulent practices, as buyers already enjoyed this protection. Securities Exchange Act Release No. 3230 (1942).

<sup>164</sup>Sec. Ex. Act.

<sup>165</sup>Ibid. s.16(b).

<sup>166</sup>Ibid. s.16(a).

<sup>167</sup>LOCKHEED AIRCRAFT CORP. v RATHMAN, 106 F.Supp. 810 (1952); LOCKHEED AIRCRAFT CORP. v CAMPBELL, 110 F.Supp. 282 (1953).

<sup>168</sup>It has been held that the appropriate court is the Federal Court which has exclusive jurisdiction over suits under the section regardless of the sum involved; AMERICAN DISTILLING CO. v BROWN, 295 N.Y. 36, 64 N.E.2d. 347 (1945). See: Sec. Ex. Act s.27.

<sup>169</sup>A buyer's task under Rule 10b-5 may be somewhat more difficult since he may have to establish fraud in order to succeed under 10b. See: FISCHMAN v RAYTHEON MFG. CO., 183 F.2d 783 (1951) or may have to face the defendant's use of defences similar to those allowed in respect of actions under Sec. Act ss.11, 12(2) as ROSENBERG v GLOBE AIRCRAFT CORP., 80 F.Supp. 123 (1948). The reason being that Congress could hardly have intended to "casually nullify" the elaborate defenses allowed to defendants under Sec. Act ss.11, 12(2). Indeed it has been held in one case that an action by buyers is not sustainable under Rule 10b-5. See: MONTAGUE v ELECTRONIC CORP. of AMERICA, 76 F.Supp. 93 (1948).

<sup>170</sup>Supra, note 131.

<sup>171</sup>Supra, note 129.

<sup>172</sup>Of course the individual broker-dealers have to register under Sec. Ex. Act s.15 unless they fall into the categories of those exempt from registration: See supra p.23. However, broker-dealers who are not members of a registered securities association are also subject to regulation by the Commission: See The Securities Acts Amendments of 1964, Act of August 20, 1964, Public Law 88-467 and Securities Exchange Act Release No. 7425 (Sept. 15, 1964).

<sup>173</sup>See generally Jennings: "Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission," 29 Law & Contemporary Problems 663 (1964).

<sup>174</sup>Sec. Act s.17; Sec. Act s.10(b) Rule 10b-5 s.15; KAHN v S.E.C., 297 F.2d 112 (1961); BERKO v S.E.C., 316 F.2d 137 (1963).

<sup>175</sup>Ibid.

<sup>176</sup>Sec. Ex. Act s.6.

<sup>177</sup>Supra, note 173.

<sup>178</sup>Ibid. s.2.

<sup>179</sup>Ibid. s.11(a).

<sup>180</sup>For proceedings, a notice of hearing is given to each party by the Commission's Secretary a reasonable time in advance of the hearing.

<sup>181</sup>Sec. Ex. Act s.21(a). This endows the Commission with discretion to make such investigation as it deems necessary to determine whether any section of the Act or any rule is being violated or is about to be violated.

<sup>182</sup>Sec. Act s.8(e); Sec. Ex. Act ss.17(a), 21(a); Holding Co. Act ss.11(a), 13(a), 18(a), (b), 30; Inv. Co. Act ss.14(b), 31(a), (b), 42(a).

<sup>183</sup>Sec. Act s.19(b); Sec. Ex. Act s.21(b); Holding Co. Act s.18(c); Inv. Co. Act s.42(b).

<sup>184</sup>Sec. Act s.22(b); Sec. Ex. Act s.21(c); Holding Co. Act s.18(d); Inv. Co. Act s.42(c).

<sup>185</sup>*Supra*, note 182.

<sup>186</sup>*Ibid*.

<sup>187</sup>Sec. Act s.20(b); Sec. Ex. Act s.21(e); Holding Co. Act s.18(f); Inv. Co. Act s.42(e); S.E.C. injunctions are statutorily created, and therefore the ordinary equitable principles have been held not to apply; e.g. proof of irreparable harm, or the inadequacy of other remedies is not necessary: See: S.E.C. v TORR, 87 F.2d 446, 450 (1937); S.E.C. v JONES, 85 F.2d 17 (1936); BRADFORD v S.E.C., 278 F.2d 566, 567 (1960).

<sup>188</sup>*Ibid*.

<sup>189</sup>DECKERT v INDEPENDENCE SHARES CORP., 311 U.S. 282, 287-290 (1940): "... We think the Securities Act does not restrict purchasers seeking relief under its provisions to a money judgment. On the contrary, the Act as a whole indicates an intention to establish a statutory right which the litigant may enforce in designated courts by such legal or equitable actions or procedures as would normally be available to him." The court was here dealing with the Sec. Ex. Act, but what was said equally applies to all civil liabilities under the S.E.C. statutes; CORPORATION TRUST CO. v LOGAN, 52 F.Supp. 999 (1943).

<sup>190</sup>Sec. Act s.24; Sec. Ex. Act s.32(a); Holding Co. Act s.29; Trust Ind. Act s.325; Inv. Co. Act s.49; Inv. Adv. Act s.217.

<sup>191</sup>Conspiracy counts in the sense of committing an "offense against the United States" are commonly included in the indictments, and the accused may be convicted of conspiracy even though all the S.E.C. antifraud provisions have been dismissed or reversed. See: UNITED STATES v GUTERMA, 281 F.2d 742, 745, 749-753 (1960).

<sup>192</sup>Sec. Act ss.7, 10(d), 19(a); Sec. Ex. Act ss.3(b), 23(a); Holding Co. Act s.20, Trust Ind. Act s.319(a), (b), Inv. Co. Act ss.38(a), 39; Inv. Adv. Act s.211(a)(b).

<sup>193</sup>Sec. Act s.19(a); Sec. Ex. Act s.23(a); Holding Co. Act s.20(d); Trust Ind. Act s.319(c); Inv. Co. Act s.38(c); Inv. Adv. Act s.211(d). These provisions do not extend to the written interpretive opinions which Commission counsel and other officials often express. However, the Commission would not normally take action when a person acts in good faith on the basis of a written staff opinion. See generally: LOCKHEED AIRCRAFT CORP. v RATHMAN, 106 F.Supp. 810 (1952); GREENE v DIETZ 247 F.2d 689 (1957); GRUBER v CHESAPEAKE & OHIO RY. CO., 158 F.Supp. 593 (1957); CONTINENTAL OIL CO. v PERLITZ, 176 F.Supp. 219 (1959).

<sup>194</sup>17 Code Fed. Regs. s.202.6.

<sup>195</sup>*Supra* notes 124, 138, 153, 158.

<sup>196</sup>All the S.E.C. Acts give the United States District Courts jurisdiction over actions based on the statutory provisions both civil and criminal, "irrespective of the amount in controversy or the citizenship of the parties." DECKERT v INDEPENDENCE SHARES CORP., 311 U.S. 282, 289 (1940); Sec. Act s.22(a); Sec. Act s.27; Holding Co. Act s.25, Trust Ind. Act s.322(b); Inv. Co. Act s.44; Inv. Adv. Act s.214; See also UNITED STATES v CAFARELLI, 183 F.Supp. 734, 737 (1959).

<sup>197</sup>Ibid.

<sup>198</sup>Sec. Ex. Act 29(b); Holding Co. Act 26(b); Inv. Co. Act s.47(b).

<sup>199</sup>Sec. Act s.14.

<sup>200</sup>SPEED v TRANSAMERICA CORP., 99 F.Supp. 808 (1951); KARSDON v NATIONAL GYPSUM CO., 73 F.Supp. 798 (1947).

<sup>201</sup>Ibid.

<sup>202</sup>"On the basis that 'forewarned is forearmed' the fundamental principle underlying the Companies Acts has been that of disclosure. If the public and the members were enabled to find out all relevant information about the Company, this, thought the founding fathers of our company law, would be a sure shield." L.C.B. Gower "Modern Company Law" 3rd Ed. 1969 London p.446.

<sup>203</sup>". . . the great bulk of the regulation of the securities industry is self-regulation under the supervision of a governmental agency." "Securities Regulation" by Richard W. Jennings and Harold Marsh Jr. 2nd. Ed. 1968, New York.

<sup>204</sup>CARICOM is the Caribbean Community, including the Caribbean Common Market established on the basis of a treaty signed by the Independent Territories of Bds., Guy., Jam., and TT., which took effect on August 4, 1973. Sec. "The Caribbean Community" by Caribbean Community Secretariat 1973, Georgetown, Guyana.

<sup>205</sup>There was a meeting of officials of the "Research Project on the Harmonisation of the Company Law of the Members of the Caribbean Community, the Bahamas and the West Indies Associated States" in Barbados from April 24-26, 1974. Attending the meeting were delegates from the CARICOM Secretariat, Brazil, Bds., Guy., Jam., KNA., TT.: Advocate-News, Barbados, April 24, 1974. It is hoped that the necessary reforms will be urgently pursued.