Privy Council Appeal No. 52 of 1997

Century National Merchant Bank Limited and Others *Appellants*

v.

Omar Davies and Others *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 16th March 1998

Present at the hearing:-

Lord Goff of Chieveley
Lord Lloyd of Berwick
Lord Steyn
Lord Hoffmann
Lord Hope of Craighead

*[Delivered by **Lord Steyn**]*

These appeals from orders made by the Court of Appeal of Jamaica on 2nd June 1997 concern the lawfulness of action taken by the Minister of Finance on 10th July 1996 under statutory powers to assume temporary management of three financial institutions, and the remedies available to aggrieved parties in the event of unlawfulness.

The three financial institutions were: (1) Century National Bank Limited, a bank licensed under the Banking Act; (2) Century National Merchant Bank and Trust Company Limited, a merchant bank licensed under the Financial Institutions Act; (3) Century National Building Society, a building society licensed under the Building Societies Act. Through various corporate entities Mr. Donovan Crawford, together with his mother, held a controlling interest in all three financial institutions. The Boards of Directors of the three institutions were virtually the same and they shared management services and staff. For several years before 10th

July 1996 the three institutions experienced serious financial and managerial problems. In the view of the Bank of Jamaica the operations of these entities were characterised by unsafe and unsound practices. Despite undertakings to remedy matters, the position in the view of the Bank of Jamaica became progressively worse. During this period the institutions were heavily dependent on support provided by the Bank of Jamaica. Protracted negotiations with a view to restructuring the institutions and placing them on a sound footing took place between the Minister of Finance, the Bank of Jamaica and the beneficial owners and senior management of the three financial institutions. There was never a successful outcome to these negotiations. One of the principal differences related to the insistence of the authorities on the replacement of the existing senior management of the three financial institutions. By the end of June 1996 unaudited in-house accounts showed (1) in the case of the bank an excess of liabilities over assets of $2.5 billion; (2) in the case of the building society an excess of liabilities over assets of $347 million; and (3) in the case of the merchant bank a surplus of assets over liabilities of $35 million. In the view of the Bank of Jamaica the merchant bank was also hopelessly insolvent. The scale of the problem facing the authorities is demonstrated by the fact that the bank was the fourth largest in Jamaica and had 43,000 depositors. And the bank's overdraft with the Bank of Jamaica had risen to $5.3 billion. After consulting the Bank of Jamaica the Minister decided to act. On 10th July 1996 the Minister of Finance, purportedly acting under the three governing Acts, assumed by immediately effective notices temporary management of each institution and appointed Mr. Richard Downer, the Senior Partner of Price Waterhouse, as Temporary Manager of each institution.

Given the focus of the appeals it is now necessary to set out the statutory background. It is only necessary to examine the Banking Act. Similar statutory regimes apply to the other two financial institutions. It is common ground that conclusions in respect of the bank will apply equally to the other two institutions. It will therefore be convenient to concentrate on the position of the bank.

The Banking Act.

Only companies duly licensed under the Banking Act may carry on banking business in Jamaica: section 3. A condition precedent to the granting of a licence by the Minister of

Finance is a recommendation by the Bank of Jamaica that the directors and beneficial owners are fit and proper persons to carry on banking business: section 4(3). Banks are obliged to deliver detailed returns and financial statements to the Bank of Jamaica: sections 16-19. The Bank of Jamaica is responsible for the supervision of banks: section 29(1). The Minister of Finance has extensive powers in respect of the control of banks: sections 20-24. The rationale of this statutory scheme is that the soundness of the banking sector is critical to the economy of Jamaica.

This is the context against which their Lordships turn to section 25 of the Act. The material provisions of section 25 are as follows:-

> " (1) The Minister after consultation with the Supervisor [the Bank of Jamaica] may in relation to a bank which is or appears likely to become unable to meet its obligations or in relation to which the Minister has reasonable cause to believe that any of the conditions specified in Parts A and B of the Second Schedule exists, take such steps as he considers best calculated to serve the public interest in accordance with this section.
>
> (2) ...
>
> (3) As respects the conditions specified in Part B of the Second Schedule, the Minister may -
>
> (a) ...
>
> (b) issue a cease and desist order in accordance with Part C of the Second Schedule;
>
> (c) assume the temporary management of the bank in accordance with Part D of that Schedule;
>
> (d) suspend or revoke the bank's license in accordance with Part E of that Schedule;
>
> (e) present to the court a petition for the winding up of the bank or an application regarding reconstruction of the bank."

Part B of the Second Schedule lists a number of conditions "requiring action by the Minister under section 25(3)",

including the situation where the bank "is engaging ... in an unsafe or unsound practice in conducting the business of the bank": para. 1(a). It is unnecessary at this stage to refer to Part C and Part E of the Schedule. But it is necessary to set out the material provisions of Part D:-

"1.-(1) For the purposes of section 25(3)(c), the Minister shall serve on the bank concerned a notice, announcing his intention of temporarily managing the bank from such date and time as may be specified in the notice.

(2) The Minister may appoint any person to manage on his behalf the bank specified in a notice under sub-paragraph (1).

(3) ...

(4) Upon the date and time specified in the notice referred to in sub-paragraph (1), there shall vest in the Minister full and exclusive powers of management and control of the bank, including, without prejudice to the generality of the foregoing, power to -

(a) continue or discontinue its operations;

(b) - (e) ...

(5) Not later than sixty days after the Minister has assumed temporary management of a bank he shall apply to the Court ... for an order confirming the vesting in the Minister of full and exclusive powers of management of the Bank as described in sub-paragraph (4).

(6) ...

2.-(1) A bank which is served with a notice under paragraph 1 may, within ten days after the date of such service, appeal to the Court of Appeal and that Court may make such order as it thinks fit.

(2) The Court of Appeal may, on sufficient cause being shown, extend the period referred to in sub-paragraph (1).

(3) The Minister may, if he considers it to be in the best interests of the depositors of a bank which is being

temporarily managed by him, apply to the court for an order staying -

(a) the commencement or continuance of any proceedings by or against the bank, for such period as the court thinks fit; or

(b) any execution against the property of the bank.

3. Where the Minister has served notice on a bank under paragraph 1, he shall, within sixty days from the date specified in such notice or within such longer period as a Judge of the Supreme Court may allow -

(a) restore the bank to its board of directors or owners as the case may be;

(b) present a petition to the Court under the Companies Act for the winding up of the bank; or

(c) propose a compromise or arrangement between the bank and its creditors under section 192 of the Companies Act or a reconstruction under section 194 of that Act."

About the Companies Act their Lordships need only observe that section 203 permits a winding up petition *inter alia* where a company is unable to pay its debts or it is just and equitable that it should be wound up. Section 192 (compromise or arrangement) and section 194 (reconstruction) are in familiar terms.

The notice of 10 July 1996.

At 3.15 p.m. on 10th July 1996 the Minister caused to be served on the bank a notice assuming temporary management of the bank with effect from 3.00 p.m. on that day. Simultaneously, the Minister appointed Mr. Downer as the Temporary Manager of the bank, and he instructed the Temporary Manager to discontinue the operations of the bank. The bank had been given no advance warning of the Minister's intended action. But at a meeting held at the Ministry of Finance at 3.00 p.m. on 10th July 1996 the Minister handed to the representatives of the bank a "rationale letter" which explained in some detail the reasons why the action was considered necessary.

The bank did not appeal to the Court of Appeal under paragraph 2(1) of Part D of the Banking Act within 10 days of the service of the notice nor did the bank before or after the lapse of the 10 days seek an extension of time under paragraph 2(2).

The continuance of the temporary management.

The temporary management was carried into effect. On 31st July 1996 the Supreme Court ordered a moratorium against proceedings or execution against the bank: see para. 2(3) of Part D. On 5th September 1996 the Supreme Court confirmed the vesting of temporary management in the Minister for 180 days: para. 1(5) of Part D. Subsequently the Supreme Court made further orders extending the temporary management. It is still in existence.

The outcome of the temporary management has been a Scheme of Arrangement, duly approved by depositors and trade and other creditors. On 16th October 1997 the Supreme Court sanctioned the Scheme of Arrangement. There will in due course be a 100% pay out to depositors. But the Scheme of Arrangement apparently provides little comfort for Mr. Crawford, his mother and their companies. For the sake of completeness their Lordships have referred to the eventual outcome of the temporary management but it does not affect the issues on this appeal.

A forensic narrative.

It is now necessary to go back in time and describe the litigation which led to the present appeals. On 2nd October 1996 the Temporary Manager on behalf of the bank started an action for recovery of certain debts and damages against Mr. Crawford, his mother and various companies controlled by Mr. Crawford. This can be called the Temporary Manager's Action. The response of the defendants to the writ was to apply by a summons dated 30th October 1996 for the action to be struck out on the ground that the assumption by the Minister of temporary management of the bank was unlawful and that the Temporary Manager's Action was brought without proper authority. On 6th February 1997 Ellis J. dismissed this application.

On 22nd October 1996 the Boards of Directors of the three institutions under temporary management started three separate actions against the Minister, the Temporary Manager

and his firm. The plaintiffs claimed declarations that the assumption of temporary management of each institution was unlawful. They also claimed damages for trespass, conversion and wrongful interference in the business of the institutions. The actions can be described as the "Directors' Actions". The three defendants promptly applied by summons to strike out the Directors' Actions on the ground that they disclosed no reasonable cause of action. Wolfe C.J. heard those applications. On 28th November 1996 he ordered all three actions to be struck out.

The defendants to the Temporary Managers' Action, and the plaintiffs in the Directors' Action, appealed to the Court of Appeal. The four appeals were consolidated for the purpose of the hearing. The appeals were heard over some 9 days. On 2nd June 1997 in detailed and careful judgments to which their Lordships wish to pay tribute Forte J.A., Gordon J.A. and Harrison J.A. (Ag.) dismissed the appeals.

The appellants now appeal to the Privy Council against the orders of the Court of Appeal dismissing the appellants' appeals against the judgments of Ellis J. and Wolfe C.J.

The Issues.

The shape of the arguments as deployed by counsel for the appellants on the present appeals differs somewhat from the arguments put before the Court of Appeal. Concentrating on the arguments advanced before their Lordships, it will be convenient to examine the principal issues arising in the following order:-

(1) Whether the remedy under paragraph 2(1) of Part D of the Banking Act of an appeal by the bank to the Court of Appeal is an exclusive remedy and, if so, what the consequences are;

(2) Whether the assumption of temporary management was unlawful inasmuch as no prior notice was given or on the ground of procedural unfairness;

(3) Whether the assumption of temporary management was unlawful because the institutions were insolvent and a petition for winding up was the only appropriate measure.

After considering these issues their Lordships will comment briefly on other issues and consequential matters.

The exclusive remedy issue.

The question whether the appeal to the Court of Appeal is an exclusive remedy is an issue of statutory construction. The starting point must be to focus on the language and context of the statute. Paragraph 2(1) of Part D is cast in language of width and generality. *Prima facie* any issue regarding the service of the notice is within the scope of the right of appeal. And paragraph 2(1) expressly provides that the Court of Appeal "may make such order as it thinks fit". It is plainly competent for a bank to contend on such an appeal that the notice was invalid for procedural or substantive reasons. And the Court of Appeal would be bound to rule on the merits of such contentions. Thus the bank could have appealed on the ground that the Minister gave no prior notice of his intention and that the Minister resolved to assume temporary management in circumstances when that was under the statute an inappropriate remedy, leaving it to the Court of Appeal to rule on the merits or demerits of those arguments. Indeed every complaint, substantial or insubstantial, advanced by the appellants before the Privy Council could have been raised before the Court of Appeal by way of an appeal under paragraph 2(1) of Part D. This is therefore not a case of an ouster of jurisdiction in whole or in part, as was considered in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147. It is a time limited provision vesting, exceptionally, original jurisdiction in the Court of Appeal to hear an appeal by the bank in respect of the notice announcing the Minister's intention to assume temporary management of the bank.

Counsel for the appellants was critical of the short period allowed for an appeal, viz. 10 days. But paragraph 2(2) provides that, on sufficient cause being shown, the Court of Appeal may extend that period. And as a matter of jurisdiction the Court of Appeal may grant such an extension after the lapse of 10 days. The time limited provision therefore has its own built in safeguard against injustice.

It is true that Part D does not expressly provide that the right of appeal will be an exclusive remedy. But a necessary or plain implication to the same effect, derived from the language and context of the statute, is enough: see *Barraclough v. Brown* [1897] A.C. 615 and *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260. There are cogent factors pointing towards a necessary implication that the appeal is an exclusive remedy. One only has to ask the

question whether the legislature, having provided for a speedy general right of appeal to the highest court in Jamaica, intended to leave intact the unfettered right of the directors of the bank to challenge the validity of the assumption of temporary management years later in a private law action at first instance. The language and the context of the statute rules out such an impractical interpretation. After all, as Part D shows, a Temporary Manager may continue or discontinue the business; stop or limit payment of obligations; dismiss or employ officers or employees; and so forth. He must be able to deal with third parties and they need to know where they stand. Moreover, a lengthy period of uncertainty about the status of temporary management of the bank will greatly complicate, for example, the possibility of working towards a scheme of arrangement with creditors or reconstruction of the bank. The need for certainty and finality about the temporary management in the public interest is manifest. For these reasons, in agreement with the Court of Appeal, their Lordships are satisfied that the appeal under paragraph 2 of Part D is an exclusive remedy.

It is rightly conceded that in these circumstances the three appeals in the Directors' Actions must fail. Counsel for the appellants nevertheless submitted that this is not the case in respect of the appeal in the Temporary Manager's Action where Mr. Crawford, his mother and companies in which Mr. Crawford has beneficial interests are defendants. He argued that their position is unaffected by the existence of the exclusive remedy of an appeal at the instance of the bank. Their Lordships are far from satisfied that this argument is correct. Parties other than the bank may lack *locus standi* to challenge the validity of the temporary management or may be debarred by a necessary implication in paragraph 2(1) of Part D from doing so. It may also be an abuse of process for them to advance such a collateral challenge to the validity of the temporary management. These questions were only barely touched on in argument. Their Lordships find it unnecessary to express any concluded view on them.

Prior notice and procedural fairness.

Counsel for the appellants argued that the notice of immediate assumption of temporary management given by the Minister was invalid. He said that reasonable prior notice was required. The sustainability of this argument

must be judged in the light of the language and scheme of the statute. Paragraph 1(1) of Part D provides for a "notice, announcing his intention of temporarily managing the bank from such date and time as may be specified". As a matter of ordinary language this provision does not seem to contemplate a requirement of prior notice. This impression is reinforced by the express provisions requiring prior notice in the case of Part C (Cease and Desist Orders) and in the case of Part E (Suspension or Revocation of Licence). But, if, contrary to their Lordships' view, it is assumed that the language is capable of letting in more than one meaning, the contextual scene removes any doubt. A prior notice of an intention to assume temporary management may cause grave problems. Would it be appropriate for the directors who are given prior notice of the Minister's intention to continue to accept deposits or honour cheques? The directors would be in a most invidious position in regard to carrying on the operations of the bank. The risk of advance notice of the Minister's intention leaking out, once it is communicated to the bank, must also be substantial. Such a leak would be headline news in Jamaica. It would tend to alarm depositors. It might very well lead to a run on the bank. Confidence is the lifeblood of banking. A run on a bank may not only finally destroy any prospect of reconstruction of a bank but it may have systemic consequences in the sense of adversely affecting the banking sector as a whole and thus the national economy. Finally, there is the risk that directors or other insiders, who have been responsible for unsound practices, may destroy incriminating records. The context therefore supports their Lordships' view that paragraph 1 of Part D does not require prior notice.

That leads to the appellants' related argument that the notice given on 10th July 1996 was in breach of standards of procedural fairness. Counsel for the appellants argued that at the very least the Minister should have given the bank an opportunity to make representations to the effect that it would be wrong to assume temporary management rather than present a winding up petition. He invokes a common law principle which is a cornerstone of administrative law in the United Kingdom and in Jamaica. Nevertheless, the limitations of that principle must be borne in mind. In *Wiseman v. Borneman* [1971] A.C. 297 Lord Reid said at page 308:-

"Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the

> circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

For the reasons already explained their Lordships are satisfied that the statutory right of appeal to the Court of Appeal, exercising wide original jurisdiction, should be sufficient to achieve justice to the bank. Moreover, and for reasons also explained, a prior opportunity for the directors and other insiders in the bank to make representations that a temporary management is inappropriate is both impractical and contrary to the public interest. The argument based on procedural unfairness must be rejected.

Temporary management in insolvency situations.

Counsel for the appellants argued that it was unlawful for the Minister to assume temporary management in circumstances where the bank was plainly insolvent. Counsel said that the only appropriate step under section 25(3) was the presentation of a winding up petition. Counsel constructed this argument by inviting their Lordships to concentrate on one outcome of temporary management, viz. the restoration under paragraph 3(a) of Part D of the bank to its board of directors or owners. He said that this had to be the Minister's intention at the time of the service of the notice. Counsel argued that if a Minister does not have this intention, because he knows a bank is hopelessly insolvent, he has no choice but must immediately present a petition for the winding up of the bank. This argument is built on sand. Paragraph 3 does not stipulate what the Minister's intention at the time of the service of the notice must be. It provides that after 60 days, or such longer period as the judge allows, the Minister shall ensure one of the three things specified in paragraph 3, viz. (1) restoration of the bank, (2) the presentation of a winding up petition or (3) an arrangement with creditors or reconstruction. Moreover, even if one concentrates on Part D only, it is clear that the Minister may embark on temporary management as the best way of realising the

assets of the bank and achieving an arrangement with creditors. This follows from the fact that under paragraph 1(4) of Part D the Minister has the power upon inception of the temporary management to discontinue the operations of the bank. If the Minister decides to take this course it will usually make a restoration of the bank impossible. Effectively the Minister will then from the start be left with a choice between subsequent winding up or a scheme of arrangement or reconstruction. Counsel's arguments on Part D are misconceived. But the dominant provisions, which serve to define the circumstances in which the Minister may assume temporary management of a bank, are contained in section 25(1) and (3). These provisions expressly allow the Minister to take the step of assuming temporary management not only when Part B conditions exist (which include unsafe and unsound practices) but also when a bank is unable to meet its obligations. Those provisions are disjunctive. This is a perfectly practical and sensible statutory scheme. It enables the Temporary Manager during the temporary management of an insolvent bank, while there is a moratorium on legal proceedings or execution against the bank, to make proposals for a scheme of arrangement or a reconstruction. This bears some comparison with the statutory provision in this country for an administration order so as to achieve "a more advantageous realisation of company's assets than would be effected on a winding up": Insolvency Act, 1986, section 8; *In re Harris Simons Construction Ltd.* [1989] 1 W.L.R. 368, at 371D, per Hoffmann J. (now Lord Hoffmann). In any event, there is no justification for a restrictive interpretation of section 25(1) by reading it in a conjunctive sense. For these reasons their Lordships reject the argument that the Minister acted unlawfully.

Other issues.

In the appellants' written case it was argued that the validity of the recommendation made by the Bank of Jamaica to the Minister under section 25(1) was open to doubt because the Bank of Jamaica had a conflict of interest. Counsel for the appellants did not address their Lordships orally on this argument. That is understandable since there is nothing whatsoever to suggest that the Bank of Jamaica failed to carry out its statutory functions properly. There was no conflict of interest: the Bank of Jamaica was and had to be guided only by the public interest. Their Lordships reject the written argument on this point as wholly unsustainable.

There are two other issues viz. (1) whether the existence of court orders confirming and implementing the temporary management is an independent and self sufficient answer to the appeals and (2) whether and, if so, when a Minister may incur personal liability for loss occasioned by unlawful action taken by him under section 25 of the Banking Act. These issues were not canvassed in oral argument. It is unnecessary to express any views on them.

Conclusion.

Counsel for the appellants put in the forefront of his submission that the appellants were seeking private law remedies. But counsel conceded that those remedies are unavailable if the appellants have failed to show that there is an arguable case that the Minister in purporting to exercise his public powers acted unlawfully. Their Lordships have decided the critical questions of law against the appellants. They have failed to demonstrate an arguable case. In these circumstances it follows that the four appeals must fail.

Disposal of the Appeals.

Their Lordships will humbly advise Her Majesty that the appeals ought to be dismissed.

Their Lordships invite the parties to lodge short written submissions on costs within 14 days. Their Lordships are content that this should be done by solicitors' letters addressed to the Registrar.