JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS: 120, 121 & 122/96;
& 20/97

COR: THE HON. MR. JUSTICE FORTE, J. A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (AG.)

CIVIL APPEAL NO: 120/96
SUIT NO. C.L. 1996/C368

BETWEEN	**CENTURY NATIONAL MERCHANT BANK LIMITED**	**APPELLANT**
AND	**OMAR DAVIES**	**1ST RESPONDENT**
AND	**RICHARD DOWNER**	**2ND RESPONDENT**
AND	**PRICE WATERHOUSE**	**3RD RESPONDENT**

CIVIL APPEAL NO: 121 OF 1996

SUIT NO: C.L. 1996/C367

BETWEEN	**CENTURY NATIONAL BANK LIMITED**	**APPELLANT**
AND	**OMAR DAVIES**	**1ST RESPONDENT**
AND	**RICHARD DOWNER**	**2ND RESPONDENT**
AND	**PRICE WATERHOUSE**	**3RD RESPONDENT**

CIVIL APPEAL NO: 122/96

SUIT NO. C.L. 1996/C366

BETWEEN	**CENTURY NATIONAL BUILDING SOCIETY**	**APPELLANT**
AND	**OMAR DAVIES**	**1ST RESPONDENT**
AND	**RICHARD DOWNER**	**2ND RESPONDENT**
AND	**PRICE WATERHOUSE**	**3RD RESPONDENT**

CIVIL APPEAL NO: 20/97

SUIT NO. C.L. 1996/C330

BETWEEN	**CNB HOLDINGS LIMITED**	**1ST APPELLANT**
	CENTURY NATIONAL DEVELOPMENT LIMITED	**2ND APPELLANT**
	DONOVAN CRAWFORD	**3RD APPELLANT**
	REGARDLESS LIMITED	**6TH APPELLANT**
	FORDIX LIMITED	**7TH APPELLANT**
	SPRING PARK FARMS	**8TH APPELLANT**
	ALMA CRAWFORD	**9TH APPELLANT**
AND	**CENTURY NATIONAL BANK LIMITED**	**RESPONDENT**

Lord Gifford Q C with Leon Green and Mrs. Priya Levers Instructed by **Mrs. Marjorie Brown** for appellants in Civil Appeal Nos. 120, 121 & 122/96.

Lord Gifford Q C with Leon Green & Mrs. Priya Levers instructed by **Wong Ken & Co** for appellants in Civil Appeal No. 20/97.

Michael Hylton Q C with Peter Goldson & Miss Debbie Fraser instructed by **Miss Nicole Lambert of Myers, Fletcher & Gordon** for 2nd & 3rd respondents and Century National Bank the respondent in Civil Appeal No. 20/97.

Lennox Campbell, Senior Assistant Attorney-General for 1st respondent Omar Davies.

April 7, 8, 9, 10, 11, 14, 15, 16, 17 & June 2, 1997

FORTE, J A

On the 10th July, 1996 at approximately 3.00 p.m. having received the approval of the Cabinet of the Government of Jamaica, the Minister of Finance, purporting to act under the provisions of the Banking Act, the Financial Institution Act and the Bank of Jamaica (Building Societies) Regulations, 1995 served notices upon the Century National Bank Ltd (CNB), the Century National Merchant Bank Ltd (CNMB) and Century National Building Society (CNBS) of his intention to assume the temporary management of those institutions (CFIs). By 4.00 p.m. on the same afternoon, Mr. Richard Downer, Accountant of Price Waterhouse, an accounting firm, having been appointed the agent of the Minister, and acting with the staff of Price Waterhouse entered and took over the three entities (CFIs) including all their branch offices. In doing so, the Minister purported to act under the respective sections of the governing statutes (supra) each being in identical terms. Because of their identical provisions it is only necessary to set out section 25 of the Banking Act which reads as follows:

> **25** - (1) The Minister after consultation with the Supervisor 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."

Sub-section (3) of section 25 speaks inter alia to the assumption of temporary management as follows:

> (3) As respects the conditions specified in Part B of the Second Schedule, the Minister may :-

(a) take action in accordance with subsection (2) (a) or (b);

(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 licence 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."

For completion it should be noted that sub-section (2)(a) and (b) to which section 25(3)(a) refers gives the Minister the power to:

"(a) require the bank to give an undertaking signed by the majority of the members of the bank's board, to take such corrective action as may be agreed between the bank and the Minister; or

(b) give directions to the bank under this section."

Then subsection 4 speaks to the directions:

(4) Directions under this section shall be such as appear to the Minister to be desirable in the interest of the bank's depositors and potential depositors, whether for the purpose of safeguarding its assets or otherwise, and may in particular

(a) require the bank to take certain steps or to refrain from adopting or pursuing a particular course of action or to restrict the scope of its business in a particular way;

(b) impose limitations on the acceptance of deposits, the granting of credit or the making of investments;

(c) prohibit the bank from soliciting deposits either generally or from persons who are not already depositors;

(d) prohibit the bank from entering into any other transaction or class of transactions;

(e) require the removal of any director or manager."

Subsection (6) makes a bank guilty of an offence if it fails to comply with any requirement, or contravenes any prohibition imposed by any direction or cease and desist order under the section.

In assuming temporary management, the Minister it appears acted in accordance with the provisions of section 25 (3) (c) which refers to Part D of the Second Schedule for the relevant procedure. Part D is headed - **"Temporary Management of a Bank"**

As this section formed the basis for the submissions made on the appellants' behalf it is necessary to set out the relevant paragraphs. They read:

> **"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).
>
> ...
>
> (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) stop or limit the payment of its obligations;
>
> (c) employ any necessary officers or employees;

> (d) execute any instrument in the name of the bank; and
>
> (e) initiate, defend and conduct in the name of the bank, any action or proceedings to which the bank may be a party."
>
> (5) Not later than sixty days after the Minister has assumed temporary management of a bank he shall apply to the Court (furnishing full particulars of the assets and liabilities of the bank) 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).
>
> ...
>
> **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)."

After temporary management was assumed, the CFIs did not invoke the provisions of paragraph 2 of Part D of the Schedule (supra) which gives them the right to appeal to the Court of Appeal within 10 days of the notice being served on them under paragraph 1 of Part D of the Second Schedule. On the 2nd September, 1996 the Minister acting in accordance with section 1(5) of Part D of the Second Schedule applied and was granted by the Court an order "confirming the vesting in the Minister of full and exclusive powers of management of the Bank". This order was effective for 180 days and has since been extended by the Court for another 180 days.

On the 2nd October, 1996 Century National Bank Ltd per the temporary manager, caused a writ to be issued against Century National Bank Holdings Ltd, Century National Development Ltd, (CND) Donovan Crawford, Valton Caple Williams,

Balmain Brown, Regardless Ltd, Fordix Limited, Spring Park Farms and Alma Crawford. (Suit C.L. 1996/C330).

For clarity it should be explained that the Century Financial Institutions were all subsidiary companies of Century National Bank Holdings Ltd (CNBH), the latter in which Mr. Donovan Crawford held 54% of the shares - 14% owned directly, 15% owned through his wholly owned Company Regardless Ltd, and 25% owned jointly with his mother Alma Crawford. Donovan Crawford was also a director of Regardless Ltd, Fordix Limited and Spring Park Farms.

Century National Bank Holdings Limited owned 100% of Century National Development Bank (CNDB), another of the defendants, 80% of Century National Bank Ltd and 100% of each of Century National Building Society and Century National Merchant Bank Ltd. Donovan Crawford was the Chairman and Chief Executive Officer of the Century Financial Institutions while Valton Caple Williams was a director of Century National Bank Ltd receiving a salary for his services and was also a Director of Century National Bank Holdings Ltd and Century National Development Ltd and Fordix Limited. Balmain Brown was also Director and President of Century National Bank Ltd.

The Statement of Claim in the action claimed various items of damages against the defendants and also various orders and declarations which for the purposes of the issues before us, need not be detailed here.

On the 23rd October, 1996 three writs were issued on behalf of the Century Financial Institutions and in the names of the separate institutions against Omar Davies (the Minister in his personal capacity) Richard Downer (the agent of the Minister - as temporary manager) and Price Waterhouse, the Accounting firm through whom Mr. Richard Downer, a partner, worked.

The statements of claim requested the following orders:

> (1) A declaration that the notice letter served by the First defendant on the Plaintiff on the 10th July, 1996 was invalid and of no effect, and was unlawful.
>
> (2) A declaration that the copies of the notice letter served on the Registrar of the Supreme Court and published in the Daily Observer were invalid and of no effect and were unlawful.
>
> (3) A declaration that the assumption by the First Defendant of the full and exclusive powers of management and control of the undertaking, business affairs and assets of the Plaintiff was invalid and unlawful.
>
> (4) A declaration that the appointment of the Second Defendant to manage the Plaintiff on behalf of the First Defendant purportedly under paragraph 1(2) of Part B aforesaid was invalid and unlawful.
>
> (5) A declaration that the management and control of the Plaintiff by the Second and Third Defendants as aforesaid to the exclusion of its Board of Directors was and continues to be invalid and unlawful.
>
> (6) An injunction restraining all and each of the Defendants, by themselves, their servants or agents or otherwise howsoever from exercising or continuing to exercise any power of management or control over the undertaking, business affairs or assets of the Plaintiff.
>
> (7) An injunction restraining the Second Defendant by himself, his servants or agents or otherwise howsoever from instituting or pursuing or conducting any legal proceedings in the name of or on behalf of the Plaintiff.
>
> (8) A mandatory order that forthwith the Defendants and each of them do provide to the Board of Directors of the Plaintiff, or to any authorized employee, agent or representative of the Plaintiff, full access to the premises of the Plaintiff and to all books files, records, computer data and the like.
>
> (9) Damages for trespass, conversion and wrongful interference in the business and affairs of the Plaintiff.

(10) All proper accounts and enquiries.

In all these cases summonses were issued to strike out the actions i.e. Omar Davies (The Minister) Richard Downer and Price Waterhouse issued summonses to strike out the actions brought against them by the Century Financial Institutions (1996/C366, 367 & 368). And the defendants in Suit 1996/C330 issued summonses to strike out the action brought against them by Century National Bank Limited.

The summons to strike out the action brought by the Century Financial Institutions (Suit 1996/C366, 367 & 368) were heard by the Learned Chief Justice, who ordered that the actions be struck out.

The summons to strike out the action by the Century National Bank Ltd (per the temporary manager) in Suit 1996/C330 was heard and dismissed by Ellis J.

The Century Financial Institutions in Suits 1996/C366, 367 and 368(per their Boards of Directors) and the defendants in Suit 1996/C330 with the exception of Balmain Brown and Valton Caple Williams have now appealed and these appeals, having been consolidated were heard by this Court over a period of nine days, at the end of which we took time out to consider our decision.

During the arguments before us, the issues were refined into the following:

> "(1) Do the Directors of the Century Financial Institutions, have a right to challenge the exercise of the Minister's powers under the relevant Acts, in a common law action or does the remedy given to them under the provisions of the relevant Acts, preclude them from bringing such an action?
>
> (2) If the answer to (1) is yes, does the order of the Court, arising from the application for the confirmation of the vesting of the assumption of temporary management, preclude them from bringing an action, for the reason that until that order is removed for whatever reason, the subsequent tenure of the temporary manager is by an order of the Court which until proven otherwise is valid.

(3) Assuming that the Century Financial Institutions are not precluded from bringing the actions do the Statements of Claim in the action brought by them, on the face of them, disclose a triable cause of action. i.e. Is there an arguable case as to -

(i) the allegation of the breach of the rules of natural justice in serving a notice which took immediate effect,

(ii) the alleged illegality of the Minister's action in assuming temporary management.

(4) In respect to Suit 1996/C330, the issue is whether Century National Bank Limited (per the temporary manager) could bring the action - a question which must be determined on the basis of whether the Minister's assumption of temporary management of the Bank was illegal which is the same issue to be determined in (3) above.

1. Do the Boards of Directors of the Century Financial Institutions have a remedy at Common Law?

This issue ought to be determined against the background of the presumption that Parliament does not intend to deprive the subject of his common-law rights except by express words or necessary implication. In the absence of this, statutes should not be interpreted so as to authorize the restriction of the subjects' rights to redress in the ordinary Courts. See ***Pyx Granite Co Ltd v. Minister of Housing and Local Government and Others*** [1959] 3 All E R 346 where Viscount Simonds said:

> "It is a principle not by any means to be whittled down that the subjects' recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words."

In the unreported case of ***Infochannel Ltd v. Telecommunications of Jamaica Ltd*** SCCA 40/95 delivered on the 5th July, 1995, I cited and adopted the following dicta of Willies J in the case of ***The Wolverhampton New Water Works Co v. Hawkesford*** 107 E.R. 486 at 495, which is relevant to the circumstances of the instant case:

> "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common-law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it." [Emphasis added]

In ***Barroclough v. Brown*** [1897] A C 615, a case which was distinguished by Viscount Simonds in the ***Pyx Granite*** case (supra), the Statute gave an aggrieved person the right to recover certain costs and expenses in a Court of summary jurisdiction. It was held that that was the only remedy open to the aggrieved person and that he could not recover such costs and expenses in the High Court, Lord Herschell stating:

> "the appellant cannot claim to recover by virtue of the statute and at the same time insist upon doing so by means other than those prescribed by the Statute which alone confirms the right."

What are the rights and remedies which are disclosed in the subject matter of appeal?

Before 1960, Banks as defined in the Bank Notes Law 30/1904 were "all companies incorporated by Charter, or under the authority of an Act of Parliament or a Colonial Statute carrying on the business of banking."

In 1960, the first Banking Law was enacted and brought into operation in 1961, for the purpose of "consolidating and amending the law regulating the business of banking."

"Banking Business" was defined in that Law as meaning:

> "The business of receiving from the public on current account or deposit account money which is repayable on demand by cheque or order and which may be invested by way of advances to customers or otherwise."

No company unless licenced under the law, could carry on the business of banking. The Minister was given the power to grant such licences, and the Law made provisions for the monitoring and supervision of banks, which were to operate on the bases of various conditions and requirements as to "Capital and Reserves," Returns and Accounts" and other similar matters. So even from those initial days banks came into existence with the permission of the Minister, and operated under his constant supervision, and were subject to inspection from time to time by an Inspector of Banks, appointed by the Governor. These requirements were necessary then, and even more so in the modern Jamaica, as banks are the "trustees" of the deposits of their customers whose total wealth sometimes are in their hands. It appears that for these reasons by the time of the enactment of the current Banking Act in 1992the Minister's powers and responsibilities especially in an independent Jamaica, became enlarged, for the purpose of keeping control of the granting of licences and the operations of banks.

It is in that context that the interpretation of section 25 and the consequent issues raised in this appeal ought to be determined. That section viewed as a whole, demonstrates the powers and the responsibilities given by Parliament through the Statute to the Minister in order to protect the public interest viz. the interest of

depositors whose funds are given up to the banks not only for safe keeping, but in many cases as investment.

The uncertainty of the stability of a bank, affects not only its depositors and creditors, but also the whole economy of the country; and consequently the controlling power given to the Minister and his Supervisor - the Bank of Jamaica is of significant importance and of great necessity. So that section 25 which deals with "Regulations against Unsafe Practices" provides a whole range of supervisory and controlling actions the Minister can take, depending on how, in consultation with the Bank of Jamaica, he assesses the various aspects of the bank's business. This too, is true of the other Financial Institutions which are governed by the Financial Institutions and the Bank of Jamaica(Building Societies) Regulations, 1995 which have identical provisions.

The question then, is, what remedy does the bank have against the wrongful exercise of the Minister's powers under the section given the reasons for these powers and the fact that his decision to act is based upon his own assessment of the situation and that he only has to have "reasonable cause to believe" that there are circumstances existing under the various provisions of section 25 which require his intervention.

The Statutes though giving him these wide powers have within them adequate safeguards to prevent an abuse of power by the Minister. In the case of the service of notice of intention to assume temporary management, the Statutes e.g. paragraph 2 of Part D of the Schedule (of the Banking Act) gives the bank who wishes to contest the notice a right to appeal to the Court of Appeal within ten days of service of the notice, with a provision in paragraph 2(2) for the period of ten days to be extended by the Court. On such an appeal, the Court has the power to "make such orders as it thinks fit" - a power, which in my view, is very wide and could include a declaration that

the notice was bad, and indeed that the Minister was acting unlawfully in serving notice of intention to assume temporary management - there being no established reason for so doing. Effectively, therefore, the Court of Appeal could in such an appeal, decide the very issues which are now raised in the actions e.g. whether the notices and the consequential assumption of temporary management were in breach of natural justice and whether the Minister acted within his statutory powers in attempting to assume temporary management.

The scheme of the Acts suggests also that where there is good reason for the Minister to act with urgency to protect the interest of the depositors, he is allowed to do so, with the safeguard that the relevant financial institution has a right to a remedy in the Courts. To demonstrate this the provisions of Part C of the schedule, which gives the power to the Minister to issue a cease and desist order, though requiring that in normal circumstances before the order is made, a notice of not less than 30 days nor more than 60 days be served, with a date and place set for the hearing, it also has the following provisions:

> "**5.** Where in relation to any bank -
>
> (a) a notice has been served pursuant to paragraph 1; and
>
> (b) at any time prior to the holding of a hearing in accordance with that paragraph, the Minister is satisfied that the situation giving rise to the notice is likely to endanger the financial position of the bank or the interests of its customers,
>
> the Minister may forthwith serve on that bank and on any person named in such notice, a temporary cease and desist order which shall take effect as from the date of such service.
>
> 6. Where a temporary cease and desist order is served under paragraph 5, the bank or, as the case may be, the person on whom it is served may, within

> ten days after the date of such service, apply to a Judge of the Supreme Court in accordance with rules of court to set aside, limit, or suspend the operation or enforcement of such order."

Then again in Part E of the Schedule which deals with "Suspension or Revocation of Licence", there is provision in paragraph 3 to appeal to the Court of Appeal. It reads as follows:

> **"3.** Where a bank has been notified of the suspension or revocation of its licence it may, within ten days after the date of such notification, appeal to the Court of Appeal and that Court may make such order as it thinks fit."

The scheme of the Acts mandates, in my judgment, that any challenge to the Minister's powers to interfere with the Century Financial Institutions continued management or their method of management in the matters expressly dealt with in the Act, and especially in regard to circumstances which demand urgent and immediate action to safeguard the Century Financial Institutions' customers, must be made in pursuance of the remedies granted in the Acts. In my view, this is not a case in which there were common law rights existing before the enactment of the Banking Act, as any Bank which receives its licence to operate does so with the full knowledge of its own responsibilities and that of the Minister, and not least of all, the powers given to the Minister, and the safeguards in the Act to prevent an abuse of these powers. In addition, the nature of the business of banking and its consequent effect on the economy of the country, demands that in particular circumstances, the Minister be allowed to act swiftly, and without prior notice in the interest of the Bank's customers and the nation as a whole. This is also true of the other financial institutions.

In my view though the Acts do not expressly deprive the Bank of the right to bring an action in common law in respect of matters arising out of their provisions,

nevertheless having regard to their nature and scheme, they do so by necessary implication. Also, in support of this view, is the provision in the Acts which requires the temporary manager after 60 days of temporary management to apply to the Court for an order confirming the vesting in the Minister of full and exclusive powers of management of the Century Financial Institutions. The very scenario, which this case has developed shows the absurdity and confusion that would develop, if the Acts were interpreted as giving an opportunity for an action in common law to be initiated. Here the appellants have failed to exercise the right of appeal given to them under the relevant Acts. Then they not having done so, the Minister through his agent, successfully applied to the Court sixty days after he had assumed temporary management of the Century Financial Entities, for an order vesting the Minister with full and exclusive powers of management. In pursuance of that confirmation the temporary manager has continued to exercise the powers given to him under Paragraph 1(4) of Part D of the Schedule. Everything he has done therefore, he has done with the authority of an Order of the Court. In my view, it would be chaotic and no doubt adversely affect the interests of depositors, if the Board of Directors were to have, in addition to the right of appeal given them under the Acts, a right at this stage to initiate proceedings in the Court, raising the very issues which should have been raised by way of appeal in the Court of Appeal. In my view this would be against the very nature and scheme of the Acts, which demand that in the interest of the public, these matters ought to be dealt with as a matter of urgency. I would answer the issue raised in the question by stating that the only remedy open to the Century Financial Entities, in these circumstances, is the remedy provided in the Acts, and consequently they have no authority to bring the actions which they seek to bring as disclosed in the Statements of Claim.

Having so found, there is really no necessity to make a finding on the other interesting issues raised in this Appeal. However I offer some views.

2. In determining the effect that the order granted by Orr J to the temporary manager confirming his management had on the Board of Directors' right to bring the actions the learned Chief Justice stated the following:

> "Can these actions be properly brought by the plaintiffs when there is an Order in force vesting the full and exclusive powers of management of the entities in the 1st and 2nd Defendant.
>
> The first question which arises in my view is what is the effect of such an Order? I unhesitatingly hold that the Order has the effect of suspending all the powers of the Board of Directors and vesting them in the 1st named Defendant. For all intents and purposes, the Board no longer exists. It is bereft of any power.
>
> The plaintiff, if they wish to have any locus standi, must proceed by way of challenging the Constitutionality of the Order vesting full and exclusive management of the entities in the first named Defendant. Until this is successfully accomplished, the Plaintiffs cannot purport to act on behalf of the entities."

In effect, the statement of the learned Chief Justice is correct. An order of the Court is considered valid and correct, until it is set aside by a competent Court. The effect of the Order of Orr J would be as the Learned Chief Justice has stated.

In those circumstances, also, the Century Financial Institutions would be shut out of making the allegations made in their Statements of Claim. This of course, gives support to the opinion earlier expressed that the only remedy that exists is that to be found in the relevant Statutes.

3. NOTICE

In so far as this question is concerned, short answers can be given having regard to the conclusions already made. The first point deals with whether the wording of paragraph 1(1) of Part D of the Schedule, implies that the Minister ought to have given prior notice before assuming temporary management of the Century Financial Institutions. It is argued that if that is so, then the notice would be invalid, and therefore all action that followed from that, would be in breach of the section. In addition, the submissions continued that the absence of prior notice, i.e. the immediate assumption of temporary management, deprived the Century Financial Institutions of their common law right of natural justice, as they had no chance to be heard before the action was taken by the Minister.

As already pointed out, this section of Part D of the Schedule does not, unlike other sections, specify that the notice given, should give any time within which the action will be taken. Insofar as the Century Financial Institutions' rights to be heard are concerned, it appears on the face of the Statute that that right exists in their exercise of the provisions of paragraph 2 of Part D, which gives them the right to appeal to the Court of Appeal within 10 days of the notice, or within any enlarged time granted by that Court. Lord Gifford however argued that "to make the statutory scheme function, by necessary implication the Minister should give a bank and the public sufficient notice to make representations to him, and to enable the bank to appeal to the Court of Appeal, if necessary, before assuming powers of temporary management." Though generally such a contention is acceptable, the nature of the matter being dealt with and the circumstances that called for the Minister's action would by necessity require that

his action be taken quickly without leaving any opportunity in time to cause an adverse economic situation to develop e.g. "a run on the bank".

In my view, the scheme of the Acts, envisaged such a situation, by specifically, omitting to put any requirement on the Minister to give prior notice, as indeed they did in dealing with other actions which the Minister can take for example the cease and desist order and even so, when the situation provides for urgency, it allows the Minister to act immediately. This type of provision is not a stranger to the law. In the Fifth Edition of "Judicial Review of Administrative Action" by DeSmith, Woolf and Jowell the authorsat paragraph 10-012 at page 482 state:

> "Desirable though it may be to allow a hearing or an opportunity to make representations, or simply to give prior notice, before a decision was taken which interferes with a person's rights or interest, summary action may be alleged to be justifiable when an urgent need for protecting the interest of other persons arises. For example, the purpose of giving the executive powers to detain security suspects in war time or grave emergency could be frustrated if the suspects were entitled to prior notice of its intentions. The interest of public safety and public health had been made for justification for the summary interferences with property (or other) rights...".

Then at paragraph 10-015 at page 485:

> "Urgency may warrant relaxing the requirements of fairness even where there is no statute or regulation by which this is expressly permitted ... Similarly where a self-regulating organization, the Life Assurance Unit Trust Regulatory Organization, acted urgently with the object of protecting investors, it was not required to consider whether there was sufficient time to receive representations. In general, whether the need for urgent action outweighs the importance of notifying or consulting an affected party depends on an assessment of the circumstances of each case on which opinions can differ."

The basic principle which underlines the rule of natural justice is that a person who is the subject of an adverse ruling must have been treated fairly.

In ***Paul Wallis Furnell v Whangarei High School*** [1973] A.C. 660 the following dicta in ***Brettingham Moore v Municipality of St Leonards*** [1969] 121 CLR 509 at 524 was cited with approval by Lord Morris of Borth-Y-Gest:

> "The legislature has addressed itself to the very question and it is not for the court to amend the statute by engrafting upon it some provision which the court might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material.
>
> It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules: ... Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action.' Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker LJ in ***Russell v Duke of Norfolk*** [1949] 1 All ER 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter for consideration." [Emphasis added]

The question therefore is not necessarily whether the person adversely affected by the ruling has had a prior hearing, but whether in all the circumstances, he has been treated fairly.

In developing his submissions on this point, Mr. Hylton Q C for the temporary manager, relied on the case of ***R v Birmingham City Council, ex parte Ferrero Limited*** [1993] 1 All ER 530 where Taylor LJ, in dealing with a case in which the Council served a suspension notice without consultation under the Consumer Protection Act of 1987 on a toy manufacturer prohibiting him from supplying a particular toy for a period of six months, stated at pages 542-543:

> "Would a duty to consult frustrate the purpose of the 1987 Act?
> As already observed, the purpose of Pt 11 of the 1987 Act is to achieve consumer safety, and s 14 is an emergency measure to protect consumers against goods the enforcement authority reasonably suspects

> are in contravention of the safety provision. Likewise, s13 empowers the Secretary of State to issue a prohibition notice if he consider goods unsafe ... if the supposed duty to consult were to depend upon the facts and urgency of each case, enforcement authorities would be faced with a serious dilemma. What amounts to urgency is incapable of precise definition, and would be open in many cases to honest and reasonable differences of opinion. There would be a danger that although the authority reasonably suspected goods were dangerous they would feel bound to delay serving a notice until they consulted the trader, whereas, without a duty to consult, they would have served forthwith. Valuable time would be lost and danger could result."

Then in dealing with whether the statutory procedure was sufficient to achieve justice, he stated:

> "By contrast, there is no provision under s 14 for representations to be made and considered, either before or after service of a suspension notice. However, as already observed, there are provisions for appeal under s 15 and for compensation under s 14(7). Thus, the scheme of the 1987 Act makes no provision for consultation before the service either of a s 13 prohibition notice or a s 14 suspension notice. The rationale of that is to avoid danger to the public by delay. But, in the case of the s 13 notice, representations can be made to revoke the notice and they must be considered. In the case of a s 14 notice, there is an appeal and, if no contravention has occurred, compensation. [Emphasis added]

Then he concluded inter alia as follows:

> "To imply such a duty would tend to frustrate the statutory purpose. Moreover, ample safeguards for the trader are built into the statutory scheme."

The dicta of Taylor LJ in the above case, speaks eloquently to the circumstances of this case, where the interest of the public, and specifically the depositors of the Century Financial Institutions demanded that the Minister act quickly, and with immediate effect in order to avoid the dangers to the depositors which would

certainly result from any delay. Here too, safeguards are built into the statutory scheme with the Century Financial Institutions having a right to bring their complaints to the Court of Appeal by way of appeals.

In conclusion, in my judgment, the whole regime and scheme of the Acts and the Regulations suggest that in circumstances where delay in assuming temporary management of the Century Financial Institutions would result in chaos and adversely affect the depositors and the economy of the country, action should be taken as quickly as possible so as to avoid those consequences. There is no breach of the rule of natural justice, as, based on "fair play" the Century Financial Institutions had the safeguard which is built into each of the Acts giving them an opportunity to challenge the Minister's action in the Court of Appeal. I am not prepared, for those reasons, to read into the Act or the Regulations any requirement to give to the Century Financial Institutions any prior notice before the Minister's exercise of the relevant powers. Consequently, I would conclude that on the face of the Statement of Claim, there is no possibility of a successful argument to the contrary i.e. that the Minister ought to have given prior notice, and that he breached the rules of natural justice.

Was the Minister's assumption of Temporary Management Illegal?

An agreed fact is that the Minister acted by virtue of the provisions of section 25(1) of the Banking Act and other identical sections in the other Statutes.

For convenience section 25 of the Act is again set out hereunder:

> "**25.** (1) The Minister after consultation with the Supervisor 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 exist, take such steps as he considers best calculated

> to serve the public interest in accordance with this section."

Section 25(3) sets out the action which the Minister may take as respects the conditions set out in Part B. It is in this section that the power to assume temporary management is to be found. On that basis the appellants contend that the Minister may only exercise that power if one or more of the conditions in Part B exists. They maintain that no such condition existed and consequently the Minister was not entitled to pursue that course, and therefore his action is unlawful. The appellants were indeed bold enough to submit that, if anything, there was evidence available to the Minister upon which he could conclude that the Century Financial Institutions were, or likely to become, unable to meet its obligations. In those circumstances, the submission continued, he (the Minister) should have placed the Century Financial Institutions in liquidation i.e. petitioning for winding-up of the bank pursuant to section 25(3)(e) of the Act.

In my view, the answer to the issues raised lies in the construction of the Statute as also on the basis of the factual evidence which may or may not show (i) that the Century Financial Institutions were, or were unlikely to meet their obligations or (ii) whether there was evidence upon which the Minister could have reasonable cause to believe that a Part B condition existed.

An effective exercise to determine the powers given to the Minister by section 25 is to set out the words of section 25 (1) without reference to Part A and Part B conditions. It would read thus:

> "**25.** (1) The Minister after consultation with the Supervisor may in relation to a bank which is or appears likely to become unable to meet its obligations ... take such steps as he considers best calculated to serve the public interest in accordance with this section."

Set out as it is in this disjunctive form, it becomes clear that where the bank or (CFI) is or is likely to become insolvent, then the Minister may invoke any of the varied and wide powers given him under section 25, (including assuming temporary management) so long as his action is calculated to serve the public interest.

A reference to a letter dated 10th July, 1996 to Mr. Donovan Crawford the same day of the assumption of temporary management, shows that among the reasons given by the Minister for taking that action was the insolvency of the Century Financial Institutions. The Minister stated:

> "You should note firstly that the foremost consideration is that of the protection of the depositors of the Century Financial Entities as well as serving the public interest." (Obviously a direct reference to section 25 (3))

Then he sets out some reasons - the first three clearly related to the Century Financial Entities' insolvency. Only one need be recorded here as follows:

> "(a) The current position of massive insolvency of the three entities. Recent preliminary examination findings have indicated further significant deterioration in the financial and operational conditions of the entities to a combined capital deficit exceeding J$3 billion save the confirmed insolvency position in excess of J$1 billion at June 1995. The entities, their depositors and the wider financial system have experienced significant negative impact, which continues to worsen at an unacceptable rapid pace."

In my view even on that basis alone, as a matter of law, the action taken by the Minister was within the provisions of the section.

Nevertheless, something must be said in respect of the contention that the action later taken, was unlawful for the reason that no Part B condition existed.

Before addressing that issue, it must be understood that section 25 (3) speaks to the Minister having "reasonable cause to believe" that the conditions existed. Lord

Gifford contended that as the Minister averred in his affidavit that he acted on the recommendation of the Bank of Jamaica then it cannot be said that he had "reasonable cause to believe." I have great difficulty in coming to the conclusion asked for by Lord Gifford. Section 25 specifically requires that the Minister acts if at all, after consultation with the Supervisor (i.e. the BOJ). If therefore there is consultation - then that consultation must relate to the reasons for taking action, and if so, what action is to be taken. The Minister consequently would be advised of all the circumstances, and based on that, exercise his discretion as to how to proceed. The question therefore is whether, the evidence he had before him was sufficient to meet the standard of "reasonable cause."

For ease of reference it is convenient to repeat hereunder the conditions of Part B, which are relevant to my conclusion:

> "(1) The bank, a director or any person employed (either as agent or otherwise) in the conduct of the business of the bank -
>
> (a) is engaging or is about to engage in an unsafe or unsound practice in conducting the business of the bank; or
>
> (b) is contravening or has contravened -
>
> (i) any provisions of this Act or any regulations made hereunder;
>
> (ii)-(iii) ...
>
> (iv) any provision of the Bank of Jamaica Act or any regulations made under that Act;
>
> (c)-(d) ...
>
> (e) has given false statements concerning the affairs of the bank;
>
> (f)-(h) ...".

The above conditions are specifically set out because there is some evidence that the Minister would have had "reasonable cause" to believe that these conditions existed. In his affidavit he maintained that he acted on the advice of the Bank of Jamaica per Mrs. Audrey Anderson, Deputy Governor of the Bank of Jamaica and Deputy Supervisor of Banks. In her affidavit evidence, Mrs. Anderson averred to circumstances which led to the belief that conditions stated in Part B were existing. In paragraph 35 of her affidavit she purports to deal with matters under heading "Statutory Grounds for Assumption of Temporary Management". She then deals with "Insolvency" of all the Century Financial Institutions which I would not detail here. Thereafter she deals with conditions which fall under the umbrella of Part B, the first being paragraph (1) (a) (supra) - which deals with unsafe and unsound practices. A few paragraphs will demonstrate the information which the Minister had concerning this aspect.

Mrs. Anderson speaks to "the operative definition" of the Bank of Jamaica of "unsafe and unsound practice" as practices which do, or might reasonably be expected to, prejudice the interest of depositors or have an injurious effect on the financial health or stability of the institution, given the particular circumstances of that institution.

In my view this definition covers adequately in summary form what can be considered unsafe and unsound practice. Whether such a situation exists however must be dependent on the particular practices, or related to the particular institution, as well as the effect they would have not only on the institution itself but also on its customers and the public.

She then lists the primary concern of the Bank of Jamaica in that regard, as:

1. Poor management
2. Poor quality of loan portfolio
3. Non-performing or impaired assets

4. Lack of adequate capital

5. Connected party transactions

6. Questionable accounting practices.

Mrs. Anderson then swears to the details under each heading, as to the circumstances of unsafe and unsound practices in which the Century Financial Entities were engaged. It is not necessary here to give a comprehensive record of all the matters sworn to in the affidavit, but reference to some matters will demonstrate the information that the Minister had when considering whether to exercise his powers.

> 1. Century National Bank's customer service officers had unrestricted access to blank certificates of deposits, even though the Bank of Jamaica had from 1994, pointed this out as an area of concern. Management was concentrating large amount of liquid funds in Century National Bank and extended unsafe levels of credit to CNBH and CND.
>
> 2. Despite repeated promises during a period of three years, CNB directors failed to adhere to their 1993 undertakings made to Bank of Jamaica.

Something should be said here of the undertaking in which the preamble stated:

> "(i). The supervisory authorities are concerned about certain aspects of the bank's management and operations including but not limited to the lack of adherence to sound credit policies, the absence of adequate internal audit operations and a shortage of sufficiently capable and experienced managerial staff;
>
> (ii). The supervisory authorities are concerned about the possibility that the bank may not be able to meet its obligations;
>
> (iii). The Minister has indicated that he has reasonable cause to believe that certain conditions specified in Part B of the Second Schedule of the Banking Act 1992 exist; and
>
> (iv). The Board is desirous of taking such corrective action as is calculated to meet the concerns of the supervisory authorities and to operate

> the bank in a safe and sound manner and is prepared to take all action which may be required to achieve and sustain this;". [Emphasis added]

It appears that in 1993 the Bank conceded that the circumstances contained in the preamble existed, and it is of significance, that it therein recognized the concerns as to whether the bank was being operated in "a safe and sound manner" and consequently gave undertakings to do many things to meet these concerns. In 1996, Mrs. Anderson avers that Century National Bank had failed to adhere to the undertakings given in 1993 despite several promises to do so. In fact, the Minister in his "rationale" letter (supra) made specific reference to the Undertaking, expressly indicating that that was one of the conditions which motivated his action in assuming temporary management of the Bank. He stated:

> "Specifically CNB has failed to meet the basic conditions made known to them by the Supervisory Authority viz -
>
> > failure to adhere to the 1993 Board Undertaking signed by the Directors, which required them to take steps to strengthen management, credit administration and loan collection procedures, inject capital, regularise related party lending and all breaches of statute."
>
> 3. As of April 30, 1996 the Bank of Jamaica inspectors reported that the "severity of loan book impairment experienced at Century National Bank is unparalleled in the commercial banking industry" Century National Building Society at that time had a loan portfolio which was 82.66% non-performing while Century National Merchant Bank had 85.29% non-performing loans. In addition, the degree to which the Century Financial Entities loan portfolio were non-performing was not appropriately reflected in the Century Financial Entities accounts.

Mrs. Anderson in her affidavit further stated:

> "Not only were many of these loans imprudent, non-performing, in breach of the 1993 Directors' Undertaking, and in violation of the governing statutes, in many cases, attempts were made to hide them in the CFE accounts. For example, loans by CNB to Holdings were deliberately classified as 'investments' rather than as 'credit facilities', presumably in order to circumvent the Banking Act requirements relating to credit facilities set out in sections 13(1)(e) which prohibits granting unsecured loans in excess of 5% of the bank's capital to any firm or corporation which holds 20% or more of the bank's capital".
>
> 4. Century National Bank used depositors' money to fund the purchase of its own shares, in the following way:
>
> (i) Shelltox was incorporated in the Bahamas in approximately August 1994. CNB paid the incorporation costs.
>
> (ii) V. Caple Williams (the "Group President" of the CFEs) was subsequently advised by an agent of Shelltox by fax as to what was necessary in order to complete a transaction in which Shelltox would purchase shares in CNB in response to CNB's public offer.
>
> (iii) Williams then instructed that agent to arrange for Shelltox to purchase US$2.2 million of preference shares in CNB and US$1.3 million worth of preference shares in Holdings[CNH]
>
> (iv) CNB placed deposits of US$3.5 million with First Trade and First Trade then loaned Shelltox that amount, secured by the covenants which provided that CNB could not withdraw its deposit at any time the loan remained outstanding.

This was only one aspect of transactions made through First Trade International Bank and Trust Ltd, the other described by Mrs. Anderson in paragraph 19 of her Affidavit as follows:

> **"19.** Another very significant concern arising out of the March 1995 inspection was the

> discovery that between late 1993 and June 1994, CNB had placed US$25.5 million in deposits (proceeds of foreign currency deposits placed by customers with CNB) with First Trade International Bank and Trust Limited ('First Trade'), a company incorporated in the Bahamas. (It later transpired that CNMB owned approximately 9% of First Trade through that company's parent company, and Donovan Crawford was a director of First Trade) At almost the same time as those deposits were made, First Trade had extended loans totalling US$25.5 million to Holdings, Development and Shelltox Limited (which were all related parties), and CNB had entered into written covenants with First Trade which provided that CNB could not withdraw its deposit at any time that the loans remained outstanding.
>
> In 1995, when Holdings and Development had failed to repay the loans, First Trade set off the CNB deposits against the debts due from Holdings and Development."

Also of significance to the question of the unsafe and unsound practices of the Century Financial Entities is the following testimony of Mrs. Anderson in paragraph 55 of her affidavit which reads:

> "**55.** As well, the extent to which CNBS and CNMB placed their liquid funds with CNB would, under any circumstances, have been inadvisable, and considering CNB's liquidity problems, was also highly imprudent. The March 22, 1995 report in relation to CNBS stated that management 'acts in an imprudent and unsafe manner jeopardising depositors' funds by concentrating most of these funds within the Century Group'. Based on the findings of the Inspectorate, it was clear to us that CNBS' major function was to garner depositors' funds which were then funnelled into CNB."

In my view the examples of the conduct of the business of the Century Financial Institutions stated above amount to sufficient evidence upon which the Minister could

have had reasonable cause to believe that the Century Financial Institutions were engaged in unsafe and unsound practices.

Nevertheless, Mr. Hylton also submitted that there was also ample evidence which would have justified the Minister having reasonable cause to believe that other conditions in Part B, also existed. An examination of the record reveals that the summary of such matters outlined in Mr. Hylton's written submissions are correct and therefore I am prepared to accept that summary which I now set out here:-

Contravention of Government Statutes/Regulations as Conditions of Part B

The evidence shows:

> (i) By Section 19(1) of the Banking Act, the Bank had a deposit limit of $5.29 billion whereas the Banker's actual deposits were $5.636 billion.
>
> (ii) By Section 13(1)(f)(i) of the Banking Act, the Bank was prohibited from granting credit facilities to anyone person of a given percentage of the banker's capital base. However, as at March 22, 1995 the Bank had ten separate violations of this provision on its books.
>
> (iii) The Merchant Bank (CNMB) breached both section 13(1)(a) of the Financial Institutions Act and an undertaking to the BOJ by investing J$11.544m in shares of Transnational Group in 1993 and by increasing this investment to J$32.227m in 1995.
>
> (iv) The Building Society (CNBS) breached section 22(b) of the Regulations by granting loans to connected persons in amounts which exceeded the permitted levels by over 450%.

Giving False Statements Concerning Affairs

From the affidavit of Mrs. Anderson, the following evidence emerges as summarized by Mr. Hylton, Q C.

> "(i) The purported transfer of shares in Jamaica Grande Ltd between the CFEs in which all the CFEs participated at various stages, were reflected in the accounts of the CFEs to have been done at artificial and grossly inflated values.
>
> (ii) The Bank loaned money to CND Ltd which in turn used the loan to buy property at Half-way-tree Road for the Merchant Bank (CNMB) at a highly inflated price with the result that the accounts of the Merchant Bank (CNMB) were falsely distorted.
>
> (iii) The Shelltox transaction appears to have been designed to allow the Bank to surreptitiously circumvent capitalization requirements under the Banking Act."

The above matters also indicate that there is adequate evidence upon which the Minister could also have had reasonable cause to believe that conditions under paragraph 1(b)(i) and (e) of Part B were existing at the time he assumed temporary management of the Century Financial Institutions.

In my judgment, the complaints made in the Writ and Statements of Claim as to unlawful exercise of his powers by the Minister, if allowed to proceed to trial, would inevitably fail, as on the face of the evidence, there could be no other conclusion but that on a true interpretation of the Statutes, the Minister acted in accordance with their provisions given the information which he had at the time. For those reasons also the appeals of the "Boards of Directors" in the names of the Century Financial Institutions must fail and the orders of the Court below striking out the Writs and Statements of Claim in suits 1996/C366, 367 and 368 affirmed.

Before leaving this issue, there is one matter which because of my conclusion does not require an opinion, but nevertheless one is offered. In his judgment in the Court below (Suits 1996/ C366, C367 & C368) the learned Chief Justice found that the Minister could not be sued in his personal capacity and concluded that for that reason alone, the actions against him were misconceived. He stated:

> "The attempt to sue Dr. Omar Davies in his private capacity is a blatant attempt to circumvent the Order of the Court. As a private citizen, Omar Davies has done nothing vis-a-vis the company. All the acts done by him are acts done pursuant to the Order of the Court vesting full and exclusive powers of management in him as the Minister of Finance, and therefore, a servant of the Crown. To attempt to sue him in his private capacity is to deny him the protection afforded him by virtue of the Crown Proceedings Act. For those reasons, I hold that Dr. Omar Davies in his private capacity is not a proper party to the action, in that, no cause of action is disclosed against him in that capacity."

Without dealing with this issue in detail, it is sufficient to adopt the words which fell from Lord Woolf in the case of ***M v. Home Office*** **(In re M)** [1994] 1 A C 377 in his speech in the House of Lords. Lord Woolf dealt extensively with the issue as it stood prior to and after the Crown Proceedings Act 1947 in England, the relevant sections being in the exact terms as our own Crown Proceedings Act.

At page 409 he dealt with the position as it was before the Act. He stated:

> "The position so far as civil wrongs are concerned, prior to the Act of 1947, can be summarised, therefore, by saying that as long as the plaintiff sued the actual wrongdoer or the person who ordered the wrong-doing he could bring an action against officials personally, in particular as to torts committed by them, and they were not able to hide behind the immunity of the Crown. This was the position even though at the time they committed the alleged tort they were acting in their official capacity. In those proceedings an injunction, including, if appropriate, an interlocutory injunction, could be granted. The problem which

> existed in seeking a remedy against the Crown was not confined to injunctions. It applied to any form of proceedings and where proceedings were possible by suing the wrong-doer personally then an injunction would be available in the same circumstances as other remedies. If such a position required reconciling with the historic maxim as to the Crown doing no wrong, then this could be achieved by an approach, which Mr. Richards endorsed in the course of argument, by saying that, as the Crown could do no wrong the Crown could not be considered to have authorised the doing of wrong, so the tortfeasor was not acting with the authority of the Crown."

As in England, the position was changed by our Crown Proceedings Act, which enabled the Crown to be sued in tort by virtue of section 3 which states:

> "**3.** - (1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject -
>
> (a) in respect of torts committed by its servants or agents;
>
> (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
>
> (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.
>
> (2) Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities

> in tort (if any) to which it would be so subject if it were a private person of full age and capacity.
>
> (3) Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown."

In commenting on the comparative section of the English Act, Lord Woolf stated at page 410 letter G:

> "Section 2 did not remove the right to sue the actual tortfeasor."

Then on page 412 he states:

> "There appears to be no reason in principle why, if a statute places a duty on a specified minister or other official which creates a cause of action, an action cannot be brought for breach of statutory duty claiming damages or for an injunction, in the limited circumstances where injunctive relief would be appropriate, against the specified minister personally by any person entitled to the benefit of the cause of action." [Emphasis added]

In the instant case, the actions sought to be brought by the Century Financial Institutions allege that the Minister acted in breach of his statutory duty, and therefore unlawfully. The Crown Proceedings Act, though allowing aggrieved persons to sue the Crown in tort, did not deprive such a person of his/her right to sue the offending Minister in his personal capacity, which he/she had enjoyed before the enactment. Consequently, I would conclude that the learned Chief Justice fell into error when he found that the Minister cannot be sued in his personal capacity.

4. Appeal No. 20/97

I now turn to the appeal of the Defendants in Suit 1996/C330 against the Order of Ellis, J which dismissed the summons seeking to strike out the Writ and Statement of Claim filed by the Bank (CNB) per the temporary manager, against the various parties named earlier.

In giving judgment in the Court below Ellis, J. identified the grounds of the application as:

> "1. That the action was filed without lawful authority of the Plaintiff (i.e. CNB); and
>
> 2. That the action is an abuse of the Court".

On those issues he concluded as follows:

> "On looking at section 25 (of the Banking Act) and what was done in this case, I find that the notice specified a date and time, and I find it to be in compliance with the Banking Act, section 25(3)(c) and Part D1(3) of the Second Schedule.
>
> These sections speak to no specific time between notice and assumption of temporary management, but it is to be noted that the statute itself provides for a challenge, if not mitigation, by making provision of an appeal to the Court of Appeal. I am not constrained to read any qualification into the nature of the notice required in the Act. I hold that the section means just what it says and I am therefore not impressed with Lord Gifford's submissions in the matter.
>
> In any event, a Court is obliged to give a purposeful interpretation to a statute. I find that the Act demands a purposeful interpretation so that the Minister of Finance can take quick action in certain cases."

The arguments contended for in this matter, are the same as have been dealt with earlier in this judgment, the appeals having been consolidated. It follows that, for

the reasons heretofore given, I would hold that the conclusion of Ellis, J is correct, and consequently this appeal should also be dismissed and the order of the Court below affirmed.

The respondents should have the costs of the Consolidated Appeals to be taxed if not agreed. In the appeals in C.A. 120, 121 and 122/96 however, in which the suits were filed in the names of the Century Financial Institutions, the costs must be paid by the members of the Boards of Directors, personally.

GORDON, J A

The Banking Act (Act 17 of 1992) provides in Section 25 as follows:

> **"25.**-(1) The Minister after consultation with the Supervisor 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.
>
> ...
>
> (3)As respects the conditions specified in Part B of the Second Schedule, the Minister may -
>
> (a) take action in accordance with subsection (2) (a) or (b);
>
> (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 licence 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 D of the Second Schedule provides:

> Temporary Management of a Bank
>
> 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) A copy of the notice referred to in sub-paragraph (1) shall be sent to the Registrar of the Supreme Court and shall be posted in a conspicuous position at each place of business of the bank and shall be published in a newspaper printed and circulated in Jamaica.

(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) stop or limit the payment of its obligations;
(c) employ any necessary officers or employees;
(d) execute any instrument in the name of the bank; and
(e) initiate, defend and conduct in the name of the bank, any action or proceedings to which the bank may be a party.

(5) Not later than sixty days after the Minister has assumed temporary management of a bank he shall apply to the Court (furnishing full particulars of the assets and liabilities of the bank) 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) All expenses of and incidental to the temporary management of a bank shall be paid by such bank in such manner as the Minister may determine.

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)."

By paragraph 2 (3) of this schedule provision is made for the Minister to act in the best interest of the depositors of the bank of which he is temporary manager. In so doing he can apply to the Court for an order -

> (a) staying the commencement or continuance of any proceedings by or against the bank, for such period as the Court thinks fit; or
>
> (b) staying any execution against the property of the bank.

The Financial Institutions Act and the Bank of Jamaica (Building Societies) Regulations, 1995 made under 34F of the Bank of Jamaica Act contain similar provisions. These Acts are designed to regulate the operation of Banks, Building Societies and other Financial Institutions.

On 10th July 1996 the Minister of Finance purporting to act under the provisions of these Acts served notices in accordance with paragraph 1(1) of Part D of the schedule and assumed temporary management forthwith of the Century National Bank Ltd, Century Merchant Bank Ltd and Century National Building Society. In assuming temporary management of these financial institutions (CFEs), the Minister appointed Mr. Richard Downer to manage them on his behalf.

On 5th September 1996 Courtenay Orr, J made an order confirming the vesting in the Minister of Finance full and exclusive powers of management of the Century Financial Entities.

On 2nd October 1996 suit No. C.L. 1996/C330 was filed in the name of Century National Bank Ltd at the instance of the temporary manager against Donovan Crawford, Valton Caple Williams, Balmain Brown, Alma Crawford, Century National Development Limited and C.N.B. Holdings Ltd among others as defendants. The suit

was filed in the purported exercise of his mandate as temporary manager to recover sums due to the Century Financial Entities. A Mareva Injunction was granted against the first, second, third and fourth defendants.

On 18th October the directors of the Century Financial Institutions resolved to challenge the assumption of temporary management by the Minister and writs were issued in Suits 1996/C366, C367 & C368 in the name of the Century Financial Institutions claiming declarations that the take-over of the Century Financial Institutions was illegal, and invalid, and, sought injunctions, damages and other reliefs. The writs were filed on 23rd October, 1996, and were issued against the Minister Hon. Omar Davies in his personal capacity, Richard Downer and Price Waterhouse, the firm of accountants of which Richard Downer was a partner.

On 23rd October a summons supported by the affidavit of Donovan Crawford was filed applying to strike out Suit 1996/C330.

Summonses were also filed making application to strike out writs 1996/C366, C367 and C368.

On 28th November, 1996 Wolfe, C.J. struck out actions 1996/C366, C367, C368. Notices of Appeal were filed on 11th December, 1996.

Ellis, J on 6th February 1997 dismissed the summons to strike out Suit 1996/C330. In Suits 1996/C366, C367 and C368 the plaintiffs appealed the judgment of Wolfe, C.J. In 1996/C330 the defendants also appealed. The appeals were consolidated.

The appellants in the suits struck out by Wolfe, C.J. in their Grounds of Appeal charged:

> 1. The learned judge failed to pay any proper regard to the issues as to whether -

(a) The purported assumption of temporary management of the Plaintiff by the First Defendant on 10th July, 1996 was unlawful, invalid and of no effect and

(b) in consequence the purported appointment of the Second Defendant to act as his agent and manager on 10th July 1996 was likewise unlawful, invalid and of no effect.

(2) The Learned Judge failed to pay any or any proper regard to the question whether the Writ and Statement of Claim herein disclosed good arguable claims against the Defendants and each of them for declarations, injunctions and damages for trespass, conversion and unlawful interference with the business and affairs of the Plaintiff.

The Appellants in Suit C330 of 1996 (C.A. 20/97) in their grounds of appeal charged:

(1) That the learned judge erred in law in holding that the Plaintiff had given lawful authority to bring this action.

(2) That the learned judge erred in law in holding, on the evidence presented to him, that the Minister of Finance and Planning had duly observed the provisions of the Banking Act when he purported to assume temporary management of the Plaintiff.

(3) That the learned judge erred in his construction of paragraph 1(1) of Part D of the Second Schedule in the Banking Act, in holding that the said paragraph did not require prior notice to be given to the Plaintiff before temporary management could be lawfully assumed.

(4) That the learned judge erred in law in not holding that the common law principle audi alteram partem and/or the duty to act fairly obliged the Minister to give sufficient notice of his intention to assume temporary management of the Plaintiff as would enable the Plaintiff to make representations and/or exercise its right to appeal to the Court of Appeal.

(5) That the learned judge erred in law in holding that a purposeful interpretation of the said Act

required that the said Minister could take quick action without giving prior notice to the Plaintiff.

(6) That the learned judge erred in law in not holding

(a) that on the evidence presented to him, the Minister of Finance and Planning had not had regard to the provisions of Part B of the said Second Schedule,

(b) that on a true construction of Section 25 of the said Act, only the existence of one of the conditions set out in the said Part B could lawfully justify the serving of a notice under Part D."

Lord Gifford, Q C submitted that the Minister of Finance in seeking to exercise the statutory power given to him under section 25 of the Banking Act must act in accordance with the terms and limitations of the statute. He submitted that the decision the Minister took was flawed, it was illegal: it exceeded the terms of the power which authorised the making of the decision. The Minister's assumption of temporary management was illegal, unlawful and in breach of the rules of natural justice. The immediacy of the act of taking temporary management following the service of the notice was in breach of the audi alteram partem rule. It did not give the bank the opportunity to be heard.

Central to the determination of the issues in these appeals is the construction of section 25 of the Banking Act. Before I embark on an analysis of this section it is incumbent on me to state that Forte, J.A. and Harrison, J.A. (Ag.) have in their judgments detailed the ownership structure of the Century Financial Entities and the historical developments in relation to them leading up to the events of the 10th July, 1996. I accept the accuracy of their recording and the validity of their findings, it is therefore unnecessary for me to indulge in repetition. Suffice it to say that Mrs. Audrey

Anderson, the Deputy Governor of the Bank of Jamaica whose direct responsibility was to supervise the Century Financial Entities, in her affidavit records the course of dealings the Bank of Jamaica had with the Century Financial Entities and gives a lucid overview of the regressive trend of the Century Financial Entities and of information given to the Minister and consultations with him . This ended with a determination to advise on the take over by way of assuming temporary management consequent on the cessation of liquidity support of the Century Financial Entities by the Central Bank and the state of insolvency of these entities.

Section 25 (1) has three segments which may be conjunctive or disjunctive as circumstances may dictate; thus:

> The Minister after consultation with the Supervisor may in relation to a bank -
>
> (a) which is (unable to meet its obligations) or
>
> (b) which appears likely to become (unable to meet its obligations) or
>
> (c) 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.

The Minister may therefore act under (a) or (b) or (c) above or he may combine (a) and (b) above and act as he considers best in the public interest.

Thus, in this case there was irrefutable evidence that the Century Financial Entities were insolvent. The Bank of Jamaica had withdrawn liquidity support and the entities were indebted to the Central Bank in excess of three billion dollars ($3b). The Minister therefore was entitled to act under sub-paragraph (a) above and take such

steps as he considers best calculated to serve the public interest in accordance with this section (25). The steps he opted to take are provided for in section 25(3)(c); he assumed temporary management of the Bank in accordance with Part D of the Schedule.

The Minister is not limited by section 25(1) in the steps he can take in the public interest. The effect of the wording of the section is to give the Minister wide powers to act in the best interest of the public. Under Parts C, D and E steps are indicated that the Minister may take in given conditions. The fact that he elects to take a step provided in Part D of the schedule does not mean that the condition for the exercise of that step must exist under Part B of the schedule.

Lord Gifford, Q C contended that it is "self evident from the language of section 25(3) that only Part B conditions are relevant to a decision to assume temporary management." For reasons above stated I do not agree with this submission. However an examination of the affidavit of the Supervisor reveals that the Minister had been informed of the bank engaging in "unsafe or unsound practice in conducting the business of the bank" (Part B 1(a)): and that the bank had "given false statements concerning the affairs of the bank."

With the wealth of evidence available the Minister wrote to Mr. Donovan Crawford, Chief Executive Officer of the Century Financial Entities on 10th July, 1996 informing him gratuitously of the "rationale which has determined this final course of action."

The Minister said inter alia:

> "You should note firstly that the foremost consideration is that of the protection of the depositors of the Century Financial Entities as well as serving the public interest."

The assumption of temporary management was strongly influenced by the following:

> "a) The current position of massive insolvency of the three entities. Recent preliminary examination findings have indicated further significant deterioration in the financial and operational condition of the entities to a combined capital deficit exceeding J$3 billion, since the confirmed insolvency position in excess of J$1 billion at June 1995."

Lord Gifford conceded that without the Bank of Jamaica support the Century Financial Entities were insolvent. The entities being insolvent, the Minister was obliged to act in the interest of the depositors. The assumption of temporary management was the preferred course. It afforded an opportunity for an examination of the affairs of the entities before a decision was taken as to the ultimate resolution of the problems.

There now must be considered whether the manner in which temporary management was assumed was done in accordance with Law.

The appellants argued that notice in Part D at paragraph 1 of the Second Schedule means prior notice. In the Act where prior notice is considered desirable provision is made for such notice to be given and for the aggrieved person to be heard. Under section 12(5) of the Act opportunity to be heard is given where the Minister revokes a company's approval to use the word "bank" after its name. In Part E of the Second Schedule paragraph 1 requires the Minister to give the bank notice in writing of his intention to suspend or revoke a licence. The bank has thirty days to make written representations. Before issuing a cease and desist order under Part C of the Second Schedule paragraph 1 the Minister is required to serve on the bank notice specifying a date not earlier than thirty days nor later than sixty days and a place when a hearing will be held. It is instructive to observe that paragraph 5 provides:

"5. Where in relation to any bank -

(a) a notice has been served pursuant to paragraph 1; and

(b) at any time prior to the holding of a hearing in accordance with that paragraph, the Minister is satisfied that the situation giving rise to the notice is likely to endanger the financial position of the bank or the interests of its customers,

the Minister may forthwith serve on that bank and on any person named in such notice, a temporary cease and desist order which shall take effect as from the date of such service." [Emphasis added]

The words of paragraph 1 of Part D of the Second Schedule are clear and unambiguous. The notice required may be one which takes effect immediately. The legislature recognised that when the Minister is made aware that a bank is insolvent he has to act speedily in the interest of depositors. He is empowered to serve a notice with immediate effect. In the case of a cease and desist notice a temporary cease and desist order is predicated on the likelihood of danger to the financial position of the bank or the interests of the customers. In the case of insolvency it would be an abdication of responsibility for the Minister to give prolonged notice of an intention to assume temporary management. It would mean that the Minister would be giving his approval to the continued operation of an institution that he knew was insolvent, thereby giving some assurance to its customers that it was safe for them to continue to do business as usual in that institution. At the same time, as word of the notice spread, there would be a run on the bank with likely civil disturbance or even death as anxious depositors sought in vain to salvage or secure their hard earned investments.

In Halsbury's Laws of England (4th Edition) Volume 44 at paragraph 357 the learned author states that where "words of the statute are clear and unambiguous they

themselves indicate what must be taken to have been the intention of parliament and there is no need to look elsewhere to discover their intention or meaning".

Where a temporary cease and desist order is served the bank or the person served may within ten days after the date of service apply to a judge of the Supreme Court to set aside, limit, or suspend the operation or enforcement of such order. Thus the Act preserves the right of the aggrieved party to be heard in opposition, albeit, ex post facto. The scheme of the legislation is special to meet the requirements of the financial sector in a society where the stability of the financial entities is of paramount importance to the economic viability of the country.

A bank served with a notice under paragraph 1 of Part D may within ten days after the service of the notice, appeal to the Court of Appeal and that court may make such order as it thinks fit. Thus by paragraph 2(1) the right of the bank to be heard is preserved. By paragraph 2(2) the Court of Appeal may, on sufficient cause being shown, extend the period referred to in sub-paragraph (1). This is a significant provision of the Act. Whereas the party aggrieved by a cease and desist Order has recourse to the Supreme Court, a temporary management order gives this party access to the highest court in the land as of right and the court is given original jurisdiction to extend time and to make such order as it thinks fit. The Bank may thus challenge the action of the Minister and seek any redress it could have before any court for any breach complained of or harm suffered.

A paradox is thus created by paragraph 1(4) and paragraph 2 of Part D.

1. Under paragraph 1 (4) on the assumption of temporary management the Minister takes over <u>full and exclusive powers of management and control of the bank</u> with power

(a) to continue, or discontinue its operations;

> (b) to initiate, defend and conduct in the name of the bank any action or proceedings to which the bank may be a party.

The Minister thus assumes the persona of the bank.

2. The Board of Directors is afforded special status, as the Bank, to challenge the Minister's action within 10 days or such extended time as the Court of Appeal may allow.

This paradoxical situation cannot be allowed to continue indefinitely hence the legislature requires that rights must be pursued with expedition. The failure of the directors to challenge the Minister determined their rights. The Minister then complied with sub-paragraph (5) of paragraph 1 of Part D and had full and exclusive powers of management vested in him by the court.

Sub-paragraph (3) of paragraph 2 of Part D empowers the Minister to 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.

With full and exclusive powers of management vested in the Minister the Board of Directors of the Century Financial Entities were stripped of their powers and rendered inoperative; they therefore were functus officio and their purported meeting and the passage of resolutions were meaningless. They had no locus standi to initiate in the name of the Entities any action.

Wolfe, C.J. in striking out the action against the 2nd and 3rd defendants held that the vesting order "has the effect of suspending all the powers of the Board of Directors and vesting them in the 1st named defendant. For all intents and purposes the Board no longer exists. It is bereft of power."

The accuracy of the Learned Chief Justice's findings is underscored by Part D paragraph 3(a) which provides:

> "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 or the Supreme Court may allow -
>
> a) restore the bank to its board of directors or owners as the case may be;". [Emphasis supplied]

In striking out the writs against Dr. Omar Davies the Learned Chief Justice said:

> "... I hold that full and exclusive powers of management having been vested in the first named defendant by the Court, the company cannot purport to act on its own without the prior approval of the first named defendant.
>
> The order effectively suspends the powers which were hitherto exercisable by the Directors of the company. Whilst the order is in force, the Directors cease to be operative. Were it otherwise, the results would be chaotic.
>
> The attempt to sue Dr. Omar Davies in his private capacity is a blatant attempt to circumvent the Order of the Court. As a private citizen, Omar Davies has done nothing vis-a-vis the company. All the acts done by him are acts done pursuant to the Order of the Court vesting full and exclusive powers of management in him as the Minister of Finance and therefore, a servant of the Crown. To attempt to sue him in his private capacity is to deny him the protection afforded him by virtue of the Crown Proceedings Act."

The Minister in assuming temporary management had acted intra vires. Ellis J likewise in dismissing the summons to strike out the action in Suit C.L. 1996/C330 found that the Minister had acted intra vires.

I consequently dismiss the appeals and order that costs be paid by the appellants as detailed by Forte, J.A.

HARRISON, J.A. (Ag.):

In these consolidated appeals, the appellants, Century National Merchant Bank Limited (in suit no. C.L. 1996/C368), Century National Bank Limited (in suit no. C.L. 1996/367), and Century National Building Society (in suit no. C.L. 1996/C366 appeal against the judgments of Wolfe, C.J., both delivered on the 28th day of November, 1996, and the appellant, CNB Holdings Limited (in suit no. C.L. 1996/C330) appeals against the judgment of Ellis, J. delivered on the 6th day of February, 1997.

The second and third defendants in suits nos. C.L. 1996/C366, C367 and C368 by summonses dated 23.10.93 applied that the said actions be struck out on the grounds that the said actions were filed without the authority of the respective plaintiffs and that each was an abuse of the process of the court. Wolfe, C.J. struck out the said actions for reasons that the order of the Minister of Finance made on 10th July, 1996, vested full and exclusive powers of management of the plaintiff entities in the "1st and 2nd defendants", suspending all powers of the relevant boards of directors and vesting them in the first defendant, that the plaintiff entities should first seek to challenge the constitutionality of the order of the said Minister and are in contempt of court, not having first sought the authority of the court to bring the said actions, and that the said entities had the right of appeal to the Court of Appeal within ten days of the service of the notice of such temporary management.

The first defendant in suit no. C.L. 1996/C330 by summons dated 28.1.97 applied that the proceedings be struck out on the ground that the temporary manager had no authority to bring an action in the name of the bank without its authority. Ellis, J. dismissed the summons for the reason that the said act of the Minister on 10th July, 1996 was lawful in that the notice and assumption of management were in accordance with the statutory provisions.

Consequently, these consolidated appeals are now heard.

The material grounds of appeal are, inter alia:

> "That Wolfe, C.J. was wrong in law, in not holding:"
>
> (1) that the assumption of temporary management by the Minister and the appointment of his agent Richard Downer on the 10th day of July, 1996, were unlawful and invalid and consequently all the defendants were liable in damages for trespass, conversion and unlawful interference with the business and affairs of the plaintiff,
>
> (2) that the order made on the 5th day of September, 1996, by Orr, J., confirming the said temporary management powers, did not suspend all the powers of the board of directors, was improperly obtained, invalid and ought to be set aside,
>
> (3) that the board of directors of each plaintiff entity by each resolution passed on the 18th day of October, 1996, had the authority and residual powers to perform functions other than management, namely, to institute proceedings in the name of and in the interest of the plaintiff entity, as it had done, to challenge the legality of the defendants' conduct and to claim for losses occasioned by such unlawful conduct,
>
> (4) that the said boards of directors may act without the prior approval of the said first defendant - temporary manager - and are not in contempt of court in doing so,

(5) that the said first defendant being a public officer exercising statutory powers may be sued in his private capacity for unlawful acts in breach of such powers and enjoys no protection under the Crown Proceedings Act therefor,

"and that Ellis, J., in Civil Appeal no. 20/97 (suit no. 1996/C330) was wrong in law, in holding,"

(6) that the plaintiff bank had authorised the institution of the said action,

(7) that the Minister of Finance and Planning had properly observed the provisions of the Banking Act and properly construed paragraph 1(1) of Part D of the Second Schedule of the Banking Act, and the common law principle of audi alteram partem, that no prior notice was required giving the plaintiff bank sufficient time to make representations or exercise its right of appeal to the Court of Appeal before the said Minister assumed temporary management, and,

(8) that the said Act did permit "quick action" to be taken without prior notice by the said Minister, who did not have regard to the provisions of Part B of the said Second Schedule and that on a true construction of section 25 of the said Act "only the existence of one of the conditions set out in the said Part B could lawfully justify the serving of a notice under Part D."

The facts relevant to the these matters are as stated hereunder: The plaintiffs, Century National Bank Limited formed in 1986 and governed by the Banking Act, Century National Merchant Bank Limited formed in 1990 and governed by the Financial Institutions Act, 1992, and Century National Building Society formed in 1992 and governed by the Bank of Jamaica (Building Societies) Regulations, 1995, [hereinafter referred to as the "Century Financial Entities" or "CFEs"], are subsidiaries of CNB Holdings Limited, fifty-four per cent

(54%) ownership of which is associated with Donovan Earl Crawford. Of the fifty-four per cent, he owns fourteen per cent (14%) directly, fifteen per cent (15%) through his wholly-owned company Regardless Limited and twenty-five per cent (25%) jointly with his mother Mrs. Alma Crawford. The said company, CNB Holdings Limited owns the CFEs, in the proportions:

(a) Century National Bank Limited - 80%

(b) Century National Building Society -100%

(c) Century National Merchant Bank -100%.

The Bank of Jamaica ("the Central Bank"), as supervisor of financial institutions under the Banking Act, supervised the CFEs from their inception. Mrs. Audrey Anderson, Deputy Governor and Deputy Supervisor of Banks, of the Central Bank was involved in the inspection and supervision of the CFEs, among other commercial institutions, during the period 1989 onwards.

On the basis of an interim examination report of the Central Bank dated the 10th day of February, 1993, with respect to Century National Bank Limited and Century National Merchant Bank Limited, the Minister of Finance and Planning, "in early 1993", met with the Century National Board and on the 19th day of February, 1993, he commissioned a special inspection of the said two entities by external auditors, Coopers & Lybrand, who subsequently made a report to the Minister.

The Central Bank's report of the 10th February, 1993, identified problems of the said CFEs, of:

(1) poor asset quality,

(2) insufficiency of management resources,

(3) imprudent and ill-advised credit management practices,

(4) severe liquidity problems,

(5) inadequate internal controls,

(6) inadequate capitalization,

(7) poor quality of earnings,

(8) breaches of statute, and

(9) insider abuse and self dealing.

The Coopers & Lybrand report identified problems of:

(1) lack of liquid resources,

(2) questionable loan portfolio quality (namely, high level of doubtful loans, excessive uncollected interest arrears and understated loan provisioning),

(3) imprudent credit practices (namely, inadequate loan reviews, restructuring and consolidation of problem/default loans to create an "evergreen" effect),

(4) overstated capital,

(5) overstated earnings,

(6) inadequate strength and depth of senior management and board membership, and

(7) imprudent management practices (namely, including self-dealing, non-arms' length dealings with insiders, and credits granted in excess of statutory limits).

After discussions between the Minister, the Central Bank and Century National Bank Limited, the latter's Board of Directors "signed a Board Undertaking dated

March 10, 1993, by which the directors jointly and severally committed to implement various remedial measures", as stated in paragraph 11 of the affidavit of Audrey Anderson dated 13.3.97. This undertaking was given:

> "...to the Minister of Finance and Planning and the Bank of Jamaica (hereinafter together or separately as the context required called 'the supervisory authorities')."

and continuing, recited:

> "WHEREAS
>
> 1. The supervisory authorities are concerned about certain aspects of the bank's management and operations including but not limited to the lack of adherence to sound credit policies, the absence of adequate internal audit operations and a shortage of sufficiently capable and experienced managerial staff;
>
> 2. The supervisory authorities are concerned about the possibility that the bank may not be able to meet its obligations;
>
> 3. The Minister has indicated that he has reasonable cause to believe that certain conditions specified in Part B of the Second Schedule of the Banking Act 1992 exist; and
>
> 4. The Board is desirous of taking such corrective action ...to meet the concerns of the supervisory authorities and to operate the bank in a safe and sound manner and ...to take all action ...to achieve and sustain this;
>
> NOW, THEREFORE ...the Board UNDERTAKES to comply strictly with and promote the policies and practices referred to above ...deemed to be in the interest of the depositors of the bank, namely ..."

There then followed extensive directions to be implemented by the board, namely, the appointment of a consultant, and his role, prohibitions against payment of cash dividends, dealing with assets concerning connected persons, credit facilities, restrictions on its lending and collection practices, programmes to regularize its interest accrual practice and adequacy of security for credit, the upgrading of managerial staff, and the correction of any impairment of capital, if necessary. The undertaking ended with the recital:

> "18. This undertaking shall subsist for a period at the end of which, based on a review to be conducted within twelve months of the date hereof, which will include a report by the consultant and by other report which the Minister claims appropriate, the Minister concludes that the undertaking is no longer required."

In addition to this undertaking, Donovan Crawford proposed that Century National Bank would dispose of certain parcels of real estate, shares in the Jamaica Grande Limited, a north coast hotel, and inject capital into the said bank and its holding company.

The Central Bank in 1993 placed Century National Bank and Century National Building Society on a "watch list" which was "...a list of institutions which are in financial difficulty..." Audrey Anderson, in her said affidavit, states that the said entities so remained:

> "...until the assumption of temporary management in 1996 ..."

Both the Central Bank and the CFEs' management were engaged in continuing dialogue for the period of years 1993 to 1995. The problems continued. The Central Bank, in compliance with its statutory duty, inspected

and filed a report in March 1995 in respect of Century National Bank, revealing an inadequate capital base and asset quality, poor management, losses in earnings and deficient liquidity. Its overdraft with the Central Bank then was $586,000,000.

In June 1995 the Minister met with representatives of the Central Bank and Century National Bank. Discussions were held and the latter was requested to remedy its situation as complained of by the Central Bank. The records show that the Minister was present at several such meetings on the 11th, 14th, 15th and 16th days of July, 1995. The Minister engaged the firm of Price Waterhouse Jamaica to:

> "...in conjunction with BOJ (the Central Bank) to assess the CFEs' loan loss provisions and the value of certain assets on the books of the CFEs..."

In October 1995 the report submitted revealed that:

> (a) "CNB's loans were overstated by $333 million...
>
> (b) "...assets of Century National Building Society were overstated by $310 million...
>
> (c) "...and assets of Century National Merchant Bank were overstated by $69 million..."

In November 1995 the Central Bank proposed a plan to the Minister for the restructuring of the CFEs.

This proposal included a "Good Bank Bad Bank Plan", which contemplated the transfer of performing assets to the "Good Bank" entity and non-performing assets to the "Bad Bank" entity of the Century National Bank, and the conversion of the said overdraft to a "form of equity" to be held by the

Government agency, the National Investment Bank of Jamaica. A further aspect of the proposal was that Government, through one of its agencies, would have full ownership of the entities, a new senior management team would be installed and the Government's investment would be repaid after the said entity was rendered once more functionally viable.

By the 31st day of October, 1995, the plan had not yet been implemented. The overdraft of the Century National Bank at the Central Bank was then $3,600,000,000.

In March 1996, Century National Bank Holdings Limited retained Price Waterhouse Canada to develop a restructuring plan for the CFEs. As a consequence Price Waterhouse Canada proposed a plan similar to the "Good Bank Bad Bank Plan" previously suggested by the Central Bank, and referred to:

> "...the need for significant upgrading of management and information systems, as well as for rationalisation of operations and group assets with a view to realising cash and reducing operating expenses."

The Central Bank, in principle, supported the Price Waterhouse Canada proposal, subject to its earlier requirements, including the appointment of a new senior management team with a new qualified Chief Executive Officer, except that:

> "Mr. Crawford, the Chairman and CEO, could remain only as non-executive titular Board Chairman, with no management responsibilities or authority and exercising no controlling vote on the Board."

The said affidavit of Audrey Anderson, paragraph 27, so states.

The Minister had numerous meetings, and extensive correspondence passed between himself, "representatives of the CFEs and the BOJ in an effort to facilitate implementation of the proposed restructuring of the CFEs."

On the 27th day of June, 1996, the Century National Bank overdraft was $4,774,000,000 and by the 10th day of July, 1996, it was $5,130,000,000.

The annual Central Bank report on the examination of Century National Bank for the period 23rd day of March, 1995 to the 30th day of April, 1996, indicated:

> "a. Capital - CNB's capital base completely eroded. Impaired capital base was a negative $3.276 billion.
>
> c. Assets - Only 30% of total assets were income-earning ...with non-performing loans totalling $2.594 billion or 84.6% of total loans ...accrued interest receivable of $522.2 million had been taken to the profit and loss account and would have, to be reversed ... Insider abuse was a major source of infraction of the Bank's governing statute, and loans to related companies and connected parties were $1.85 billion, or 51.5% of total credits.
>
> c. Management - CNB management was reported to be grossly incompetent and unable to efficiently manage its resources and guide the institution on a sound and profitable basis to the benefit of shareholders and, more importantly, depositors.
>
> d. Earnings - A net operating loss of $1.225 billion had been experienced over the 10 month period ending April 30, 1996 ...bringing accumulated losses to $2.39 billion.
>
> e. Liquidity - The Bank was experiencing a chronic liquidity problem. The income derived from total earnings was insufficient to finance the level of liabilities incurred."

In her said affidavit, at paragraph 34, Audrey Anderson said:

> "For the reasons described above, and in the historical context set out, the Bank of Jamaica recommended in early July 1996 to the Minister that he assume temporary management of the CFEs."

On the 10th day of July, 1996, the Minister served on each of the CFEs, a notice that he intended to assume temporary management of the said entity at 3:00 p.m. that day; he handed three copies of the said notice to Mr. Balmain Brown, one of the directors of Century National Bank, and who along with another director, Mr. Caple Williams, Mr. D. Lattibeaudiere, the Governor of the Central Bank and others, had been summoned to a meeting at the Ministry of Finance at 3:00 p.m.

The notice to the said bank read:

> "Notice pursuant to paragraph 1(1) of Part D of the Second Schedule to the Banking Act 1992
>
> To: Century National Bank Limited
> 14-16 Port Royal Street
> Kingston
>
> Attention: Mr. Donovan Crawford
> Chief Executive Officer
>
> In pursuance of the powers conferred on me by Schedule to the Banking Act 1992, I hereby serve notice of my intention to assume the temporary management of Century National Bank Limited with effect from 3:00 p.m. on July 10, 1996.
>
> Omar Davies
> Minister of Finance & Planning
>
> Received by...
> Date: 10/7/96."

Notices to the other two entities were similarly worded except that, in respect of Century National Merchant Bank and Trust Company Limited, the relevant statutory authority for the exercise of the power was "section 25(3)(c) and paragraph 1(1) of Part D of the Second Schedule to the Financial Institutions Act", and in respect of Century National Building Society, reference was to "Regulation 64(d) and paragraph 1(1) of Part B of the Schedule to the Jamaica (Building Societies) Regulations, 1995."

Mr. Richard Downer of Price Waterhouse, in Jamaica, and who was appointed temporary manager by the Minister, went to the head office of the CFEs at approximately 4:00 p.m., with assistance, and took over control posting copies of the Minister's notice of assumption of temporary management on all entrance doors. Similar operations of assumption of management were effected on other branches of the CFEs throughout the island.

Lord Gifford for the appellants submitted that the Minister acted unlawfully in assuming temporary management of the CFEs in that he did not follow the statutory requirements of section 25 of the Banking Act, in that he did not consult with the BOJ, and did not reveal in his "rationale" letter that he acted under the conditions existing under Part B of the Second Schedule; that the state of insolvency he relied on is not a condition of Part B; that the CFEs were not insolvent until the 10th day of July, 1996, when the BOJ withdrew its liquidity support and it was unlawful to allow an insolvent entity to continue, and acting in the public interest should have liquidated it instead; that the Minister

had no intention to manage but to close down the bank; that no valid notice was given by the Minister because notice under the Act means prior notice allowing time to the person affected to make representations against the notice; alternatively, the Minister was in breach of his common law duty to act fairly by simultaneously giving notice and assuming temporary management; that the Minister may be sued in his personal capacity for his unlawful act, enjoying no protection under the Crown Proceedings Act - ***M. vs. The Home Office*** [1994] 1 A.C. 377; that their resolution passed on the 18th day of October, 1996, entitled the board of directors of the Century National Bank to challenge the unlawful action of the Minister as it could have challenged the appointment of a receiver - ***Windsor Refrigerator Co. Ltd. vs. Branch Nominees*** [1961] 1 Ch 375; that the said directors were entitled to be represented when Orr, J. confirmed the Minister's action which being initially ultra vires was not validated ex post facto and the order of Orr, J. is itself invalid. His submissions applied to each of the CFEs. Counsel relied, inter alia, on ***In Re B. Johnson (Co.) Ltd.*** [1955] 1 Ch. 634, ***Judicial Review of Administrative Action*** by DeSmith, Woolf and Jowell, 5th Edition, ***Ridge vs. Baldwin*** [1964] A.C. 40, ***Durayappah vs. Fernando*** [1967] 2 A.C. 337, ***R. vs. Secretary of State, ex parte Fayed et al*** [1997] 1 All E.R. 228. He concluded that the appellants had an arguable case and the appeals should be allowed.

Mr. Hylton for the second and third respondents in suits nos. C.L. 1996/C366, C367 and C368 and the respondent in suit no. C.L. 1996/C330 argued that the Banking Act, the Financial Institutions Act and the Bank of

Jamaica (Building Societies) Regulations, 1995, govern the assumption of temporary management in respect of the CFEs and in particular section 25 and the Second Schedule to the Banking Act as it relates to the Century National Bank (the Bank) and provide several bases for such action by the Minister; firstly, that the Bank "is or appears likely to become unable to meet its obligations" - actual or apprehended insolvency - section 25(1), in that its liabilities exceeded its assets, it was unable to pay its debts, and its undertaking of March 1993 confirms this inability, in spite of the liquidity support of the BOJ; that the Minister did consult with the BOJ and had the power to so act despite the insolvency of the bank; that the heading of section 25 "Regulations against unsafe practices" compares with the condition in Part B "...is engaging or is about to engage in unsafe and unsound practice" which permits the Minister to assume temporary management and contemplates such action when the practice results in insolvency; secondly, that the Bank was "engaging in ...an unsafe and unsound practice", in its management systems and operations which were pointed out by the BOJ and which the Bank promised to correct and gave the undertaking of the 10th day of March, 1993, acknowledging a lack of management in "a safe and sound manner", which along with the First Trade transaction resulted in risk of loss to its depositors, see ***The Greene County Bank vs. Federal Deposit Insurance Corp.*** 92 F. 3d 633 (8th Cir. 1996); thirdly, that the Bank contravened the Banking and BOJ Acts, and directions by the Minister, a condition of Part B, namely, exceeding its deposit limit and credit facility in relation to its capital base; fourthly, that the bank made false statements, namely, in respect of

purchases in Jamaica Grande Limited, the Shelltox transaction and the loan to purchase property from the Merchant Bank; that the notice by the Minister does not mean "prior" notice because the statute so states when it means it, e.g. Parts C and E of the Second Schedule; that the legislature contemplated that the Minister needed to act urgently in some cases and individual's rights are protected ex post facto by the right of appeal; he relied, inter alia, on ***Judicial Review of Administrative Action*** by DeSmith, Woolf and Jowell 5th Edition, ***Paul Wallis Furnell vs. Whangarei High School*** [1973] A.C. 360, ***R. v. Birmingham City Council, ex parte Ferrero Ltd.*** [1993] 1 All E.R. 530, ***Clough v. Supt. Greyson et al*** S.C.C.A. 24/88; that even if the appellants have an arguable case, that is no basis to allow the appeal because the temporary manager has the power to authorise the institution of suits or otherwise.

Miss Palmer, supplementing Mr. Hylton's submission, stated that summary action will be justifiable where there is an urgent need to protect people's interest, demonstrated that the authorities cited by the appellants do not support their contention that "notice" means prior notice and concluded that fairness was observed by the remedy of appeal.

Mr. Campbell for the respondent argued that "unauthorised acts by government officers may be the subject of actions against them in their personal ...capacity", obliquely conceding that the Minister may be sued in his personal capacity, with which I agree; that the complaints of the appellants sound in public law and therefore they should not have proceeded by ordinary action

for declaration and injunction. He relied, inter alia, on ***O'Reilly vs. Mackman*** [1983] 2 A.C. 237 and ***M. vs. Home Office*** (supra).

The Banking Act which came into existence in December 1992, in section 29 designates the Bank of Jamaica (the Central Bank) supervisor of banks. The section further obliges the Central Bank [see subsection (2)] to:

> "(a) compile such statistics relating to banking practice in Jamaica as the Minister may require; and maintain a general review of banking practice in Jamaica;
>
> (b) examine and report to the Minister on the several returns delivered to him pursuant to section 16;
>
> (c) at least once in each year examine in such manner as it thinks necessary the affairs or business of every bank carrying on business in Jamaica ...for the purpose of being satisfied that the provisions of this Act are being complied with and that the bank is in a sound financial position, and report to the Minister the results of every such examination;
>
> ...
>
> (f) submit to the Minister--
>
> (i) an annual report ...and
>
> (ii) at any time, a report relating to the condition of any bank examined by it,
>
> and any such report may contain such recommendations as the Bank of Jamaica considers necessary or desirable to correct any malpractices or deficiencies discovered in the execution of its duties." [Emphasis added]

Section 16 of the Act requires every bank to deliver to the Central Bank, monthly, a statement of assets and liabilities and returns of other information,

and, annually, a return of the bank's earnings, expenses, debts, and, other returns and information "as the Minister may require."

The Minister is accordingly responsible to ensure that the financial institutions maintain a viable healthy existence in the interest of the public and for the protection of depositors and avoid unlawful or undesirable activities. Section 25 empowers the Minister:

> "after consultation with the supervisor ...(to) take such steps as he considers best calculated to serve the public interest in accordance with this section..."
>
> (a) "...in relation to a bank which is or appears likely to be unable to meet its obligations or"
>
> (b) "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..." [Emphasis added]

The precursor to this Act was the Banking Law, 1960, section 21 of which reads:

> "21--(1) The Minister may in relation to a bank which is or appears likely to become unable to meet its obligations take such steps as he considers best calculated to serve the interest of the community."

Subsection (1) permitted the Minister to require the manager of any bank "to supply ...such information relating to the financial position of the bank." Failing to do so or supplying false information attracted a criminal sanction of summary prosecution; the Minister had no power to take any other "steps".

The current section 25(1) authorises the Minister in circumstances where the bank "is or appears likely to be unable to meet its obligations" in an expansion of his powers, to:

> "...take such steps ...in accordance with this section."
> [Emphasis added]

Numerous steps are recited in the said section.

Part A conditions listed in the Second Schedule entitle the Minister to take the steps recited in subsection (2), namely, (a) requiring an undertaking or (b) giving directions. Part B conditions permit the Minister, under subsection (3), to:

> "(a) take action in accordance with subsection 2(a) or (b);
>
> (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 licence 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."

The Minister is not correspondingly delimited in circumstances where the bank "is or appears likely to be unable to meet its obligations." It seems, therefore, that he may impose any of the sanctions authorised by section 25, which in subsection (3) permits the Minister to impose the full range of sanctions, from mere directions to the ultimate sanction of winding up, in order to give a functional intelligibility to the interpretation of the section.

Section 25 appears under the rubric "*PART VIII. Regulation against Unsafe Practices.*" A bank which is unable to meet its debts may thereby be regarded as engaging in an unsafe practice. Unlike marginal notes, headings may be read as a part of the Act. A bank in such circumstances, for all practical purposes, may be viewed as insolvent.

One of the conditions in Part B "requiring action by the Minister under section 25(3)" is:

> "(1) The bank, a director or any person employed (either as agent or otherwise) in the conduct of the business of the bank--
>
> > (a) is engaging or is about to engage in an unsafe or unsound practice in conducting the business of the bank;..."

On this basis, the Minister had the power to assume temporary management under section 25(3), if he was of the view that the bank was insolvent. It is inaccurate to state in argument that, the Minister had no power to temporarily manage an insolvent bank, is acting unlawfully and, thus obliged to wind it up, because the statute itself, in recognising the existence of insolvency of the bank in Part A of the Second Schedule, permits the Minister merely to (a) extract an undertaking from the bank "to take ...corrective action" or (b) "give directions."

The Minister was not unaware of the state of affairs of the CFEs, nor of his obligations under section 25. The Board Undertaking of the 10th day of March, 1993, was written acknowledgement by the CFEs of their own unsatisfactory condition and of the Minister's concern with:

> (1) "...the possibility that the bank may not be able to meet its obligations."

and the Minister's view that:

> (2) "...he has reasonable cause to believe that certain conditions specified in Part B of the Second Schedule of the Banking Act 1992, exist..."

This state of affairs remained unchanged up to the assumption of temporary management in July 1996; the undertaking still subsisted - the Minister never concluded that it was "...no longer required."

The Central Bank inspection report of the 30th day of April, 1996, showed that the combined excess of liabilities over realisable assets of the CFEs was $5,356,562. On the 30th day of June, 1996, at the Century National Bank the excess, by its own in-house unaudited balance sheet, was $2,517,000, at Century National Building Society it was $346,700,000, but at Century National Merchant Bank its balance sheet showed assets exceeding liabilities by $34,710,000, even though its monthly returns, according to Audrey Anderson, had shown "...an inexorable progression towards insolvency."

It is instructive to note that in respect of the Century National Building Society, the Bank of Jamaica (Building Societies) Regulations, 1995, in paragraph 63 reads:

> "63. The Minister after consultation with the Supervisor may in relation to a society which is or appears likely to become unable to meet its obligations take such steps ...best calculated to serve the public interest in accordance with this Part."

The Minister is then given the power to request an undertaking or to give directions [paragraph 64(a) & (b)] or:

> "(d) assume the temporary management of the Society in accordance with Part B of the Schedule."

Paragraph 63 is listed under the heading "Actual and Apprehended Insolvency." This is a clear indication that the Minister may assume temporary management of an insolvent building society.

The Minister was in possession of sufficient facts to indicate that the CFEs were insolvent. His "rationale" letter, although not a requirement of the statute, discloses the bases for the Minister's action. This letter dated the 10th day of July, 1996, was sent to Donovan Crawford and commences:

> "Dear Mr. Crawford,
>
> SUSPENSION OF OPERATIONS AND TEMPORARY MANAGEMENT OF CENTURY NATIONAL BANK LTD (CNB), CENTURY NATIONAL MERCHANT BANK & TRUST COMPANY LTD (CNMB), CENTURY NATIONAL BUILDING SOCIETY (CNBS), COLLECTIVELY REFERRED TO AS CENTURY FINANCIAL ENTITIES (CFEs)
>
> Pursuant to my assumption of temporary management of the above institutions on 10 July 1996, in accordance with the powers conferred on me under the Banking Act, 1992, the Financial Institutions Act, 1992, and the Bank of Jamaica Building Societies Regulations, 1995 I feel it is also necessary for me to provide you with the rationale which has determined this final course of action.
>
> You should note firstly that the foremost consideration is that of the protection of the depositors of the CFEs as well as serving the public interest.
>
> The assumption of temporary management was strongly influenced by the following:
>
> > (a) The current position of massive insolvency of the three entities. Recent preliminary examination findings have indicated further significant deterioration in the

> financial and operational condition of the entities to a combined capital deficit exceeding J$3 billion, since the confirmed insolvency position in excess of J$1 billion at June 1995.
>
> The entities, their depositors and the wide financial system have experienced significant negative impact, which continues to worsen at an unacceptably rapid pace."

I am of the view that this state of affairs referred to by the Minister represents the specific state of insolvency and qualifies as an "...unsafe and unsound practice...", a condition in paragraph (1)(a) of Part B of the Second Schedule.

Helpful assistance on the definition of "unsafe and unsound practice" is found in a decision by the United States Court of Appeals - Eight Circuit, in the case of ***The Greene County Bank v. Federal Deposit Insurance Corp.*** ("FDIC") (supra). In upholding an order of the FDIC (the regulatory body for banks), to the appellant bank to cease and desist from certain practices, the court held:

> "It is well-settled in this Circuit, however, that an 'unsafe or unsound practice' exists where the conduct is 'deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder'."

Continuing his letter of the 10th day of July, 1996, the Minister said:

> "Specifically, CNB has failed to meet the basic conditions made known to them by the Supervisory Authority, viz.
>
> > failure to adhere to the 1993 Board Undertaking signed by the Directors, which required them to take steps to strengthen management, credit administration and loan collection procedures, inject capital,

> regularise related party lending and all breaches of statute;..."

The above complaint of the Minister and other failures therein listed can be construed as "directions issued by the Minister or the Bank of Jamaica pursuant to this Act" (paragraph (1)(b)(iii) of the said Part B), entitling the Minister to assume temporary management.

The reference to "...breaches of statute" is a further condition at paragraph (1)(b)(iv). Any such breach would justify the Minister's action.

There were several such contraventions of the statutes by the CFEs, detected by the Central Bank and made the subject of its reports, including that of March 1995. Some of the examples contained in the said affidavit of Audrey Anderson are:

> (i) the Century National Bank granted a loan to one of its directors of $11,118,000 as of the 24th day of March, 1995, being 2.95% of its capital base, although the permitted maximum unsecured credit facilities is 1% - contravening section 13(1)(d)(i) of the Act; and several loans exceeding a statutory maximum of 20% of its capital base, including loans to Century National Bank Holdings Limited, its parent company - (28.4% of its capital base) and to Century National Development Company, a subsidiary of its holding company - (37.1% of its capital base) in contravention of section 13(1)(f)(i) of the Act.
>
> (ii) the Century National Merchant Bank, as of April, 1996 granted credit to Jamaica Grande and to Century National Bank, in amounts of 401% and 70.9% of its capital base, although the permissible maximum is 20% of its capital base in contravention of section 13(1)(f) of the Financial Institutions Act, and in addition, made investment in Jamaica Grande and Transnational Group and acquired real estate, all being not, '...in the ordinary course of its

> operations...' in contravention of said section 13(1)(a) of the said Act.
>
> (iii) the Century National Building Society granted credit to Century National Bank, Century National Merchant Bank, Century National Bank Holdings Limited, each in amounts far in excess of the permissible maximum of 5% of its capital base and in contravention of section 22(b) of the Building Societies Regulations; in addition, credit facilities in excess of it statutory maximum of 20% of its capital base were granted, in contravention of section 23, its "loan loss reserves" were inappropriate and its accrued interest was taken to its profit and loss account - both in contravention of section 56.

On the basis of these contraventions, the Minister was entitled to serve notice of his intended assumption of temporary management.

Although his said rationale letter does not allude to them, there are distinctly false statements by the CFEs in relation to their financial operations, for example, the Jamaica Grande Hotel shares transaction and the "First Trade" transaction which would satisfy paragraph 1(e) of Part B requiring the Minister to act. I am not entirely convinced that when the Minister assumed temporary management he was then aware of the falsity of these statements.

The appellants complain that service of the notice and the assumption of temporary management on the same day was unlawful under the statute, prior notice not having been given, and was in breach of the common law principle of audi alteram partem.

Part D of the Second Schedule to the Banking Act (which is similar in wording to corresponding provisions in the Financial Institutions Act and the Bank of Jamaica (Building Societies) Regulations) reads:

> "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.
>
> ...
>
> (3) a copy of the notice ...shall be sent to the Registrar of the Supreme Court and shall be posted in a conspicuous position at each place of business of the bank and shall be published in a newspaper printed and circulated in Jamaica.
>
> ...
>
> 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."

The statute in Part D does not require that prior notice be given and, therefore, one should assume from a reading of the statute as a whole that prior notice was never intended.

A change of wording, by the draftsman in a statute, means a change of intention.

Whenever the legislature intended that prior notice be given, it so states. In Part C, the cease and desist order, requires notice by the Minister "...specifying a date not being earlier than thirty nor later than sixty days after the date of service of the notice...". In Part E, the suspension and revocation of licence, requires that before suspension the Minister shall give notice "...indicating a period (not less than thirty days) within which the bank may submit ...a statement of objection."

The test is one of fairness to the person who will be affected by such precipitous action by a public official. At common law, the general rule is that such an individual who may be affected should be given sufficient prior notice in order that he may make representations as to why such action should not take place. This rule may be displaced specifically by the statute or by necessary implication. The test is satisfied in some cases where an opportunity is given to challenge the impugned action, subsequently.

In the instant case, the CFEs, affected by the simultaneous notice and assumption of temporary management by the Minister, are not, by the wording of the statute, entitled to prior notice but are not precluded from pursuing their challenge to the said notice. Paragraph 2(1) (Part D) permits them within ten days of the service of such a notice to appeal to the Court of Appeal. They are then not in any way restricted from challenging the basis for the Minister's action and also the validity of the said notice and in particular to make any representations they wished. They chose not to do so.

The procedure under Part D is a comprehensive statutory scheme, incorporating the unusual and unaccustomed access by an aggrieved party directly to the Court of Appeal. It is in essence, by way of originating process, to challenge the action of the Minister; such a party is in no way deprived by this process from pursuing all his objections to the court. The court may, on request, extend the period for him to do so - paragraph 2(2). By its wording and tenor, it was intended that the procedure under the statute should be followed.

The right to a fair hearing, a principle of natural justice, in the case of the administrative act of a public official was firmly accepted in the well-known case of ***Ridge vs. Baldwin*** [1964] A.C. 40.

The authors in ***Administrative Law***, 7th Edition, by Wade & Forsyth at page 519 said:

> "Sometimes urgent action may have to be taken on the ground of public health or safety... In such cases the normal presumption that a hearing must be given is rebutted by the circumstances of the case."

The courts, therefore, do exercise a fair degree of flexibility, in demanding fairness to the individual. In the case of ***Lloyd v. McMahon*** [1987] A.C. 625, relied on by the appellants in the instant case, Lord Bridge observed, at page 702:

> "...the so-called rules of natural justice are not engraved on tablets of stone ...what the requirements of justice demand when any body, domestic, administrative or judicial has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

The authors, in ***Judicial Review of Administrative Action*** by DeSmith, Woolf and Jowell, at paragraph 10-012 stated:

> "Desirable though it may be to allow a hearing or an opportunity to make representation, or simply to give prior notice, before a decision was taken which interferes with a person's rights or interest, summary action may be alleged to be justifiable when an

> urgent need for protecting the interest of other persons arises."

Urgency has been held to justify the suspension of the manufacture of toys without giving prior notice where it was viewed as an "emergency holding operation" for the protection of the public from dangerous toys - ***R. v. Birmingham C.C. ex parte Ferrero Ltd.*** [1993] 1 All E.R. 530.

In ***R. v. Secretary of State for the Home Department, ex parte Doody*** [1994] 1 A.C. 531, in allowing the appeal of prisoners who were wrongly denied the opportunity to make representations to the Secretary of State in relation to the length of sentence to be served before review, Lord Mustill in the House of Lords observed, inter alia, at page 560:

> "Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both."

In ***Clough v. Supt. Greyson*** (supra), the Court of Appeal in Jamaica held that the statutory scheme of the Firearms Act was not a denial of justice and satisfied the test of fairness although no prior notice was given to the appellant before his firearm licence was revoked because the opportunity to be heard was afforded by appeal to the Minister after the revocation.

The banking industry is an important institution in a country's financial and overall economic image. Confidence in its operation and its financial strength is necessary in the interest of the public and in particular its depositors. It is necessary that that confidence be preserved and the interests of all be

protected. The Minister is entrusted with the duty to do so. The Banking Act, the Financial Institutions Act and the Bank of Jamaica (Building Societies) Regulations, 1995, as they relate to the CFEs, respectively, each reflect in their statutory framework, the machinery to ensure that image and protection. The existence of any semblance of instability or non-viability obliges the Minister under the relevant statute, provided the relevant circumstances exist, to assume temporary management as a matter of urgency, without prior notice to the entity. The CFEs were given ample opportunity to apply to the Court of Appeal, a court in the higher curial order to the Supreme Court, to challenge any aspect of the Minister's action; all remedies in the circumstances were available to the appellants at that stage. In any event, the CFEs were well acquainted with the shortcomings complained of and documented to them by the supervisory authorities, and the unacceptable practices which were not corrected. The appellants cannot reasonably complain of a lack of fairness in the light of their prior knowledge, nor can they have been unaware of the statutory consequences.

Closely allied to the right to be heard is the individual's right at common law not to be prevented from access to the court in the vindication of his right to a remedy when he is affected by the unlawful act of a public official. In the instant case, the appellants argue that, despite the provisions of the relevant statutes, they are not precluded from bringing the suits which they did because of the unlawful act of the Minister.

Viscount Simonds, in the case of ***Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government et al*** [1959] 3 All E.R. 346, on the issue of whether the individual was restricted to the remedy under a particular statute and to no other, said:

> "The question is whether the statutory remedy is the only remedy and the right of the subject to have recourse to the courts of law is excluded... It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."

Even where the statute sought to oust the jurisdiction of the court, it was held that if the order made was contrary to natural justice it was outside the jurisdiction and therefore subject to judicial examination - ***Anisminic Ltd. v. Foreign Compensation Commission*** [1969] 2 A.C. 147.

If, however, the particular machinery employed by the statute provides to the individual aggrieved a complete and comprehensive process for the full examination of his complaint, the presumption is that he is required to proceed by that statutory scheme.

The right of appeal to the Court of Appeal given in paragraph 2(1) of Part D of the Banking Act (as well as in the corresponding statutes all in relation to the CFEs), is a summary procedure peculiar to those statutes, designed by the legislature to effect a quick method of examination of the action of the Minister as it concerns the banking industry. It seeks to bring an early certainty and finality to the question of the validity of the action of the Minister. A prolonged process of determination would not be in the interest of such institutions. The

particular entity is free to pursue all his remedies. The challenge to the validity of and the reasons for the notice, is a challenge to the executive action of a public official. It is akin to an application for the prerogative orders of certiorari and prohibition, and within ten days of such executive action. The appellants do not need to resort to any common law remedies. It seems to me that the true nature of the appellants' suits, couched as each is for declarations of unlawful action, injunctions to restrain, a mandatory order to return the said premises and a claim for damages for trespass, conversion, and wrongful interference are in substance claims in the nature of prerogative orders and damages. This is a classic example of an application for judicial review obtainable in the United Kingdom under the 1981 Supreme Court Act and Order 53. There is no parallel omnibus procedure in Jamaica statutes.

The said authors in ***Administrative Law*** (supra) observed at page 726:

> "Many statutory schemes contain their own system of remedies, e.g. by way of appeal to a tribunal or to a minister. There may then be a choice of alternative remedies either under the Act or according to the ordinary law. On the other hand, it may be held that the statutory scheme impliedly excludes the ordinary remedies. If its language is clear enough it may exclude them expressly..."

and at page 727:

> "...on the other hand, the question is whether the statutory remedy is exclusive.
>
> The court's interpretation may be determined by convenience."

and of the approach of the legislature to wrongful official action, stated at page 742:

> "A prominent feature of many modern statutes is a provision which allows judicial review to be sought only within a short period of time ...and thereafter bars it completely. These provisions have become common, particularly in statutes dealing with compulsory acquisition and control of land... Their primary object is to make it safe for public money to be spent ...without the danger that the order ...might later be invalidated. If the six weeks elapse without legal proceedings being started, the public authority can go ahead with its plans in the knowledge that they cannot be upset subsequently."

The tone of the Banking Act, and the other relevant statutes envisages a quick resolution of the issue of the validity of the Minister's action. It provides a complete scheme for such resolution. Any other process of challenge necessitating an extension over long periods is inappropriate. The statute could not have intended that the person aggrieved by the action of the Minister be free to neglect the statutory obligation to file a challenge within the ten-day period and resort to the lengthy common law process of action by writ, with its attendant time delays of appearance, defence, reply and other permitted procedural steps. Even an application for leave to apply for an order of certiorari to quash the unlawful order of a public official would be required to be made promptly "...not later than one month after the date of the proceeding..." - section 564C of the Judicature (Civil Procedure Code) Act.

The writs were filed in October 1996, in excess of three months after the Minister assumed temporary management; hearing is still not fixed even for the

"early" date of June 1997. This is contrary to the spirit of the statute. The appellants, not having availed themselves of their rights under the statutes which provided an exclusively peculiar procedure to be heard, are precluded from proceeding by any other means.

For the above reasons, the suits nos. C.L. 1996/C366, C367 and C368 were rightly struck out by the learned Chief Justice.

Paragraph 1(5) of Part D, which is alike corresponding provisions in the Financial Institutions Act, 1992, and the Bank of Jamaica (Building Societies) Regulations, 1995, obliges the Minister to "not later than sixty days after he has assumed temporary management" to apply to the Supreme Court for an order "vesting in the Minister ...full and exclusive powers of management." The Minister is required to present "full particulars of the assets and liabilities of the bank." It is my view that the Banking Act contemplates an examination by the court of the conduct of the affairs of the bank by the Minister in order to determine whether or not to confirm the Minister's assumption of temporary management; the appellants do not appear to have any right to be heard at this stage; they would have already exhausted their rights before the Court of Appeal under paragraph 2(1).

I am accordingly of the view that the order of Orr, J., made on the 5th day of September, 1996, in confirmation of the temporary management, was validly made.

In respect of the appeal in suit no. C.L. 1996/C330, from the order of Ellis, J., it follows that the Minister, having lawfully assumed temporary management

under the relevant statutes, could lawfully bring the said action in the name of Century National Bank Limited without any prior permission of the respective directors. By paragraph 1(4)(e) of Part D of the Second Schedule to the Banking Act, the Minister is permitted to:

> "(e) initiate, defend and conduct in the name of the bank, any action or proceedings to which the bank may be a party."

Ellis, J. was, therefore, quite right to dismiss the summons to strike out the said action.

In view of my conclusions expressed above, it is unnecessary to reveal my thoughts in respect of the remaining grounds argued.

I would dismiss the appeals.

FORTE, J.A.:

The appeals are dismissed, and the orders of the court below affirmed. Costs of the consolidated appeals to the respondents to be taxed, if not agreed. In appeals C.A. 120, 121 and 122/96, the costs must be paid by the members of the Boards of Directors, personally.