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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 64/98

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE BINGHAM J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN HENRY FORDE APPLICANT/APPELLANT
A N D THE ATTORNEY-GENERAL RESPONDENT

Dr. R. B. Manderson-Jones for the appellant

Lennox Campbell, Q.C., instructed by the
Director of State Proceedings, for the respondent

February 4, 1999 and April 14, 2000

HARRISON, J.A.:

This is an appeal from the judgment of Harrison, J. on June 25, 1998,
dismissing the originating summons of the appellant dated May 25, 1998.

The appellant had sought declarations that:

1. A notice dated May 7, 1998, to shareholders of the Workers Bank issued by the Minister of Finance, pursuant to section 25A of the Banking (Amendment) Act, 1997, was invalid;
2. The stay of commencement of proceedings against the Bank pursuant to section 25C(1)(c)(i) of the Banking Act, 1992, is contrary to section 13 of the Constitution of Jamaica;

3. The Minister has no power to vest shares of shareholders in himself, despite the provisions of section 25B(1) of the Banking Act;

4. Section 25F(b) of the Banking Act is inconsistent with section 18 of the Constitution, in providing that the Minister may by notice refuse compensation on the basis that the value of the share is nil.

The grounds of appeal are that:

- 1) The learned Judge erred in holding that although the notice to the Appellant cites the wrong section under The Banking Act the notice is not invalid; and further erred in failing to appreciate that the notice is not under the Banking Act and does not in fact cite any section under The Banking Act but purports to be a Notice pursuant to subsection (1) of Section 25A of the Banking (Amendment) Act, 1997.
- 2) The learned Judge erred in holding that the complaint that it is the bank which should be served with the notice is not fatal.
- 3) The learned Judge erred in holding that because Section 13 of the Jamaica (Constitution) Order in Council, 1962, is merely declaratory in scope and sections 14 - 24 are concerned with the protection of the rights of the individual, subsection (1)(c)(i) of Section 25C of The Banking Act, 1992, (as amended by Section 14 of the Banking (Amendment) Act, 1997 which provides for an order 'staying commencement' of any proceedings against the Bank is not inconsistent with Section 13.
- 4) The learned Judge erred in finding that subsection (1) of Section 25B of The Banking

Act, 1992, (as amended by Section 14 of the Banking (Amendment) Act, 1997) empowers or authorizes the Minister to vest in himself the shares which shareholders have in the bank.

- 5) The learned Judge erred in failing to hold that Subsection (b) of Section 25F of The Banking Act, 1992, (as amended by Section 14 of the Banking (Amendment) Act, 1997) is inconsistent with Section 18 of the Jamaica (Constitution) Order in Council, 1962."

Dr. Manderson-Jones argued that the said notice issued by the Minister of Finance was invalid in that, there was no basis for its issuance as there is no section 25A of the Banking (Amendment) Act, 1997, but section 25A of the Banking Act, 1992, which did not provide for notice to shareholders. The "stay of proceedings" against the Bank provided by section 25C(1)(c)(i) of the Banking Act, 1992, as amended by the Banking (Amendment) Act, 1997, was invalid, in that it impeded the subject's unqualified right of access to the court. The shareholders had a right to compensation under section 18(5) of the Constitution and the Minister had no right to threaten to appropriate their assets in infringement of their rights. By declaring that the shares had no value, the Minister may acquire and sell the Institution, having vested the shares in himself and there were no regulations nor "principles" to inform shareholders how their right to compensation was to be determined and given.

Mr. Campbell for the respondent submitted that the possession of the shares by the Minister was not a compulsory acquisition attracting

compensation, because section 18 of the Constitution authorised the taking, in consequence of a licence 18(2)(f), for the purpose of investigation 18(2)(k), or to safeguard the interest of others 18(3). This legislation was reviewed by the Court of Appeal in *Panton et al vs. Minister of Finance et al* (unreported) S.C.C.A. No. 113/96 delivered November 26, 1998. There was a presumption of validity of legislation, therefore the provision for "stay" in section 25C(1)(c)(i) of the Banking Act was not invalid, it provided an opportunity to the Minister to examine the circumstances prior to his decision and did not infringe section 13 of the Constitution which was merely perambulatory. Learned Queen's Counsel concluded that the notice, erroneously stated as being issued under section 25A of the Banking (Amendment) Act, 1997, was not invalid, and should be viewed by the court as an intention to give effect to the substance and aim of the statute, both by advising the shareholders and obliging the Minister, having taken temporary management of the Bank, to notify the Bank.

The Banking Act, 1992, governs the operations of commercial banks in Jamaica, and obliges the Minister of Finance to see to their proper and safe functioning, in the public interest. Section 25A of the said Act, as inserted by section 13 of the Banking (Amendment) Act, 1997, obliges the Minister to notify any bank which, in his opinion, was hopelessly non-viable, and consequently it was necessary that the interests of its depositors had to be protected. Section 25A reads:

"25A.--(1) Where the Minister, after consultation with the Supervisor, is of the opinion that--

- (a) a bank has ceased to be viable;
- (b) the viability of the bank cannot be restored by the exercise of powers under section 25; and
- (c) it is in the best interests of the bank's depositors that there be a reconstruction of the bank or a disposition of its assets in accordance with section 25E on an expeditious basis,

the Minister shall notify the bank in writing accordingly and provide the bank with an opportunity to make representations within ten days of the receipt of the notice by the bank."
[Emphasis added]

The said notice should properly have been addressed to the bank, to be acted upon by its directors, quoting the correct statutory reference, namely, section 25A of the Banking Act, as amended by section 13 of the Banking (Amendment) Act, 1997.

There was no necessity, therefore, under section 25A of the statute to send any notice to the shareholders. The said notice dated May 7, 1998, "To: All Shareholders" was superfluous, in the circumstances. However, the said notice directed attention to section 25B of the Act, in alerting the shareholders of the probability of a vesting order and its consequential effect. In the circumstances, I am in agreement with Harrison, J. that the incorrect

statutory reference to the Banking (Amendment) Act cannot avail the appellant. There was no specific complaint that the bank was not notified.

Because the entire scheme of the statute is the protection of the interest of the public by maintaining the healthy financial state of banks, the Minister has an obligation and is given the power under section 25B of the Banking Act, after considering the representations of the subject bank which has been deemed non-viable, and cannot be restored "by the exercise of the powers under section 25" to:

"...vest the shares and subordinated debt of the bank in the Minister..."

This power of the Minister under the said section 25B is not unrestricted. It is "...subject to the approval of the Cabinet on the recommendation of a committee of advisors comprising the Supervisor, the Deputy Supervisor, the Financial Secretary and such other person as the Minister may appoint" (section 25B(1)). Consequently, the law in its prudence, when the viability of the bank exists in this negative state, empowers the court to restrict, temporarily, litigation concerning the said bank. Section 25C(1)(c) reads:

"The Minister may if he considers it to be in the best interests of the bank's depositors, apply to a Judge of the Supreme Court for an order staying--

- (i) the commencement or continuance of any proceedings by or against the bank, for such period as the Judge thinks fit;
- (ii) any execution against the property of the Bank;"

This temporary restraint by a court in respect of litigation concerning the bank, may be obviously necessary to permit the Minister the unhampered opportunity to restore the bank to a sound viable state, if possible. It is not an infringement of the right of the shareholder to "unimpeded access ...to the courts", being the exercise of one of the fundamental rights guaranteed to the subject and recited in section 13 of the Constitution of Jamaica. It is not without significance that the said section 13, in reciting the entitlement of every person to such rights, cautions that the enjoyment of such rights by a person are:

"...subject to respect for the rights and freedoms of others and for the public interest..."

The order "...staying...any proceedings" may well be necessary to give to the Minister the opportunity and time "...in the best interest of the bank's depositors..." (section 25C(c) of the said Act) to determine the appropriate steps to be taken. The Court would ultimately determine whether or not the latter action is necessary.

There is no merit in this contention.

The clear intent and purpose of section 25B of the Banking Act is to give to the Minister the power to "vest the shares and subordinated debt of the bank..." in himself, but not until it is apparent to him that the application of other alternative measures will not restore the bank to a state of viability. The other alternative measures permissible are provided by section 25,

namely, the extraction by the Supervisor from a majority of the bank's directors an undertaking to take certain specified corrective measures, or the giving of directions or the issuance of a cease and desist order. In addition, the said section 25 empowers the Minister, inter alia,

“25(6) Where the Minister, after consultation with the Supervisor, believes that a bank is or appears likely to become unable to meet its obligations...”

to assume the temporary management, suspend or revoke the bank's licence or petition the court to wind up or reconstruct the bank (see *Century National Bank v. Davies et al* (unreported) Privy Council Appeal No. 52/97 1997 delivered March 16, 1998). It is only after he has considered all the avenues open to him under section 25 of the Act to restore in the public interest the insolvent or potentially insolvent bank or a bank which is indulging in unsafe and unsound practices and unable to meet its obligations, and considers them unworkable, may the Minister vest the shares of the bank in himself, under the provisions of section 25B of the Act. However, shares are property and the taking of property, even temporarily, without compensation on just terms will be viewed as a breach of section 18 of the Constitution of Jamaica. This court so held in *Panton et al vs. The Minister of Finance et al* (unreported) S.C.C.A. No. 113/96 delivered November 26, 1998. Relying, inter alia, on *Minister of State for the Army vs. Dalziel* (1943-1944) 68 C.L.R. 261. Harrison, J.A. said, at page 96:

"The taking by the State of any property, without compensating the owner therefor on just terms, or without any machinery in the statute authorising such taking to determine such compensation, makes such a statute invalid and in breach of Section 18(1) of the Constitution, entitling the owner to constitutional redress."

Section 18 of the Constitution of Jamaica reads, *inter alia*:

"18.--(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that--

- (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given;"

However, section 18 of the Constitution expressly authorises the statutory taking of property, as a regulatory scheme, as the Banking Act permits, but in certain specific instances. Subsections 2 and 3 read:

"(2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property--

- ...
 - (f) as an incident of a...licence...

- ...
 - (k) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry...

(3) ...or for the reasonable restriction of the use of any property in the interests of safeguarding the interests of others..."

These excepted circumstances are not regarded as being property "...compulsorily acquired...", attracting compensation (*Panton vs. The Minister of Finance* [supra]).

Section 25B, however, validly authorises the Minister to make a vesting order in respect of the shares in a bank, when the circumstances so demand, in the interest of the public, in protection of depositors and, in particular, in order to preserve the financial strength of the banking structure, when other methods have proved ineffective.

Furthermore, the said statute makes provision for adequate notice to the owner of any shares that may be affected by the Minister's vesting order.

Section 25F reads:

"25F. The Minister shall, within forty-five days after the date specified in the notice referred to in subsection (2) of section 25D, give to each person who, immediately before the making of the vesting order, was the holder of shares or subordinated debt in the bank to which the vesting order relates or the assignee or successor in title of that person--

- (a) a notice containing an order of compensation in an amount to which that person would be entitled, determined in accordance with section 25H; or
- (b) a notice stating that no offer of compensation is being made because the amount so determined is nil."

Provision is also made for the determination of compensation, although no regulations relating to the method of calculation are in force. Section 25H reads:

"25H.--(1) The award of compensation to a person affected by the making of a vesting order in respect of a bank shall be determined in accordance with the following principles--

- (a) the amount of compensation shall be calculated on the net value of the bank's assets and by such method as may be prescribed in regulations made under subsection (2);
- (b) where the amount of the bank's liabilities exceeds the value of its assets, the amount of compensation shall be nil;"

The absence of regulations would not preclude a court, where application for compensation is made under the provision of section 25I, from making a just award of compensation for shares affected by such a vesting order.

Rattray, P., in *Panton et al vs. The Minister of Finance* (supra), on the particular facts of that case, was driven to conclude (on page 6) that:

"On the evidence, the financial state of the company is such as to lead to a conclusion that the shares of the appellants in the companies were of no monetary value."

This conclusion may well be arrived at in respect of the majority of such banking institutions which have been permitted to deteriorate to a state of insolvency. Section 25H(1)(b) sufficiently states the statutory principle:

“(b) where the amount of the bank’s liabilities exceeds the value of its assets, the amount of compensation shall be nil;”

The learned trial judge was also correct in holding that section 25F was not inconsistent with section 18 of the Constitution and properly dismissed the summons.

For the above reasons, we are of the view that this appeal should be dismissed.

The appeal is dismissed with costs to the respondent to be agreed or taxed.