JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 113/96

COR: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	DONALD PANTON	1ST APPLICANT/APPELLANT
AND	JANET PANTON	2ND APPLICANT/APPELLANT
AND	THE MINISTER OF FINANCE	RESPONDENTS
AND	THE ATTORNEY-GENERAL	

Frank Phipps, Q.C., Walter Scott & Miss Carolyn Reid instructed by **L. G. S. Broderick & Company** for Donald Panton

Ian Ramsay, Q.C., Walter Scott, & Deborah Martin instructed by **L.G.S. Broderick & Company** for Janet Panton

Lennox Campbell, Senior Assistant Attorney-General & Marcia Dunbar instructed by the Director of State Proceedings for the Attorney-General

January 12, 14, 15, 16; 19, 20, 21, 22,
March 3, 4, 5, 6; 23, 24, 25, 26, 27;
May 26; November 26, 1998

RATTRAY, P:

On the 20th November, 1996 the Constitutional Court (Panton, Langrin & Smith JJ) dismissed the appellants' application to that Court for redress under section 25 of the Constitution of Jamaica and awarded costs to the respondents. It is an appeal against this determination of the Constitutional Court which is now before us.

The appellants are the controlling shareholders of a group of companies of which the relevant ones are Blaise Trust Company and Merchant Bank Limited, Blaise Building Society, and Consolidated Holdings Ltd. For convenience they will hereinafter be referred to as the "Bank", the "Building Society" and the "Holding Company". These

financial entities fall statutorily under the regulation of the Bank of Jamaica referred hereinafter as"BOJ".

They likewise respectively fall under the requirements of the Financial Institutions Act, the Building Societies Act and the Bank of Jamaica (Industrial and Provident Societies) Act as well as the regulations made under these legislative enactments.

It was the complaint of the appellants that the Minister's intervention in the management and control of these institutions constituted a compulsory acquisition of the appellants' property and therefore was in breach of Section 18 of the Constitution of Jamaica which provides as follows:

> "**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 -
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> a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and
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> b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of -
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> (i) establishing such interest or right (if any);
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> (ii) determining the amount of such compensation (if any) to which he is entitled; and
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> (iii) enforcing his right to a such compensation."

The appellants maintain that none of the legislative enactments mentioned provide for the determination of compensation and a method of procedure as required by Section 18(1) of the Constitution of Jamaica. Neither do they secure a right of access to a Court for the purposes stated in Section 18(1) of the Constitution.

It will be necessary to give some background history in relation to the three companies which are the subject matter of this litigation.

The Minister of Finance, the first respondent acting on the powers conferred upon him by the challenged legislation in respect of each entity assumed temporary management and control of each institution and placed temporary managers in each of these. His action was duly confirmed by the Supreme Court as required in law. These institutions operate under licence from the Government: the Bank under the Financial Institutions Act and the Building Society and the Holding Company being "specified financial institutions" under the Bank of Jamaica Act.

The impugned legislative enactments under which the Minister acted were as follows:

(a) The Financial Institutions Act of 1992.

(b) The Bank of Jamaica (Amendment) Act ,1995.

(c) The Building Societies (Amendment) Act, 1995.

(d) The Bank of Jamaica (Building Societies) Regulations, 1995.

(e) The Bank of Jamaica (Industrial & Provident Societies) Regulations, 1995.

With respect to the Bank an inspection report commissioned by the Bank of Jamaica revealed sixteen breaches of the Financial Institutions Act. It stated that the Bank faced serious operational and financial problems. The Bank's overall condition was assessed as being poor. Unsecured credit facilities were granted above the limits permitted by law to shareholders and directors including the appellants. Capital adequacy was deemed to be poor. The Bank's portfolio was almost totally illiquid. The practices in relation to the management of the licensee's funds were unsafe, unsound and imprudent. Depositors were at great risk and the Bank was facing the danger of insolvency.

The temporary managers placed in the institutions by the Minister reported that the Building Society and the Holding Company were insolvent and the Bank "was solvent only because deposits from these two institutions were transferred to it".

In relation to the Building Society and the Holding Company, reports of the Chartered Accountants found that the transactions and affairs of all three institutions were so intermingled that a detailed and accurate separation of them would have been most time consuming and in many respects impossible.

This was the situation which led to the Minister assuming temporary management of the Bank on the 18th December, 1994 and of the Building Society and the Holding Company on the 10th April, 1995. On the 2nd June 1995 the Supreme Court conferred the vesting in the Minister of full exclusive powers of management of the Building Society and the Holding Company. The Supreme Court had already so done in respect of the Bank on the 15th February, 1995.

Schemes of Arrangement between the institutions and the creditors/depositors were proposed by the Minister in respect of all the entities. These were agreed to by the creditors/depositors and sanctioned by the Supreme Court. Under the Schemes of Arrangement the creditors/depositors of each institution were able to receive 90 cents in the dollar of sums owing to them and the preferred creditors would be paid in full. The Schemes committed the Government of Jamaica to lend to the institutions, if necessary, enormous sums not exceeding One Thousand and Seventy-Eight Million Dollars.

There has been no rebuttal of the Minister's allegations that the three entities "occupied the same physical office space and facilities". All the institutions had the same employees. Furthermore, the operations of the three institutions were closely intertwined. The deposits, liabilities and assets of the three institutions were co-mingled with deposits being transferred and re-transferred between these institutions.

It was this state of affairs which impelled the Minister in respect of each institution to obtain the Orders from the Supreme Court vesting in him full and exclusive powers of management in all three institutions and later to enter into the Schemes of Arrangement sanctioned by the Court. No complaint comes from the creditors. They have been salvaged by the actions of the Minister.

The declarations sought by the appellants are to the effect that all these pieces of legislation are unconstitutional and in breach of Section 18 of the Constitution of Jamaica and the constitutional rights of the appellants in that they permit the compulsory taking possession of the property of the appellants and the compulsory acquiring of an interest in or right over property of the appellants without prescribing - "The principles on which and the the manner in which compensation therefor is to be determined and given:" (Section 18 (1)(a) of the Constitution).

The gravamen of the submissions on behalf of the appellants is to the effect that the shares in the companies had been compulsorily taken possession of by the Minister; and their interest in, or right over these shares compulsorily acquired under legislation which does not provide for compensation.

This appeal despite the voluminous nature of the record and the detail of legal arguments rests upon narrow questions of law. The judgment of the Privy Council in ***Century National Bank Ltd and Others v. Omar Davies and Others*** PrivyCouncil Appeal No. 52/97 delivered on the 16th of March, 1998 after the commencement of the hearing of this appeal and which upheld the decision of this Court of Appeal in Jamaica (Forte, Gordon JJA & Harrison J.A. (Ag.) as he then was) has put beyond challenge the Minister's legal right to act as he did in putting in temporary management in these financial entities and entering into Schemes of Arrangement in respect of them. The one point therefore outstanding is, whether the provisions of Section 18 of the Constitution of Jamaica require that the Acts and Regulations under

which the Minister acted must include compensatory provisions, the legislation as is claimed by the appellants being confiscatory of the property of the appellants.

The appellants' case rests upon whether the appellants as shareholders in these financial entities have been deprived of their property, to wit their shares in the companies by virtue of the Minister's action.

In this regard the areas which have been canvassed by counsel before us and indeed in the Full Court are as follows:

1) Do shares in a company fall under the rubric of "property of any description?"

2) If the answer is in the affirmative did the Minister in exercising his authority under the impugned legislation compulsorily take possession of the appellants shares in these financial entities or compulsorily acquire any interest or right over these shares?

3) Is the impugned legislation regulatory or confiscatory?

The appellants maintain that as shareholders they have been deprived of their property. 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. The ownership however of these shares are still vested in the appellants. Whatever may be their value, this has not in any way been diminished by the Minister's intervention.

In this scenario it would be compelling to conclude that the shareholders in these institutions would in those circumstances have no real interest in the assets of the companies. What then is the nature of their property in the shares, if the shares have no value? They have no locus standi on which they could rely to dissent from the Schemes.

In ***re Tea Corporation, Limited Sorsbie v. Same Company*** [1904] 1 Ch. 12 provides the authority for the propositon that in the Scheme of Arrangement, no regard

must be had to a class of contributories, to wit shareholders in respect of whom the Court is satisfied that having regard to the Company's assets that class has no interest in them. Buckley J. had found as a fact that the value of the company's assets was such as to negative the notion that the ordinary shareholders had any financial assets whatever in them.

Vaughan Williams L.J. at page 23 stated:

> "But when you come to the ordinary shareholders you find that they have no interest whatever in the assets, and Buckley J was of opinion that, having regard to this fact, their dissent from the scheme was immaterial. I think that the learned judge was right in so holding."

Both Romer L.J. and Sterling L.J. were in agreement.

This answers the submission of counsel for the appellants that the appellants have been deprived by the Minister's action of their right to vote. In these circumstances they were never entitled to a right to vote at all.

I am however reluctant to conclude that they have no property at all because all they have are share certificates which bear no value at a particular time. By some miracle in the future these pieces of paper may have some value. The real question then to be determined is whether their shares have been compulsorily acquired by the Minister in these circumstances.

None of the impugned legislation vest the shares in the Minister. However, from whatever angle one views the Minister's action it certainly cannot be said that he has taken possession of the appellants' shares in these financial entities. What loss or damage has a shareholder suffered by virtue of the bailout of the depositors and creditors by the Minister through the Schemes of Arrangements? Reliance has been placed by the appellants on the dicta of Sir Neville Peterkin C.J. delivering the judgment of the Court of Appeal of the Eastern Caribbean States in ***Attorney-General of St. Christopher and Nevis v. Lawrence*** [1983] 31 W.I.R. 176 at page 185:

> "No-one but one whose rights are directly affected by a law can raise the question of the constitutionality of that law. A corporation has a legal entity separate from that of its shareholders. Hence, in the case of a corporation, whether the corporation itself or the shareholders would be entitled to impeach the validity of the statute will depend upon the question whether the rights of the corporation or of the shareholders have been affected by the impugned statute. But it may happen that while a statute infringes the fundamental rights of a company, it also affects the interests of its shareholders; in such a case, the shareholders also can impugn the constitutionality of the statute."

The impugned statutes in my view neither infringe the fundamental rights of the company or of its shareholders. Indeed in the former case these statutes have provided a method by which the company has been salvaged; and the shareholders are in no worse position than they were before.

This then leads to another question, which is, the nature of the impugned legislation. Are they confiscatory or regulatory?

The Full Court embarked upon a correct and well established approach to be taken by a court when the constitutionality of legislation is challenged. Their Lordships' judgments emphasized the presumption in favour of the validity of legislative enactments which can only be rebutted by an identifiable transgression which is clear and beyond reasonable doubt. The judicial support found by the court below in cases from various Commonwealth jurisdictions rests upon an unchallenged foundation. I endorse the dicta and conclusions in the judgments cited and I need not add to them.

The Court below too, correctly found that shares are property and thus in an appropriate case would attract the protection of Section 18 of the Constitution of Jamaica. The focal question in the case is whether there is a compulsory acquisition of the shares of the appellants in the respective companies. As I have stated the fact that they were in my view valueless at the time of the Minister's action does not make

them any less property as we cannot state what value may accrue to them at some later date.

An analysis of the impugned legislation reveals the following features:

1. They properly relate to companies and/or entities which may be defined as financial institutions and which operate under licences from the relevant authorities.

2. They make provisions which are clearly for the protection of the public.

3. They fall under the regulatory authority of the Bank of Jamaica.

4. The authority invested in the Minister is for the stated purpose of protecting the public interest.

5. The Minister's powers relate to management and control if certain circumstances deleterious to the public interest exist.

6. Ownership of the shares is not invested in the Minister.

In a modern society the economic foundation upon which the nation state rests is very much determined by the integrity of its financial institutions. Their protection from collapse consequent on imprudent management and unacceptable fiscal practices is an important consideration for Parliament in carrying out its constitutional mandate to "... make laws for the peace, order and good government of Jamaica."

The impugned legislation and the regulations made thereunder, are all designed to protect the public interest, in an important area of national development. In so far as unacceptable practices posed a real threat to the economic integrity of the nation the vested interest of the public is identified. The impugned laws and regulations therefore authorised the Minister's intervention for the very purpose for which he took the necessary action in the instant case and such action was indisputably in the public interest. I agree with the Judges of the Full Court therefore that the impugned legislation is regulatory and not confiscatory.

Had I determined, which I have not, that there was in these circumstances "the taking of possession or acquisition of property", I would have found Section 18(2) of the Constitution relevant, and I would have further concluded that such "taking of possession or acquisition" was done "as an incident of a licence", since all these entities are subject to licences granted to them by the government. [Section 18(2)(f)] The action of the Minister would be in keeping with the constitutional mandates of Section 18 as one of the exceptions to the general rule. The section reads as follows:

> "**18.** (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 -
>
> (a) - (e) ...
>
> (f) as an incident of a lease, tenancy, licence, mortgage, charge, bill of sale, pledge or contract;
>
> ...".

It is an interesting fact that a joint and several undertaking dated the 18th of April, 1994 and which was signed by the two appellants as directors of the Merchant Bank accepted the conditions found in terms of undesirable practices and the deteriorating financial condition of the Bank and pledged to take the steps stated in the document as recommended by the supervisory authorities and to correct the admittedly existing breaches of the Financial Institutions Act. It was a failure to carry out this joint and several undertaking which led to further action which the Minister had to take in order to preserve the integrity of these institutions. It is difficult to imagine how it could be alleged that what was originally a consensual intervention had become a compulsory acquisition or to identify any factors which had changed the nature of the intervention.

Counsel for the appellants have brought to our attention that the Financial Institutions (Amendment) Act, 1997, Banking (Amendment) Act, 1997 and the Building

Societies (Amendment) Act, 1997 passed since the commencement of this litigation have now all included the compensatory provisions which they maintained made the former Acts unconstitutional. The submission is that the legislature has now recognized that these compensatory provisions as required by the Constitution should have been in the original legislation. In my view this is a non-sequitur. A reading of the Amending Acts of 1997 will disclose that they provide for the first time that the shares of the respective entities can now be vested in the Minister. Prior to this, there was no legal provision for the shares to be so vested. Once the shares are vested in the Minister then the line has been crossed from regulatory in this regard to a compulsory acquisition and that is why the amendments have carried out the constitutional mandate to provide in the legislation for compensatory provisions not heretofore required.

The final complaint was that the appellants' rights to natural justice including the right to a fair hearing under Section 20 of the Constitution had been breached by the Minister in taking temporary management of the respective financial entities and in administering the management of the respective companies.

The regulatory provisions provided the appellants the opportunity at every stage of the proceedings to be heard and to carry out certain functions during the regulatory exercise. The appellants were not just mere shareholders they were directors of the company. They were parties to undertakings, they had access to the Court of Appeal, they were notified of what was taking place. In my view therefore this complaint is without merit.

I have read the draft judgment of Downer, J.A. and disagree therewith so far as he concludes that the Minister "... had no legal authority to go on to a Scheme of Arrangement as he failed to follow the mandatory provisions of the Act and secure confirmation of his provisional temporary management" and then proceeds to grant a

declaration in respect of the Building Society and the Provident Society in terms of paragraph 5(a)(ii) and (iii) in the amended Notice and Grounds of Appeal that -

"the applicants were entitled to:

(a) adequate notice of the Minister's intention:

(i) to assume temporary management of the Blaise Financial Institutions;

(ii) to apply for confirmation of a vesting Order in the Minister full and exclusive powers of management of the Blaise Financial Institutions,

(iii) of the application to restructure the respective companies and distribute their assets under Schemes of Arrangements."

The complaint before the Constitutional Court was that the principles of natural justice were breached by not giving notice in these regards. The challenge was to the constitutionality of the impugned legislation hence redress was sought in the Constitutional Court.

The judgment of that Court was challenged on appeal on the basis of unconstitutionality, specifically in respect to:

(a) an alleged failure of the legislature to conform with the provisions of section 18 of the Constitution;

(b) an alleged breach of the principles of natural justice.

The issues therefore joined between the parties were clearly identified and included no allegation of a failure of the Minister to "secure confirmation of his provisional temporary management". Indeed no submissions were made in the Constitutional Court or in the Court of Appeal in this regard.

I hold therefore that the Court of Appeal cannot embark upon or arrive at a decision in a civil matter with regard to a question which was never made an issue

between the parties and in respect of which no submissions have been made either before us or in the Court below.

CONCLUSION

I would uphold the decision of the Constitutional Court, and dismiss the appeal with costs to the respondent.

DOWNER, J.A.

The appellants Donald and Janet Panton were shareholders in a group of companies, namely, Blaise Trust Company and Merchant Bank Ltd. ("The Bank"), Blaise Building Society ("The Society") and Consolidated Holdings Ltd. ("The Provident Society"). Before the Constitutional Court (Panton, Langrin and Smith JJ.), the appellants alleged that their constitutional rights as property owners were breached by the Minister of Finance as his actions were pursuant to provisions of the Financial Institutions Act (The "Act") which were in contravention to Section 18 of the Constitution. There was also a complaint of breaches of natural justice on the basis of the Minister's failure to notify them of his intention to take possession of the three financial institutions (Blaise Financial Institutions). Additionally there was a complaint of the illegality of the Minister's action after he had obtained the status of a provisional Temporary Manager. These allegations are of importance and were pursued in the Constitutional Court which rejected the claims. It is to be noted from the outset, that the claims are in constitutional and administrative law.

As the Pantons were aggrieved by the decision in the court below they have exercised their rights to appeal to this Court. It is therefore appropriate to examine the scope and limits of Section 18 of the Constitution to ascertain whether the limitations in that section precluded Parliament from enacting The Act. Also the Minister's conduct must be examined to ascertain if all his actions were clothed with legal authority.

Analysis of Section 18 of the Constitution and its impact on the Financial Institutions Act

Chapter III of the Jamaican Constitution which protects Fundamental Rights and Freedoms was modelled on the European Convention of Human Rights. Its earlier antecedents were Magna Carta and the Bill of Rights.

A significant feature of the protective provisions in Chapter III is the recognition that in an ordered society individual rights must be reconciled with the rights of others as well as the public interest. Accordingly the role of the State is recognised in the protective provisions and the balance between individual rights and the public interest is expressly stated in the principles enshrined in Chapter III. The enforcement of those principles is determined by the Supreme Court whenever a challenge is made by an aggrieved party that his rights are infringed by the State or other public authorities.

It is appropriate to advert to the preamble to Chapter III to ascertain how the balance is struck generally and then go on to examine Section 18 to determine how individual rights of property are reconciled with the rights of other property owners and the public interest.

Chapter III

Fundamental Rights and Freedoms

> "13 Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely -
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

(b) freedom of conscience, of expression and of peaceful assembly and association; and

(c) respect for his private and family life,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

The subsequent provision pertinent to this case is Section 18. Counsel for the appellants Mr. Phipps Q.C. and Mr. Ramsay Q.C. relied on Section 18 (1). That section reads:

"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; and

(b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of -

(i) establishing such interest or right (if any);

(ii) determining the amount of such compensation (if any) to which he is entitled; and

(iii) enforcing his right to any such compensation."

The forceful submission by Counsel for the appellants was that the assumption of Temporary Management by the Minister of Finance pursuant to Part D of the Second Schedule to the Act was in contravention of Section 18(1) of the Constitution as there were no provisions in the Act for compensation. In this context Counsel emphasised Section 18(5) of the Constitution which reads:

> "(5) In this section "compensation" means the consideration to be given to a person for any interest or right which he may have in or over property which has been compulsorily taken possession of or compulsorily acquired as prescribed and determined in accordance with the provisions of the law by or under which the property has been compulsorily taken possession of or compulsorily acquired."

Mr. Campbell for the respondents countered this submission by adverting to Sections 18(2) and (3) which empower Parliament to enact legislation enabling public authorities to regulate property rights without provisions for compensation where property rights are subject to the incident of a licence or where it is necessary to take possession of property, for the purposes of examination, trial or enquiry, or where the taking of property is necessary to protect the rights of others. Section 18(2) in part reads:

> "(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 -
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> ...
>
> (f) as an incident of a lease, tenancy, licence, mortgage, charge, bill of sale, pledge or contract;
>
> (g) by way of the vesting or administration of trust property, enemy property, or the property of persons adjudged or otherwise declared bankrupt or insolvent, persons of unsound mind, deceased persons, or bodies corporate

> or unincorporate in the course of being wound up;
>
> . ..
>
> (k) for so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry--".

Also relevant in this context is Section 18 (3) which reads:

> "(3) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the orderly marketing or production or growth or extraction of any agricultural product or mineral or any article or thing prepared for market or manufactured therefor or for the reasonable restriction of the use of any property in the interests of safeguarding the interests of others or the protection of tenants, licensees or others having rights in or over such property." [Emphasis supplied]

The Constitution must be read as a whole and these sub-sections emphasise the reconciliation of the rights of other property owners such as the depositors and other creditors in the Blaise Financial Institutions as well as the role of the State in regulating the financial and monetary aspects of the economy where it is necessary to take possession of property without the payment of compensation . The counterpart of these sections is Section 48(1) of the Constitution which reads:

> "48.-(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica."

In construing Section 18(2) and (3) of the Constitution guidance has been provided by Viscount Simonds in the case of **Belfast Corporation v O.D. Cars, Ltd.**[1960] 1 All E.R. 65. His Lordship was construing the Government of Ireland Act 1920, so as to determine the constitutional validity of the Planning (Interim Development) Act (Northern Ireland), 1931. That His Lordship's words were apt was recognised by all three judges in the court below. Here are the relevant passages.

Viscount Simonds in recognising the common law presumptions which underpinned the Government of Ireland Act 1920 at page 69 said:

> "It is no doubt the law that the intention to take away property without compensation is not to be imputed to the legislature unless it is expressed in unequivocal terms."

Then Viscount Simonds continued thus:

> "For my Lords, I would here point out that, if such restrictions as the Acts of 1931 and 1944 impose cannot be enforced without the payment of compensation, the practical effect must be to deprive the Parliament of Northern Ireland of the power to legislate not only in this particular field in a manner recognised as necessary to its proper fulfilment in Great Britain but in numerous other fields also in which it has been widely realised that the rights of the individual must be subordinate to the general interest. Learned counsel for the respondents were constrained to admit that their success in this argument might lead to the invalidation of numerous Acts whose validity has been hitherto unchallenged. It would not be easy to reconcile this result with the power accorded to the Parliament by s.4 of the Act to make laws for the peace, order and good government of Northern Ireland. It is right, however, that, in the interpretation of constitutional instruments, guidance should be sought from those courts whose constant duty it has been to construe similar instruments, if only because, as it appears to me, a flexibility of construction is admissible in regard to such instruments which might be rejected in construing ordinary statutes or inter partes documents." [Emphasis supplied]

Viscount Simonds issued a caution which legislators must heed. It reads thus at page 70:

> "The day may come when it will be necessary to consider the relevance to the constitution of Northern Ireland of the observation of HOLMES, J., in the case already cited **Pennsylvania Coal Co. v Mahon (1922), 260 U.S. at p. 415**:

> 'The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking'."

One of the numerous other fields in which it has been widely realised that the rights of the individual must be subordinate to the general interest, is banking. In **Robert John Davis and Another and Percy Radcliffe and Others** [1990] 1 W.L.R. 821 at 825, Lord Goff of Chieveley adverting to the regulatory provisions in the Isle of Man said:

> "Under the Banking Act 1975, it became an offence to carry on a banking business in the Isle of Man without a licence, or otherwise than in accordance with the terms of a licence. Detailed provision is made in the Act of 1975 for the licensing of banks and other related matters. Applications for a licence to carry on a bank have to be made to the Treasurer, in whom is vested the power to issue such a licence, with or without conditions; to refuse a licence; or to revoke a licence previously granted. However the Finance Board is given the power to give to the Treasurer such directions as it thinks fit with regard to the exercise of such powers. The Treasurer is vested with other powers under the Banking Act 1975, including power (with the authority of the Finance Board) to suspend or discontinue the business of a bank; and power to inspect the books and other documents of a bank (with power of entry for that purpose) and to take copies of such documents, as to the exercise of which powers the Finance Board may again give such directions to the Treasurer as it thinks fit. On 30th July 1975 the Finance Board, in the exercise of powers conferred upon it by section 11 of the Act of 1975, issued the Banking Licence Regulations 1975 which were concerned with applications for banking licences, renewal of banking licences, the form of a banking licence, and other related matters. From time to time the Treasurer published guidance noted on applications for banking licences."

Turning now to the Act which is the successor to the Protection of Depositors Act, (See Section 45 of the Act,) Part VII provides the legislative scheme for the Regulation against Unsafe Practices. Be it noted that it is obligatory to obtain a licence to accept deposits. Section 3 (1) of the Act reads:

> "3.-(1) A person other than a company duly licensed under this Act shall not in Jamaica -
>
> (a) carry on the business of accepting deposits; or
>
> (b) issue or cause to be issued advertisements for deposits,
>
> and any person who contravenes this subsection shall be guilty of an offence."

So from the inception, the Pantons as shareholders in the Blaise Financial Institutions knew that these institutions were regulated by statutes. It is therefore instructive to refer to Section 25 of The Act. It reads in Part VIII Regulation against Unsafe Practices:

> "25-(1) The Minister after consultation with the Supervisor may in relation to a licensee which is or appears likely to become unable to meet its obligations or in relation to which the Minister has reasonable cause to believe that any of the conditions specified in Parts A and B of the Second Schedule exists take such steps as he considers best calculated to serve the public interest in accordance with this section.
>
> (2) As respects the conditions specified in Part A of the Second Schedule the Minister may -
>
> (a) require the licensee to give an undertaking signed by the majority of the members of the licensee's board, to take such corrective action as may be agreed between the licensee and the Minister; or
>
> (b) give directions to the licensee under 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 licensee in accordance with Part D of that Schedule."

It is important to note that in respect of Section 25(2) (a) of the Act that there was a Joint and Several Undertaking signed by Donald and Janet Panton as well as John Francis and Jeffrey Panton as a majority of the Directors of the Bank to take corrective action detailed in the undertaking. The citation of certain aspects of the undertaking is appropriate. It commenced thus:

"JOINT AND SEVERAL UNDERTAKING

THIS JOINT AND SEVERAL UNDERTAKING is given the Eighteenth day of April, 1994 by the undersigned ("The Board") being a majority of the members of the Board of Directors of BLAISE TRUST COMPANY & MERCHANT BANK LIMITED("The merchant bank") a company licensed under the Financial Institutions Act 1992, to the Minister of Finance and Planning and the Bank of Jamaica (hereinafter together or separately as the context requires called "the Supervisory Authorities".)

WHEREAS

1. Recent examination of the merchant bank has revealed a deteriorating financial condition;

2. Certain practices of the merchant bank are undesirable;

3. Certain aspects of the merchant bank's management are of grave concern including but not limited to the lack of adherence to

sound credit policies, the absence of proper internal audit operations and a shortage of sufficiently capable and experienced managerial staff;

4. The Minister has reasonable cause to believe that conditions specified in Parts A and B of the Second Schedule of the Financial Institutions Act, 1992 exist; and

5. The Board is desirous of taking such corrective action as is calculated to restore the bank to a safe and sound condition;

NOW, THEREFORE, in pursuance of the premises the Board UNDERTAKES to comply strictly with and promote the policies and practices set out below and to take such precise steps recommended by the Supervisory Authorities as appear reasonably to be consistent with the said policies and practices and which may reasonably be deemed to be in the interest of the depositors of the merchant bank, namely, as follows:

1. (i) The merchant bank will itself co-operate, and will take all necessary steps to ensure that

(a) Blaise Building Society;

(b) subsidiaries of the merchant bank;

(c) other companies which fall within the definition of connected persons under the Financial Institutions Act including any company holding a majority of the shares of the merchant bank,

cooperate with the Special Consultant ("the Consultant") selected by the Supervisory Authorities to monitor the implementation of this Undertaking and to advise on necessary corrective action

(ii) It is understood that provisions of this undertaking will require the taking of action or the refraining from action by the merchant bank and that such requirements may be applicable to the entities referred to in sub-paragraph (i) above; accordingly each such requirement

where so relevant shall be deemed to include the merchant bank taking all necessary steps to ensure that the action is taken or not taken as the case may be, by the relevant entity.

2. It is understood and agreed that the Consultant will be required to report regularly to the Supervisory Authorities and that any such report will not be in breach of the confidential nature of the merchant bank's operations."

There are a number of other provisions and the final one reads:

"17.It is agreed and understood that the remuneration of the Special Consultant will be reimbursed to the Bank of Jamaica by the merchant bank."

Since the specific complaint of the Pantons, was that the assumption of Temporary Management by the Minister, under the Act amounted to compulsory acquisition in contravention of Section 18(1) of the Constitution, it is necessary to examine Section 25 and the provision of Part D of the Second Schedule of the Act.

PART D

Temporary Management of a Licensee

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

(2) The Minister may appoint any person to manage on his behalf any licensee specified in the 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 licensee and shall be published in a newspaper printed and circulated in Jamaica."

Here are the three notices pertaining to the Blaise Financial Institutions. In respect of the Bank the notice reads:

> "December 17, 1994
>
> NOTICE
>
> In pursuance of the powers conferred on me by Section 25(3) (c) of the Financial Institutions Act, 1992, and Part D of the Second Schedule thereof, I hereby serve notice of my intention to assume the temporary management of Blaise Trust Company and Merchant Bank Limited with effect from 11.00 a.m. on the 18th December, 1994.
>
> OMAR DAVIES
> Minister of Finance and Planning"

The inference must be that between the undertaking of April and the Notice of December, the Bank had not complied with the Undertaking.

For the Building Society here is the notice:

> "April 10, 1995
>
> NOTICE
>
> In pursuance of the powers conferred on me by Regulation 64(d) of the Bank of Jamaica (Building Societies) Regulations, 1995, and Part B of the Schedule thereof, I hereby serve notice of my intention to assume the temporary management of Blaise Building Society with effect from 3:00 p.m. on the 10th April, 1995.
>
> Omar Davies
> Minister of Finance and Planning."

As regards the Provident Society the notice was as follows:

"April 10, 1995

NOTICE

In pursuance of the powers conferred on me by Regulation 8 (d) of the Bank of Jamaica (Industrial and Provident Societies) Regulations, 1995, and Part B of the Schedule thereof, I hereby serve notice of my intention to assume the temporary management of Consolidated Holdings Limited, an industrial and provident society, with effect from 3:00 p.m. on the 10th April, 1995.

Omar Davies
Minister of Finance and Planning."

The effect of the Notices is stipulated in the following paragraphs in Part D of the Second Schedule:

"1.- (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 licensee, 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 licensee; and

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

(5) Not later than sixty days after the Minister has assumed temporary management of the licensee he shall apply to the Court (furnishing full particulars of the assets and liabilities of the

> licensee) for an order confirming the vesting in the Minister of full exclusive powers of management of the licensee as described in sub-paragraph (4).
>
> (6) All expenses of and incidental to the temporary management of a licensee shall be paid by such licensee in such manner as the Minister may determine."

Paragraph 1(5) above must be read in conjunction with paragraph 3 (a) which is cited later to show that the statute provides for the owners as shareholders to challenge the Minister in the Supreme Court when the Minister seeks confirmation of his status as Temporary Manager. Prior to that he was a Provisional Temporary Manager. Further by parity of reasoning if **Lawrence** supra had a right as a shareholder to challenge the constitutionality of an Act, he had the right to challenge the legality of a Minister's conduct.

To reiterate 1 (5) above is important as there is a complaint that the Pantons will be deprived of the value of their shares by the unilateral action of the Minister. The Court mentioned is the Supreme Court. It must be acknowledged that the Minister's assumption of Temporary Management is provisional until confirmed by the Supreme Court. The mandatory provisions for publication of these Notices stipulated in paragraph 1(3) supra would have enabled the Pantons to challenge the Minister in the Supreme Court. The Court on the basis of the assets and liabilities presented could in its own discretion direct the Minister or serve the summons on the Pantons or other shareholders. So the claim that there was a denial of natural justice on this aspect of the case was not well founded. Here is the evidence of the confirmatory proceedings in respect to the Merchant Bank.:

> "Before the Honourable Mr. Justice Reckord
> The 15th day of February, 1995.

> UPON THIS MOTION coming on for hearing this 15th day of February, 1995 and after hearing Mr. Douglas Leys and Mrs. Llyle Sloley Attorneys-at-Law instructed by the Director of State Proceedings for the Applicants and Mr. John Vassell for the Defendants IT IS HEREBY ORDERED THAT:
>
> 1. Pursuant to paragraph 1 (5) of Part D of The Second Schedule of the Financial Institutions Act the vesting in the Minister of full exclusive powers of management of Blaise Trust Company and Merchant Bank Limited of 9 Trinidad Terrace, Kingston 5 as described in paragraph 1 (4) of Part D of the Second Schedule of the Financial Institutions Act be confirmed."

The declaration sought in the Grounds of Appeal which reads:

> "A Declaration that the Applicants were entitled to:
>
> (a) adequate notice of the Minister's intention:
>
> (i) ...
>
> (ii) to apply for confirmation of a vesting order in the Minister full and exclusive powers of management of the Blaise Financial Insitutions.
> ..."

could be granted.

However, the wording of the Declaration sought shows that the Pantons knew of their rights before the Supreme Court. That they did not challenge the confirmation is some indication that they accepted the insolvency of the Bank and that their shares had no value. In these circumstances since the grant of a Declaration is discretionary (see Section 239 of the Civil Procedure Code Law) I would refuse the grant of the declaration sought. The issue of whether there were confirmation of proceedings in respect of the two other Blaise Financial Institutions will be addressed later.

This issue of a challenge by any other person apart from the licensees was raised in the **Century National Bank Ltd. and Others v Omar Davies** Privy Council Appeal No 52/97 delivered 16th March, 1998 with respect to private law actions by Mr.Crawford and his mother against the Temporary Manager. Lord Steyn specifically left the point open as to a challenge in the Supreme Court thus at page 9:

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

In recognising that in regulating the business of banking it is appropriate to make provisions for a Temporary Manager in clearly defined circumstances, Lord Steyn said in the **Century National Bank** case at page 9:

> "After all, as Part D shows, a Temporary Manager may continue or discontinue the business; stop or limit payment of obligations; dismiss or employ officers or employees; and so forth. He must be able to deal with third parties and they need to know where they stand. Moreover, a lengthy period of uncertainty about the status of temporary management of the bank will greatly complicate, for example, the possibility of working towards a scheme of arrangement with creditors or

> reconstruction of the bank. The need for certainty and finality about the temporary management in the public interest is manifest."

Further Lord Steyn continuing at page 11 said:

> "Moreover, even if one concentrates on Part D only, it is clear that the Minister may embark on temporary management as the best way of realising the assets of the bank and achieving an arrangement with creditors. This follows from the fact that under paragraph 1 (4) of Part D the Minister has the power upon inception of the temporary management to discontinue the operations of the bank. If the Minister decides to take this course it will usually make a restoration of the bank impossible. Effectively the Minister will then from the start be left with a choice between subsequent winding up or a scheme of arrangement or reconstruction. Counsel's arguments on Part D are misconceived. But the dominant provisions, which serve to define the circumstances in which the Minister may assume temporary management of a bank, are contained in section 25(1) and (3). These provisions expressly allow the Minister to take the step of assuming temporary management not only when Part B conditions exist (which include unsafe and unsound practices) but also when a bank is unable to meet its obligations. Those provisions are disjunctive. This is a perfectly practical and sensible statutory scheme. It enables the Temporary Manager during the temporary management of an insolvent bank, while there is a moratorium on legal proceedings or execution against the bank, to make proposals for a scheme of arrangement or a reconstruction. This bears some comparison with the statutory provision in this country for an administration order so as to achieve "a more advantageous realisation of company's assets than would be effected on a winding up". Insolvency Act, 1986, section 8; **In re Harris Simons Construction Ltd.**[1989] 1 W.L.R. 368, at 371D, per Hoffmann J. (now Lord Hoffman)."

Once the Minister had assumed temporary management one basis on which the Pantons could have invoked the jurisdiction of the Supreme Court was in proceedings for confirmation of the Temporary Manager. That would be a claim in administrative law. They had standing in their capacity as shareholders. As such they are the owners. The alternative method was by the provisions of Section 25 (1) of the Constitution. That section reads:

> "25.-(1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

Then 25 (2) and the proviso reads:

> "25.-(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

The Pantons were effectively deprived of their property rights as shareholders once the Minister managed The Blaise Financial Institutions. So they had the requisite standing pursuant to Section 25(1). There is some support for this stance in **Attorney-**

General of St. Christopher and Nevis v Lawrence 31 WIR 176 at 185, where Sir Neville Peterkin, C.J said:

> "No-one but one whose rights are directly affected by a law can raise the question of the constitutionality of that law. A corporation has a legal entity separate from that of its shareholders. Hence, in the case of a corporation, whether the corporation itself or the shareholders would be entitled to impeach the validity of the statute will depend upon the question whether the rights of the corporation or of the shareholder have been affected by the impugned statute. But it may happen that while a statute infringes the fundamental rights of a company, it also affects the interests of its shareholders; in such a case, the shareholder also can impugn the constitutionality of the statute **(see Cooper v Union of India** 1970) 1 SCC 248). In the instant matter, as I see it, if Lawrence can allege and show an infringement in relation to him, then he gains ***locus standi***, and he becomes entitled thereby to raise the constitutionality of the entire law in relation to the property of the company. Having concluded that his application was well founded in relation to Lawrence the trial judge was quite right in my opinion to consider the law in general application and to declare as he did on the question of its validity."

Since there is a complaint about breach of natural justice the provisions of paragraph 2 of Part D of the Second Schedule were relevant. They read:

> "2.-(1) A licensee which is served with a notice under paragraph 1 may, within ten days after the date of such service, appeal to the Court of Appeal and that Court may make such order as it thinks fit.
>
> (2) The Court of Appeal may, on sufficient cause being shown, extend the period referred to in sub-paragraph (1).
>
> (3) The Minister may, if he considers it to be in the best interests of the depositors of a licensee which is being temporarily managed by him, apply to the Court for an order staying -

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

(b) any execution against the property of the licensee."

The exceptional provision of conferring original jurisdiction on the Court of Appeal for the benefit of the licensee was considered in the **Century Bank case** (supra). I will return to this issue later. It is necessary now to explain the origins of that case so that the contrasts to and the similarities with the instant case are highlighted. That was a case of a private law action, and this is how Lord Steyn considered it at page 6:

"A forensic narrative

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

Then the second set of actions were described thus:

"On 22nd October 1996 the Boards of Directors of the three institutions under temporary management started three separate actions against the Minister, the Temporary Manager and his firm. The plaintiffs claimed declarations that the assumption of temporary management of each institution was unlawful. They also claimed damages for trespass, conversion and wrongful interference in the business of the institutions. The

> actions can be described as the "Directors' actions". The three defendants promptly applied by summons to strike out the Directors' Actions on the ground that they disclosed no reasonable cause of action. Wolfe C.J. heard those applications. On 20th November 1996 he ordered all three actions to be struck out."

Continuing the narrative Lord Steyn said:

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

Against this background Lord Steyn in defining the issues raised said:

> **"The Issues**
>
> The shape of the arguments as deployed by counsel for the appellants on the present appeals differs somewhat from the arguments put before the Court of Appeal. Concentrating on the arguments advanced before their Lordships, it will be convenient to examine the principal issues arising in the following order:-
>
> (1) Whether the remedy under paragraph 2 (1) of Part D of the Banking Act of an appeal by the bank to the Court of Appeal is an exclusive remedy and, if so, what the consequences are;
>
> (2) Whether the assumption of temporary management was unlawful inasmuch as no prior notice was given or on the ground of procedural unfairness;
>
> (3) Whether the assumption of temporary management was unlawful because the

> institutions were insolvent and a petition for winding up was the only appropriate measure.
>
> After considering these issues their Lordships will comment briefly on other issues and consequential matters."

I have adverted to the **Century Bank** case to demonstrate that although the instant proceedings were in public law pursuant to Section 1(9) of Chapter 1 and Section 25 of Chapter III of the Constitution the Pantons in the Court below and in this Court raised without opposition from the respondents some issues which could properly have been raised by the licensee directly in this Court. The **Century Bank** case is relevant to the legality and the merits of the Minister's action and since some of those mattes were fully argued in this court I will revert to them when I have concluded the issue of the constitutionality of the Act. Returning to the constitutional issue, the following protective provisions in paragraph 3 of Part D of the Second Schedule to the Act reads:

> "3. Where the Minister has served notice, on a licensee under paragraph 1, he shall within sixty days from the date specified in such notice or within such longer period as a Judge of the Supreme Court may allow -
>
> (a) restore the licensee to its board of directors or owners as the case may be; or
>
> (b) present a petition to the Court under the Companies Act for the winding up of the licensee; or
>
> (c) propose a compromise or arrangement between the licensee and its creditors under section 192 of the Companies Act or a reconstruction under section 194 of that Act." [Emphasis supplied]

The emphasised words make it clear that paragraph 3(a) contemplates that the owners i.e. the shareholders are to have access to the Supreme Court at confirmation so that they can state a case that the Provident Society or Building Society ought to be returned to them. This is no empty provision, it goes to the root of the appellants' claim in respect of two of the Blaise Financial Institutions.

These additional provisions further demonstrate that a Temporary Manager is not meant to be permanent. He must keep within the statutory limits imposed by Part D and so paragraphs 3 (b) and (c) fall within Section 18 (2) (g) of the Constitution. Counsel for the appellants relied on the statement of principle in **Pallai v Mandanayake** to contend that under the guise of regulation the provisions of Part D of the Second Schedule to the Act amount to compulsory acquisition without provision for compensation. The principle was stated in **Inland Revenue Commissioner and Attorney-General v Lilleyman and Others** (1964) 7 W.I.R. 496 at 505 thus.

> "Indeed Lord Oaksey in delivering the opinion of the Board in **Pallai v Mandanayake** [1955] 2 All ER at page 837 when dealing with the character of the challenged legislation said:
>
> ... There may be circumstances in which legislation, though framed so as not to offend directly against a constitutional limitation of the power of the legislature, may indirectly achieve the same result, and that in such circumstances the legislation may be ***ultra vires*** . The principle that a legislature cannot do indirectly what it cannot do directly has always been recognised by their Lordships' Board, and a legislature must, of course, be assumed to intend the necessary effect of its statutes.... If there was a legislative plan the plan must be looked at as a whole..."

Respondents' counsel however stated that when the Act is considered as a whole, it is manifest that the regulations are in the interest of sound banking. Further

Mr. Campbell has stated without contradiction that some $90M has been paid out to depositors because of the insolvency of the Bank. The above passage from **Pillai** was cited from the judgment of Jackson, J.A. Archer P, at 523 in **Lilleyman** at page 523 cites an equally apt passage. Here is how he put it:

> "Their Lordships emphasised that the principle that a legislature cannot do indirectly what it cannot do directly has always been recognised by their Lordships' Board. They pointed out that where there is a legislation plan it must be looked at as a whole and said (per Lord Oaksey) [1955] 2 All E.R. at p. 838):
>
> 'The cases which have been decided on the British North America Act, 1867 [U.K.] , and the Australian Constitution have laid down the principle which their Lordships think is applicable to the present case, although it is true that in those cases the question was as to the construction of legislative subjects assigned to the Dominion or Commonwealth Parliaments on the one hand, and to the legislatures of the provinces or States on the other whereas in the present case the question is as to the construction of a constitutional limitation on the general sovereign power of the Ceylon legislature to legislate for the peace, order and good government of Ceylon. But, in their Lordships' opinion, the question for decision in all these cases is in reality the same, namely, what is the pith and substance, as it has been called, or what is the true character of the legislation which is challenged'."

To my mind, the main thrust of the appellant's submission that the provisions of Part D in the Second Schedule to the Act were unconstitutional has not succeeded. The provisions of the Act which were challenged can be justified under Section 18(2) (f) (g) or (k) as well as Section 18 (3) of the Constitution (supra). Since Section 18 (3) is the most comprehensive of these constitutional provisions it is necessary to reiterate it,

to demonstrate the regulatory powers of Parliament in this regard. The essentials for this case reads.

> "Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides ...for the reasonable restriction of the use of any property in the interests of safeguarding the interests of others or the protection of... licensees or others having rights in or over such property."

The fundamental right is 'the enjoyment of property'. Property is a legal institution created by the common law and by statute. Here is how the Interpretation Act defines property.

> " 'Property' includes money, goods, things in action, land and every description of property, whether real or personal; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined."

A share in any of the Blaise Financial Institutions is undoubtedly property and a share has been defined thus in the Companies Act in Section 73(1):

> "The shares or other interest of any member in a company shall be personal estate, transferable in manner provided by the articles of the company, and shall not be of the nature of real estate."

The provisions in Part D of the Second Schedule of the Act are just an instance of the regulation of property and so it is within the ambit of Sections 18(2) and (3) of the Constitution. There was no need therefore to provide for compensation when these regulatory provisions of the Act were enforced.

In light of the above, grounds 3 and 5 of the amended Grounds of Appeal which read:

> "3. The Constitutional Court having found that the Applicants were temporarily restricted in the use

> of their property, erred in law by failing to find that this temporary restriction without permission and/ or consent, compulsorily deprived them of possession of their property
> ...
>
> 5. The Constitutional Court erred in law in holding that the exemptions in Sections 18 (2) and (3) of the Constitution deprived the Applicants/ Appellants of the protection of Section 18 (1) of the Constitution."

have failed in respect of the Bank.

Also Grounds 1, 2 and 4 are just alternative ways of stating Grounds 3 and 5. Grounds 1, 2 and 4 read:

> "1. The Constitutional Court erred in law in holding that the assumption of the temporary management of the institutions cannot by any reasonable construction be considered compulsorily taking possession of property.
>
> 2. The Constitutional Court erred in law in holding that the temporary management of a person's property through a regulatory process aimed at protecting the interest of the public does not lead to compulsorily taking possession of, or acquisition of the property.
> ...
> 4. The Constitutional Court erred in fact in finding that the restriction of the Applicants/Appellants use of their property did not amount to a deprivation of their property and/or a taking possession of their property and/or an acquisition of their property."

These alternatives have also failed with respect to the Bank. The sixth ground of the amended Grounds of Appeal reads:

> "6. The Constitutional Court erred in law in dismissing the Further Amended Originating Notice of Motion in holding that the Applicants'/appellants' rights to a fair hearing and/or their legitimate expectation under Section 20 of the Constitution were not contravened."

Section 20 (2) of The Constitution reads:

> "20(2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

It is difficult to understand this ground of appeal in the light of the provisions in paragraph 2(1) in Part D of the Second Schedule to the Act (supra). The answer to this ground is provided by Lord Steyn in the **Century Bank** case at page 8. His Lordship said of this exceptional provision:

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

> is a time limited provision vesting, exceptionally, original jurisdiction in the Court of Appeal to hear an appeal by the bank in respect of the notice announcing the Minister's intention to assume temporary management of the bank."

Then His Lordship continued thus:

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

Emphasising that the remedy of appeal to the Court of Appeal excludes common law judicial review, or private law actions, His Lordship said:

> "It is true that Part D does not expressly provide that the right of appeal will be an exclusive remedy. But a necessary or plain implication to the same effect, derived from the language and context of the statute, is enough: see **Barraclough v Brown** [1897] A.C. 615 and **Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government** [1960] A.C. 260. There are cogent factors pointing towards a necessary implication that the appeal is an exclusive remedy. One only has to ask the question whether the legislature, having provided for a speedy general right of appeal to the highest court in Jamaica, intended to leave intact the unfettered right of the directors of the bank to challenge the validity of the assumption of temporary management years later in a private law action at first instance. The language and the context of the statute rules out such an impractical interpretation."

It is true that these exceptional provisions permitting direct access to the Court of Appeal is confined to licensees. But as pointed out earlier a shareholder could not be denied a right of hearing when the Temporary Manager seeks to have his status

confirmed by the Supreme Court. It might be added that the exclusive provision granting licensees direct access to the Court of Appeal or the right to a hearing in the Supreme Court which would be accorded to a shareholder is in conformity with Section 1(9) of Chapter I of the Constitution which reads:

> "No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."

It is one of the oddities of this case which was thoroughly argued on both sides, that the confirmation proceedings before the Supreme Court was not adverted to by either side. Yet Part D of the Second Schedule paragraph 1 (5) suggests that this necessary step ought to have preceded the Scheme of Arrangement before Cooke, J. in respect of the Blaise Financial Institutions on 26th October, 1995. In the court below Langrin, J. said:

> "Mr. Phipps submitted that when the Minister assumed management of the respective companies he had compulsorily acquired property in which the applicants had an interest and property over which they had rights. When the Minister went further by statutory authority to have confirmation of the vesting of interest he was seeking approval of the Court in his unconstitutional act."

Then Smith, J. said:

> "But if necessary within 60 days the Minister must apply to the Court for an order confirming the vesting in the Minister of full and exclusive powers of management."

Then there is the further indication that the matter was raised below. Panton, J. said:

> "According to this amendment, the grounds for this application for a declaration are that the applicants were denied the right to be heard when the Minister gave notice of his intention to take temporary management when he applied to the Court for confirmation of the vesting of temporary management, and when he decided to apply to the Court for a scheme of arrangement."

So Panton and Langrin, JJ assumed the mandatory confirmatory proceedings in the Supreme Court. Smith, J. regarded those proceedings as discretionary. If there were no such proceedings certain legal consequences would follow. Since this Court on its own motion can take a jurisdictional point or alternatively it can be taken at any stage, the issue will be addressed in relation to the Building Society and the Provident Fund.

A curiosity that was not raised but is puzzling is whether there could have been an appeal from the proceedings for confirmation.

What were the circumstances requiring the intervention of the Minister pursuant to Section 25(3) of The Act to assume temporary management of the Blaise Financial Institutions?

Counsel for the appellants challenged the Minister's intervention on the basis of the reports the Minister had received from the Bank of Jamaica in its role as Supervisor and Examiner of Licensees pursuant to Section 29 of the Act. There was no opposition to this stance by Mr. Campbell for the respondents. Further it can be inferred from the citations below that if the Minister's acts were pursuant to a valid law, then the issue as to whether it was appropriate for him to act in the particular circumstances was an issue for judicial review. It could be contended that by invoking Section 25 of the Constitution an aggrieved party ought to be confined to issues which

involve a claim that Chapter III provisions have been breached. If that view is correct then we ought not to have listened to submissions on this ground.

A passage by Viscount Simonds in the **Belfast** case (supra) suggests a distinction between a law which is challenged because it is unconstitutional and the challenge to a Minister who has acted beyond the powers entrusted to him by Parliament. It is the well known distinction between constitutional and administrative law. Referring to the decision of Lord Mc Dermott LCJ, His Lordship said at page 71:

> "My Lords, it appears to me that the short answer to this contention (and I hope that its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases. It is not for the "planning authority" but for the Ministry to determine whether a proposed exercise of the powers is reasonable. That is an administrative duty, to be exercised not arbitrarily but for the purposes of the Act. If it is not so exercised, it is open to challenge and there is no need for express provision for its challenge in the statute. If I understand the learned Lord Chief Justice, he would not consider the section invalid if the duty of deciding on the reasonableness of the exercise of a power was given not to the Ministry but to the judiciary. But I find it difficult to suppose it to be the purpose or theory of any constitution that a purely administrative function of this character should be given to the judiciary rather than to the executive. Matters of policy which are determined by the government and carried out in detail by the aid of experienced administrative staff cannot be confided to the judiciary. Their function begins if and when for any reason administrative action lays itself open to challenge. The measure itself is not open to such challenge unless it is plainly and on the face of it within the prohibition. That condition is not satisfied merely because the powers it confers on the executive may be exercised unreasonably. I am, therefore, of opinion that the ground on which specifically the Lord Chief Justice held the section to be invalid was not sound."[Emphasis supplied.]

The speech by Lord Radcliffe is also of importance to appreciate how the common law presumptions pertaining to acquisition of property or the regulation of it are enshrined in Section 18 of the Constitution. His Lordship put it thus at page 72:

> "I do not see how you can give a meaning to this phrase, 'taking without compensation', except by reference to the general treatment of the subject in the law of England and Ireland before 1920. A survey would, I think, discern two divergent lines of approach. On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless compensation was afforded in its place. Acquisition of title or possession was 'taking'. Aspects of this principle are found in the rules of statutory interpretation devised by the courts which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it. This vigilance to see that the subject's rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual liberty."

Turning to regulatory legislation, Lord Radcliffe said at page 73:

> "Side by side with this, however, and developing with increasing range and authority during the second half of the nineteenth century, came the great movement for the regulation of life in cities and towns in the interests of public health and amenity. It is not an adequate description of the powers involved so far at any rate as the United Kingdom is concerned, to speak of them as 'police powers'. They went far beyond that. Their chief sphere was in the delegated legislation conceded to local authorities, though in some cases they arose from the direct legislation of Parliament itself. Achieved by one means or the other, there is no doubt at all that the effect of them was to

> impose obligations and restrictions on the owner of town land which impaired his right of development, prohibited or restricted his rights of user and in some cases imposed monetary charges on him or compelled him to expend money on altering his property. Generally speaking, though not without exception, these obligations and restrictions were treated as not requiring compensation, though, of course, in a sense they expropriated certain rights of property."

Lord Radcliffe also it seems makes the distinction between the invalidity of the statute and action by the Minister pursuant to a valid provision, although the action might be ultra vires or beyond the provisions of the statute. Here is how he stated the problem at page 74:

> "I do not imply by what I have said that I regard it as out of the question that, on a particular occasion, there might not be a restriction of user so extreme that in substance, though not in form, it amounted to a 'taking' of the land affected for the benefit of the public. It is not very easy to imagine such a restriction being imposed by a responsible authority or surviving the test of the Ministry's approval, the more so as the Act deals separately with open spaces as a subject of acquisition not without compensation. But given that such a case might hypothetically occur, the question for us is whether that possibility in itself is sufficient to invalidate s. 10 (2), the natural subject of which is restrictions and not 'takings'. I do not think that it is. It seems to me the wrong way to treat the constitutional provision. To my mind, it does more justice to its intent if a restriction which is in substance a taking, should one ever occur, is attacked ad hoc as not within the true meaning and scope of s.10 (2) than that the whole subsection should be thrown on the scrap-heap as constitutionally an outlaw."

There is a tenable argument that once the jurisdiction of the Supreme Court is invoked pursuant to Sections 25 of the Constitution it may exercise the full powers

accorded it by Section 97 of the Constitution, its common law powers of judicial review, its inherent jurisdiction, and the statutory powers pursuant to the Judicature (Supreme Court) Act. Further as was stated previously, judicial review is expressly recognised in Section 1(9) of Chapter 1 of the Constitution.

It is now necessary to advert to the evidence adduced before the Court below to justify the Minister in the exercise of his powers to assume Temporary Management in respect of the Blaise Financial Institutions. Here is how it was put by the Pantons:

> "3. That we are both businesspersons and the controlling shareholder of a group of companies, including Blaise Trust Company and Merchant Bank Limited (hereinafter called the "Bank"), Blaise Building Society (hereinafter called the "Society") and Consolidated Holdings Limited.
>
> 4. That in or about February 1994, I was called to a meeting by the Minister of Finance, Dr. Omar Davies. That this meeting was attended by the Governor of the Bank of Jamaica (hereinafter called "BOJ"), a Mrs. Anderson along with 12 or 14 other staff of BOJ and the Minister of Finance, a Mr. John Francis, the 2nd Applicant and myself from the Bank. That the meeting was chaired by the Minister of Finance, but in total control of the meeting was the Governor of the BOJ. That this was the first of a series of meetings that took place in 1994 which was the result of the normal inspector's report carried out by the said Mrs. Anderson. That this report revealed 3 or 4 breaches of the new 1992 Financial Act, but the said report was centered around the purchase of Navy Island and other aspects of the Bank which made it appear to be more serious than the actual 3 or 4 breaches that were committed.
>
> 5. That we were told that we should accept BOJ's consultant to be placed at the head office and that BOJ would immediately do an audit on the Bank's affairs. That the Minister made it very clear that he would take over the management of the Bank, if we did not agree."

The Minister's reply in part was as follows:

"3. That in answer to paragraph 4 of the said Affidavit it is incorrect to say that the Governor of the Bank of Jamaica (hereinafter referred to as "the Governor") was in total control of the meeting. The meeting was totally under my control. That I explained to Mr. Panton that the meeting was mainly the result of an Inspection Report which had been commissioned on Blaise Trust Company and Merchant Bank Limited (hereinafter referred to as "BTCMB") by Mrs. Audrey Anderson, Deputy Supervisor of Banks and Financial Institutions, Bank of Jamaica (hereinafter referred to as "BOJ") pursuant to the provisions of the Financial Institutions Act. That I invited the Governor to outline the major problems indicated in the Report. That the said Report revealed 16 breaches of the 1992 Financial Institutions Act and that BTCMB was facing serious operational/financial problems. That it is incorrect to say that 'the Report was centred around the purchase of Navy Island and other aspects of the Bank which made it appear to be more serious than the actual 3 or 4 breaches that were committed'. That the Report indicated that unsatisfactory to poor ratings were accorded in all areas of operations and that BTCMB appeared to be facing insolvency. There is now produced and shown to me marked "ODI" for identity a copy of the said report.

4. That in answer to paragraph 5 it is incorrect to say that BTCMB was told to accept BOJ's consultant to be placed at its head office. That the management of BTCMB was given a copy of the said report and asked to comment and indicate what measures it would take to rectify the problems. That I am informed by Mrs. Audrey Anderson and do verily believe that the management of BTCMB met with her and other members of staff of the BOJ at which time the management concurred in the findings of the Report and indicated steps that had already been taken, and further to this, forwarded a Business Plan to rectify the situation. That the Business Plan appeared inadequate and I instructed Mrs. Anderson to submit an Undertaking Letter for the Board of BTCMB to sign agreeing to the measures set out in the Undertaking Letter which included the presence in BTCMB of a consultant employed

> by the BOJ to oversee the fulfillment of the Undertaking and to give any assistance possible to BTCMB. That at the said meeting I explained to the management of BTCMB that the Undertaking represented a co-operative method of achieving remedial measures but that if the Board of Management could not by signing the Undertaking and accepting the Consultant give assurance of compliance, then in the interest of the depositors and in pursuance of my responsibility for the Financial Sector, I would be obliged to take over temporary management of BTCMB to ensure that the measures were carried out, failing which, I would pursue other options at law. That I am informed by Mrs. Anderson and do verily believe that the terms of reference to the Consultant were communicated to the management of BTCMB by Letter of April 21, 1994 but at no time was any authority given to reorganize and restructure BTCMB. There is now produced and shown to be marked "OD2" a copy of the said letter."

It is pertinent to cite another paragraph from the Minister's affidavit:

> "11(a) That in answer to paragraph 14, on the 18th day of December 1994 by virtue of the powers vested in me under the Financial Institutions Act I assumed temporary management of BTCMB and appointed Philmore Ogle, Chartered Accountant of the Accounting Firm, Deloitte Touche Tomatsu to manage the said company on my behalf. That the said Philmore Ogle prepared and filed in this Honourable Court on the 10th day of February, 1995 and the 2nd day of June, 1996 two Reports on BTCMB which revealed that at the time of my assuming temporary management of BTCMB, the transactions affairs and cash resources of the three Blaise Financial Institutions ("the institutions" were intermingled to such an extent that a detailed and accurate separation of them would have been most time consuming and in some respects impossible. There are now produced and shown to be marked "OD5" and "OD6" for identity copies of the said Reports. That it was virtually impossible to treat the said institutions as separate entities and as such the documents relating to all three institutions had to be held by the said temporary manager with a view of determining with some certainty the deposits and liabilities of each institution. That

> without withholding the said documents it was impossible for me to have effectively discharged my functions under the Financial Institutions Act. That during the course of unraveling the co-mingled deposits and liabilities, I assumed temporary management of BBS pursuant to the Bank of Jamaica (Building Societies) Regulations of 1995. That it is therefore, incorrect to say that I assumed temporary management of BBS and CHL on the 18th day of December, 1995. That on the contrary, I assumed temporary management of these latter institutions on April 10, 1995 by virtue of powers vested in me under the Bank of Jamaica Act at which time I appointed the said Mr. Philmore Ogle and Mr. William Thwaites, Chartered Accountant of the Accounting Firm Peat Marwick to manage CHL and BBS respectively on my behalf. That the said temporary managers prepared and filed in this Honourable Court on the 2nd June 1995 two Reports on the operations of these institutions. These are now produced and shown to me marked "OD7" and "OD8" for identity copies of the said Reports." [Emphasis supplied]

The emphasised passage will be of relevance when the issue of retrospective legislation is addressed. Paragraph 11(b) is of vital importance. It adverts to confirmation proceedings before Record, J. of 15th February, 1995. The proceedings concern the Merchant Bank and it is now necessary to refer to the pertinent section, of the Minister's affidavit.:

> "11(b) That on the 10th day of February 1995, a Notice of Motion was filed in the Supreme Court on my behalf requesting the Court to confirm the vesting in me of full exclusive powers of management of BTCMB. That the Honourable Court granted the Order requested. There is now produced and shown to be marked "OD9" for identity a copy of the said Order."

The Order of Record, J. has been referred to supra. It is interesting to note that in a later affidavit of 17th October the Minister again referred to the confirmatory Order of Record, J. thus:

> "6. That in reply to paragraph 11 of the said Affidavit, an Order confirming the vesting in the Minister of full exclusive powers of management of BTCMB was made by this Honourable Court on February 15, 1996. I exhibit hereto and mark for identification "OD2" a copy of the said Order."

This response was a reply to the affidavit of Donald Panton, paragraph 11 which reads:

> "11. That after the illegal take over of the Bank no vesting orders were granted in relation to Blaise Trust Company and Merchant Bank in accordance with Section 15 of Part D of the Second Schedule of the Financial Institutions Act."

Donald Panton really meant paragraph 1(5) of part D of the Second Schedule of the Act.

There is a need for a further reference to paragraph 11 (b) of the Minister's affidavit. It continued thus:

> "That on the 2nd day of June 1995 a Notice of Motion was filed on my behalf in the Supreme Court requesting the Honourable Court to confirm the vesting in me of full exclusive powers of management of BBS and CHL respectively.. That the Honourable Court granted the Orders requested."

It will be necessary to return to this aspect of the matter as there is no trace of these confirmatory orders in the record relied on in this Court. Then paragraph 12 reads:

> "12. That in answer to paragraph 15, at the time of assuming temporary management of BTCMB the findings of the said Inspection Report exhibited herein revealed that there were several breaches of

> the Financial Institutions Act which led me to believe that the said institution was insolvent. Furthermore, the said Report of Philmore Ogle revealed that at the time of my assuming temporary management of the said institution there was a significant co-mingling of assets among BTCMB, BBS and CHL with deposits being transferred to BTCMB from the other institutions and re-transferred between the three institutions, with scant regard for corporate boundaries. That I have been informed by Mrs. Audrey Anderson and do verily believe that at no time did the BOJ admit that BTCMB was solvent at the time of closing nor did I so admit."

In the light of the above evidence it is clear that the Minister was justified in exercising his powers pursuant to Section 25(3) (c) and Part D of the Second Schedule to the Act.

Other issues raised during hearing

(i) Stay of Actions and disposals by Financial Institution Services Ltd.

Financial Institutions Services Ltd. had intervened in this Appeal but withdrew with leave of this Court when the Pantons withdrew their request during the course of the hearing that there be a stay of all actions by the Temporary Manager and a further stay of agreements for the sale or disposal of the assets of the Blaise Financial Institutions. It is helpful to set out how the stay was requested in the Notice and Grounds of Appeal:

> "4. A stay of all actions commenced in the name of the Bank, the Society, Consolidated and/or Financial Institutions Services Limited against the Applicants since their management has been taken over by the Temporary Manager and/or his nominees, and a stay of all or further proceedings, sale, transfer and agreements by the Minister of Finance, the Temporary Manager of the Bank, The Building Society, Consolidated and/or Financial Institution Services Limited or the Minister's agents or nominees as they relate to the Bank, the Building Society, Consolidated, Financial Services Limited and/or their assets."

It is appropriate therefore to turn to the affidavit of Donald Panton to ascertain the status of Financial Institution Services Ltd. The relevant paragraphs read:

> "32. That as a result of the Scheme of Arrangement a company by the name of Financial Institutions Services Limited was incorporated. This company is duly incorporated under the Laws of Jamaica with the Accountant General of Jamaica being the majority shareholder.
>
> 33. That Financial Institutions Services Limited (hereinafter called "FIS") has taken control of all of the property and assets of the Bank, the Society and Consolidated.
>
> 34. That FIS has advertised for sale various parcels of realty owned by the Bank and I fear that some of the Bank's assets have already been sold."

In this context the affidavit of Patrick Hylton is instructive and speaks for itself:

> "I PATRICK HYLTON, being duly sworn, make oath and say as follows:-
>
> 1. That my address is 9 Trinidad Terrace, Kingston 5, in the Parish of Saint Andrew, and I am Managing Director of Financial Institutions Services Limited by which I am duly authorised to make this Affidavit.
>
> 2. That I exhibit herewith marked "PH 1" a copy of the Schemes of Arrangements proposed by the Minister in relation to the three Blaise institutions, Blaise Trust Company and Merchant Bank Limited, Blaise Building Society and Consolidated Holdings Limited, and the Orders of the Supreme Court sanctioning the said Schemes. Financial Institutions Services Limited is the entity referred to in the said Schemes as FIS.
>
> 3. That the Applicants, Donald Panton and Janet Panton, were each served with Notices of the meetings of the creditors of the three Blaise institutions at which the Schemes of Arrangements were proposed and approved. They did not attend any of the meetings and did not oppose the Scheme, and, in fact, Mrs. Janet Panton gave me

> a proxy with specific instructions to vote on her behalf in favour of the Schemes.
>
> 4. That I have seen the accounts of Blaise Trust Company and Merchant Bank Limited and Consolidated Holdings Limited, prepared by Mr. Philmore Ogle during the period when he was Temporary Manager of these institutions on appointment by the Minister and that prepared by him and Mr. William Thwaites as Temporary Manager of Blaise Building Society and all three institutions were, at the material times, insolvent."

A somewhat unusual feature of this case, was, there was no expert evidence from the Pantons to counter paragraph 4 above before Financial Institution Services withdrew from this appeal. In fairness to the Pantons, counsel did mention that the question of costs was one of the considerations which made it prudent for them not to continue at this stage their complaints against the Intervener.

There was a complaint by counsel for the Pantons that no use ought properly be made of the ground of appeal or the affidavits since the ground was withdrawn and the Intervener also withdrew with leave of the Court. To my mind the Pantons discontinued their appeal in this regard but the sworn evidence adduced can be used by this Court to elucidate the ultra vires point which may be of assistance to them.

(ii) <u>The effect of Amending Legislation</u>

There was a submission that the amendments to the Financial Institutions Act in section 25F contains provisions for compensation the lack of which in the parent Act was the principal complaint in these proceedings. This amendment was necessary for there are provisions for the compulsory acquisition of shares in section 25B. It is of no assistance to the Pantons since under the Regulatory provisions of The Act they were not deprived of their shareholdings by the assumption of Temporary Management by the Minister.

(iii) The issue of the protection of the Companies Act as regards the Pantons' shareholdings.

The outcome of the appellants' shareholdings is governed by the status of the Temporary Manager. The Minister must within sixty days either restore the licensee to its Board of Directors or owners as the case may be, or present a winding up petition to the Court under the Companies Act or propose a compromise or arrangement pursuant to Section 192 or 194 of the Companies Act. See paragraph 3 of Part D of the Second Schedule. Here is how those sections pertaining to compromise and arrangement were construed in the English Companies Act. **In re Tea Corporation, Limited Sorsbie v Same Company** 1904, Ch. 12 cited by Mr. Campbell, Vaughan Williams, L.J. said at p.23:

> "It is said, however, that the scheme is rendered defective because the ordinary shareholders did not vote in favour of it. I think the right answer to this was given by Buckley J. You are to divide the shareholders into classes, and when you have done that you find that the preference shareholders have an interest in the assets. But when you come to the ordinary shareholders you find that they have no interest whatever in the assets, and Buckley J. was of opinion that, having regard to this fact, their dissent from the scheme was immaterial. I think that the learned judge was right in so doing. it seems to me that by the very terms of s. 24 you are to divide the contributories into classes and to call meetings of each class, and if you have the assent to the scheme of all those classes who have an interest in the matter, you ought not to consider the votes of those classes who have really no interest at all. It would be very unfortunate if a different view had to be taken, for if there were ordinary shareholders who had really no interest in the company's assets, and a scheme had been approved by the creditors, and all those were really interested in the assets, the ordinary shareholders would be able to say that it should not be carried into effect unless some terms were made with them. In my opinion the

> decision of the learned judge was right, and the appeal should be dismissed."

Then Romer L.J. put it this way at p. 24:

> "The learned judge, as I understand came to the conclusion upon the evidence before him as to the value of the company's assets that the ordinary shareholders had no interest in the assets, and I cannot gather from the appellant's counsel that the judge was in substance wrong in coming to that conclusion. Having regard to the evidence and the admissions made in the Court below, I think he was right in drawing the inference that the ordinary shareholders had no interest, and I base my judgment solely on that ground."

Sterling L.J. was of the same mind. He said at p. 25:

> "Having regard to what took place in the Court below, it must, I think, be taken that the assets are not sufficient to meet the claims of the creditors and the preference shareholders, and that the ordinary shareholders have no interest. In this state of things it seems to me that it was within the power of the Court to sanction the scheme, as regards the creditors under s. 2 of the Act of 1870, and as regards the preference shareholders under that section combined with s. 24 of the Companies Act, 1900."

It is important to emphasise that the Arrangements pursuant to Section 192 and 194 of the Companies Act are under the control of the Courts. The Pantons would have been able to claim the value of the shares if any before the Court. Section 192(1) shows that the members' interests are not ignored. It reads:

> "192.-(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or

> class of members, as the case may be, to be summoned in such manner as the Court directs."

In the light of the above the Declaration sought cannot be granted. How useful a grant would be is questionable for if the Pantons have a serious claim they ought to have gone before the Supreme Court to vindicate those rights. Once again when the declaration sought is considered it demonstrates that the Pantons merely wish to state a point. They have no real interest in their shares which were probable without value.

Here is the Declaration sought in the Amended Notice and Grounds of Appeal.

> "5. A Declaration that the Applicants were entitled to:
>
> (a) adequate notice of the Minister's intention:
>
> (i) to assume Temporary Management of the Blaise Financial Institutions;
>
> (ii) to apply for confirmation of a vesting order in the Minister full and exclusive powers of management of the Blaise Financial Institutions;
>
> (iii) of the application to restructure the respective companies and distribute their assets under Schemes of Arrangement
>
> (b) To be heard in opposition."

It must be reiterated he had ample opportunity to challenge the confirmatory proceedings before Record, J. in respect of the Bank. What may be an issue was the lack of confirmatory proceedings with respect to the other two Blaise Financial Institutions and in that context 5(a) (ii) and (iii) above may be of importance.

Also relevant in this context is that they withdrew the stay against Financial Institution Services Ltd. Since the grant of the Declaration sought is discretionary I would refuse the grant in respect of the Bank since it would serve no useful purpose as

it would not accord with facts or law. It is true that the Arrangements in respect of the Merchant Bank and the Provident Society in Clause 11 reads:

> "11. Should any surplus remain after the above distribution the distribution of such surplus shall be determined by the Minister of Finance and Planning in such manner as he deems fit."

If the Pantons were serious about this clause they should have appeared before Cooke J. on 26th October 1995 and challenged the Scheme. It is not an issue that ought to be decided by this Court of Appeal in actions for constitutional redress and for challenging the legality of the Minister's action. It must be stressed that Sections 192, 193, 194, 195, and 195A of the Companies Act provide ample protection for shareholders. It is unthinkable that a Supreme Court judge would sanction a Scheme without reading and applying these sections.

(iv) The issue of retrospective legislation and the provision of Section 18(2) (k) of the Constitution

Another live issue was the effect of retrospective legislation with respect to the Building Society and The Provident Society. It is useful to turn once again to the Affidavit of the Minister. Here is his evidence on the issue:

> "7. In this regard I have instructed the Governor of the Bank of Jamaica to hold non prejudical discussions with NCB with a view to arriving at common understanding on which such a scheme could be effected. However before any decision can be taken and the possible terms of such a scheme effected I would have to be legally in control of the remaining two entities namely Blaise Building Society and Consolidated Holdings Limited. I was unable to assume control of these two entities prior to the 7th of April 1995 because I did not have any legal basis on which I could assume control. With the passing of the Bank of Jamaica (Building Societies) Regulations 1995 and the Bank of Jamaica (Industrial and Provident Societies) Regulations 1995 on the 7th April 1995 I

> am now able to assume control of these two institutions. In this regard I have assumed Temporary Management of the Respondent. There is now produced and shown to me marked "OD 7" copies of my letters assuming Temporary Management."

There is a suggestion in this paragraph that an affirmative resolution was passed by the Senate on 7th April 1995. I will return to this issue later.Then he continues thus:

> "9. I was only able to make this application during the Easter vacation as the Regulations aforesaid were only approved in the Senate on the 7th April 1995 and as previously mentioned it is these regulations which will empower me to examine the feasibility of a scheme of arrangement for all three entities."

These paragraphs were in response to Donald Panton's affidavit which read as follows:

> "25. That by virtue of this take over of the Bank in December 1994 the property of Consolidated was also taken possession of by the Minister of Finance and/or the Government of Jamaica.
>
> 26. That in or about the month of February 1995 the Parliament of Jamaica passed amendments to the Building Society's Act and the Bank of Jamaica Act.
>
> 27. That subsequent to the passage of the amendments to the Building Societies Act and the Bank of Jamaica Act the Minister of Finance and/or the Government of Jamaica obtained the approval of Parliament for regulations made pursuant to the Bank of Jamaica Act, to wit the Bank of Jamaica (Building Societies) 1995 and the Bank of Jamaica (Industrial and Provident Societies) Regulations 1995."

The necessary affirmative resolutions in respect of the Building Societies was approved by both Houses on the 31st day of March, 1995. Those for the Provident Societies were approved by both Houses on the 14th day of February 1995. I have had the opportunity of examining photostat copies of those affirmative resolutions in another context. It is clear that counsel for the Pantons took no objection to the fact that the relevant Gazette stating that the affirmative resolutions were approved was not produced. Then Donald Panton continued thus:

> "28. That by virtue of these amendments the Minister of Finance was given the power to appoint Temporary Managers for Building Societies and Industrial and Provident Societies and on or about the 24th day of April Mr. William Thwaites was appointed the Temporary Manager of the Society and on or about the 10th day of April, 1995 Mr. Philmore Ogle was appointed the Temporary Manager of Consolidated. That I attach herewith marked "DP8" and "DP9" copies of Letters of Appointments of Messrs. Thwaites & Ogle.
>
> 29. That by these manoeuvres the Minister of Finance and the Government of Jamaica sought to legalise the unlawful and/or illegal compulsory acquisition of the property of the Society and Consolidated.
>
> 30. That the Minister of Finance has in a sworn Affidavit admitted that prior to April 7, 1995 he did not have any legal basis on which he could have assumed control of the Society and Consolidated and that prior to that date he was not legally in control of the Society and Consolidated. That I attach herewith marked "DP10" a copy of the Affidavit of Omar Davies the Minister of Finance."

Turning to the statutory provision which was challenged, firstly the Bank of Jamaica (Amendment) Act Section 1 reads:

> "1.-(1) This Act may be cited as the Bank of Jamaica (Amendment) Act, 1995, and shall be read and construed as one with the Bank of

> Jamaica Act (hereinafter referred to as the principal Act) and all amendments thereto.
>
> (2) The provisions of this Act, other than section 4 and paragraph (c) of section 5 shall be deemed to have come into operation on the 1st day of December, 1994.
>
> (3) Section 4 shall be deemed to have come into operation on the 25th day of April, 1994.
>
> (4) Paragraph (c) of section 5 shall come into operation on the date of enactment of this Act..
> ..."

The Governor-General's assent was given on 13th February, 1995. See Section 60(1) of The Constitution. It was in this context that the claim that retrospective statutes were unconstitutional was made and summarily dismissed by all three judges in the Court below. Here is how Panton J put it:

> "In the said case [**Secretary of State for Social Security and another v Tunnicliffe** [1991] 2 All ER 712 Lord Justice Mustill at page 720 referred to the "well-established principle of statutory interpretation for which no citation is required". He had specifically in mind the advice of the **Privy Council in Yew Bon Tew v. Kenderaan Bas Mara** (1982) 3 All E.R. 833 at 836:
>
> > 'Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used...Whether a statute is to be construed in a retrospective sense, and if so what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute.'
>
> The complaint in relation to the legislation seems to be more as to the policy of the governing authorities rather than to an issue bearing on law or the

> Constitution. That being so, the Constitutional Court is not the place for it.
>
> Professor A.L. Goodhart, in an article "Ex post facto legislation" published in The Law Quarterly Review Volume 66, 1950, wrote thus at page 317:
>
> > 'It is suggested, therefore, that those who argue that retrospective civil legislation must be wrong in all circumstances, and those who ignore the seriousness of such a step in weakening the structure of the law are equally mistaken. Here, as in other branches of the law, the answer to the question must depend, not on any absolute principle, but on what is reasonable under the circumstances remembering always that those circumstances must be regarded as including within their ambit fair play and justice both to the individual and to the State'.
>
> It is my view that the professor's words are apt in the context of this case, and I adopt them. I see no rights of the applicants that have been infringed or are likely to be infringed by section 34F."

As for existing rights and obligations which can be impaired by retrospective legislation Lord Templeman provides the answer in **Societe United Docks and others v Government of Mauritius** [1985] 1 All ER 864. At p. 876 His Lordship said:

> "The appellants filed affidavits complaining that the retrospective provisions of the amending Act deprived the appellants, and were intended to deprive the appellants, of the benefit of the arbitration award and complaining that the retrospective provisions interfered with the exercise of judicial power. The appellants also complained that the amending Act was contrary to the provisions of s 8 of the Constitution. These complaints were referred to the Supreme Court pursuant to s 84 of the Constitution, which directs that any question as to the interpretation of the Constitution involving a substantial question of law shall be referred to the Supreme Court."

Then at p. 877 His Lordship continued thus:

"The attention of the Supreme Court was not directed to the provisions of ss 3 and 17 of the Constitution but to the question whether the retrospective provisions of the amending Act, aimed specifically at the award, constituted an unconstitutional infringment by the legislature of the judicial powers. In **Liyanage v R** [1966] 1 All ER 650, [1967] 1 AC 259 the Parliament of Ceylon passed Acts pursuant to a legislative plan ex post facto to secure the conviction and enhance the punishment of particular individuals, legalising their imprisonment while they were awaiting trial, making admissible statements which had been inadmissibly obtained, altering the fundamental rules of evidence so as to facilitate their conviction and altering ex post facto the punishment to be imposed on them. The Board held that the Acts involved the usurpation and infringment by the legislature of judicial powers inconsistent with the written constitution of Ceylon which, though not in express terms, manifested an intention to secure to the judiciary freedom from political, legislative and executive control. Similarly, in **Hinds v R** [1976] 1 All ER 353 at 360, [1977] AC 195 at 213 the Board affirmed the principle that -

> 'implicit in the very structure of a constitution on the Westminister model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter dealing with the judicature, even though this is not expressly stated in the constitution...

In the present case the Board have not heard full argument and do not pronounce on the submission by the appellants that the amending Act was an unconstitutional interference with the rights of the Supreme Court.

It suffices that the amending Act was a coercive act of the government which alone deprived and was intended to deprive the appellants of property without compensation and thus infringed the Constitution. The Supreme Court reached the opposite conclusion and the appeal must therefore be allowed and a declaration made that each

> worker employed by the MMA at any time or times between 1 January 1980 and 30 June 1983 is entitled by way of redress under Section 17 of the Constitution to be paid by the MMA or the government of Mauritius the difference between the salary and allowances in fact paid to him and the increased salary and allowances which would have been payable to him pursuant to the award."

Turning to Section 34F of the Bank of Jamaica (Amendment) Act referred to in the extract from the judgment of Panton J. it reads:

> "34F.-(1) The Minister may, in accordance with the recommendations of the Bank, make regulations prescribing prudential criteria and minimum solvency standards to be complied with by commercial banks and specified financial institutions.
>
> (2) Without prejudice to the generality of subsection (1), regulations made under that subsection may include provisions in relation to
>
> (a) minimum capital requirements;
>
> (b) requirements for ensuring capital
>
> ..."

The evidence discloses that by the Bank of Jamaica (Specified Financial Institutions) (Building Societies) Notice, 1994 all Building Societies were designated specified financial institutions and there was a similar notice for Provident Societies. Then comes the critical sub-section:

> "(p) the taking of such steps as the Minister considers necessary where the Minister has reasonable cause to believe that a speficied financial institution is or appears likely to become unable to meet its obligations.

Also important is 34F (3) which reads:

> (3) Regulations made under this section shall be subject to affirmative resolution."

Then in The Proclamation Rule Regulations Jamaica Gazette Supplement dated March 27, 1995 the Minister exercised his rule making power. What the Minister did in respect of Provident Societies as regards Temporary Management was to incorporate provisions of Part D of the Second Schedule of the Financial Institutions Act by delegated legislation as part of the Bank of Jamaica (Amendment) Act. It was a bold act of legislative reference by subsidiary legislation. It now appears as Part B of the Schedule of both the Bank of Jamaica (Industrial and Provident Societies) Regulations, 1995 and the Bank of Jamaica (Building Societies) Regulations, 1995. The Gazette Supplements Nos 43 and 44 must make it clear that the necessary affirmitive resolutions have been approved by both Houses of Parliament.

The legislative reference was constitutionally permissible but there must be strict compliance with rules to ensure validity. See **Metcalfe v Cox** [1895] A.C. 328. There are fundamental differences between an Act of Parliament and Delegated Legislation. As to the operation of statutes Section 21 of the Interpretation Act reads:

> "21. Every Act (which expression in this section does not include regulations) shall be a public Act and shall be judicially noticed as such, unless the contrary is expressly provided by the Act."

As for regulations, Section 31 of the Interpretation Act reads:

> "31.-(1) All regulations made under any Act or other lawful authority and having legislative effect shall be published in the *Gazette* and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication.
>
> (2) The production of a copy of the *Gazette* containing any regulations shall be *prima facie* evidence in all courts and for all purposes of the due making and tenor of such regulations."

As for an Act of Parliament, Section 15 of the Interpretation Act reads:

> "15.-(1) Every Act shall, unless it is otherwise therein expressly provided, come into operation on the day of the publication of the notification of assent.
>
> (2) The date on which an Act comes into operation whether under the provisions of this section or according to the express provisions contained in the Act, shall be written on the original of the Act and on all copies thereof in some convenient place near the heading thereof."

So the Notice of Temporary Management of the Provident Society is valid if the regulations authorising issue comply with the Interpretation Act. Section 20(2) of that Act reads:

> "(2) The expression "subject to affirmative resolution" when used in relation to any regulations shall mean that those regulations are not to come into operation unless and until affirmed by a resolution of each House of Parliament."

The affirmative resolutions were not approved in the Senate until 31st March 1995, although the Minister signed the regulatons on the 27th day of March 1995, for both the Building Society and the Provident Society.

I have already pointed out that no objection was taken by counsel for the Pantons regarding the failure on the part of counsel for the respondents to produce the Gazette making it clear that affirmative resolutions were passed. The affirmative resolutions and publication in the Gazette are valuable constitutional safeguards and should be adhered to generally. See the Jamaica Gazette Act. But in the special circumstances of this case having regard to the affidavit the necessary inference is that the Pantons and their counsel must have examined the affirmative resolutions. It is

against this background that the declaration sought in the Amended Notice and Grounds of Appeal which reads:

> "A Declaration that the Bank of Jamaica (Industrial and Provident Societies) Act, 1995, Bank of Jamaica Industrial and Provident Societies) Regulations, 1995 Bank of Jamaica (Building Societies) Regulations, 1995 the Building Societies Amendment Act, 1995 and the Financial Institutions Act of 1992 are all unconstitutional."

cannot be granted.

The retrospective provisions in the Act were meant to provide protection for the Minister and the Temporary Manager from suits in respect of his retention and examination of the books of the Provident Society so as to examine the accounts before he assumed Temporary Management. On April 10th, 1995, the retrospective provisions did not 'impair existing rights or obligations'. Equally the retrospective provisions were not in breach of Section 18 of the Constitution. They were to preclude the possibility that valuable documentation would be destroyed if the Temporary Manager had allowed the Pantons or their servants or agents access to the Bank which housed all three Blaise Financial Institutions. The Minister also took steps to protect himself and others. Here they are:

> "7. That prior to my assuming temporary management of BBS and CHL inspectors were appointed to inspect the files of the said two institutions subsequent and pursuant to them being designated "specified financial institutions" under the Bank of Jamaica Act.
>
> 8. That on December 23, 1994, this Honourable Court made an Order restraining the directors, officers, servants and/or agents of BBS from taking possession of or interfering with the files and records of BBS. I exhibit hereto and mark for identification "OD3" a copy of the said Order."

The retrospective provisions in respect of the Provident Society and the Building Society were in accordance with the regulatory provisions of Section 18(2) (k) of the Constitution for the purpose of examination, and investigation prior to assuming Temporary Management. It might be emphasised that the retrospective provisions were concentrated on Building Societies and Provident Societies generally and the aim was to protect the public. Blaise Financial Institutions and Century Financial Institutions were the forerunners but there have been several other failures since. There has been a serious banking crisis in this country and elsewhere and numerous financial institutions have been 'bailed out' by the Ministry of Finance to prevent an even more serious crisis in the economy

Turning to the challenge concerning the Temporary Management of the Building Society it is necessary to examine firstly the Building Societies (Amendment) Act 1995 and the Bank of Jamaica (Building Societies Regulations) 1995. The Gazette reads in part:

> "PRINCIPAL CHANGES IN REGULATIONS FOR BUILDING SOCIETIES TABLED ON
>
> FEBRUARY 14,1995, AS OF MARCH 24,1995
>
> THE BANK OF JAMAICA ACT
>
> THE BANK OF JAMAICA (BUILDING SOCIETIES) REGULATIONS, 1995
>
> In exercise of the powers conferred on the Minister by section 34F of the Bank of Jamaica Act, the following Regulations are hereby made:-"

Section 2 of the Building Societies (Amendment) Act gives primacy to section 34F of the Bank of Jamaica Act and so brings into play the Regulations which govern Temporary Management of the Society. Part B of the Schedule of these regulations are

identical to those for the Provident Society which in turn is identical to Part D of the Second Schedule to the Financial Institutions Act.

It was already established that the contention that these sections of the Act were unconstitutional was untenable. They were in accordance with Sections 18(2) (g) and (k) and 18(3) of the Constitution. By parity of reasoning the provisions in the regulations pertaining to the Building Society and the Provident Society which were identical to Part D of the Second Schedule of the Act were also in conformity with the Constitution.

Was there any evidence that the Provisional Temporary Management of the Building Society and the Provident Society was confirmed?

Turning to paragraph 11(b) of the Minister's affidavit it reads in part:

> "That on the 2nd day of June 1995 a Notice of Motion was filed on my behalf in the Supreme Court requesting the Honourable Court to confirm the vesting in me of full exclusive powers of management of BBS and CHL respectively. That the Honourable Court granted the Orders requested. There is now produced and shown to me marked "OD10" and "OD11" for identity copies of the said Orders. That further to this Honourable Court confirming the vesting in me of full exclusive powers of management I was informed by Mr. Philmore Ogle and Mr. William Thwaites and do verily believe that BBS and CHL were insolvent and that BTCMB was solvent only because deposits from these two institutions were transferred to it."

Both orders exhibited were made by Smith, J. on 8th June, 1995. It is sufficient to cite the one pertaining to the Provident Society as both orders were identical:

> "IT IS ORDERED THAT:
>
> I. Full and exclusive powers of Management of Consolidated Holdings Limited of 9 Trinidad Terrace, Kingston 5 be vested in the Minister of Finance for a further period of sixty days from the date of this Order as described in Part B of

the Schedule of the Bank of Jamaica (Industrial & Provident Societies Regulations, 1995."

These orders do not follow the form of that before Record, J. supra. Moreover, they are not in conformity to Part B paragraph 1 (5) of the Bank of Jamaica (Industrial and Provident Societies) Regulations 1995 or Part B paragraph 1(5) of the Bank of Jamaica (Building Societies) Regulations, 1995. For ease of reference the particular provision and the Order of Record, J. are again cited. The sub-section reads:

> "(5) Not later than sixty days after the Minister has assumed temporary management of the society he shall apply to the Court (furnishing full particulars of assets and liabilities of the society) for an order confirming the vesting in the Minister full exclusive powers of management of the society as described in sub-paragraph (4)."

This is the Order of Record, J.:

> "Before the Honourable Mr. Justice Reckord
> The 15th day of February, 1995.
>
> UPON THIS MOTION coming on for hearing this 15th day of February, 1995 and after hearing Mr. Douglas Leys and Mrs. Llyle Sloley Attorneys-at-Law instructed by the Director of State Proceedings for the Applicants and Mr. John Vassell for the Defendants IT IS HEREBY ORDERED THAT:
>
> 1. Pursuant to paragraph 1 (5) of Part D of The Second Schedule of the Financial Institutions Act the vesting in the Minister of full exclusive powers of management of Blaise Trust Company and Merchant Bank Limited of 9 Trinidad Terrace, Kingston 5 as described in paragraph 1 (4) of Part D of the Second Schedule of the Financial Institutions Act be confirmed."

In order to grasp the gist of this case it must be understood that both in the Court below and in this Court there was firstly a challenge as to the constitutionality of Part D of the Second Schedule of the Financial Institutions Act and its counterparts in

the regulations for Building Societies and Provident Societies, and secondly as to the legality of the Minister's conduct acting pursuant to the above Act and Regulations. The challenge as to the constitutionality of the Act and Regulations has failed.

Also having regard to the confirmatory order before Record, J. the challenge to the Minister's conduct in relation to The Bank has also failed. There are different considerations with regard to the legality of the Minister's conduct pertaining to the other two Blaise Financial Institutions. There is no evidence that he secured approval by a Judge of the Supreme Court for confirmation of his provisional temporary management of the Building Society or the Provident Society. That being so it is necessary to revisit the evidence and the treatment in the Court below and the amended grounds of appeal, to come to a decision as to whether there be any merit in the declaration sought on this aspect of the case. Donald Panton in his affidavit had stated as follows:

> "29. That by these manoeuvres the Minister of Finance and the Government of Jamaica sought to legalise the unlawful and/or illegal compulsory acquisition of the property of the Society and Consolidated."

Langrin, J. grasped the essence of the challenge to the Minister's conduct but found that such a challenge must be made in Full Court. Here is how he stated it:

> "Having regard to the separation of powers evident in the Constitution it is unlikely that a Minister of Government will be vested with power to determine questions affecting the civil rights or obligations of a person. That being so administrative issues will have to be confined to the Full Court of the Supreme Court."

Again the learned judge further stated:

> "Apart from the Constitutional issue dealt under Section 20 of the Constitution I am of the view that the applicants' delay in prosecuting its rights cannot

> earn them the relief which they seek. The Minister had assumed temporary management of all the entities by April 10, 1995 and the Originating Notice of Motion was filed in the Supreme Court on 18th July 1995 a delay of three months.
>
> Application for leave for judicial review must be made promptly and in any event within one month of the proceeding."

It is clear that the learned judge was of the view that a challenge to the Minister's conduct must be by way of the prerogative orders pursuant to Section 564 of the Civil Procedure Code Law But it is also permissible to challenge the legality of the Minister's conduct by Motion and in the same Motion challenge the constitutionality of the Act. The shareholders had a right to challenge the Minister's conduct when he sought to confirm his status as Temporary Manager as distinct from a provisional Temporary Manager. The challenge both in the Court below and in this Court, was not elegant, but it was made. The Minister has failed to produce the relevant Order, so the inference must be that there were no such proceedings. In the Court below the challenge to the Minister was on the ground of natural justice. The remedy sought was a declaration and that again was permissible. How was the challenge mounted on appeal? To reiterate here is how the Declaration was sought:

> "5. A Declaration that the Applicants were entitled to:
>
> (a) adequate notice of the Minister's intention:
>
> (i) to assume Temporary Management of the Blaise Financial Institutions;
>
> (ii) to apply for confirmation of a vesting order in the Minister full and exclusive powers of management of the Blaise Financial Institutions;
>
> (iii) of the application to restructure the respective companies and distribute

their assets under Schemes of Arrangements.

(b) To be heard in opposition."

The formal claim was on the basis of the Notice. It will be substantiated especially in the case of Donald Panton when references are made to the relevant provisions of the Civil Procedure Code Law. The substance was that the Minister's action after securing Temporary Management was illegal and void. He had no legal authority to go on to a Scheme of Arrangement as he failed to follow the mandatory provisions of the Act and secure confirmation of his provisional temporary management. So I would grant the Declaration sought in respect to the Building Society and the Provident Society at paragraphs 5(a) (ii) and (iii) in the Amended Notice and Grounds of Appeal. A declaration is a useful remedy but it lacks coercive force. In the Court below the second respondent, the Attorney-General filed and argued a Respondent's Notice which raised a preliminary point of law.

It was rejected by all three judges in the Court below. This point of law was not argued in this Court. As previously stated the appellants discontinued their appeal against the Intervener. Whether both these withdrawals were prudent was debatable. That the appellants took the appropriate action to challenge the constitutionality of Part D of the Second Schedule of the Financial Institutions Act and the comparable regulations has already been addressed. On the other hand the challenge to the Minister's conduct did require resort to 'other law' referred to in Section 25(2) of the Constitution.

Paragraph 2 of the Respondent's Notice demonstrated that all concerned in the Court below erred in assuming that the Supreme Court confirmed the provisional Temporary Management of all three Blaise Financial Institutions. Also it shows that

there was recognition that there was an administrative law issue for which adequate means of address was provided. Here is how paragraph 2 supra was worded:

> "2. The application fails in limine since the essence of the Applicants' case is the unconstitutionality of the actions taken by the Minister of Finance with respect to the three financial institutions and the Court in approving/confirming those actions. In other words, they are alleging that the Minister erred in action as he did and the judge erred in hearing the application and granting the orders sought. If these be errors, they are errors of substantive law, since the question of interpretation is a question of substantive law, as distinct from procedural law, cannot give rise to a breach of fundamental human rights within the context of a Westminister model Constitution. (see **Maharaj v Attorney General of Trinidad and Tobago (No.2)** 1978 2 All E.R. 670 at p. 679)" [Emphasis supplied]

It is now pertinent to advert to the relevant substantive law. Only the Supreme Court can set aside its own orders when there has been an ex parte hearing. The alternative would have been to appeal to this Court. The basis for setting aside the orders of Cooke, J. on 26th October, 1995 approving the Scheme of Arrangement would be permissible if a new situation had arisen. The error which has been detected is that, the provisional Temporary Management of the Minister was not confirmed. That might well be found to be a new situation.

The pertinent principle was enunciated by Lord Oliver of Aylmerton in **Minister of Foreign Affairs, v Vehicles and Supplies Ltd, and Others** [1991] 1 W.L.R. 550. His Lordship said at 555 to 556:

> "On the principal ground upon which the decision of Ellis J. was reversed, however, their Lordships take an entirely contrary view to that taken by the Court of Appeal. Although the three members of the court were unanimous in their conclusion on this point, they reached it by rather different routes.

> Rowe P., whilst acknowledging that in civil proceedings commenced by writ the ex parte interim order of a judge is reviewable and may be varied or discharged either by the judge who made the order or, in an appropriate case, by another judge, nevertheless held that in proceedings under section 564B of the Civil Procedure Code the only method of varying or revoking an ex parte order was by way of appeal to the Court of Appeal except in the case where the order itself gives a liberty to apply to vary or discharge. Carey J.A., with whom Forte J.A. agreed, accepted that a judge of the Supreme Court has an inherent jurisdiction to set aside or vary an order made ex parte and even to revoke leave given ex parte, but that this only applied where 'new matters are brought to his attention either with respect to the facts or the law.' In his view Ellis J. did not have before him any material which enabled him to exercise the jurisdiction."

His Lordship continued thus:

> "An ex parte order is, in its nature, provisional only and Carey J.A. was plainly right in following and adopting what was said to this effect by Sir John Donaldson M.R. in **WEA Records Ltd. v. Visions Channel 4 Ltd.** [1983] 1 W.L.R 727, and by Lord Denning M.R. in **Becker v Noel (**Practice **Note)** [1971] 1 W. L. R. 803. Rowe P. considered that section 564B, in providing for an appeal to the full court against a refusal of leave, impliedly ousted any reconsideration of the matter either by the same judge or by another judge. This, with respect, is non sequitur and it would, if correct, produce the absurd result that, even in a case where an order had been obtained by deliberate concealment of material facts and misleading evidence, the judge who had been wrongly persuaded to make the order would be incapable of revoking it. All other considerations apart, it is provided by section 686:
>
> > 'Where no other provision is expressly made by law or by rules of court the procedure and practice for the time being of the Supreme Court of Judicature in England shall, so far as applicable, be followed.'

> Neither the Code nor the Rules contain express provisions relating to the discharge of ex parte orders but R.S.C., Ord. 32, r. 6 provides in terms that 'The court may set aside an order made ex parte.' Leave granted to institute proceedings for judicial review can, in an appropriate case, be revoked by a judge under this rule: see **Reg. v. Secretary of State for the Home Department, Ex parte Herbage (No. 2)** Q.B. 1077, 1092."

In this context it is now necessary to refer to Section 486 of the Civil Procedure Code Law. It reads :

> "486. Except where, according to the practice existing at the time of the passing of the Judicature (Supreme Court) Law, or under the provisions of this Law, any order or rule might be made absolute "ex parte" in the first instance, and except where notwithstanding the provisions of the preceeding section a motion or application may be made for an order to show cause only, no motion shall be made without previous notice to the parties affected thereby."

Then it continues thus:

> "But the Court or a Judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order "ex parte" upon such terms as to costs or otherwise, and subject to such undertaking (if any), as the Court or Judge may think just; and any party affected by such order may move to set it aside."

Here it may be useful to cite Section 354 of the Civil Procedure Code Law which reads:

> "354. Any verdict or judgment obtained where any party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within ten days after the trial."

Section 676 which provides for "Enlargement of Time" would apply if necessary.

Then His Lordship in approving the decision of Ellis J. said:

> "Their Lordships entertain no doubt that Ellis J. was acting within his jurisdiction in making the order which he made on the minister's application and they have difficulty in understanding Carey J.A.'s assertion that the judge had before him no new material justifying his exercise of the jurisdiction. He had in fact most material evidence, adduced before the court for the first time, first as to the supposed effect of the stay which Clarke J. had purported to grant, and secondly that in fact the allocation had been made already and the instructions given to J.C.T.C. which, in so far as the "stay" could have had any effect, was not bound by the order and was not even a party to the proceedings. In their Lordships' judgment, Ellis J. was entitled, on an application properly made, in his discretion to vary or revoke the ex parte order which had been made by Clarke J. and no ground has been shown for an interference by an appellate court with his exercise of discretion, which seems to their Lordships perfectly proper on the supposition, which everybody connected with the court seems to have adopted, that the order for a stay had some inhibiting effect."

Moreover this Court is obliged to take judicial notice pursuant to Section 21 of the Interpretation Act of two further sections of the Civil Procedure Code Law. Section 489 reads:

> "489. If, on the hearing of a motion or other application, the Court or a Judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or Judge may either dismiss the motion or application, or adjourn the hearing thereof in order that such notice may be given, upon such terms (if any) as the Court or Judge may think fit to impose."

Then since the Scheme of Arrangement was introduced by a Petition, Section 496 of the Code is relevant. It reads:

> "At the foot of every petition (not being a petition of course) presented to the Court, and of every copy thereof, a statement shall be made of the persons

> (if any) intended to be served therewith, and if no person is intended to be served, a statement to that effect shall be made at the foot of the petition, and of every copy thereof."

There was no compliance with this provision.

Further, Section 497 states:

> "497. Unless the Court or a Judge gives leave to the contrary, there must be at least two clear days between the service and the day appointed for hearing a petition."

These are significant procedural safeguards for the appellants and there is no evidence that there was compliance before the Scheme of Arrangement was approved of in the Supreme Court.

It is open to the appellants to argue that the failure to have the provisional Temporary Management of two of the Blaise Financial Institutions confirmed was unknown to Cooke J, when he sanctioned the Scheme of Arrangement for all three Blaise Financial Institutions.

The 'other law' which provides for a coercive order is an order of Prohibition pursuant to section 564 B of the Judicature (Civil Procedure Code) Law. This could be applied to the Minister or his agent if there is anything left to prohibit. There is no time limit for such an order.

Conclusion

The order of the Supreme Court must be varied. The challenge as to the constitutionality of the Act and the relevant regulations have failed. The challenge as to the Minister's conduct in relation to the Bank has also failed. The challenge as to the legality of the Minister's conduct in relation to the Building Society and Provident Society has succeeded in that sixty (60) days after he was granted Provisional

Temporary Management, he failed to seek confirmation in the Supreme Court as required by law. Because of this the statutory provisions which afforded the shareholders as owners a right to a hearing at the proceedings for confirmation before the Supreme Court were ignored. A simpler wording of the declaration sought would be that the Minister's actions, or that of his agents after sixty (60) days of Temporary Management was not authorised by law and therefore void. So I would set aside the order for costs below and order that the appellants pay half the respondents taxed or agreed costs both here and below.

HARRISON, J.A.

This is an appeal from the judgment of the Constitutional Court (Panton, J. Langrin, J. and Smith, J.) delivered on 20th July, 1996, dismissing the appellants' motion for constitutional redress by way of compensation under Section 25 of the Constitution for breaches of their constitutional rights. The appellants had complained to the said Court that the actions of the Minister of Finance in compulsorily taking over the assets, property and management of Blaise Trust Company and Merchant Bank Limited (the "Bank")... under the Financial Institutions Act of 1992 ... and of the Blaise Building Society (the "Society") and Consolidated Holdings Limited ('Consolidated')...(both)... under the Building Societies (Amendment) Act, 1995...", without compensating them therefor, and under the said statutes which do not provide for compensation, were unconstitutional and in breach of their rights under Section 18(1) of the Constitution of Jamaica.

The grounds of appeal are that:

> "1. The Constitutional Court erred in law in holding that the assumption of the temporary management of the institutions cannot by any reasonable construction be considered compulsorily taking possession of property.
>
> 2. The Constitutional Court erred in law in holding that the temporary management of a person's property through a regulatory process aimed at protecting the interest of the public does not lead to compulsorily taking possession of, or acquisition of the property.
>
> 3. The Constitutional Court having found that the Applicants were temporarily restricted in the use of their property, erred in law by failing to find that this temporary restriction without their permission and/or consent, compulsorily deprived them of possession of their property.

4. The Constitutional Court erred in fact in finding that the restriction of the Applicants/Appellants use of their property did not amount to a deprivation of their property and/or a taking possession of their property and/or an acquisition of their property.

5. The Constitutional Court erred in law in holding that the exemptions in Sections 18 (2) and (3) of the Constitution deprived the Applicants/Appellants of the protection of Section 18 (1) of the Constitution.

6. The Constitutional Court erred in law in dismissing the Further Amended Originating Notice of Motion in holding that the applicants' rights to a fair hearing and/or their legitimate expectation under Section 20 of the Constitution were not contravened."

The facts relevant to this matter are as follows: The applicants are business persons and together the controlling shareholders in the Bank, the Society and Consolidated. An inspection report by the Bank of Jamaica of the affairs of the Bank for an eleven (11) month period up to 8th October, 1993 was submitted to the Minister of Finance, in accordance with Section 29(2) (f) (i) of the Financial Institutions Act. The Bank was then a licensee under the said Act. This report revealed that the applicants along with one Jeffrey Panton were the shareholders in (100%) Unijam Limited, the parent company of the Bank. The applicants were then directors both of the Bank and its said parent company.

The report revealed, inter alia, that the general condition of the Bank was poor, having "failed to operate as a sound viable entity" and received "unsatisfactory to poor ratings... in all areas of operation". It revealed further that the Bank's external auditors David Wong and Company had raised "... concerns regarding the threat of insolvency...in the management letter concerning the 1992 audit ratings", but the

Bank's "...Board and management...failed to take cognizance of either the recommendations of its external auditors or that of the Supervisory Authorities..." ...and "they pay scant regard to the Financial Institutions Act, a statute by which they are governed, but have breached almost all the possible requirements."

The report further disclosed several breaches of the Act by the Bank (licensee):

(1) Unsecured credit in excess of the limit of 1% of its capital base to several directors of the licensee in breach of Section 13 (1) (d) (i). For example, the paid-up capital was $16,602,000, and an unsecured loan of $3,000,000 representing 30.54% was made to the applicant Donald Panton.

(2) Grant of unsecured credit facilities to a firm in which the licensee, or its director has an interest as a shareholder, in excess of 5% of the capital base. For example, a credit of 14.53% to Richfield Development Corporation in which the applicant Janet Panton was a shareholder in breach of Section 13(1) (e) (i) of the Act.

(3) Grant of credit facilities to "one person" in excess of "the aggregate 20%", in breach of section 13 (i) (f) (i); namely to the extent of 43.36% "and" 149.41%", among others.

There were several other breaches of the Act by the Bank (licensee) under Sections 13, 16 and 17.

The report also detailed, that:

(a) "Investment in subsidiaries have generated no revenues for BTMB (the Bank) to date."

(b) "... this licensee's funds management practices are unsafe, unsound and imprudent."

(c) "The extent of insider dealings have therefore resulted in increased dependence on borrowed funds, thus in effect also putting depositors at risk. This situation is compounded by the danger of insolvency facing this licensee."

(d) "... despite the anomalies raised... the management has not seen it fit and prudent to create a provision for investment losses. "

(e) "There were high-risk over-exposure to certain borrowers including the applicant Donald Panton, in breach of section 13 of the Act, which was "clearly untenable as it brings very pointedly to the fore the bank's vulnerability to a mere 8 debtors because of its adherence to unsound banking practices."

(f) "The credit and operation "... is alarming ... delinquent cards continue to be honoured by Blaise."

(g) "Blaise management was found wanting "in several areas", ... failed to demonstrate the expertise and commitment necessary to guide the company on the path of growth and viability, and are in fact pursuing practices which places it in jeopardy with the eventual possibility of loss of depositors funds."

(h) "One of the major problems ... is that of insider dealing, as credit is being over-extended on unsound bases to directors, shareholders and their connected entities ... facilitating a serious compromise of credit principles... these loans are major non-performers (and) there is no anxiety on management's part to ensure that they are regularised or that income is generated from these loans.

The current practice of using depositor's funds to meet connected company requirements is quickly working to this licencee's detriment."

(i) ..." the licensee may not be able to meet its obligations... previous recommendations were neither followed up (nor)... implemented and immediate implementation was necessary in order to stave-off the impending and dangerous threat of insolvency."

(j) Despite these pronouncements, the minutes of directors' meetings gave no indication that any serious attention was being given to these

> areas. As such the threat (of insolvency) continues to loom large."

The Minister correctly noted in his affidavit dated 9th July, 1996 that:

> "The report indicated that unsatisfactory to poor ratings were accorded to all areas of operations and that BTCMB (the Bank) appeared to be facing insolvency."

The Bank, having received a copy of the report, its management met with one Mrs. Audrey Anderson, the deputy supervisor of Banks and Financial Institutions at the Bank of Jamaica, and indicated that steps had been taken to remedy the situation outlined in the said report. The Bank, in addition submitted to the Bank of Jamaica its "Business plan" to rectify the shortcomings; this plan was found to be inadequate.

An undertaking was signed by the management of the Bank and the Bank agreed to co-operate and assist in remedying the breaches and correct the shortcomings in the operation of the Bank. One Hugh Bonnick was appointed by agreement as special consultant to assist in this remedial action; see letter dated 21st April, 1994 from the Governor of the Bank of Jamaica to the general manager of the Bank. Meetings were held between the board of the Bank and the Bank of Jamaica supervision department on 23rd March, 1994 and again on 12th July, 1994. At the latter meeting Mr. Brian Young of Price Waterhouse attended and presented an audit report dated 28th March, 1994, revealing inter alia, "continuing losses" at the Bank, and breaches of sections 9, 10 and 13 of the Financial Institutions Act. Consequently, the Minister having suggested that an "injection of new capital" was required by the Bank, he was informed by the Bank that it had approved the sale of its property Navy Island and some funds had been received as down payment on lots sold there.

The audits of the Bank revealed "inter-linkages" between the Bank and the Building Society and Consolidated Holdings Ltd. As a result, in May 1994, Price Waterhouse was requested to do an audit of the latter two entities.

On 18th December, 1994, the Minister assumed temporary management of the Bank and appointed Mr. Philmore Ogle to manage it. On 10th February, 1995, the Supreme Court (per Reckord, J.) confirmed the vesting in the said Minister full exclusive powers of management of the Bank , under the provisions of paragraph 1 (5) Part D Second Schedule of the Financial Institutions Act.

In June, 1994, the audit of the Society and Consolidated Holdings Ltd. was commenced. The books and other documents from both entities were taken possession of by the Minister, because in view of the co-mingled deposits. "... it was virtually impossible to treat the said institutions as separate entities and as such the documents relating to all three institutions had to be held... with a view to determining with some certainty the deposits and liabilities of each institution." This latter fact was confirmed in a report filed in Court by Philmore Ogle on 10th February, 1995.

On 10th April, 1995, the Minister assumed temporary management of the Society and Consolidated Holdings Ltd, and maintained that on 2nd June, 1995 the Supreme Court confirmed the vesting of full and exclusive powers of management in respect of the said entities under the provisions of the Bank of Jamaica (Building Societies) Regulations, 1995, and the Bank of Jamaica (Industrial and Provident Societies) Regulations 1995, respectively. Messrs Philmore Ogle and William Thwaites were appointed to act on the Minister's behalf in respect of these two institutions. Ogle and Thwaites both confirmed to the Minister that the Society and Consolidated Holdings were insolvent and so also was the Bank were it not for the fact that deposits

were transferred to the said Bank from the former two institutions and thereby showing it to be solvent.

A scheme of arrangement in respect of each of the three institutions was proposed by the Minister, between each institution and its depositors for the repayment of amounts of money owing to them. Each scheme was approved by the creditors on 15th October, 1995, and sanctioned by the Court as binding on 26th October, 1995.

Mr. Phipps for the first appellant Donald Panton argued that the shareholders in a company had interests which was property in law, and although the Minister had the authority, under Section 25 of the Financial Institutions Act to assume temporary management of the Bank, such an action protected the interests of the depositors only and was hostile to the shareholders, and therefore was in breach of Section 18 of the Constitution, entitling them to compensation. The said statute was unconstitutional, because no provision was contained therein for compensation to the said shareholders, nor for them, to have access to the courts to challenge the temporary management. The exceptions in Sections 18(2) and 18(3) of the Constitution did not apply because prior to the take-over "examination (and) investigation" had already been done by the Minister whose act of protecting the interests of the depositors and disposing of the surplus assets was a deprivation without compensation, discriminatory of the shareholders, and of no effect. The assumption of temporary management of the Building Society and Consolidated Holdings was effected on 18th December, 1994 when the Minister had no power to do so, was in breach of Section 18(1) of the Constitution, illegal and void, and the retrospective indemnity provided by Section 6 of the Bank of Jamaica (Amendment) Act, 1995 was without effect. The Minister's action in respect of the temporary management, the vesting orders, and the schemes of

arrangements are null and void and in breach of natural justice because the applicant who had locus standi, was not afforded a right to be heard. He relied, inter alia, on **Attorney-General of St. Christopher and Nevis vs Lawrence** (1983) 31 WIR 177, **Cooper vs Union of India** (1970) 1 SCC 248, **Belfast Corporation vs. O.D. Cars Ltd** [1960] 1 All E.R. 65, **Societe' United Docks et al v Government of Mauritius** [1985] 1 All ER 864 and **Matinkinca et al vs Council of State, Ciskei et al** (1994) BCLR 17.

Mr. Ramsay for the second appellant Janet Panton argued that the applicants as holders of shares in the Bank, a limited liability company, were proportionate owners of the said company. Therefore as shareholders they are one of the organs of the company and together with the directors constitute the company. The applicants therefore had the right to participate in the management and control of the company through the directors. Ownership of shares, like choses in action, is property and therefore when the Minister assumed temporary management he compulsorily acquired the applicant's property, ousted them and the directors from participating in the Company's affairs, deprived the shareholders of the right to choose directors or performing any of their functions, thereby committing a breach of the applicant's constitutional rights. The applicants are accordingly entitled to compensation. The scheme of arrangement giving the Minister the right to repay the depositors and to dispose of the surplus assets as he "deemed fit", to the exclusion of the shareholders is unfair, is an appropriation and makes the statute unconstitutional in not providing for compensation to the shareholders. The exceptions, contained in Section 18(2) and (3) are inapplicable, because the permissible taking for examination and enquiry was completed prior to the taking under Part D Second Schedule of the Financial Institutions Act, and the restriction on use of the applicants' property was a deprivation

of their beneficial interests, leaving them mere worthless papers in the form of the legal estate to their shares. He relied, inter alia, on **Inland Revenue Commissioner et al vs Lilleyman et al** (1964) 7 WIR 496, **Minister of State for the Army vs Dalziel** (1943-44) 68 C.L.R. 261; **Lawrence's** case (supra); **King vs Attorney-General** (1992) 44 WIR 52; **Cooper vs Union of India** (supra), and **Pennsylvania Coal Co. v Mahon** (1922) 260 U.S. 393.

Mr. Campbell for the respondents argued that the taking over of temporary management by the Minister (of the Bank) the licensee in which the applicants were the majority shareholders was not a compulsory acquisition. It was a regulatory action under the Financial Institutions Act (the "Act") viewed as a whole, to protect the interest of the depositors, because of the several breaches, and the unsafe and unsound practices, detected by the audit authorised by the Bank of Jamaica, as the supervisory authority and also by the licensee's external auditors David Wong, who noted "the threat of insolvency (of which) the Bank failed to take cognizance." The licensee had acknowledged that these breaches and deficiencies existed, and as corrective measures appointed a new board of directors and signed a letter of undertaking agreeing to comply with the terms of its licence and to rectify the "...unsafe practices... deteriorating conditions...and...undesirable practices..."

Mr. Campbell further argued that the applicants were possessed of "property" in their shares, and consequently had the locus standi to make this application. Having obtained the controlling interest in the Bank they were bound by the statute that they the applicants took majority shareholding in the licensee, subject to the right of the depositors, sections 28 and 21 of the said Act.

The regulatory tenor of the said Act was not so severe as in the **Belfast Corporation** case (supra), nor a "colourable devise" as in the **Lilleyman case,** to be described as confiscatory. It was no higher than a restriction of user. To successfully challenge the constitutionality of the Act, the applicants must show that the taking was by force and the State gained a benefit. The taking was consensual, the Bank was insolvent, and the value of shares worthless. Government had the right in order to "keep order and good government...." to impose regulatory legislation and the assumption of temporary management under the said Act authorised by Section 18 of the Constitution, was a mere restriction on the use of the shares, a deprivation, not an acquisition, and the surplus under the scheme of arrangement would be dealt with in accordance with the Act. The said Section 18 authorised a taking as an incidence of the Bank licence and a restriction to safeguard the interest of others.

The entities were insolvent. The applicants as shareholders in an insolvent company had no interest in its assets. He concluded that the retrospective legislation enacted by Section 6 of the Bank of Jamaica (Amendment) Act, 1995 was not invalid. He relied, inter alia, on **King v Attorney-General**, (supra); the **Belfast Corporation** case; **Trade Docks vs. Government of Mauritius** [1985] 1 All ER 864, **Lilleyman's** case (supra); **Australian Tape Manufacturers et al vs Commonwealth of Australia** (1993) Aust High Ct. Lexis 141; **Cooper vs Union of India** (supra), and **Attorney-General of St. Christopher vs Lawrence** (supra).

The Financial Institutions Act came into force on 31st December 1992. One of the purposes of the Act is to provide regulatory controls over certain institutions accepting deposits, and engaged in related financial transactions with members of the

public. The Act does not apply to certain institutions, such as, for example, "any commercial bank..." (Section 1 (2)).

The Blaise Trust Company and Merchant Bank ("the Bank") licensed on 15th November, 1988 by the Minister of Finance under the Protection of Depositors Act 1966, which was repealed and replaced by the Financial Institutions Act, is deemed to be licensed under the latter Act by virtue of its transitional provisions (Section 45). The said Minister has a statutory duty to ensure that such institutions continue to function in a proper, sound, and business-like manner, for the benefit of the public.

The Minister acts on the recommendations of the Bank of Jamaica which is designated the "supervisor" of "every bank carrying on business in Jamaica." The Bank of Jamaica is required to examine them and report to the Minister, in accordance with Section 29 of the Banking Act, in order to see to it that such institutions maintain sound and acceptable business practices.

Such a report dated 8th October, 1993 by the Bank of Jamaica was received by the said Minister detailing several breaches of the said Act, and in particular Section 13 breaches. The breaches were not corrected, as the Bank had agreed to do, in the undertaking it gave dated 18th May, 1994. Accordingly the Minister was obliged to act.

Section 25 of the Financial Institutions Act places a statutory obligation on the Minister of Finance to take decisive action in the event that any of these financial institutions indulge in any unsafe practice or even show a progression towards insolvency. The section reads:

> "25.-(1) The Minister after consultation with the Supervisor may in relation to a licensee 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 steps as he considers best

calculated to serve the public interest in accordance with this section .

(2) As respects the conditions specified in Part A of the Second Schedule the Minister may -

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

(b) give directions to the licensee under 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 licensee in accordance with Part D of that Schedule;
..."

The conditions in Part B of the Second Schedule empowering the Minister to take action, include situations where:

"(1) The licensee, a director or any person ... in the conduct of the business of the licensee -

(a) is engaging or is about to engage in an unsafe or unsound practice in conducting the business of the licensee; or

(b) is contravening or has contravened -

(i) any provisions of this Act or any regulations made hereunder;

(ii) any condition specified in the licence granted under Section 4 of the Act in respect of that licensee;
..."

The appellants conceded that the Minister had the power under the Act to assume temporary management of the Bank, as he did, but complained that the Act is unconstitutional because it made no provisions for compensation of the shareholders whose rights and interests, being property, were compulsorily acquired, when the Minister assumed such temporary management. Neither did the applicants have an opportunity to be heard.

The relevant provisions of Part D of the Second Schedule read:

> "1.-(1) For the purposes of section 25 (3) (c) of the Act, the Minister shall serve on the licensee concerned a notice, announcing his intention of temporarily managing the licensee from such date and time as may be specified in the notice.
>
> (2) The Minister may appoint any person to manage on his behalf any licensee specified in the 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 licensee 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 licensee, including, without prejudice to the generality of the foregoing, power to -
>
> (a) continue or discontinue its operations;
>
> ...
>
> (5) Not later than sixty days after the Minister has assumed temporary management of the licensee he shall apply to the Court (furnishing full particulars of the assets and liabilities of the licensee) for an order confirming the vesting in the Minister of full exclusive powers of

management of the licensee as described in sub-paragraph (4).

..."

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

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

(3) The Minister may, if he considers it to be in the best interests of the depositors of a licensee which is being temporarily managed by him, apply to the Court for an order staying -

(a) the commencement or continuance or any proceedings by or against the licensee, for such period as the Court thinks fit; or

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

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

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

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

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

Provisions similar to the above govern the Minister's action in relation to the Society and Consolidated Holdings. They are contained in regulations made under the

Bank of Jamaica (Amendment) Act, 1995, amending the principal Act by the inclusion of Section 34F; these regulations were subject to affirmative resolutions.

The Bank of Jamaica (Industrial and Provident Societies) Regulations, 1995 and the Bank of Jamaica (Building Societies) Regulations 1995, were both published in the Jamaica Gazette Supplement, Proclamations, Rules and Regulations dated 27th March 1995 in accordance with Section 31 of the Interpretation Act. The resolutions were affirmed by Parliament on 7th April, 1995.

The applicants are relying on Section 18(1) of the Constitution as the principal basis of complaint.

> "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; and
>
> (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of -
>
> (i) establishing such interest or right (if any);
>
> (ii) determining the amount of such compensation (if any) to which he is entitled; and
>
> (iii) enforcing his right to any such compensation."

This general protection by the Constitution against compulsory acquisition without just compensation or the machinery to determine it, besides admitting to exceptions, must also be viewed in the context of the wider law. Section 18 appears in Chapter III under the rubric, "Fundamental Rights and Freedoms". Section 13 which

commences that chapter, recites the entitlement of "every person in Jamaica... to the fundamental rights and freedoms of the individual... whatever his race, place of origin, political opinions, colour, creed or sex...", but cautions, that such rights and freedoms are:

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

The framers of the Constitution, in Section 13, thereafter listed the basic rights, including "...the enjoyment of property..." and continued:

> "the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedom by any individual <u>does not prejudice the rights and freedoms of others</u> or the public interest." (Emphasis added)

This theme of non-infringment of other people's rights in the enjoyment of one's property is probably a part of the modern concept of "live and let live." This prohibition against lack of concern for others, in the pursuit of one's enjoyment is specifically recited in the said Financial Institutions Act. Section 20 obliges anyone who agrees to purchase shares in a company licensed under the Act, which agreement to purchase would result in the purchaser gaining effective control of the licensee to appreciate that such an agreement shall be "subject to the approval of the Minister..." and:

> "20.-(1)...
>
> (2)...
>
> (a) the Minister shall not give approval unless he is satisfied that -
>
> (i) ...
> (ii) <u>the interests of the licensee's depositors would not be</u>

> prejudiced if the applicant obtained effective control of that licensee;" (Emphasis added)

The applicants, together with one Jeffrey Panton, were 100% shareholders in Unijam, the parent company of the Bank. They would have been well aware of their statutory obligation not to prejudice the interest of the depositors.

The conduct of the directors of the Bank as detailed in the said Bank of Jamaica report reveals (a) concerns of insolvency, (b) inside dealing putting depositors at risk, (c) breaching of "almost all the possible requirements" of the Act, (d) unsecured credit to directors in excess of the limit (including the applicant Donald Panton, who received a loan more than thirty (30) times in excess of the statutory limit), (e) unsecured credit to a company in which its director has an interest as shareholder (Janet Panton) almost three (3) times in excess of the statutory limit), (f) the continuing losses "high-risk overexposure to certain borrowers" (including the applicant Donald Panton), (g) the "failure to demonstrate the expertise and commitment necessary..."thereby placing it "in jeopardy with the eventual possibility of loss of depositors' funds to meet connected company requirements...," and several other unsafe practices. These could not have been seen by the Minister other than necessitating the protection of the interests of the depositors, by taking control of the Bank and its assets in the exercise of his statutory duty. However, the applicants claim that they are entitled to be compensated.

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.

In the **Minister of State vs Dalziel** (supra), where under a statute, the army took a lot used for parking vehicles, and sought to compensate but "not to include profits", it was held that the latter provision was invalid as being not on just terms, and the taking of any interest in property, even temporary, or for an indefinite period of exclusive possession of property, is a compulsory taking and compensation is payable, on just terms.

In **Attorney-General of St. Christopher and Nevis vs. Lawrence** (supra), the appellant managing director and shareholder in a bank, was dismissed by means of a statute, without notice or compensation. It was held that this was a deprivation of property without compensation making the statute unconstitutional by the Constitution, entitling the appellant as shareholder to the locus standi to challenge the legislation. Noting that the Court in **Chiranjit Lal vs India,** AIR (1951) SCC 41 did not regard the shareholders' right to vote, to select directors, to pass resolutions or to institute winding-up proceedings as "property", Sir Neville Peterkin recognized the change in judical view and observed at page 184:

> "The matter has, however been clarified now by judicial pronouncements and the word 'property' is given a broad scope. It has been held that there was no reason why the word 'property' should not be given a liberal and wide connotation or should not be extended to those well-recognised types of interests which have the insignia or characteristics of proprietary rights. In our jurisdiction it has been extended to include money (see **Inland Revenue Commissioner and Attorney-General v Lilleyman** (1964) 7 WIR 496)."

In dealing with the question of the 'locus standi' of the shareholder, in the circumstances, to mount a challenge of constitutionality he continued, at page 185:

> "No-one but one whose rights are directly affected by a law can raise the question of the constitutionality of that law. A corporation has a

> legal entity separate from that of its shareholders. Hence, in the case of a corporation, whether the corporation itself or the shareholders would be entitled to impeach the validity of the statute will depend upon the question whether the rights of the corporation or of the shareholders have been affected by the impugned statute. But it may happen that while a statute infringes the fundamental rights of a company, it also affects the interests of its shareholders; in such a case, the shareholders also can impugn the constitutionality of the statute (see **Cooper v Union of India** (1970) 1 SCC 248). In the instant matter, as I see it, if Lawrence can allege and show an infringement in relation to him, then he gains ***locus standi***, and he becomes entitled thereby to raise the constitutionality of the entire law in relation to the property of the company."

In the case of **Belfast Corporation vs O.D. Cars, Ltd** (supra), the House of Lords, in construing the constitutionality of a statute, the Planning (Interim Development) Act (Northern Ireland) 1944 found that it was "regulatory... and not confiscatory." However Viscount Simonds said, at page 69:

> "...the intention to take away property without compensation is not to be imputed to the legislature unless it is expressed in unequivocal terms."

The prohibition imposed by Section 18(1) restraining a compulsory taking, allows an exception, whenever such taking is in the protection of the property of others. Section 18(3) in this regard reads:

> "(3) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides... for the reasonable restriction of the use of any property in the interests of safeguarding the interests of others..."

The facts are recited in the various affidavits filed and in particular in the evidence in the affidavit of Omar Davies dated 13th July, 1996. It reads:

> "... the audit report on Blaise Trust Company and Merchant Bank ... done by Price Waterhouse...

> reflect a constant mismanagement and imprudent co-mingling of assets deposits and liabilities at the time of my assuming temporary management of the institution... these statements have not been refuted by the Applicants...
>
> ... the deposits, liabilities and assets of the three institutions were co-mingled with deposits being transferred and re-transferred between these institutions. The affairs of these institutions were so intertwined that it was impossible to immediately distinguish which records and books belonged to BTCMB and which to the other institutions."

They reveal the state of affairs facing the Minister.

Together they provide a clear indication of the necessity for the Minister, in order to protect the property of the depositors, in the exercise of his statutory power and in accordance with his constitutional obligation , to take over the management and control of the Bank.

In addition, the co-mingling of funds and the transfer and re-transfer of depositors' funds between the three institutions was an imprudent and improper method of managing financial institutions. This required the intervention of the Minister. Because of this, the Minister, in his said affidavit said:

> "... in the circumstance the withholding of the documents, files and books of BBS was necessary if I were to be able to perform my functions under the Financial Institutions Act."

Section 18(2) (k) provides a further exception to the prohibition against a compulsory taking of property without just compensation:

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

The interpretation of the clauses of the Constitution are not subject to the strict legal rules of interpretation applicable to ordinary general legislation, for example, the eiusdem generis rule, but must be given a broad, generous construction: **(Minister of Home Affairs vs Fisher** (1979) 3 All ER 21).

The Parliament of Jamaica makes laws for "the peace, order and good government of Jamaica" (section 48). The Financial Institutions Act and the said regulations made under section 34F of the Bank of Jamaica Act were enacted to achieve that purpose.

In order to fulfil this latter obligation it was necessary for the Minister to take the action he did, by investigation and enquiry, to verify and deal with the reports he had received and in order to protect the interests of the depositors.

For the above reasons I am in agreement with the Full Court that the taking of temporary management by the Minister under the provisions of the Financial Institutions Act did not infringe Section 18(1), in that the Act was a regulatory Act, and his action was in accordance with the exceptions contained in Sections 18(3) and 18(2)(k) of the Constitution.

Furthermore, it is my view that the appellants may not challenge the action of the Minister in these proceedings because they are not competent to do so, in the circumstances of this case.

The combination of the rights of the shareholders in a company, namely, the right to vote his share in general meeting, the right to choose directors, the right to receive dividends, if declared, and the right to share in the assets at winding up may generally be regarded as rights of "property", the deprivation of which the owner may protect. Consequently, a taking of the assets of a company may affect the interests of

the shareholder. In **Attorney-General of St. Christopher vs Union of India** (supra), Sir Neville Peterkin, C.J., relying on **Cooper vs Union of India,** (supra), said at page 185:

> "... it may happen that while a statute infringes the fundamental rights of a company, it also affects the interests of its shareholders; in such a case, the shareholder also can impugn the constitutionality of the statute."

The shareholder is the proportionate owner of the Company but he does not own the company's assets, which belong to the company: (Palmer's Company Law, Vol.1 page 6005). The directors are agents of the company and owe a duty to the company, but do not owe a duty to the shareholders per se. Such directors are required to exercise ordinary care and skill in the performance of their duties; in the best interest of the company. In discussing the duties of directors of a company, Lord Diplock, in **Lournho Ltd. vs Shell Petroleum Co. Ltd.** [1980] WLR 627, at page 634, said that the principle that directors must act in the best interest of the companyis not exclusively the interests:

> "... of its shareholders but may include those of its creditors."

When the question of the duty of directors arise, in a solvent company the shareholders are the company: (**Multinational Gas and Petrochemical Co. vs Multinational Gas and Petrochemical Services** [1983] 2 All ER 563. Where however a company is insolvent the directors must have regard to the ascendancy of the interest of the creditors (See **West Mercia Safetywear Ltd vs Dodd** [1988] BCLC 250). These principles recognise the responsibilities of the directors to the company including their duty to depositors as a matter of priority in certain stated circumstances.

The shareholders in general meeting are the company. They can ratify or authorise any action by the directors or the company, as such. The rule in **Foss and Harbottle** long ago confirmed this principle of majority rule. K.W. Wedderburn, in discussing this rule in the **Cambridge Law Journal** [1957], at page 198, said:

> "The majority which decided disputes about internal management was also the traditional authority for deciding whether or not the corporation should bring an action in order to remedy a wrong committed against it. Majority rule naturally applied to decisions about legal proceedings."

In the instant case, when the Minister assumed temporary management of the Bank on 18th December, 1994, it was open to the Bank, i.e. the licensee, to challenge this action under paragraph 2 (1) of Part D of the Second schedule to the Financial Institutions Act. It reads:

> "2-(1) A licensee 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 shareholders and the directors are the organs of a company. The shareholders in general meeting, being the company ("licensee)" could have authorized the directors to institute legal proceedings under the said provisions. Nothing precluded them from doing so. Such legal proceedings could have been instituted by the directors under the machinery set out in the said Part D of the Second Schedule, and therein, all the remedies could have been pursued and all the complaints could have been aired in the Court of Appeal, exercising its peculiar original jurisdiction, including the complaint of the shareholders in the instant appeal.

In discussing the exclusiveness of the remedy afforded by Part D of the Second Schedule of the Banking Act (similar to the above provisions in the Financial

Institutions Act) in an appeal to this Court in **Century National Merchant Bank Ltd. et al vs. Davies,** S.C.C.A. Nos. 120, 121, 122/96 and 20/97 delivered 2nd June, 1997, I said at page 76:

> "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."

Noting further that the right of access of the individual to the courts of law should not be whittled down, except by clear words **(Pyx Granite Co. Ltd. vs. Ministry of Housing** [1959] 3 All ER 346), nor excluded in breach of natural justice **(Anisminic Ltd. vs. Foreign Compensation Commission)** [1969] 2 A.C. 147), I said at page 80 of the **Century National Bank** case (supra).

> "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."

On appeal in the said case, the Board of the Privy Council (Privy Council Appeal No 52/97 delivered 16th March, 1998) in upholding this view, said at page 8:

> "It is true that Part D does not expressly provide that the right of appeal will be an exclusive remedy. But a necessary or plain implication to the same effect, derived from the language and context of the statute, is enough: see **Barraclough v Brown** [1897] A.C. 614 and **Pyx Granite Co. Ltd. v Ministry of Housing and Local Government** [1960] A.C. 260. There are cogent factors pointing towards a necessary implication that the appeal is an exclusive remedy. One only has to ask the question whether the legislature, having provided for a speedy general right of appeal to the highest court in Jamaica, intended to leave intact the unfettered right of the directors of the bank to challenge the validity of the assumption of temporary management years later in a private law action at first instance. The language and the context of the statute rules out such an impractical interpretation. After all, as part D shows, a Temporary Manager may continue or discontinue the business; stop or limit payment of obligations; dismiss or employ officers or employees; and so forth. He must be able to deal with third parties and they need to know where they stand. Moreover a lengthy period of uncertainty about the status of temporary management of the bank will greatly complicate, for example the possibility of working towards a scheme of arrangement with creditors or reconstruction of the bank. The need for certainty and finality about the temporary management in the public interest is manifest. For these reasons, in agreement with the Court of Appeal, their Lordships are satisfied that the appeal under paragraph 2 of Part D is an exclusive remedy."

The assumption of temporary management of the Blaise institutions by the Minister carries with it the flavour of a compulsory taking. Such action attracts an immediate consideration of the validity of such taking. Accordingly, the shareholders in general meeting, if at that time they were sincerely convinced of a loss of benefit due to the deprivation of their property, should have directed the directors to challenge the

Minister on behalf of the licensee (the Bank), and consequentially, on their own behalf, under the provisions of the said paragraph 2(1) of Part D of the Second Schedule. Paragraph 2(2) accommodatingly makes provision for extension of time within which to apply to the Court of Appeal, beyond the initial period of ten (10) days.

In the said Century National Bank case, in deciding that the appeal under paragraph 2 of Part D (similar to the provision under the Financial Institutions Act) was an exclusive remedy, the Board of the Privy Council (per Lord Steyn) dealing with the service of the notice by the Minister, held , at page 8:

> "***Prima facie*** any issue regarding the service of the notice is within the scope of the right of appeal. And paragraph 2(1) expressly provides that the Court of Appeal "may make such order as it thinks fit". It is plainly competent for a bank to contend on such an appeal that the notice was invalid for procedural or substantive reasons. And the Court of Appeal would be bound to rule on the merits of such contentions. Thus the bank could have appealed on the ground that the Minister gave no prior notice of his intention and that the Minister resolved to assume temporary management in circumstances when that was under the statute an inappropriate remedy, leaving it to the Court of Appeal to rule on the merits or demerits of those arguments. Indeed every complaint, substantial or insubstantial, advanced by the appellants before the Privy Council could have been raised before the Court of Appeal by way of an appeal under paragraph 2 (1) of Part D" (Emphasis added)

In the instant case there was ample scope and opportunity for the applicants, majority shareholders, in general meeting to utilize this exclusive remedy, in challenge to the validity of the Minister's action, including its constitutional validity. There was no necessity to institute independent proceedings in the Constitutional Court because the machinery of the said Part D of the Second Schedule was enacted to accommodate the full range of complaints of breaches of their rights before the Court of Appeal in

order to bring an early certainty and finality to the question of the validity of the action of the Minister. The critical issue of the viability and financial health of the said financial institutions are required to be settled with dispatch in order to maintain public trust and confidence.

As pointed out by Panton, J. in the Court below:

> "On July 18, 1995, that is, exactly seven months after the Ministers assumption of temporary management over the bank, the applicants filed a notice of motion seeking redress under Section 25 of the Constitution of Jamaica."

Thereafter, there were several amendments to the original motion, and the hearing of the final Amended Motion did not commence until 22nd October, 1996, before the Constitutional Court. This latter date was a far cry from the promptness and early finality anticipated in the requirements of paragraph 2 (1) of Part D, that the licensee may appeal to the Court of Appeal but within ten days. Parliament could not have intended such a protracted process to be employed.

Although Section 25(2) of the Constitution entitles persons, such as the shareholders, to apply to the Supreme Court for redress, if they complain that their rights under Section 18(1) are infringed, Section 25(2) by its proviso, allows the said Court to decline jurisdiction, in some circumstances.

> "25 - (2)...
>
> Provided that the Supreme Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

It is my view that the applicants are restricted to the provisions and procedure under Part D of the Financial Institutions Act.

The appellants also complain that their rights to a fair hearing both at common law and under the provisions of Section 20 of the Constitution were contravened.

This issue was also canvassed in the **Century National Bank** case. The Board in answer held that no prior notice was required by Part D, observed that fairness was ensured to the appellants by the exclusive remedy granted to them by Part D of the Second Schedule, and said, at page 10:

> "Counsel for the appellants argued that at the very least the Minister should have given the bank an opportunity to make representations to the effect that it would be wrong to assume temporary management rather than present a winding up petition. He invokes a common law principle which is a cornerstone of administrative law in the United Kingdon and in Jamaica. Neverthelsss, the limitations of that principle must be borne in mind. In **Wiseman v Borneman** [1971] A.C. 297 Lord Reid said at page 308:-
>
> > 'Natural justice requires that the procedure before any tribunal which is acting judically shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and to require additional steps would not frustrate the apparent purpose of the legislation.'
>
> For the reasons already explained their Lordships are satisfied that the statutory right to appeal to the Court of Appeal, exercising wide original jurisdiction, should be sufficient to achieve justice to the bank. Moreover, and for reasons also explained, a prior opportunity for the directors and other insiders in the bank to make representations that a temporary management is inappropriate is both impractical and contrary to the public interest.

The Board of the Privy Council in the **Century National Bank** case anticipated a challenge of this nature as in the instant case. Dismissing the appellant Bank's appeal, the Board (per Lord Steyn) said, at page 9:

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

It is curious, to say the least, that the applicants in their capacity as shareholders in a company, whose directors, the said shareholders in this latter capacity, had admittedly committed several statutory breaches and so mismanaged the company that it was reduced to a state of insolvency, may be permitted by the law to claim compensation by way of constitutional redress, when the Minister as he was obliged to do, stepped in to protect the depositors. This borders on an abuse of the process of the court.

For the above reasons it is my further view that the appellant shareholders as individuals, have no locus standi to maintain any challenge, in this manner, to the action of the Minister.

> The argument based on procedural unfairness must be rejected."(Emphasis added)

Applying these observations to the appellant's case there is no basis for a complaint of unfairness.

The submission that the amendment to the Financial Institutions Act now Section 25F, providing for compensation is an admission that there was inadequacy in the Acts (as it previously stood) is without substance. A statutory provision for compensation does not confirm that its previous non-existence made the regulatory taking under Section 25 of the Act unconstitutional. The amendment in 1998 was necessary because the said shares were then made to vest in the Minister. A subsequent change in rules does not mean that there was a previous inadequacy. (See **Hart vs Lancashire** (1869) 21 L.T.216).

A scheme of arrangement was concluded between each of the Blaise entities and the creditors/depositors on 15th October, 1995 and sanctioned by the Court on 26th October, 1995. Clause C of each document recites the fact that, in relation to each entity:

> "it appears likely to the Minister that the (entity) will be unable to meet its obligations..."

Clause II reads:

> "11. Should any surplus remain after the above distribution the distribution of such surplus shall be determined by the Minister of Finance and Planning in such manner as he deems fit." (Emphasis added)

In so far as the latter clause seeks to give to the said Minister a discretion to determine the distribution of the surplus as he chooses, it may not do so. On the facts disclosed, these shares are valueless, but in the unlikely event that any surplus remains it must be dealt with in accordance with the provisions of the Companies Act.

The grounds of appeal therefore fail. Because of my findings above, it is unnecessary for me to deal with any other matters raised in this appeal.

My conclusions in respect of the Bank apply to the other two Blaise entities, the Building Society and Consolidated Holdings.

I agree with the conclusion of the Full Court I would dismiss this appeal with costs to the respondents.

Rattray, P.

Appeal dismissed. Order of the Court below affirmed by unanimous decision in respect of Blaise Trust Company and Merchant Bank Limited; and by a majority (Downer J.A. dissenting) in respect of Blaise Building Society and in respect of Consolidated Holdings Limited.

Costs of appeal to the respondents to be taxed if not agreed.