IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M81 OF 2001

CORAM: THE HONOURABLE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE SMITH
THE HONOURABLE MISS JUSTICE SMITH

IN THE MATTER OF SECTIONS 19 AND 23 OF THE CONSTITUTION

AND

IN THE MATTER OF AN APPLICATION BY UNIVERSAL MERCHANTS LIMITED FOR DECLARATIONS AND CONSTITUTIONAL REDRESS PURSUANT TO SECTION 25 OF THE CONSTITUTION AND SECTION 15 OF THE FINANCIAL ADMINISTRATION AND AUDIT ACT.

BETWEEN	**UNIVERSAL MERCHANTS LIMITED**	**- APPLICANT**
AND	**THE FINANCIAL SECRETARY OF THE GOVERNMENT OF JAMAICA (SHIRLEY TYNDALE)**	**- 1ST RESPONDENT**
AND	**THE ACCOUNTANT GENERAL OF THE GOVERNMENT OF JAMAICA (LORRAINE WINSTON DIAZ)**	**- 2ND RESPONDENT**
AND	**THE REGISTRAR OF COMPANIES (CLAUDETTE MORGAN-GREAVES)**	**- 3RD RESPONDENT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**- 4TH RESPONDENT**

Mrs. Margaret Macaulay and Oswald James for the Applicant
Michael Hylton, Q.C., Solicitor General, Mrs. Nicole Foster-Pusey and Miss Annaliesa Lindsay for the Respondents.

Heard: January 22, 23, 24 and March 18, 2002

WOLFE, C.J.

Before embarking upon the pith and substance of this matter let me dispose of a preliminary matter.

This matter was set down for hearing in July 2001 but was taken out of the list upon the receipt of a letter from Berthan Macaulay, Q.C., that he would be unavailable to argue the matter due to his illness.

On October 4 and 11, 2001, further letters were received from Mr. Macaulay with medical certificates indicating that he was still ill.

The medical certificate which accompanied the letter of October 11, under the hand of Professor Owen Morgan, professor of medicine and neurology, indicated that Mr. Macaulay, Q.C. would not be able to argue appeals before January 2002. In keeping with the medical certificate, the Registrar of the Supreme Court set this matter down for hearing in the penultimate week of the month of January, 2002.

On the matter coming on for hearing, Mrs. Macaulay announced that she appeared to make an application for adjournment on behalf of Mr. Macaulay, Q.C., on the ground of his illness.

The Learned Solicitor General for the respondents opposed the application.

The Court refused the application for the following reasons.

(i) The motion was filed from as far back as July 2001 and set down for hearing on July 25, 2001 and removed from the list on the ground of Mr. Macaulay's illness.

(ii) In January 2002 application was again made for the matter to be adjourned on the basis of Mr. Macaulay's illness.

(iii) There was no indication as to when Mr. Macaulay would be well enough to argue the matter.

The Court was only advised that he was improving.

(iv) Mr. Oswald James, Attorney-at-Law, has been involved in the matter from the outset and was actually instructing and appearing with Mr. Macaulay and ought to be sufficiently seized of the matter to argue same.

(v) The prolonged nature of Mr. Macaulay's illness ought to have alerted him of the necessity to make contingency arrangements for the matter to be heard.

(vi) Attorneys-at-Law who move the Jurisdiction of the Constitutional Court or the Judicial Review Court must understand the difficulty which is experienced in setting up a court of three Judges and must take every step to ensure that matters are heard as scheduled.

Had this case been adjourned the Court would have broken down for the entire week, all the other matters having been disposed of.

Finally, Mr. James assured the Court that he was ready, willing and able to proceed with the matter, albeit after the Court had indicated that it was not minded to grant the adjournment.

With that preliminary matter out of the way, I now proceed to address the substantive matter.

This motion filed on the 17th day of July, 2001 under sections 19, 93 and 25 of the Jamaica Constitution and section 15 of the Financial Administration and Audit Act, seeks:

(1) A Declaration that the Memorandum of Association signed on the 29th day of January, 1997, by the First and Second Respondents, delivered to the Third Respondent for the Third Respondent to issue a Certificate of Incorporation, incorporating a company to be named Finsac Limited as No. 56,160 be declared void, on the ground that the First and Second Respondents acted in excess of the powers conferred on them by section 93 of the Constitution and by the Jamaican Parliament under section 15 of the Financial Administration and Audit Act;

(2) An Order, that the Third Respondent doth cancel the said Certificate of Incorporation referred to in the foregoing paragraph 1, issued by the name Finsac Limited;

(3) A Declaration that the provisions of section 19 of the Constitution, including its right to confidentiality are being or are likely to be contravened in relation to the Applicant by the First and Second

Respondents in that the purported company which the First and Second Respondents purport to sign the Memorandum of Association procuring the Third Respondent to incorporate a company bearing the name Refin Trust Limited;

(4) A Declaration that the Memorandum of Association for Refin Trust Limited is null and void;

(5) A declaration that the Certificate of Incorporation issued by the Third Respondent in the name of Refin Trust Ltd. is invalid; and for an Order that the Third Respondent doth cancel the said Certificate of Incorporation under the name of Refin Trust Limited;

(6) An Order that the purported companies; Finsac Limited and Refin Trust Limited be restrained from disclosing information relating to the bank accounts of the Applicant to the third persons which they unlawfully acquired from National Commercial Bank Jamaica Limited and Union Bank of Jamaica Limited.

Mrs. Macaulay at the outset sought leave to amend the motion in the terms set out below -

(1) To delete paragraph 3 and substitute therefor the following:

"A declaration that the provisions of section 18 and 19 of the Constitution are being or are likely to be contravened in relation to the Applicant by the Company Finsac Ltd. incorporated by the First and

Second Respondents and Refin Trust Limited incorporated by the said Finsac Limited."

(2) To add as a seventh paragraph the following:

"A declaration that the purported assignment of Applicant's property by Finsac Limited incorporated by First and Second Respondents without notice to the Applicant is illegal and of no effect."

(3) To amend the heading by inserting in the line commencing:

"IN THE MATTER" the figure 18 after the word sections and also by inserting a comma thereafter.

The court granted the application to amend as prayed at 1 and 3. The Application as set out at 2 was refused.

The circumstances giving rise to this motion have been admirably and accurately set out in the Judgment of Mr. Justice Smith. Consequently, I will refrain from repeating them.

SUBMISSIONS

GROUNDS 1, 2, 4 and 5

Mr. James submitted that the second respondent is a creature of statute pursuant to section 15 of the Financial Administration and Audit Act. The functions of the office having been specifically set out in the statute it must be presumed that Parliament did not intend to add further functions, thereby limiting the scope of the particular office.

It follows therefore that if the Accountant General exercises a function which he is not permitted to perform by section 15 of the Financial Administration and Audit Act, he or she has acted *ultra vires* and the consequence of the act would be null and void.

He contends that section 15 of the Financial Administration and Audit Act does not empower the Accountant General to subscribe to the Memorandum of Association and in so subscribing to the Memorandum of Association, incorporating Finsac Limited, the Accountant General has acted *ultra vires*. The act is therefore void. The Memorandum of Association incorporating Finsac has not been properly subscribed and therefore Finsac Limited has not been lawfully incorporated and does not exist. To state the obvious, he continues by saying if it does not exist it cannot hold property.

Similarly, he contends, the Financial Secretary who also subscribed to the Memorandum of Association incorporating Finsac Limited is a creature of section 93 (3) of the Constitution and is deemed to be a Permanent Secretary by virtue of section 126 (4) of the said Constitution.

Section 93 (1) of the Constitution enacts:

> "Where any Minister has been charged with the responsibility for a subject or department of government, he shall exercise general direction and control over the work relating to that subject and over that department; and, subject as aforesaid to such direction and control, the aforesaid work and the department shall be under the supervision of a

> Permanent Secretary appointed in accordance with the provisions of section 126 of this Constitution.
> (emphasis mine)

Based on the foregoing Mr. James concludes that the Financial Secretary is without the authority to subscribe to the Memorandum of Association of Finsac Limited. By parity of reason, he says, if Finsac Limited does not exist then Refin Trust which is incorporated by Finsac Limited is still born, or rather, the victim of a miscarriage. Reliance was placed on the dictum of ***Lord Denning in Macfoy v United Africa Co. Ltd. [1961] 3 All ER 1169 at p. 1172.***

> "The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Mr. Hylton, Q.C., in response to this submission relied upon the provisions of section 17(1) of the Companies Act, which states:

> "A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered under this Act".

In Bowman v Secular Society Ltd. [1917] A.C. 406. The House of Lords had to consider the effect of the equivalent English provision and Lord Dunedin at page 435 said:

> "The certificate of incorporation in the terms of the section quoted of the Companies Act 1990, prevents any one alleging that the company does not exist."

The Author of ***Palmer's Company Law 24th Edition at paragraph 16 - 06*** states:

> "The present effect of the conclusiveness of the certificate of incorporation leaves little room for doubt: it prevents the re-opening of matters prior and contemporaneous to the registration and essential to it, and it places the existence of the company as a legal person beyond doubt. Consequently, even if the two signatures to a memorandum were written by one person, or were forged, the certificate would be conclusive that the company was duly incorporated so too, if the signatures were all minors, the certificate would still be conclusive".

In ***Princess of Reuss v. Bos (1871) L.R. 5 HL 176 the House of Lord*** had to consider whether a company, once incorporated by registration under the Companies Act, can be removed from the register and disincorporated.

Lord Hatherley L.C. said at p.193 -

> "All we have to ask ourselves is this, my Lords. Has the company come into existence - has it been born? If it has been born, I think . . . . . it ought to be, as speedily as possible, extinguished . . . . . The question is therefore simply whether it has been created. If created, there is no power in this Act of Parliament, nor in any other Act of Parliament that I am aware of, by which, through any result of a formal application, like an application for *scire facias* to repeal a charter, the company can be got rid of, unless by winding up".

For the reasons aforesaid, I hold that the contentions of the applicant in this regard are without merit. The certificate of incorporation is conclusive. The remedy to remove the company from the Register of Companies is winding up, a remedy available elsewhere and which provides adequate redress.

The proviso to section 25 (2) of the Constitution states:

> "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."

This ought to be sufficient to dispose of the arguments in respect of the status of Finsac Ltd. and the application to order the third respondent to cancel certification of Finsac Limited. However, Mr. Hylton, Q.C. submitted that the Accountant General and the Financial Secretary acted *intra vires* in subscribing to the Memorandum of Association. He pointed out that although the Accountant General is appointed by virtue of section 15 (1) of the Financial Administration and Audit Act, the Crown Property (Vesting) Act vests him with additional powers.

Section 6 (1) of the Act provides that:

> "The Accountant General for the time being shall be a corporation sole by the name of the Accountant General and shall have power to hold and dispose of land and other property of whatever kind".

He urged the Court to find that "other property of whatever kind" must necessarily include shares.

Whilst there is no statutory provision which specifically stipulates that the Accountant General or Financial Secretary is empowered to subscribe to a Memorandum of Association, one must have regard to how a Government functions. The Minister is a policy maker. Implementation of policy is effected through the Civil Servant.

The Minister of Finance took a policy decision to intervene in the financial sector pursuant to section 25 of the Financial Institutions Act 1992. Finsac Limited was incorporated to give effect to the policy decision.

Section 2 (1) of the Financial Administration and Audit Act recognises what is known as a "government company" and defines it thus:

> "a company registered under the Companies Act, being a company in which the Government or an agency of the Government, by the holding of shares, is in a position to direct the policy of that company."

The Accountant General, a corporation sole by virtue of section 6 (1) of the Crown Property (Vesting) Act is an agency of Government entitled to hold shares. If the Accountant General can hold shares in a company then he ought to be able to subscribe to the Memorandum of Association. Similarly, the Financial Secretary who is deemed to be a Permanent Secretary by virtue of section 93 (3) of the Constitution and who is charged with the responsibility of supervising the work and department may perform any act which may be regarded as incidental or consequential to the statutory authority.

See ***Wade and Forsyth on Administrative Law 7th Edition page 245.***

The view of ***Lord Greene M.R. in Carltona Ltd. v. Commissioner of Works and Others [Nov 6. 1943] All England Law Reports Annotated [vol. 2 CA] P. 560 at 563*** is instructive.

The Learned Master of the Rolls said:

> "In the Administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer that in Parliament. The whole system of departmental organization and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

Against this background, in the absence of any evidence that the Financial Secretary and the Accountant General acted without the authority of the Minister, my view is that the *maxim omnia praesumuntur rite esse acta* applies.

For the aforesaid reasons I hold that the Accountant General and the Financial Secretary in subscribing to the Memorandum of Association did not act *ultra vires.*

The applicant contends that Refin Trust Limited is also a non-entity on the basis that if the incorporation of Finsac Limited is void then Refin Trust Limited "is a one man company which is contrary to The Companies Act".

Having held that the incorporation of Finsac Limited is valid the contention of the applicant re Refin Limited must of necessity fail. In any event the subscribers of the Memorandum of Association in respect of Refin Trust Limited are private individuals. The reference to Patrick Hylton as a Director of Finsac Limited is merely a description of the shareholder as is required by Memorandum of Association. He is not signing on behalf of Finsac Limited.

Further it is my view that this Court cannot properly make any order against Refin Trust Limited. Refin Trust Limited is not a party to the proceedings. It would have a right to be heard. To order the Third Respondent to remove Refin Trust Limited from the register of company without affording it a hearing would be a breach of *the audi alteram partem* rule.

GROUND 3 AS AMENDED

The applicant contends that sections 18 and 19 of the Constitution are being or are likely to be contravened in relation to the application by Finsac Limited and by Refin Trust Limited.

The Affidavit of Mario Hernadez, a director of the applicant company, discloses that in 1998, its loan portfolio with National Commercial Bank Jamaica Limited was assigned to Refin Trust Limited.

In August 2000, the applicant was also advised by Union Bank Jamaica Limited that Finsac Limited had agreed to purchase a part of its credit portfolio and would assume direct responsibility for management of those accounts. The accounts included the credit facility given by Union Bank Jamaica Limited to the applicant.

The applicant concedes that both National Commercial Bank Jamaica Limited and Union Bank Jamaica Limited were in law entitled to assign the debts.

This concession makes any complaint under section 18 of the Constitution non meritorious. Section 18 speaks to the compulsory acquisition of property. Assignment of a debt is not the acquisition of property. In an assignment of a debt the securities guaranteeing the payment of the debt remain the property of the debtor. Only the right to be paid the debt is acquired. It is a mere substitution of creditor.

In ***Donald Panton and Janet Panton v. The Minister of Finance and the Attorney General PCA 20/2000*** delivered on July 12, 2001 (unreported) a similar issue arose for consideration where the Minister of Finance took over temporary control of a group of companies of which the Pantons were directors. The minister acted pursuant to section 25 (3) of the Financial Institutions Act.

Their Lordships of the Privy Council held that taking control of the companies was not the taking of property.

The applicant further asserts that the transfer of the accounts was a breach of confidentiality owed by the banks to their clients and contrary to section 19 of the Constitution. Section 19 enacts:

> "Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."

I am of the view that section 19 has no relevance in the instant case. There is no search of person or property. Neither is there any entry on premises. The argument for the applicant is wholly misconceived.

GROUND 6

The applicant seeks to restrain Finsac Limited and Refin Trust Ltd. from disclosing to third parties information relating to the accounts of the applicant on the basis that the information was unlawfully acquired from National Commercial Bank Jamaica Ltd. and Union Bank Jamaica Ltd.

Having conceded that National Commercial Bank Jamaica Ltd. and Union Bank Jamaica Limited were entitled to assign the debts it is difficult to understand the allegation of unlawful acquisition. In the assignment of a debt the assignee is entitled to receive such information as will assist him in deciding whether it is worthwhile to take the risk.

Interestingly, the applicant had previously sought an injunction before a Judge of the Supreme Court in Chambers, seeking the very relief now being

sought before us. The application was refused. From that decision the applicant filed an appeal which it has not pursued.

The Learned Solicitor General submitted that in the circumstances the issue between the parties is *res judicata.* I too am inclined to that view.

In any event, as was earlier pointed out, Finsac Ltd. and Refin Trust Ltd. are not parties to this motion. They have not been afforded the opportunity of being heard, hence no order could properly be made against them.

Finally, the respondents argued that the Motion is misconceived and invited the Court not to entertain the application even if substantively it had merit.

Relying upon section 3 of the Judicature (Constitutional Redress) Rules 2000, the respondents submitted that the section clearly limits redress to a breach of section 14 - 24 of the Constitution. In the Motion as amended only paragraph 3 complains of any breach of any of the above sections.

Even if it were to be assumed that the facts disclosed the breaches alleged in paragraph 3, it is the submission of the respondents that other adequate remedies are available to the applicant.

Section 25(2) is relied on to support the submission.

> 25 (2) "The Supreme Court shall have original jurisdiction to hear and determine any applications 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 provisions of the said section 14 – 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."
> (emphasis mine)

I entertain absolutely no doubt that had the applicant established the breaches alleged there is adequate redress available to it under other law.

The dictum of ***Lord Diplock in Harrikissoon v. Attorney General of Trinidad and Tobago [1980] AC 205 at 268*** speaks eloquently as to the circumstances in which the jurisdiction of the Constitutional Court should be invoked.

> "the notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms, but its value will diminish if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of

> avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

Kerr JA reinforced the application of the principle in ***Director of Public Prosecutions for Jamaica v Fuertado (1979) 30 W.I.R. 206 at p. 217***.

> "A *fortiori,* this is even more pertinent when the Constitution contains a purposeful provisio such as that in the Jamaica Constitution s 25 (2). We are of the view that even if there were a contravention of the Constitution s. 20, adequate means of address were available to the respondent under other law and consequently the court should not exercise its powers under the Constitution, s 25."

The dictum of the ***Privy Council in Jaroo v. Attorney General of Trinidad and Tobago reported in the Times,*** February 6, 2002 and delivered on February 4, 2002 is to be noted by all Attorneys-at-Law who would invoke the Constitutional Jurisdiction of the Supreme Court.

> "Where some procedure for redress either under common law or some statute might more conveniently be invoked, resort to constitutional procedure would be inappropriate and an abuse of process. If it became clear that the use of that procedure was no longer appropriate its continued use would also be an abuse,"

For the reasons I have given I would order that the motion be dismissed.

F.A. SMITH J.

By Amended Notice of Motion dated the 17th July, 2001 the applicant sought the following Declarations and Orders:

(1) A Declaration that the Memorandum of Association signed on the 29th day of January, 1997 by the First and Second Respondents delivered to the Third Respondents for the Third Respondent to issue a certificate of Incorporation, incorporating a company to be named Finsac Ltd. as No. 56,160 be declared void, on the ground that the First and Second Respondents acted in excess of the powers conferred on them by section 93 of the Constitution and by the Jamaican Parliament under section 15 of the Financial Administration and Audit Act.

(2) An Order that the Third Respondent doth cancel the said Certificate of Incorporation referred to in the foregoing paragraph 1, issued by the name Finsac Ltd.

(3) A Declaration that the provisions of sections 18 and 19 of the Constitution are being or are likely to be contravened in relation to the applicant by the Companies Finsac Ltd. incorporated by the First and Second Respondents and Refin Trust Ltd. incorporated by the said Finsac Ltd;

(4) A Declaration that the Memorandum of Association for Refin Trust Ltd. is null and void;

(5) A Declaration that the Certificate of Incorporation issued by the Third Respondent in the name of Refin Trust Ltd. is invalid; and for an Order that the Third Respondent doth cancel the said Certificate of Incorporation under the name Refin Trust Ltd;

(6) An Order that the purported companies Finsac Ltd. and Refin Trust Ltd. be restrained from disclosing information relating to the bank accounts of the Applicant to third persons which they unlawfully acquired from National Commercial Bank Jamaica Ltd. and Union Bank of Jamaica Ltd.

BACKGROUND

During the last decade of the 20th century the Government of Jamaica moved to rescue the collapsing financial sector by assisting several financial institutions, which had liquidity problems. Part of this assistance was to purchase various bad debts from some of these institutions for face value. In furtherance of this assistance Finsac Ltd. a private company limited by shares was incorporated in January, 1997. Finsac is not a bank or a licensed financial institution; it is governed by a Board of Directors appointed by the Minister of Finance. Its Memorandum of Association was subscribed to by the 2nd Respondent the Accountant General and the 1st Respondent the Financial

Secretary. Consequently a Certificate of Incorporation was issued by the 3rd Respondent.

In May, 1998 Refin Trust Ltd, a private company limited by shares and a wholly owned subsidiary of Finsac Ltd was incorporated. Refin like Finsac is neither a bank nor a licensed financial institution. The subscribers to its Memorandum of Association are Finsac Ltd and Mr. Dennis Boothe, a chartered accountant. A Certificate of Incorporation was issued by the 3rd Respondent. Refin Trust Ltd, purchased various bad debts from the troubled financial institutions. Although these debts are owned by Refin they are administered by Finsac's personnel.

Also incorporated was Recon Trust Ltd. a subsidiary of Finsac. However, the debts purchased by Recon were transferred to and are now owned by Refin. Recon, too, is not a bank or financial institution.

The applicant, Universal Merchants Ltd was a customer of the National Commercial Bank Ltd (NCB) and the Union Bank of Jamaica Ltd (UBJ). The applicant had several accounts at these banks and was indebted to the banks.

Sometime in September, 1998, NCB advised the applicant that its loan accounts with the bank were transferred to Refin Trust Ltd. Subsequently several discussions and meetings between the applicant and Refin and Finsac took place with a view to establishing a repayment arrangement.

In March, 1999 the applicant was indebted to Refin in the sums of J$23,636,499.00 and US$310,828.00. A formal demand for payment was made accompanied by a threat in the event of failure to dispose of the securities held

and to sue for the shortfall. The applicant submitted further proposals for the settling of the debts. The applicant applied to the UBJ for credit facility and on the 22nd of August, 2000, was granted an Amortised Demand Loan of $2.5m. By letter dated the 31st day of August, 2000, UBJ advised the applicant that Finsac Ltd had agreed to purchase a part of the bank's credit port folio and assume direct responsibility for the management of these accounts. The applicant was not in default of loan repayment to UBJ. According to Mr. Patrick Hylton the Managing Director, Finsac now intends to wind up and complete its role in rehabilitating the financial sector. To that end it was decided that the Bad Debt portfolio would be sold. Negotiations for the sale of the portfolio are now far advanced.

The applicant responded to the decision of Finsac to sell the portfolio by filing the Notice of Motion already referred to.

THE ISSUES

The main issues raised by counsel for the applicant concern:

(1) The constitutionality or validity of the incorporation under the Companies Act of Finsac Ltd by the 1st and 2nd Respondents; and

(2) The constitutionality of the assignment of the applicant's debts – viz. whether the proposed assignment of the debts constitutes or is likely to constitute:

(a) a breach of the applicant's right to protection from compulsory acquisition of its property under section 18 of the Constitution; and

(b) a breach of its right to protection from unlawful search under section 19 of the Constitution.

The orders and declarations sought at paragraphs 2,4, 5 and 6 of the Notice of Motion are really consequential on the Declarations sought at paragraphs 1 and 3.

1. THE INCORPORATION OF FINSAC LTD

Mr. Oswald James for the applicant made the following submissions:

(i) Where Parliament creates an office and enacts functions of the holder of that office it must be presumed that Parliament did not intend to add further functions and intend to limit the power of the office holder.

(ii) By virtue of section 15 of the Financial Administration and Audit Act, Parliament created the office of Accountant General and enacted the functions of the holder of that office. The formation of a private company is not one of the functions enacted In section 15 of the Financial Administration and Audit Act.

(iii) Therefore, the 2nd Respondent (the Accountant General) in signing the Memorandum of Association for the formation of the company called Finsac Ltd acted ultra vires.

(iv) Since Finsac is void any act or anything done by it is also void. Therefore, Refin Trust Ltd a subsidiary of Finsac is also void.

(v) Further the office of the Financial Secretary who is deemed to be a Permanent Secretary is created by section 93(3) of the Constitution. Section 93(1) enacts that the functions of the holder of that office are to supervise any subject and the department of government for which the Minister of Finance is assigned responsibility. The Minister of Finance is not given the power to delegate his function.

(vi) Therefore, the 1st Respondent, like the 2nd Respondent, acted ultra vires when she signed the Memorandum of Association for the formation of Finsac Ltd.

(vii) In the light of the foregoing the 3rd Respondent (The Registrar of Companies) ought not to have issued the Certificates of Incorporation in respect of Finsac Ltd and its wholly owned subsidiary Refin Trust Ltd.

Counsel for the applicant relies on the following cases –

R.H. Galloway v. The Mayor and Commnalty of London (1866) 1 LR English and Irish Appeals p. 34; Attorney General v. Fulham Corporation (1921) 1 Ch 440; Gary vs. Attorney General of Grenada (2001) PC 30 and Macfoy v. United Africa Co. Ltd (1961) 3 All ER 1170 at p. 1172.

RESPONDENTS' SUBMISSIONS

The Solicitor General on behalf of the Respondents replied in this way:

(i) The Motion is misconceived – see section 3 of the Judicature (Constitutional Redress) Rules 2000.

(ii) By virtue of section 17(1) of the Companies Act the Certificate of Incorporation is conclusive and places the existence of the company as a legal person beyond doubt. He also relies on Bowman v Secular Society Ltd (1917) of C. 406; Palmer's Company Law 24th Edition paragraph 16-06; Princess of Reuss v Bos (1871) L.R. 5 H.L. 176.

(iii) In any event, the Financial Secretary and the Accountant General acted properly in subscribing to the Memorandum.

For this contention he relies on section 6(1) of the Crown Property (Vesting) Act; Wade and Forsyth on Administrative Law. The Attorney General v Smethwick (1932) All ER 304 At 307(a-i) among others.

ANALYSIS OF SUBMISSIONS AND THE LAW

I find the authorities relied on by the applicant to be unhelpful.

Let me at the outset say that in my view the submissions of the learned Solicitor General are manifestly correct. Section 25 of the Constitution provides:

> **"25** (1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of section 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.
>
> (2) The Supreme Court shall have 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 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".

This section clearly limits the jurisdiction of this Court to the hearing and determination of allegations of contraventions of the provisions of sections 14 to 24 of the Constitution.

It is certainly not and could not conceivably be the complaint of the applicant that the signing of the Memorandum of Association for the creation of Finsac Ltd. by the 1st and 2nd Respondents constitutes a contravention of any of the provisions of sections 14 to 24 in relation to the applicant. Neither is it the applicant's complaint that the issuing of the certificate of incorporation by the 3rd Respondent contravenes or is likely to contravene its rights under any of said sections. Indeed it is not the applicant's case that the incorporation of Finsac Ltd entails the contravention of any of its fundamental rights and freedoms guaranteed to it under the provisions of sections 14 to 24 of the Constitution.

I agree with the Solicitor General that the Motion in this respect is misconceived.

Although the above conclusion is sufficient to dispose of the first issue, I will none-the-less proceed to deal with the other submissions relating to the

validity of the incorporation of Finsac Ltd., and of course, will later deal with the constitutionality of the assignments of the debts.

Section 17(1) of the Companies Act states:

> "A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered under this Act".

This section restricts actions for a declaration of nullity of a company.

In Jamaica, like in the United Kingdom, the question whether the formation of the company is null and void cannot arise, in view of the conclusiveness of the certificate of Incorporation, once it is issued – Palmer's Company Law (supra) paragraph 16-07.

At paragraph 16-06 (ibid) the learned author states:

> "The present effect of the conclusiveness of the certificate of incorporation leaves little room for doubt; it prevents the reopening of matters prior and contemporaneous to the registration and essential to it, and it places the existence of the company as a legal person beyond doubt. Consequently, even if two signatures to a memorandum were written by one person, or were forged, the certificate would be conclusive that the company was duly incorporated. So too, if the signatories were all minors, the certificate would still be conclusive".

Under the caption "Impeaching incorporation" the learned author continued (para 16-10):

> "The further question whether a company once incorporated by registration under the Companies Act, can be removed from the register and disincorporated was considered by the House of Lords in Princess of Reuss v Bos (1871) L.R. 5 H.L. 176. In that case the question arose as to the regularity of the constitution of a company ... the articles of association contained provisions contrary to the Act of 1862 under which the company was incorporated, and Lord Hatherley L.C. said (at p. 193):
>
> > "All we have to ask ourselves is this, my Lords has the company come into existence – has it been born? ... If created, there is no power given in this Act of Parliament, nor in any other Act of Parliament that I am aware of, by which through any result of a formal application like an application for scire facias to repeal a charter, the company can be got rid of, unless by winding up".

The learned Solicitor General relied on the above passages and submitted, correctly, in my view, that this court is not empowered to order that the certificates of incorporation be cancelled. I hold that the submissions of Counsel for the applicant that Finsac Ltd. is void because the 1st and 2nd Respondents had no authority to subscribe to the memorandum, are untenable.

The Solicitor General further submitted that in any event the 1st and 2nd Respondents acted properly in subscribing to the memorandum. Although the Accountant General (2nd Respondent) is appointed by virtue of section 15 of the

Financial Administration and Audit Act which section also sets out his functions, the Crown Property (Vesting) Act gives him additional powers. Section 6(1) of the latter provides:

> "The Accountant -General for the time being shall be a corporation sole by the name of the Accountant –General and shall have power to hold and dispose of land and other property of whatever kind".

This statutory provision makes short shrift of Mr. James' submission that the 2nd Respondent acted ultra vires in subscribing to the memorandum of Finsac Ltd.

Section 93(3) of the Constitution establishes the office of the Financial Secretary (1st Respondent) and provides that the office holder shall be deemed to be a Permanent Secretary. Section 93(1) states that the Permanent Secretary shall supervise the work and department to which the Minister is assigned. There is nothing in this section or as far as I am aware in any other section of the Constitution or any Act which prohibits the Financial Secretary from subscribing to a Memorandum of Association under the authority of the Minister. The submission of Counsel for the applicant that the Minister of Finance cannot delegate his functions is without authority. In Carltona Ltd. v Comrs of Works (1943) 2 ALL ER 560 at p.563 Lord Greene MR said:

> "In the administration of government in this country the functions, which are given to Ministers (and constitutionall properly given to Ministers because they are constitutionally responsible) are functions so multifarious that no Minister could ever personally attend to them ... the duties imposed upon Ministers and the powers given to Ministers are normally

> exercised under the authority of the Ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the Minister. The Minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the Minister would have to answer for that in Parliament. The whole system of departmental organization and administration is based on this view that Ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them".

The decision of the Minister to use the company form of organization to achieve government's objectives is certainly not repugnant to the Constitution. The formation of government companies is certainly contemplated by the 1992 amendments to the Financial Administration and Audit Act. Indeed a "government company" is defined as a company registered under the Companies Act, being a company in which the government or an agency of the government by the holding of shares is in a position to direct the policy of that company (see section 2).

The evidence before this Court is that, the government through the Minister of Finance has had to intervene in the financial sector to promote good government of the country. To achieve this end Finsac Ltd. was created. Because of the requirements of the Companies Act, the Accountant General

cannot be the sole shareholder. I entirely agree with counsel for the respondents that in the circumstances, the act of the Financial Secretary in subscribing to the memorandum and holding the nominal single share can fairly be regarded as incidental or consequential to her powers and duties.

I cannot accept the submission of counsel for the applicant that the 1st and 2nd Respondents acted ultra vires when they subscribed to the memorandum of association for the formation of Finsac Ltd. So much for the first issue and I turn next to consider the second issue.

2. THE CONSTITUTIONALITY OF THE ASSIGNMENT OF THE DEBTS

This entails the allegations of breaches of sections 18 and 19 of the Constitution.

Counsel for the applicant submitted that "everything belonging to the applicant with which his bank was concerned are (sic) his property ... and cannot be compulsorily acquired in circumstances not in compliance with section 18 of the Constitution". Counsel referred the Court to authorities on which the applicant relies. I cannot agree with counsel that the cases referred to are relevant.

Section 18 reads as follows:

"No property of any description shall be compulsorily taken possession of and no interest in or 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 manner in which compensation therefore is to be determined and given; and

(b) secure to any person claiming an interest in or right over such property a right access to 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".

In the case before the Court, there is not one iota of evidence that any of the applicant's properties was taken or acquired compulsorily or otherwise. The evidence before this court is that the debts of the applicant were assigned by the banks to Refin Trust Ltd. As I understand it an assignment, whether equitable or statutory, involves the sale of the contractual rights of the creditor/assignor to the assignee thereby entitling the assignee to sue the debtor for the recovery of the debt. It does not involve the compulsory acquisition of the debtor's property. The applicant debtor still owns its real estate and other securities. Any credit balance in the bank accounts is still owed to it. The assignment does not effect any change in the applicant's interest in or right over property of any description. The assignee does not take or acquire any interest in or right over any of the applicant's properties, which the original debtor (the assignor) did not have. The Terms of the contract between the applicant and the bank (debtor and creditor) remain the same. No obligation for compensation arises. As the Solicitor General puts it, the only change is that it now owes a new creditor. In my view the applicant's claim is devoid of merit.

It is also the contention of the applicant that by virtue of the assignment or proposed assignment of its debts its confidential banking information has been or is being or is likely to be disclosed and that such disclosure constitutes a breach of its right to protection from unlawful search guaranteed by section 19 of the Constitution. This seems to be the major complaint of the applicant in so far as its claim for constitutional redress is concerned.

Section 19 of the Constitution provides:

"**19** – (1) except with his own consent, no person shall be subject to the search of his person or his property or the entry by others of his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required –

(a) ...

(b) ...

(c) ...

(d) for the purpose of protecting the rights or freedoms of other persons.

Mr. James for the applicant submitted that the proposed assignment not only of the applicant's debt but also of the entire account of the debtor which would include securities, letters etc., is or is likely to be a contravention of the provisions of section 19 in relation to the applicant. At the first blush it seems to me that a

creditor or bank who disclosed to a purchaser of a debt or chose in action all the information necessary to put the purchaser in as good a position to collect the debt as the creditor or bank was, cannot be charged with subjecting the debtor to the search of his property without his consent. Section 19 of the Constitution can give the applicant no comfort. The applicant has a contractual relationship with the bank, if the bank breached the terms of the contract the applicant's remedy lies in an action for breach of the contract and not to the extraordinary remedy of constitutional redress. In my view the Constitutional redress made available by section 25 of the Constitution is analogous to tort or a situation akin to tort and not where there is a contractual relationship.

It is the submission of the Solicitor General that even if the applicant establishes a breach, the motion should be dismissed because the applicant has remedies under other law.

By virtue of the proviso to section 25(2) (supra) this court shall not exercise its powers if satisfied that adequate means of redress for the alleged contravention are available under any other law. The learned Solicitor General cited Harrikissoon v Attorney General of Trinidad and Tobago (1980) A.C. 265; Director of Public Prosecutions v Fuetado (1979) 30 W.I.R. 206 in support of his contention that once it is shown that there are other adequate means of redress the Constitutional Court is prohibited by section 25(2) proviso from exercising its jurisdiction.

He identified the following as two adequate means of redress:

(1) A winding up petition pursuant to section 203(1) of

The Companies Act; and

(2) An action for breach of contract – see Tournier v. National Provisional Union Bank of England (1923) ALL ER 550.

As to the winding up petition I entertain some doubt as to the locus standi of the applicant. Never the less I do not desire to express a final opinion on this. However, there can be no doubt that the applicant has a contractual relationship with its creditor and can sue for breach of contract.

The banker's duty of secrecy regarding a customer's account and matters relating to it is a legal duty arising out of contract – see Tournier v National Provincial and Union Bank of England (supra) at p. 550 c. There is an implied term in every such contract that the creditor will not disclose confidential information. It should be noted that this duty of secrecy is a qualified and not an absolute one. In Tournier's case, Banks L.J. in addressing the duty of secrecy said at page 554c:

> "At the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract and that duty is not absolute but qualified".

It may be noted here that one such qualification is that disclosure is justified where it is necessary in carrying on the business of banking - see Tournier. Also it may be stated that assignments of debts are activities within the "business of banking" and the bank and its assignee are fully entitled to the

benefit of section 49(f) of the Judicature Supreme Court Act – see Ryan v. Bank of Montreal and Montgomery (1908) 16 CLR 75.

I am firmly of the view that even if there were contraventions of sections 18 and 19 of the Constitution (and I think there was none) adequate means of redress were available to the applicant under the law of contract. Consequently this Court should not exercise its powers under section 25 of the Constitution.

Further Mr. Hylton Q.C. submitted that the constitutional rights and freedoms for which the Constitution affords protection are subject to 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 and the public interest.

In this context he referred to suit No. E437 of 1998 – an Originating Summons brought by Refin Trust Ltd. against certain banks and financial institutions.

In that action Marsh J held that Refin Trust Ltd. was entitled to receive and the respondent banks were entitled to disclose all information pertaining to debts purchased by Refin from the respondent banks because given the special relationship between the applicant (Refin) and the banks, such disclosure was in the public interest.

Although the applicant in the instant case was not a party to suit No. E437 of 1998 the decision of Marsh J clearly supports Mr. Hylton's contention that because of the special relationship between the applicant and the companies incorporated by the 1st and 2nd Respondents the disclosures complained of by

the applicant were all in the public interest. I think there is merit in this contention.

Finally as counsel for the respondents correctly submitted this Court may not grant the injunctive relief sought against Finsac Ltd and Refin Trust Ltd. at paragraph 6 of the Notice of Motion. The reason for this, simply put, is that those two legal entities are not parties to this action.

CONCLUSION

For the reasons that I have endeavoured to give, I would dismiss the Motion in its entirety with costs to the respondents to be taxed if not agreed.

G. Smith, J.

The applicant Universal Merchants Limited by an amended Motion filed on the 17th day of July 2001 sought the following Declarations and Orders:

(1) A Declaration that the Memorandum of Association signed on the 29th day of January, 1997 by the First and Second Respondents, delivered to the third Respondent for the third Respondent to issue a Certificate of Incorporation, incorporating a company to be named Finsac Limited as No.56, 160 be declared void, on the ground that the First and Second Respondents acted in excess of the powers conferred on them by section 93 of the Constitution and by the Jamaican Parliament under Section 15 of the Financial Administration and Audit Act.

(2) An order that the Third Respondent doth cancel the said Certificate of Incorporation referred to in the foregoing paragraph I, issued in the name of Finsac Limited.

(3) A Declaration that the provisions of Sections 18 and 19 of the Constitution are being or are likely to be contravened in relation to the Applicant by the Companies Finsac Limited incorporated by the First and Second Respondents And Refin Trust Limited incorporated by the said Finsac Limited;

(4) A Declaration that the Memorandum of Association for Refin Trust Limited is null and void.

(5) A Declaration that the Certificate of Incorporation issued by the Third Respondent in the name of Refin Trust Limited is invalid; and for an Order that the Third Respondent doth cancel the said Certificate of Incorporation under the name of Refin Trust Limited.

(6) An order that the purported companies, Finsac Limited and Refin Trust Limited be restrained from disclosing information relating to the bank accounts of the Applicant to third persons which they unlawfully acquired from National Commercial Bank Jamaica Limited and Union Bank of Jamaica Limited.

RE: GROUNDS 1, 2, 4 & 5

Mr. Oswald James submitted on behalf of the Applicant:

1. That where Parliament creates an office and enacts functions for the holder of that office it must be presumed that Parliament did not intend to add anything more. The corollary is that if Parliament intended to add to the statutory functions that it prescribed for a particular office holder then it could always do so by an amending Act.

2. By virtue of Section 15 of the Financial Administration and Audit Act the Parliament of Jamaica created the office of the Accountant General and enacted the functions of the holder of that office. The subsections setting out the functions of that office have not been amended. Therefore if the Accountant General exercises a function, which he has not been empowered to perform, then the performance of such a function would be ultra vires and if ultra vires, it is null and void.

3. Any act purported to be done pursuant to that which is void is itself void.

   He cited the case of **MacFoy vs United Africa Company Limited** [1961] 3 ALL ER 1169.

The Accountant General in subscribing his name as a signatory to the Memorandum of Association for a company called Finsac Limited acted ultra vires. It follows that because of that Finsac Limited is void (a non-entity).

The functions of the Accountant General are set out in Section 18(2)(3) & (4) of the Financial Administration and Audit Act. Those are the narrow powers conferred on the Accountant General and any action taken outside of those functions would be ultra vires.

4. That when the Accountant General signed the Memorandum of Association of Finsac Limited on the 29th day of January 1997 there were no amendments to Section 15 of the Financial Administration and Audit Act. Hence the Accountant General was acting outside the scope of his authority.

5. The office of the Financial Secretary is created by Section 93 of the Constitution of Jamaica. Section 93(1) enacts the functions of the holder of that office. Further by virtue of Section 126(4) of the Constitution of Jamaica the Financial Secretary is deemed to be a Permanent Secretary. The functions of the Permanent Secretary are set out in Section 93(1) which states:

> "Where any minister has been charged with the responsibility for a subject or department of government, he shall exercise general direction and control over the work relating to that subject and over that department; and, subject as aforesaid to such direction and control, the aforesaid work and the department shall be under the supervision of a Permanent Secretary appointed in accordance with the Provisions of Section 126 of this Constitution."

The Financial Secretary, is the Permanent Secretary to the Minister of Finance, by subscribing to the Memorandum of Association, acted ultra vires.

6. The First Respondent (the Financial Secretary) and the 2nd Respondent (the Accountant General) purported to sign the Memorandum of Association for a company Finsac Limited, in consequence, a Certificate of Incorporation was issued by the 3rd Respondent the Registrar of Companies. That since both the 1st and 2nd Respondents were acting outside the scope of their authority (being creatures of statute with statutory functions) their actions were null and void. It

therefore follows that the actions of the 3rd Respondent would also be null and void when she purported to issue the Certificate of Incorporation for Finsac Limited.

7. In relation to Refin Trust Limited similar arguments were advanced save and except that one of the signatories to the Memorandum of Association was Finsac Limited.

The Solicitor General in his submission on behalf of the Respondents relied on Section 17(1) of the Companies Act which provides:-

> "A Certificate of incorporation given by the Registrar in respect of any Association shall be conclusive evidence that all the requirements of this Act in respect of Registration and of matters precedent and incidental thereto have been complied with and that the association is a company authorized to be registered under this act."

In considering the equivalent English provision in the case of **Bowman v. Secular Society Limited** [1917] A.C. 406 at p.435 Lord Dunedin stated:-

> "The Certificate of Incorporation in terms of the section quoted of the Companies Act 1900, prevents anyone alleging that the company does not exist."

That position was reiterated in Palmers Company Law 24th Edition at paragraph 16 – 06 in which it is stated:-

> "The present effect of the conclusiveness of the Certificate of incorporation leaves little room for doubt: it prevents the re-opening of matters prior and contemporaneous to the Registration and essential to it, and it places the existence of the company as a legal person beyond doubt. Consequently, even if two signatures to a memorandum were written by one person, or were forged, the Certificate would be conclusive that the company was duly incorporated. So too, if the signatories were all minors, the Certificate would still be conclusive."

The question of whether a Company once incorporated, can be removed from the Register of Companies was considered in the case of **Princess of Reuss v. Bos** (1871) L.R. 5 H.L. 176, in which the Court held that once the Certificate of Incorporation was issued the company was born and cannot be got rid of except by winding up.

I accept the submissions made and the authorities cited by Mr. Hylton Q.C. and find that :-

1. the Certificate of incorporation issued by the Registrar of Companies (the 3rd Respondent) under the Companies Act is conclusive;
2. the remedy to remove the Company from the Register of Companies is available to the applicant by virtue of the Companies Act and such redress may be had in the appropriate forum, not in the Constitutional Court.

I now go on to deal with the question as to whether or not the Financial Secretary and the Accountant General acted properly in subscribing their names to the Memorandum of Association. In response to Mr. James' submission that the 1st and 2nd Respondents acted improperly and outside the scope of their powers, the Solicitor General contended that although the Accountant General is appointed by virtue of Section 15(1) of the Financial Administration and Audit Act, the Crown Property (Vesting) Act confers upon him additional powers. Section 6(1) of the Crown Property (Vesting) Act provides that:-

> "The Accountant General for the time being shall be a corporation sole by the name of the Accountant General and shall have power to hold and dispose of land and other property of whatever kind."

He further argued that the phrase "other property of whatever kind" would include shares. Therefore, he concluded, that the Accountant General would have the authority to subscribe to the Memorandum of Association of Finsac Limited and legitimately hold shares therein.

Similarly, the Financial Secretary who holds office by virtue of Section 93 of the Constitution is not precluded from subscribing to the Memorandum of Association of a company and from holding shares. This section establishes the office of the Financial Secretary and stipulates the functions of that office. The Solicitor General contended and in my view correctly so that there was nothing in that section which prevented or curtailed the power of the Financial Secretary from subscribing to the Memorandum of Association or to the holding of shares in a Company.

In support of that proposition, Mr. Hylton Q.C. then quoted from the learned authors of Wade & Forsythe on Administrative Law, 7th Edition at p.245.

> "A Statutory power will be construed as impliedly authorizing everything which can fairly be regarded as incidental or consequential to the power itself; and this doctrine is not applied narrowly. For example, a local authority may do its own printing and bookbinding .... Statutory powers therefore have considerable latitude and by reasonable construction the Courts can soften the rigour of the ultra vires principle .... It must be remembered that the Courts intervene only where the thing done goes beyond what can fairly be treated as incidental or consequential."

He cited the cases of **The Attorney General v Great Eastern Railway Company** 1880 5 AC 473 and **The Attorney General v Smethwick** [1932] ALL E.R. 304 at p.307 where Lord Hanworth, M.R. said that:-

> "....We have the direction of the House of Lords that if this undertaking is incidental to or consequential upon those things which the legislature has authorized they ought not to be held by judicial construction to be ultra vires ...."

I accept as correct the submissions of the Solicitor General and am of the view that the Financial Secretary by virtue of the powers conferred on her by Section 93(1) of the

Constitution is empowered to subscribe to the Memorandum of Association under the authority of the Minister of Finance.

The submission by Mr. James counsel for the Applicant, that the Minister of Finance cannot delegate his functions is without merit. I arrived at that conclusion based on the pronouncement of the Court in the case of **Carltona Limited v Commissioner of Works** 1943 2 ALL ER 560 at p.563.

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them.... The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his Authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in parliament. The whole system of departmental organization and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made."

In the functioning of Government, the Minister is the person who is recognized as the policy maker. The Civil servant (in this case the Financial Secretary) is the person responsible for the implementation of the policies handed down by the Political directorate.

In this situation the Minister of Finance took a policy decision under Section 25 of the Financial Institutions Act to intervene in the Financial Sector in the interest of the public. Consequently, Finsac Limited was incorporated to implement the Government's decision.

The Government having incorporated Finsac Limited to implement it's decision, it was submitted by Counsel for the Applicant that the 1st and 2nd Respondents acted ultra vires when they subscribed to the memorandum of association.

I find this submission unacceptable and illogical. Section 2(1) of the Financial Administration and Audit Act recognizes and defines a "Government Company" as:

> "a company registered under the Companies Act, being a company in which the government or an agency of the Government, by holding shares, is in a position to direct the policy of that company".

Section 2 of the Companies Act sets out the requirements for the formation of a company, including who can hold shares and subscribe to the Memorandum of Association of a company. If the Accountant General by virtue of Section 6(1) of the Crown Property (Vesting) Act is empowered to hold shares in a company a fortiori he must be able to subscribe to the Memorandum of Association of a company.

The Financial Secretary under Section 93(3) of the Constitution of Jamaica is deemed to be a Permanent Secretary and bears the responsibility of supervising the work and department to which she is appointed. She may perform any act which is incidental or consequential to that authority. I find that the act of subscribing to the Memorandum of Association and the holding of a nominal single share, are acts which are incidental or consequential to her statutory powers and duties and therefore would not be ultra vires.

Mr. James, in what I considered to be a very novel submission on behalf of the applicant, argued that Refin Trust Limited was "a non-entity", it does not exist. The subscribers to the memorandum of association of Refin Trust Limited are Messrs Patrick Hylton and Dennis Boothe. Neither of these gentlemen is a party to this action. Indeed Refin Trust Limited is not a party to this action. In the interest of natural justice and fair play they would be entitled to be heard on this issue. It is my opinion that, that submission must fail as Refin Trust Limited is not a party to this action.

GROUND 3

The Applicant alleges that there have been breaches of Sections 18 and 19 of the Jamaican Constitution.

Section 18 of the constitution provides:-

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

The applicant submitted that everything belonging to it with which its banks (National Commercial Bank Limited and Union Bank of Jamaica Ltd.) were concerned is its property and cannot be compulsorily acquired in circumstances which were not in compliance with Section 19 of the Constitution.

It contended that its property was compulsorily acquired and that it had not been compensated for same, hence its present complaint and request for redress by the court.

The Solicitor General in response cited the case of **Panton v the Minister of Finance and The Attorney General P.C.A 20 of 2000** where their Lordships in the Privy Council when asked to consider a similar issue held that the minister by taking control of the companies had not acquired the appellant's property.

As I understand the facts of this present case, what has taken place is that there has been an assignment of the applicant's debts to Refin Trust Limited by the banks. The applicant therefore still own its real estate and any other security which it might have pledged to the banks in securing the loans . In other words with the assigning of the debts to Refin Trust Limited, there is a new assignee who has stepped in to fill the shoe of the banks.

The applicant conceded that the banks were in law entitled to assign their debts . Having so conceded then it follows that there was nothing to prevent the banks from assigning the debts to Refin Trust Limited. This submission is therefore baseless and must fail.

Mr. James for the Applicant contended that the Applicant's right of confidentiality under Section 19 of the Constitution of Jamaica has been or is being or is likely to be breached. It is his contention that the proposed disclosure to third persons of the Applicant's banking information constitutes or is likely to constitute an infringement of the Applicant's right to protection from unlawful search of its property guaranteed by Section 19(1) of the Constitution.

Section 19(1) of the Constitution provides that:-

> "Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises".

Section 19(2) states:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required -
>
> (a) .....
>
> (b) .....
>
> (c) .....

(d) for the purpose of protecting the rights or freedoms of other persons".

Mr. James submitted that the proposed assignment of the applicants debts did not apply only to the debts per se but also to its entire accounts. These would include its securities, letters and other confidential banking information which he argued would be in contravention of the applicant's rights as guaranteed by Section 19(1) of the Constitution.

On a close examination of this submission I am unable to find where any such breach has occurred. The assignments of debts are normal activities which take place in the business of banking and the commercial world and I find and conclude that the Banks were well within their rights to have assigned these debts as they saw fit.

GROUND 6

The Applicant sought an injunction against Finsac Limited and Refin Trust Limited to restrain them from disclosing to third parties information relating to the Accounts of the Applicant on the grounds that the information was unlawfully acquired from National Commercial Bank Limited and Union Bank of Jamaica Limited.

The first point I wish to make is that neither Finsac Limited nor Refin Trust Limited is a party to this action, hence no injunctive relief may be granted against them.

Secondly, the Applicant having conceded that the banks i.e. National Commercial Bank Limited and Union Bank of Jamaica Limited were entitled to assign the debts of the applicant, cannot now be heard to say that there was an unlawful acquisition of the information relating to their debts and their accounts. When a debt is assigned surely the person to whom the debt is being assigned must be privy to such information that will help in determining whether or not a prudent and wise decision is being made.

Certainly, the assignee cannot be expected to accept an assignment blindfolded. One has to be realistic, we are here dealing with Financial Institutions (banks) which are in the business of making profits. In this particular case an attempt was being made to save and shore up a number of Financial Institutions some of which were on the brink of collapse not embarking on some type of philanthropic escapade.

I find that there is no merit in this submission by the applicant.

CONCLUSION

I am of the opinion that the Motion should be dismissed for the following reasons:-

(1) The Certificate of Incorporation issued by the Registrar of Companies in respect of Finsac Limited under the Companies Act is conclusive.
The remedy for its removal is available under the Companies Act and redress is therefore available in another forum under that Act.

(2) The 1st and 2nd Respondents did not act in excess of the powers conferred on them by Section 93 of the Constitution of Jamaica and Section 15 of the Financial Administration and Audit Act.

(3) That the provisions of Sections 18 and 19 of the Constitution have not been contravened in relation to the applicant by Finsac Limited and/or Refin Trust Limited.

(4) The injunctive relief sought against Finsac Limited and Refin Trust Limited is without foundation and as such is misconceived.

Costs are awarded to the Respondents against the Applicant to be Taxed or agreed.

WOLFE, C.J.

Motion dismissed. Costs to the Respondents to be taxed if not agreed.