

Insolvency

Temporary management of an insolvent bank

by Shazeeda Ali

Century National Merchant Bank v Davies [1998] 2 WLR 779 (PC) is a decision of the Judicial Committee of the Privy Council pursuant to an appeal from the Court of Appeal of Jamaica. This paper will analyse the arguments put forth by the parties to the case.

THE FACTS

Briefly the facts of the case are that the appellant bank and two associated financial institutions, each controlled by the same people, had serious financial and managerial problems. As a result the Minister of Finance (MOF), acting under the authority of the Banking Act, assumed temporary management of the bank upon issuance of an immediately effective notice. The MOF simultaneously appointed a temporary manager and instructed him to discontinue the operations of the bank. Similar steps were taken in relation to the two other financial institutions under identical provisions in the relevant legislation.

The present appeal to the Privy Council represents the culmination of a series of litigation in which the appellants sought to challenge the lawfulness of the MOF's actions in assuming the temporary management of the bank and other financial institutions.

DECISION

In arriving at its decision the Privy Council considered the following material provisions of the Banking Act. Since the legislation governing the other financial institutions are similar to the Banking Act these conclusions are of equal applicability.

Section 25 of the Banking Act empowers the MOF 'to take such steps as he considers best calculated to serve the public interest' in relation to a bank which 'is or appears likely to become unable to meet its obligations' or which the MOF has reasonable cause to believe is engaging in an 'unsafe or unsound practice' in conducting its banking business. In these situations the MOF has the power *inter alia* to assume the temporary management of the bank in

accordance with the following specified procedures.

The MOF is required to serve on the bank concerned a notice announcing his intention to temporarily manage the bank from the date and time stated in the notice. From that moment, full and exclusive powers of management and control vests in the MOF, including the power to discontinue its operations, and in this regard the MOF is permitted to appoint any person to manage the bank on their behalf. (sch. 2, pt D)

A bank which is served with such a notice is entitled to appeal to the Court of Appeal within ten days of that notice and the Court of Appeal 'may make such orders as it thinks fit' (sch. 2, pt. D, para. 2(1) and (2)).

Subsequent to the MOF assuming temporary management, the appellant bank did not appeal to the Court of Appeal within ten days of the service of the notice, nor did it seek an extension of time to do so as permitted by the relevant provision. Instead, the appellant bank sought to impugn the validity of the MOF's actions by seeking a declaration in the Supreme Court that the MOF had acted unlawfully in the assumption of temporary management. The bank's action was struck out and their appeal from that order was dismissed by the Court of Appeal in a 'detailed and careful' judgment, to which the Privy Council has presently paid tribute.

The bank's appeal to the Privy Council was based on the following arguments:

- (1) the bank's remedy of a direct appeal to the Court of Appeal is not an exclusive remedy;
- (2) the assumption of temporary management was unlawful since no prior notice was given and the absence of an opportunity for the bank to make representations was procedurally unfair;
- (3) the assumption of temporary management was unlawful because the bank was insolvent and a petition for winding-up was the only appropriate measure.

Direct appeal

With respect to the first issue, the Privy Council held that the relevant provision is cast in language of such 'width and generality' that any issue regarding the notice would be within the scope of the statutory right of appeal, including a challenge that the notice was invalid for procedural or substantive reasons. By distinguishing *Anismic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 HL; their Lordships dismissed the contention that this was a case of ouster of jurisdiction, since the Banking Act vested exceptional original jurisdiction in the Court of Appeal to hear an appeal by the bank in respect of the MOF's notice. Even though this right of appeal is not expressly specified to be an exclusive remedy, this is a necessary implication of the language and context of the statute. The legislature has provided for a 'speedy general right of appeal' and as such could not have intended to leave intact 'the unfettered right' to challenge the validity of the assumption of temporary management years later in a private law action at first instance. Any such construction would be impractical and as there is a manifest need for certainty and finality about the temporary management, the statutory right to appeal is deemed to be an exclusive remedy.

Procedurally unfair

In relation to the second issue their Lordships maintained that the context of the statute confirms that prior notice of an intention to assume temporary management 'may cause grave problems.' In delivering the judgment of the Privy Council, Lord Steyn held that such a prior notice would place the directors of the bank 'in a most invidious position in regard to carrying out the operations of the bank.' There could also result deliberate destruction of incriminating records by those in the bank responsible for the unsound practices. In painting a worse case scenario his Lordship noted that the risk of an advance notice leaking out could alarm depositors and cause a run on the bank. Since 'confidence is the

lifeblood of banking' this could destroy any prospect of a reconstruction of the bank and could even have systemic consequences by adversely affecting the banking sector and ultimately the national economy as a whole.

Inappropriate measures

For these reasons, the need for a surprise element in the MOF's notice justifies the procedure adopted as any opportunity for the bank to make representations that the temporary management is inappropriate would be both impractical and contrary to the public interest. There was therefore no procedural unfairness or violation of the principles of natural justice. Moreover, on the basis of *Wise v Borneman* [1971] AC 297 HL; the Privy Council held that the bank's statutory right of appeal to the

Court of Appeal is sufficient to achieve justice and to require any additional steps, such as representations, would only frustrate the purpose of the banking legislation.

With regard to the final argument, the Privy Council held that the relevant provisions expressly permit the 'perfectly practical and sensible statutory scheme' of enabling the MOF to assume temporary management of the bank even when it is insolvent and unable to meet its obligations. In such a case the temporary manager is specifically empowered to make proposals for a scheme of arrangement with creditors or for reconstruction of the bank, and is thus not bound to present a petition for the bank's winding-up.

Consequently, the Privy Council

dismissed the appeals as the appellants had failed to make out an arguable case that the MOF had acted unlawfully in his assumption of temporary management.

The provisions of the Banking Act and related legislation reflect the rationale that the preservation of 'the soundness of the banking sector is critical to the economy of Jamaica', whilst the consistently solid judgments in the history of this case illustrate that any act which threatens to impede the efficiency and integrity of the financial sector will be circumscribed by those charged with ensuring its proper regulation. 

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