IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CONSTITUTIONAL COURT

SUIT NO. M64 OF 1995

BEFORE: THE HONOURABLE MR. JUSTICE PANTON
THE HONOURABLE MR. JUSTICE LANGRIN
THE HONOURABLE MR. JUSTICE SMITH

BETWEEN	DONALD PANTON AND JANET PANTON	APPLICANTS
AND	THE ATTORNEY GENERAL	RESPONDENT

Frank Phipps, Q.C., Walter Scott, Abe Dabdoub and Miss Carolyn Reid, instructed by L.S. Broderick & Co. for the first-named applicant

Ian Ramsay and Miss Deborah Martin, instructed by L.S. Broderick & Co. for the second-named applicant

Lennox Campbell, Lackston Robinson and Ms. Marsha Dunbar, instructed by the Director of State Proceedings for the respondent

Heard: October 22, 23, 24 and 25;
November 11, 12, 13, 14, 15 and 20, 1996

PANTON, J.

Tha applicants say that they are "businesspersons and the controlling shareholder of a group of companies including Blaise Trust Company and Merchant Bank Limited .... Blaise Building Society .... and Consolidated Holdings Limited".

On December 18, 1994, the Minister of Finance assumed temporary management of Blaise Trust Company and Merchant Bank Limited and on April 10, 1995, he assumed temporary management of Blaise Building Society and Consolidated Holdings Limited. He has asserted that he had constitutionally valid legislative authority for his actions.

On July 18, 1995, that is, exactly seven months after the Minister's assumption of temporary management over the bank, the applicants filed a notice of motion seeking redress under section 25 of the Constitution of Jamaica. They sought the following:

(a) a delcaration that the Minister had contravened their constitutional rights" in taking over the management" of the financial institutions;

(b) compensation for the contravention; and

(c) such other relief as the Court would see fit.

The notice of motion stated that the grounds for the application were:

(a) a breach of section 18 of the Constitution; and

(b) the unconstitutionality of the Building Societies (Amendment) Act 1995, and the Bank of Jamaica (Amendment) Act, 1995.

The applicants were apparently not happy with the notice that they had filed as eleven months later (June 1996) they filed a document headed "Amended originating notice of motion".

In this amended notice of motion, the applicants indicated that they were seeking a declaration that their constitutional rights had been contravened by the Minister of Finance "in compulsorily taking over the assets, property and management" of the financial institutions "without compensating them therefor". In addition to the two pieces of legislation that they sought to be declared unconstitutional, they added the Bank of Jamaica (Building Societies) Regulations 1995 and the Bank of Jamaica (Industrial and Provident Societies) Regulations 1995.

On October 2, 1996, the applicants filed another document headed "further amended originating notice of motion". By this further amendment, the applicants sought a declaration that the Financial Institutions Act 1992 was unconstitutional.

Finally, on October 25, 1996, during the hearing of the arguments, the applicants sought (and were granted) a further amendment to their motion. They sought a further declaration that the applicants' right to natural justice had been breached by the Minister of Finance in "taking temporary management" of the institutions, and "in the administering of management of the respective companies". 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.

The position therefore is that the applicants started in July 1995 with a complaint of unconstitutionality in the taking over of the management of the institutions by the Minister and, by a series of amendments, eventually formulated a complaint alleging the compulsorily taking over of the assets, property and managment of the institutions.

In summary form, out of this maze, after the various amendments spread over sixteen months, this is how the applicants eventually worded that which they sought:

1. (a) a declaration that their constitutional rights had been "contravened by the actions of the Minister of Finance and/or the Bank of Jamaica and/or the Government of Jamaica in compulsorily taking over the assets, property and management of Blaise Trust Company and Merchant Bank Limited ... without compensating them therefor under the Financial Institutions Act 1992 which:

   (i) does not make provisions for compensation;

   (ii) or prescribe principles on which and the manner in which compensation therefor is to be determined;

   (iii) or secure the applicants' rights to establish their interests and determine the compensation to which they are entitled in a Court of Law;

   (iv) and enforcing their rights to any such compensation and,

   (b) compensation for the said contravention of the applicants' constitutional rights".

2. a declaration in terms similar to (1) above except that it excludes reference to the action of the Bank of Jamaica, and the legislation alluded to are the Building Societies (Amendment) Act, 1995, and the Bank of Jamaica (Industrial and Provident Societies) Act, 1995.

3. a declaration that the Bank of Jamaica (Industrial and Provident Societies) Act, 1995, the Bank of Jamaica (Industrial and Provident Societies) Regulations, 1995, the Bank of Jamaica (Building Societies) Regulations 1995, the Building Societies Amendment Act, 1995, and the Financial Institutions Act 1992 are all unconstitutional.

4. "a declaration that the applicants' right to natural justice, including the right to a fair hearing under section 20 of the Constitution has been breached by the Minister in taking temporary management of the Bank, the Building Society and Consolidated Holdings Ltd., and in the administering of management of the respective companies".

The grounds of the application were stated as follows:

"(a) that the taking over of the Bank, the Society and Consolidated is a breach of Section 18 of the Constitution of Jamaica;

(b) that the Bank of Jamaica (Amendment) Act, 1995, is unconstitutional;

(c) that the Building Societies (Amendment) Act, 1995, is unconstitutional;

(d) that the Bank of Jamaica (Building Societies) Regulations, 1995, is unconstitutional;

(e) that the Bank of Jamaica (Industrial and Provident Societies) Regulations, 1995, is unconstitutional;

(f) that the Financial Institutions Act, 1992, is unconstitutional".

On November 20, 1996, we dismissed the motion, giving a summary of our reasons then, with a promise to provide our full reasons in due course. These are my reaons for dismissing the motion.

It seems imperative that we should firstly look at the relevant provisions of section 18 of the Constitution.

SECTION 18(1) OF THE CONSTITUTION OF JAMAICA provides thus:

> "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 of 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".

Having looked at section 18, it seems appropriate that the next step is to look at the legislative authority of the Parliament of the land, as defined in the Constitution. The relevant provision for consideration in this respect is section 48.

SECTION 48(1) OF THE CONSTITUTION OF JAMAICA provides thus:

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

In considering whether an Act of Parliament is unconstitutional, there is one fundamental point which should be borne in mind at the outset. It is this: There is a presumption in favour of the validity of all acts of Parliament. This is the general position in most, if not all, Commonwealth countries where there are written constitutions.

In the Australian case, British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation (1926) 38 CLR 153, at page 180, Isaacs, J. had this to say:

> "Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question trangresses

the limits laid down by the organic law of the constitution, it must be allowed to stand as the true expression of the national will ... There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds".

In another Commonwealth country, Canada, there is high supportive judicial authority for the said proposition. In McKay v. The Queen 53 D.L.R. (2d) 532, at pages 536-7, Cartwright, J. said:

> "If an enactment is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly".

In Barbados, Chief Justice, Sir Denys Williams, in a case in 1992, had this to say:

> "There is thus a presumption in favour of the constitutional validity of an Act which is challenged as unconstitutional and the burden is on him or her who complains to show that there has been a clear transgression of the constitutional provisions. The Court is not concerned with questions of the propriety or expediency of the legislation but only whether Parliament has gone beyond its constitutional powers". [King v. Attorney General (1992) 44 W.I.R. 52 at page 67].

So, the Chief Justice of Barbados refers to a "clear transgression" while Isaacs, J. of Australia refers to "clear beyond reasonable doubt" in relation to the standard of proof.

It is against this background that the Court has to view the challenge mounted by the applicants in this case in respect of the various pieces of legislation.

THE FINANCIAL INSTITUTIONS ACT 1992 came into operation on the very last day of 1992. It provides for the licensing of companies wishing to carry on the business of accepting deposits or to issue or cause to be issued advertisements for deposits. It is a criminal offence to contravene the licensing requirements.

Applications for a licence are made to the Minister of Finance who may, in his discretion, grant or refuse an application. He may not however grant an application unless the Bank of Jamaica recommends the directors, managers and shareholders with more than 20% shareholding as being honest and solvent.

The Act does the following:

1. It sets a minimum capital requirement for a company seeking a licence, and provides for the maintenance of a reserve fund.
2. It restricts the extent of the deposit liabilities of a licensee, and limits the fixed assets that the licensee may hold.
3. It provides for the making of monthly and annual returns to the Bank of Jamaica by a licensee in relation to its operations, and makes it a criminal offence to fail to make a return.
4. It gives the Bank of Jamaica the role of supervisor of licensees.

The supervisory role of the Bank of Jamaica allows that Bank access to all books and records of licensees, and requires the Bank to report to the Minister on the performance of licensees. The Bank of Jamaica may also make such recommendations as it considers necessary or desirable to correct any malpractices or deficiencies discovered in the execution of its duties. (See sections 29 and 30 of the Act).

The portion of the Act that has earned the wrath of the applicants is section 25, particularly subsections 1 and 3 (c).

SECTION 25 (1) OF THE FINANCIAL INSTITUTIONS ACT reads thus:

> "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 the section".

SECTION 25 (3)(c) reads thus:

"As respects the conditions specified in Part B of the Second Schedule the Minister may -

assume the temporary management of the licensee in accordance with Part D of that Schedule".

PART D of the SECOND SCHEDULE is set out hereunder"

""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.

(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.

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.

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"".

It is perhaps useful to point out at this stage that the Financial Institutions Act repealed the PROTECTION OF DEPOSITORS ACT which had come into operation on the 1st November, 1974. That Act had itself made it a criminal offence for any person other than a licensee to carry on the business of accepting deposits after the expiration of three months from the 1st November, 1974. The supplemental affidavit of Donald Panton dated 9th July, 1996, asserts in paragraphs 8, 9 and 10 that the Blaise Trust Company and Merchant Bank Limited did not have a licence under any of the relevant Acts. This seems to be an admission of the commission of criminal offences

by all those persons including the applicants who held out to the public that they were directors of an entity that was licensed to do business with the members of the public.

No submission was advanced before us on this point by any of the learned attorneys-at-law for the applicants. However, it is not unusual in Jamaica for parties to a suit in the Supreme Court to ignore a point while making lengthy submissions, yet the said point may become a major focus in appellate proceedings at the instance of the negligent party. Therefore, I shall deal with the point in passing.

It is my opinion that even if the bank was not licensed, it would be irrelevant as the applicants who were at one stage directors never raised this as a matter of importance when the Minister and the Bank of Jamaica officials held meetings with them, and offered suggestions as to how the institution may be better operated. Indeed, they seem to have co-operated. In the words of the applicants they did not wish to "create any adverse publicity". They even took the voluntary step of advertising for sale the famous Navy Island which apparently formed part of the assets of the institutions. They wished, it would appear, to perpetuate a deception on the public to the effect that the bank was licensed. In my judgment, they behaved in a manner indicating the right of the Minister and the officials of the Bank of Jamaica to treat the institution as licensed.

One cannot help but wonder how it is possible for an institution such as a bank to be unlicensed for several years without the Bank of Jamaica being aware. That is a frightening situation, in my view.

DOES TEMPORARY MANAGEMENT EQUAL COMPULSORY ACQUISITION?

This is the question that learned Queen's Counsel Mr. Phipps posed for the Court's consideration.

> "Does section 25(3)(c) of the FIA", he asks, "provide for compulsory acquisition, and as such, does it violate section 18 of the Constitution in that there is no provision for access to the Courts and compensation?"

Mr. Phipps contended that by assuming management of the respective companies, the Minister acquired by statutory authority property, interest in property and rights over property in which the applicants had rights as shareholders. The applicants were deprived of their right over property. A shareholder, he said, had a right to determine the management of a company, and a shareholder had an interest in all the future activities of a company.

Learned attorney-at-law. Mr. Ramsay, submitted that the phrase that had to be analysed was "full and exclusive powers of management and control" as appearing in paragraph 1(4) of Part D of the Second Schedule. In his view, exclusive control is the very hallmark of possession.

He wished also that the Court would consider whether section 18(3) of the Constitution created an exemption. Mr. Ramsay submitted that there was a distinction between restriction on use of property as against taking possession of and acquiring rights and interests in property. The Minister, he felt, had dispossessed the shareholders. The learned attorney-at-law further submitted that where a person is deprived of the entire use, that was not a restriction on the use of property. Restriction, he said, must leave some user in the property. In the instant case, the property was taken over. "Rights and interests acquired", he said, "never again to be seen".

The Court must first ask itself, it seems to me, what is the status of a shareholder seeing that the basis of the applicants' motion is their shareholding. To this end, it is usefulto refer to the Companies Act. Section 73 of that Act states in subsection (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 langauge of this section needs, it seems, no attempt at explanation. However, it should be mentioned that section 80 of the said Act states that a certificate, under the common seal of the company, specifying any shares held by any member, shall be prima facie evidence of the title of the member to the shares. Presumably, the applicants are in possession of such certificates.

Having noted the definition of a share, it is now necessary to consider and determine whether any property was involved and whether there had been a compulsory taking of such property by the Minister. In this regard, it is appropriate to mention the case Macaura v. Northern Assurance Company Limited and Others (1925) A.C. 619, where the owner of a timber estate sold the whole of the timber thereon to a timber company in consideration of fully paid up shares in the company. Subsequently, he insured the timber against fire, effecting the policies in his own name. The timber was eventually lost to fire. He claimed on the policies. He was not only the sole shareholder, he was also a major creditor of the company. It was held in the House of Lords that neither as a creditor nor as a shareholder did he have an insurable interest in the timber. Lord Buckmaster put it this way at page 626:

> "Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up".

Lord Sumner, at page 630, said:

> "He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder, could he insure the company's assets... His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire".

Lord Wrenbury, at page 633, was content to say:

> "My Lords, this appeal may be disposed of by saying that the corporator even if he holds all the shares is not the corporation, and that neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation".

The challenged portions of section 25 of the Financial Institutions Act provide for the Minister, given the existence of certain conditions, to assume

temporary management of the financial institution in accordance with Part D of the Second Schedule. Examination of the section and the various Parts of the Second Schedule reveals that -

1. there is no provision that interferes with the shares or shareholdings of the applicants; and
2. there is no provision that gives the Minister the right to compulsorily take the applicants' shares or rights attached thereto.

The legislation leaves the shares and shareholdings intact. In my view, the submissions of the applicants have been based on a misconception of the legislation and its import.

In my judgment, the giving of full and exclusive powers of management to the Minister does not violate the Constitution as the legislation is making provision for good management rather than for acquisition or ownership. Part D is clearly inconsistent with a compulsory acquisition of property as it provides for:

1. the service of notice on the licensee;
2. the need for the Minister to apply to the Supreme Court for an order to confirm the vesting of the powers of management;
3. the licensee to be able to oppose the action of the Minister by applying to the Court of Appeal; and
4. the Minister, as one of his options, to restore the licensee to its directors or owners.

In my view, the main point that should never be forgotten is that the licensee is an institution that is dealing with the public, inviting deposits of cash, and the Parliament of the country has a key role to make laws for the peace, order and good government of Jamaica. Parliament cannot be denied the right to pass laws that give a Minister the power to assume the temporary management of a banking institution that is perceived to be operating, for example, in breach of its own memorandum or articles of association; or in a situation where its assets are substantially less than its liabilities; or where it is engaging in unsafe or unsound practice; or where it has given false statements concerning its affairs.

In the case Belfast Corporation v. O.D. Cars, Ltd. (1960) 1 All. E.R. 65 Viscount Simonds posed the following questions at page 68: "What is the meaning of the word "take"? What is the meaning of the word "property"? What is the scope of the phrase "take any property without compensation"?

Those questions were not dissimilar to the matters for consideration in this case. He answered the questions in this way at page 69 A-C:

> "I hope that I do not over-simplify the problem, if I ask whether anyone using the English language in its ordinary signification would say of a local authority which imposed some restriction on the user of property by its owner that that authority had "taken" that owner's "property". He would not make any fine distinction between "take", "take over", or "take away". He would agree that "property" is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights, which in the aggregate constitute ownership of property could itself and by itself be called "property" and, to come to the instant case, he would deny that the right to use property in a particular way was itself property and that the restriction or denial of that right by a local authority was a "taking", "taking away" or "taking over" of "property"."

Viscount Simonds went on to say:

> "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."

The applicants, who are shareholders, are still owners of their respective shares and may do that which they please with them. As Mr. Lennox Campbell for the respondent submitted, the shareholders still have their shares which they may sell even now. The Minister has not interfered with the shareholdings and the legislation has not made any provision for any such interference. The legislation has made provision for the Minister to temporarily manage the institution if certain conditions exist. Nothing is unconstitutional about that. It would, in my view, be most outrageous and unacceptable if Parliament did not have the power to provide for intervention by a regulatory authority in a situation where for example a fraud was being practiced on the public.

In my judgment, there is no basis in fact or in law for any declaration that the constitutional rights of the applicants had been contravened by the compulsory taking over of the assets, property and management of Blaise Trust Company and Merchant Bank, or of any of the other related institutions.

WAS SECTION 20 OF THE CONSTITUTION BREACHED?

The next area for consideration is whether there has been a breach of section 20 of the Constitution. According to the "notice of motion to further amend motion" dated the 25th day of October, 1996, the applicants are seeking a declaration that their right to natural justice including the right to a fair hearing under section 20 of the Constitution has been breached by the Minister in taking temporary management of the bank, the building society and Consolidated Holdings Ltd. and in the administering of the management of the respective companies.

I have carefully considered the provisions of section 20, and have formed the view that it has no relevance whatsoever to the matter before the Court. I shall not, however, content myself merely with that statement. Due to the submissions relating to unfairness advanced by Mr. Phipps, as well as Mr. Ramsay, I think that perhaps I should make some observations in this regard. It has been said that there was unfairness in that there was no notice to the applicants. There is some uneasiness in me in dealing with this point as it is really a matter for a reviewing Court whereas it is the challenge to the constitutionality of the legislation that has brought this panel together.

So far as the bank is concerned, Part D of the Second Schedule to the Financial Institutions Act referred to earlier provides for the Minister to serve on the licensee a notice announcing his intention of temporarily managing the licensee from such date and time as may be specified in the notice. A copy of this notice shall be sent to the Registrar of the Supreme Court and shall be posted at a conspicuous place at the business place of the licensee. Further, a copy of the notice shall be published in a newspaper printed and circulated in Jamaica.

The licensee may, upon being served with a notice, within ten days after the date of service, appeal to the Court of Appeal which has power to extend the time for appeal.

It is clear that the notice published in a newspaper printed and circulated in Jamaica is intended to reach persons such as shareholders, depositors and other interested parties. It would then be left to the discretion of such persons to determine whether they should take the necessary steps to galvanize the licensee into the type of action provided for in the legislation, such as appealing to the Court of Appeal.

It was submitted that in the instant case the Minister acted unfairly in making the notice effective on the very date that he notified the licensee of his intention. This, in my view, overlooks the fact that the legislation permits an appeal to the Court of Appeal within ten days of the service of the notice, and the Court of Appeal may enlarge the time for appeal. So, it really does not matter on which date the notice is to become effective.

In my judgment, the applicants have failed to show that there has been any unfairness. Accordingly no declaration may be granted to that effect.

RETROSPECTIVITY

The applicants have challenged Section 34F of the Bank of Jamaica Act in relation to its constitutionality. The Bank of Jamaica Act was passed in October 1960. The principal objects of the Bank are stated in section 5 as being "to influence the volume and conditions of supply of credit so as to promote the fullest expansion in production, trade and employment, consistent with the maintenance of monetary stability in Jamaica and the external value of the currency, to foster the development of money and capital markets in Jamaica and to act as banker to the Government".

In 1973 and 1992, this Act was amended so as to give the Bank the power to require any commercial bank or specified financial institution to furnish such information as the Bank thinks requisite in order to ascertain whether that bank or institution is complying with certain provisions of the Banking Act and the Financial Institutions Act.

In 1992, Part VA (comprising Sections 34A to 34D inclusive) was inserted in the Act. That Part provides for the supervision and examination of banks and specified financial institutions. In 1995, the Bank of Jamaica (Amendment) Act [No. 2 of 1995], added two new sections - 34E and 34F. This amendment received the assent of the Governor-General on the 13th day of February, 1995.

Section 34E provides for the indemnifying of the Bank and certain named persons in the exercise of the powers under the Act. This section has not drawn the ire of the applicants. What is objectionable to them is section 34F which gives the Minister the power to make regulations prescribing "prudential criteria and minimum standards to be complied with by commercial banks and specified financial institutions". Regulations made under this section require affirmative resolution. Section 1 of the amending Act, provides that the section that is being challenged (that is, section 34F) shall be deemed to have come into operation on the 1st day of December, 1994. That means simply that the legislation has been back-dated.

Learned Queen's Counsel submitted that there is unconstitutionality "in that the legislation is seeking to create legislation as being retrospective as distinct from legislation passed today to deal with past conduct". He said that in inserting section 34F what was being said was that "the legislation created in February was created in December of the previous year". "The Act", he said, "cannot be passed in the way that it was done - that is, passed in February to be regarded as having been passed in December". "Legislation", he said, "cannot amend legislation retrospectively". As a result of this impossible situation, it was his submission that the power given to the Minister to create regulations thereunder is void.

Learned Queen's Counsel also submitted that retrospectivity was possible at common law but not under the Jamaican Constitution. I must confess that I have not yet grasped this submission.

In dealing with this question of retrospectivity, it seems to me that the starting point ought to be the Interpretation Act. Section 15(1) thereof provide thus:

> "Every Act shall, unless it is otherwise therein expressly provided, come into operation on the day of the publication of the notification of assent".

In my judgment, this section is a complete answer to any argument that the Parliament could not have done what it did in relation to section 34F. It is also worthy of note that the word "Act" is defined in section 2

of the Interpretation Act as meaning any statute enacted by the Legislature of the Island whether before or after the 1st April, 1968, and includes any regulations made thereunder. That which applies to the Act applies to the regulations made thereunder. As Devlin, J. (As he then was) said:

> "....no statute or order is to be construed as having a restrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act". [See Master Ladies Tailors Organisation v. Minister of Labour (1950) 2 All. E.R. 525, at 528]

Courts have long recognised that "restrospective laws offend against the general principle that legislation intended to regulate human conduct ought to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law" [See Thornton's "Legislative Drafting" (1970) page 101].

Indeed, it is said that there is a presumption against the restrospective operation of statutes. In the case Phillips v. Eyre (1870) L.R. 6 Q.B. 1 at page 23, there is this statement:

> "Restrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. 'Leges et constitutiones futuris certum est dare formam negotiis non ad facta praeterita revocari; nisi nominatim et de praeterito tempore et adhuc pendentibus negotiis cautum sit'. Accordingly, the court will not ascribe restrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature".

The legislation that is challenged makes it clear that the legislation is to be effective from a date that had passed. Section 15(1) of the Interpretation Act allows it; and from as long ago as Phillips v. Eyre, it was acknowledged that express words form one method through which the court would ascribe retrospective force to legislation.

A distinction has to be made between criminal law and civil law so far as this type of legislation is concerned. For example, that which was not a crime when done yesterday cannot become a crime today. As pointed out by Mr. Lackston Robinson for the respondent, section 20(7) of the Constitution makes this clear. That subsection reads thus:

> "No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed".

I have not seen any provision of the Constitution that has been breached by the legislation that is being challenged. Specifically, the provisions of Chapter 111 of the Constitution, dealing with Fundamental Rights and Freedoms have not, in my judgment, been violated in any way. There has been what I regard as a vague reference by Mr. Phipps to section 60, but I am at a loss as to the connection considering that that section deals with assent to bills.

Lord Justice Staughton in the case Secretary of State for Social Security and another v. Tunnicliffe (1991) 2 All E.R. 712 had this to say at page 724:

> "In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended".

In the said case, 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 to 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. It is clearly in the interests of the State that its citizens are provided with legislative protection from the possibility of being duped by bankers or other persons operating such institutions.

For the foregoing reasons I am of the opinion that the motion should be dismissed and I order accordingly. Costs are awarded to the respondent; such costs to be agreed or taxed.

PRELIMINARY OBJECTION

Before parting with this matter, I should mention that a preliminary objection to the motion was taken by the respondent as to the locus standi of the applicants and, further, as to the propriety of the Court to hear the matter in view of the proviso to section 25(2) of the Constitution.

Section 25(1) provides that a person who alleges that any of the provisions of sections 14 to 24 of the Constitution has been contravened in relation to him, may apply to the Supreme Court for redress.

Section 25(2) states the jurisdiction of the Supreme Court and adds the following: "provided that the Supreme Court shall not exercise its power 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".

I agree with Mr. Walter Scott that persons such as the applicants who assert that section 18 of the Constitution has been breached do have locus standi. They are shareholders. They have an interest in the companies. The fact that they may have been labouring under a misconception that section 18 had been breached does not bar them from having the matter aired in the Supreme Court. It is a matter for the Court to examine.

So far as the proviso is concerned, it cannot be confidently said that adequate means of redress existed under any other law. If the applicants were right in their contention, there would have been no other law to provide them with redress. The non-provision of compensation in the law was one of their complaints.

In my view, therefore, there was no merit in the objection.

LANGRIN, J.

This motion seeks redress under Section 25 of the Constitution for the action of the Minister of Finance in assuming temporary management of the applicants' companies. The Financial Institution Act, the Bank of Jamaica (Amendment) Act of 1995 and The Building Societies (Amendment) Act 1995 and their respective Regulations of 1995 are being impugned as contrary to Section 18 of the Constitution.

The applicants are shareholders in the three financial institutions with each having shareholding interests as follows:

(i) 53,688 shares in Blaise Trust Company and Merchant Bank.

(ii) One proprietory share in Consolidated Holdings Limited.

(iii) One of three subscribing shareholders to the extent of one proprietory share in the Blaise Building Society as a nominee for Blaise Trust Company and Merchant Bank which wholly owns the said Building Society.

The Bank, Building Society and Consolidated Holdings all occupied the same premises and employed the same staff.

The financial institutions as borne out by an audit conducted in 1994 were unable to meet their obligations and were in breach of certain conditions specified in Part B of the Second Schedule to the Financial Institutions Act. There were irregularities, unsafe practices and breaches of the Financial Institutions Act which are conditions that satisfied the provisions of Section 25(1) and Part B of the Second Schedule.

On the 17th December 1994 the Minister served a notice of his intention to assume temporary management of the Bank from 11:00 a.m. on the 18th December 1994. On the 26th October 1995 a Scheme of Arrangement between the Bank and its creditors/depositors was approved by the Court. A Petition for Winding Up of the Bank

was filed in the Court because of the Bank's inability to pay the expenses of the temporary manager.

On the 10th April 1995 the Minister served a notice of his intention to assume temporary management of the Building Society. The Vesting Order in the Minister was confirmed by the Court on 8th June 1995. A Scheme of Arrangement with respect to the Building Society and its Creditors/Depositors was approved by the Court on 26th October, 1995. A Petition for Winding Up was filed in the Court because of the Building Society's inability to pay the expenses of the temporary manager.

Again on the 10th April 1995 the Minister served a Notice of his intention to assume temporary management of Consolidated Holdings Limited on the same day. The Vesting Order in the Minister was approved by the Court on the 8th June, 1995. The Scheme of Arrangement with respect to Consolidated Holdings Limited and its creditors/depositors was approved by the Court on 26th October, 1995. A Petition for Winding Up was filed in the Court because of the Consolidated Holdings Limited inability to pay the expenses of the temporary manager.

The applicants jointly seek the following relief:

1. (a) A Declaration that the Constitutional rights of the applicants have been contravened by the action of the Minister of Finance and/or the Government of Jamaica in compulsorily taking over the assets, property and management of Blaise Trust Company and Merchant Bank Limited hereinafter called "the Bank" without compensating them therefor under the Financial Institution Act of 1992 which:

   i. does not make provisions for compensation

   ii. or prescribe principles on which, and the manner in which compensation therefor is to be determined;

   iii. or secure the applicants' rights to establish their interests and determine

the compensation to which they are entitled in a Court of law

iv. and enforcing their rights to any such compensation and,

(b) Compensation for the said contravention of the applicants' constitutional rights.

(2) (a) A Declaration that the constitutional rights of the applicants have been contravened by the action of the Minister of Finance and/or the Government of Jamaica in compulsory taking over the assets, property, and/or management of Blaise Building Society (hereinafter called "the Society") and Consolidated Holdings Limited (hereinafter called "Consolidated") without compensating them therefor under the Building Societies Amendment Act 1995 and the Bank of Jamaica (Industrial and Provident Societies) Act 1995 which:

i. do not make provision for compensation

ii. or prescribe principles on which, and the manner in which compensation therefor is to be determined;

iii. or secure the applicants' rights to establish their interest and determine the compensation to which they are entitled in a court of law;

iv. and enforcing their right to any such compensation and

3. 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.

3A. A declaration that the applicants' right to natural justice, including the right to a fair hearing under Section 20 of the Constitution, has been breached by the Minister in taking temporary management of the Bank, the Building Society and Consolidated Holdings Limited, and in the administering of management of the respective companies.

The respondent raised a preliminary objection to the hearing of the application, the essence of which was:

Firstly, that the property complained of is that of the Company which is a separate legal entity from the shareholders who have invested in it. The applicants are complaining of breaches for whom the proper complaints are the companies described in the motion.

Secondly, the proviso to Section 25 of Constitution under which the relief is sought has a mandatory bar to the exercise of the Supreme Court jurisdiction under Section 25 to hear and determine any application where the court is satisfied that adequate means of redress are available under any other law. Adequate means of redress are provided under the statute and regulations.

Thirdly, even if the Minister acted wrongly such errors would be errors of substantive law and not errors of the nature of procedural law constituting breaches of the fundamental rules of natural justice.

Mr. Walter Scott on behalf of the applicants suitably replied to the submissions advanced by the applicants. We overruled the preliminary objection. Suffice it to say that Counsel for the respondents found himself arguing the merits in support of his preliminary objection. That being so it was absolutely necessary to hear arguments on the merits in order to dispose of the Motion.

The grounds upon which the reliefs are sought are as follows:

The taking over of the various entities is a breach of Section 18 of the Constitution of Jamaica.

2. That the various Statutes are unconstitutional

3. That the applicants were denied a right to be

heard when the Minister gave notice of his intention to take temporary management and 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.

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.

Further, there is nothing in the Financial Institution Act or the other relevant statutes stating that a person having interest in or right over any of the property which may be affected by the Minister's action has access to the Court or prescribes the principles on which or manner in which compensation is to be determined.

Mr. Ramsay submitted that in assuming temporary management of the financial entities the Minister took over and there was vested in him a corpus of corporeal objects to which incorporeal interests and rights were attached. Thus he can be said to have taken in the words of the statute the possession of property as well as acquiring interests and rights pertaining to such property. Subsequently and unconstitutionally he sought to make disposition of the Company's property to the detriment of the shareholders.

He further submitted that if the powers of full and exclusive management and control given under the Act are unconstitutional then the Minister would have had no standing to apply to the Court for a Scheme of Arrangement in respect of something which he had no right to do in the first place. It would therefore follow that the Scheme of Arrangement itself would be bad and itself part of the unconstitutional act.

Mr. Campbell Counsel for the respondent submitted that for the challenge to the constitutionality of the Financial Institutions Act to succeed the applicants must demonstrate to the Court's satis-

faction that the Act was not regulatory in scope but confiscatory. Also that the Act succeeded in compulsorily acquiring the rights over and interest in the shares of the applicant thereby transferring to the acquirer the complete title of the original holder and this was not done in the execution of or pursuit of any order of the Court or it was not done to permit the Minister to make any examination or investigation of the entities. Further the applicant must also prove that the purpose of the Act was not for the reasonable restriction of the use of the applicants' interest with a view of safeguarding the interests of creditors/depositors in the financial institutions.

Further he argued that the Minister's assumption of temporary management is to afford him the opportunity of examining and investigating the practices and procedures of the specific institutions with a view to making a determination as to whether the entity is unable to meet its obligations or otherwise. All the reports made to the Supervisor pursuant to the Act could have been shared with the Minister.

> The first question to be considered is whether the Financial Institution Act and other relevant legislation are unconstitutional.

The Parliament of Jamaica has the power to make laws regulating the financial institutions of Jamaica and give power to a Minister to take necessary action when the occasion arises. By virtue of Section 48(1) of the Constitution of Jamaica such a position is not open to doubt. However, if any of the provisions regulating financial institutions conflict with the Constitution in its present form then it could only do so legally if the Constitution was first amended to ensure that there is no inconsistency between the provisions of the Act and the Constitution.

Section 2 of the Constitution of Jamaica provides that any law inconsistent with the Constitution is to the extent of the inconsistency void. This is subject to the exception contained in

Section 50 which provides that an Act containing provisions inconsistent with Section 13 to 26 inclusive of the Constitution shall if passed on a final vote in each House by the votes of not less than two-thirds of all its members take effect despite the inconsistency. The primary submissions advanced by the applicants before this court states categorically that the Financial Institutions Act (1992), The Bank of Jamaica (Amendment) Act (1995), The Building Societies (Amendment) Act 1995 and the respective Regulations of 1995 with almost all identical provisions all contravene Section 18 of the Constitution.

The Court in determining whether the legislation under consideration are inconsistent with the Constitution of Jamaica is not concerned with the propriety of the law impugned but only if these provisions are of such a character that they conflict with the entrenched provisions of the Constitution and therefore can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision.

Turning now to the Financial Institutions Act, Part VIII is headed Regulation against unsafe Practices; For ease of reference I set out as under the relevant statutory provisions:

> "Section 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) .....
>
> (3) As respects the conditions specified in Part B of the Second Schedule the Minister may -
>
> (a) .....
>
> (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;

(d) Suspend or revoke the licensee's licence in accordance with Part E of that Schedule;

(e) present to the Court a petition for the winding up of the licensee or an application regarding reconstruction of the licensee.

Part B of the Second Schedule under the heading Conditions requiring action by the Minister under Section 25(3) of the Act is set out as under:

(1) The licensee, a director or any person employed (either as agent or otherwise) 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 -

(1) any provisions of this Act or any regulations made thereunder;

(c) has continued to take deposits in violation of a direction;

(d) has given false or misleading information in its application for a licence;

(e) has given false statements concerning the affairs of the licensee;

(f) refuses or neglects to make returns or to produce books, records or documents to an authorised officer;

(g) refuses to permit inspection of the licence by an authorised officer;

(h) has ceased to carry on the business of taking deposits.

(2) A receiver has been appointed in respect of the licensee.

Part D of the Second Schedule under the heading Temporary Management of a Licensee is set out as under:

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 operation;

(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.

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.

Section 18 of the Constitution reads in part 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 -

(a) prescribes the principles on which the manner in which compensation thereof 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.

(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) .....

(f) as an incident of a lease, tenancy, licence, mortgage, charge, bill of sale, pledge or contract;

(h) in the execution of judgments or orders of courts;

> (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."
>
> (Underling mine)

The fundamental rights provision relating to the protection of property states that any law relating to compulsory acquisition should secure to each interested person "a right of access to a court" for the purpose of establishing his interests as well as the determination and enforcement of his rights to compensation.

The Financial Institutions Act is a part of a regulatory framework that has been instituted to regulate the entities operating within the financial sector. It is clear that the Act is an update and modernization of the clear objectives of the Protection of Depositors Act.

On a true construction of the Act it is regulatory. Nowhere does the legislation refer to compulsory acquisition of assets of licensee and so the assumption of temporary management is merely a feature of the regulatory control of the Minister.

The Act makes provisions for the act of the Minister to be scrutinized by Courts. The Act did not specifically mention any rights of the shareholders. The shares are still the property of the shareholders. There is nothing to prevent them from selling their shares to anyone.

The legislative measures had the effect of depriving a licensee of his rights of management temporarily but did not in anyway interfere with the property of the shareholders or any rights which they had over their property. Any restriction on their property was a necessary incident of the licence granted to the company in which they owned their shares.

The vesting in Section 1(4) cannot be deemed to be a compulsory acquisition or compulsory taking possession of the shares. The Minister must be enabled to perform functions of management in order to protect creditors and depositors of the financial institutions. The vesting of full management and control protects the Minister from attack.

Even if the vesting is giving the Minister temporary possession of the shares it is not a compulsory act and is subject to review. A notice was given of the intending act of the Minister and the notice given to the Registrar makes it inconsistent with compulsory acquisition.

There is inconsistency with the word 'temporary' and compulsory acquisition. The Minister is vested with powers of management and control and not with possession of property. The applicants cannot complain that the shares are registered in the Minister's name.

Section 3 of the Act deals with restoring, petitioning compromise or management of the licensee. The regulatory mode is clearly established. Restriction is more consistent with regulatory provisions than confiscation. Why confiscate to restore. There is nothing which indicates that any benefit is flowing towards a person who is acquiring. It is not being contested that there were irregularities and unsafe practices and breaches of the Financial Institutions Act and breach of other conditions which satisfied the provisions of Section 25(1) and Part B of the second Schedule.

Nothing can be done with the applicants' property without the consent of the depositors. Therefore on any view it is demonstrably clear that the legislation is not inconsistent with Section 18 of the Constitution.

In my judgment it is impossible to conceive of a situation in a country with Parliamentary democracy where the legislature did not assume the responsibility for regulating the banking system to the extent where the necessity arises that the temporary management of a bank could not be assumed in order to protect the depositors.

The second question to be considered is whether the restriction on the exercise of a shareholder's rights given by the grant of a Licence to operate a bank thereby resulting in the Minister's decision to assume temporary management amounts to compulsory acquisition of property?

> "Property is defined in section 3 of the Interpretation Act as: includes money, goods, things in action, land and every description of property, whether real or personal; also obligation easements and every description of estate, interest and profit present and future, vested or contingent, arising out of or incident to property as above defined."

"Property of any description" as well as 'interest in and right over property' in section 18 of the Constitution are entitled to be given a generous and purposive construction. See Minister of Home Affairs v. Fisher (1979) 3 ALL ER. p.21.

The Constitution does not afford protection against progress or provides compensation for a business which fails because of irregularities and unsafe practices. The Minister did not act in order to ruin the applicants but in order to preserve an efficient financial institution in the interest of the public.

Where an authority imposes some restriction on the user of property it cannot reasonably be said that the authority compulsorily acquired the property or any interest therein. It is undoubtedly 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.

In the case of Belfast Corporation v. O.D. Cars Limited (1960) 1 ALL ER. 65 at p.69, Viscount Simonds in deciding whether an Act was a regulatory measure and not confiscatory so as to take any property without compensation had this to say:

> "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."

If as in the present case a person's property was as a consequence of the Financial Institutions Act and the relevant statutes temporarily regulated there was no breach of Section 18 for that regulation was in accordance with a law which it was within the competence of the legislature to pass.

In my view the applicants have no right of property in the licence granted to the financial entities and that the bundle of rights referred to by Mr. Ramsay such as right to continue management, right to vote at general meetings, right to receive capital upon a winding-up and the right to receive notices of meetings are not rights of property for which the applicant can complain.

It has been rightly argued by the respondent that the statutes are merely regulatory and it only regulated the banking and financial services of the relevant institutions. It did not compulsorily acquire the applicants shareholding interests which consists of the bundle of rights mentioned supra. I accept the submission that these statutes ought properly to be characterised

as regulatory and cannot by any reasonable objective analysis be recognised as compulsory acquisition. If this is not so it would be difficult if not impossible to imagine a regulatory statute without the usual provision of compensation in the legislation.

I accept Mr. Campbell's submission that the Financial Institutions Act is an update and modernization of the Protection of Depositors Act with clear objectives for the protection of depositors and provide a better framework to regulate and control the Licensee under its supervision.

The applicants relied on Attorney General of St. Christopher and Nevis v. Edmund W. Lawrence (1983) 31 WIR 176. This is a case where the dismissal of the managing director of the St. Kitts/Nevis/Anguilla National Bank (who was a shareholder of the bank) without notice or compensation following the enactment of a Special Provision Act entailed a deprivation of property without compensation which being unconstitutional by reason of Section 6 of the Constitution of St. Kitts and Nevis permitted the former managing director to challenge the validity of the legislation.

This case can easily be distinguished from the instant case. Mr. Lawrence's shareholding was still intact when the statute removed him as Managing Director. Mr. Lawrence in fact did not complain on the basis of his shareholding interest. His major complaint was on the basis that he had lost his office and there was no declaration sought that his property rights had been infringed.

Let me turn now to the relevant exceptions to Section 18. Consistent with the principles enunciated by Lord Wilberforce in Minister of Home Affairs v. Fisher (supra) where he said that Chapter 1 of the Constitution calls for a generous interpretation avoiding what has been called "the austerity of tabulated legalism suitable to give to individuals the full measure of the fundamental rights and freedoms referred to." There are these limitations under Section 18(2) referred to above which are designed to ensure that the enjoyment of the said right and freedom by the individual does not prejudice the rights and freedoms of others or the public interest.

These limitations are stated supra at Section 18(2)(f)(h) and subsection 3. The fact that the shares were the subject of a licence simply means that the applicants had impliedly consented to the restriction of the licence and are therefore precluded from the protection under the section. Moreover, the Minister's action was approved by the order of the Court which in my view would remove the protection from the applicant.

In so far as Subsection 3 is concerned it is my view that the Constitution allows for reasonable restriction of the use of any property in the interests of safeguarding the interests of others. I reject the applicants' contention that the ejusdem generis rule of interpreting the relevant provision in the Constitution should apply.

A person may be temporarily deprived of his property by a restrictive provision in a statute but it does not follow that such a provision which leads to a temporary deprivation also leads to compulsory acquisition. If as in the present case the applicants were in consequence of the Financial Institutions Act and the other amending Acts restricted in its use of property there was no breach of Section 18 for that restriction was in accordance with a law which it was within the competence of the legislature to pass.

> The third question to be considered is whether there is a right to secure protection of law under Section 20 of the Constitution.

The grounds set out in the Motion specifically stated that the applicants rights to natural justice including the right to a fair hearing has been breached by the Minister in taking temporary management of the financial entities.

It appears clear from the evidence that the opportunity of being heard was not given to the applicants before assumption of the temporary management of the entities neither were they informed of the reasons for the temporary management. The question arises therefore as to whether or not natural justice is a fundamental right under the Constitution in relation to the issue before the

Court.

Provisions to secure Protection of law

Section 20-(1) provides as under:

> "(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.
>
> (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."
>
> (underlining mine)

Subsection 1 deals expressly with criminal proceedings while subsection 2 relates to civil proceedings and incorporates the principles of natural justice in relation to inferior tribunals. Unless the authority is prescribed for the determination or the extent of civil rights or obligations the right is not protected by the Constitution. 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. Section 25(1) of the Constitution which provides for the enforcement of the protective provisions states as under:

> "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, 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."

It seems obvious that this provision envisages concurrent actions available to a person under common law or statutes for breaches stipulated in Section 14 to 24 of the Constitution. A fortiori, Section 25(2) states under:

> "25(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-section (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 the 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 mandatory proviso demonstrates quite clearly that if remedies for any breaches of these provisions exist in the Supreme Court whether by way of the Full Court procedure or otherwise then those remedies in my view are adequate. See Maharaj. v. Attorney General (No.2) (1078) 30 WIR 310 and Chokolingo v. The Attorney General (1980) 32 WIR 354.

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. In my judgment the extraordinary delay in prosecuting the motion is detrimental to good administration. See Kane v. Minister of Home Affairs and Justice 23 WIR 416.

Accordingly, the applicants' rights to the principles of natural justice including the right to a fair hearing under Section 20 of the Constitution was not contravened. The Minister's ultimate decision is a purely administrative one and whatever he does bears little resemblance to adjudicating on an action at law between parties. There is a third party, the general public as a whole whose interests it is the Minister's duty to treat as paramount.

Although the legitimate expectation of the applicants must be respected so that they may be consulted it should not override the public interests. A balance must be arrived at. In my view fairness does not require the perceived need for a swift action in order to avoid depletion of the deposits to be sacrificed in favour of consulting the applicants whose expectations however reasonable and genuine might well have subverted the Minister's policy objectives in containing the deposits.

> The fourth question which must be considered is whether the assumption of temporary management of the Building Society and Consolidated Holding's Limited made under regulations because of retrospectivity is therefore unconstitutional?

The affidavit evidence discloses that the Minister assumed temporary management of the Building Society and Consolidated Holdings on April 10, 1995. This was at a time when the relevant legislation was in operation. However, this is being disputed by the applicants who contend that temporary management of these entities was assumed on the 18th December, 1994, the same day when the Minister took control of the bank. There is no evidence of any notice having been given to these entities before the 10th April 1995 when Notices were served on them. That being so I find that the temporary management of those entities did not commence before the 10th April, 1995.

The applicants submitted that the purported assumption of temporary management of the Building Society and Consolidted Holdings Limited, under void regulations is illegal, null, void and of no effect.

Section 60(1) of the Constitution reads as follows:

> "60-(1) A Bill shall not become law until the Governor General has assented thereto in her ..... and has signed it in token of such assent.

Section 2 of the Constitution reads as follows:

> "2- Subject to the provisions of section 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall,

to the extent of the inconsistency, be void."

The Bank of Jamaica (Amendment) Act 1995 was assented to by the Governor General on 13th February, 1995. On the 29th March, 1995 regulations were promulgated under the Bank of Jamaica (Amendment) Act and these regulations purported to be retrospective in order to give effect to any immunity which may be required by the Minister for any act done by him in respect of these relevant financial entities effective from the 1st December, 1994.

Mr. Phipps Q.C. contends that the regulations could not, have been valid since at the date of the acts sought to be protected by the immunity the Governor General had not as yet assented.

In my view the Constitution does not make provision for the time when a law comes into operation. It is the Interpretation Act which does so at Sections 15 and 31. There is therefore no inconsistency between Section 60 of the Constitution and the Interpretation Act.

In my view the temporary management of these entities was assumed subsequent to the coming in force of the law. In any event where Parliament uses clear language to indicate the retrospectivity of legislation such legislation is valid since it is not inconsistent with the Constitution.

It was also contended by the applicants that the temporary management of the entities was assumed pursuant to powers under regulations which is not law and that renders the act of the Minister nugatory. This submission is rejected since by virtue of Section 31 of the Interpretation Act a regulation is a law.

Accordingly, for these reasons the applicants claim for redress under the Constitution has failed. It only remains for me to thank Counsel on both sides for their industry and the clarity of their submissions.

SMITH, J.

Essentially this Motion seeks to impugn the constitutionality of The Financial Institutions Act 1992 (F.I.A.), The Bank of Jamaica (Amendment) Act 1995, The Building Societies (Amendment) Act 1995 and two Regulations made in 1995 pursuant to powers conferred upon the Minister of Finance by The Bank of Jamaica Act. These Regulations are the B.O.J. (Building Societies) Regulations and B.O.J. (Industrial and Provident Societies) Regulations.

The applicants Donald and Janet Panton are husband and wife. They are shareholders in the three financial institutions involved in these proceedings namely.

(i) Blaise Trust Company and Merchant Bank Ltd. (The Bank) - a company carrying on the business of a Merchant Bank pursuant to a licence issued under and by virtue of the F.I.A.

(ii) Blaise Building Society.

(iii) Consolidated Holdings Limited - a company carrying on the business of an industrial and Provident Society and of a financial institution by way of taking deposits.

All these entities occupied the same premises, employed the same staff and it is fair to say that there was some intermingling among them. Indeed the Audit Report on the Bank reflected "a constant mismanagement and imprudent co-mingling of assets, deposits and liabilities." It is the contention of the Respondent that the sharing of the same physical office space and facilities resulted in their operations being indistinguishable.

On the 17th December, 1994 the Minister of Finance served a notice of his intention to assume temporary management of the Bank as of the 18th December, 1994. On the 18th December the Minister by virtue of powers vested in him under the F.I.A. assumed temporary management of the Bank. The Minister appointed Mr. Philmore Ogle a chartered accountant, to manage it. The decision to assume temporary management was mainly the result of an Inspection Report which had been commissioned pursuant to the provisions of the F.I.A. This report revealed about 16 breaches of the 1992 F.I.A.

The report indicated that the Bank had failed to operate as a sound and viable entity and as such unsatisfactory to poor ratings were accorded in all areas of operations.

It is probably noteworthy that the applicants were not only shareholders but directors of the Bank.

Two reports on the Bank by Mr. Ogle revealed that at the time of the Minister's assumption of temporary management of the Bank, "the transactions affairs and cash resources of the three 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. That it was vitually 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 to determining with some certainty the deposits and liabilities of each institutions." Thus all three institutions were effectively closed on the 18th December, 1994, although ostensibly the Minister had only assumed temporary management of the Bank.

On the 20th December, 1994 a Writ was filed on behalf of Blaise Building Society seeking among other things a declaration that the Building Society is exempted from the provision of the F.I.A. In their defence the Attorney General admitted that the F.I.A. did not apply to the plaintiff but claimed that the closure was inevitable.

On the 15th February, 1995 the Supreme Court on the application of the Minister confirmed the vesting in the Minister of full and exclusive powers of management of the Bank pursuant to paragraph 1 (5) of Part D of the second Schedule of the F.I.A.

On the 14th February, 1995 The Bank of Jamaica (Amendment) Act 1995 and the Building Societies (Amendment) Act were passed.

On the 27th March, 1995 the two Regulations mentioned above were made. The combined effect of these was to give the Minister power retrospectively to assume temporary management of the Consolidated Holdings Limited and the Blaise Building Society.

On the 10th of April, 1995 the Minister after serving the required notices assumed temporary management of these latter institutions.

On the 8th day of June, 1995 the Supreme Court made orders vesting in the Minister full and exclusive powers of management of Consolidated Holdings Limited and Blaise Building Society pursuant to paragraph 1(5) of Part B of the Schedule of the Bank of Jamaica (Industrial and Provident Societies) Regulations 1995 and paragraph 1(5) of Part B of the Schedule of the Bank of Jamaica (Building Societies) Regulations 1995 respectively.

A Notice of Motion was filed on the 18th July, 1995. An amended Notice of Motion was filed in June 1996. On the 2nd October, 1996 a Further Amended Notice of Motion was filed. This is what we are now concerned with.

By this Motion the applicants seek:

1 (a) A Declaration that the constitutional rights of the Applicants have been contravened by the actions of the Minister of Finance and/or the Bank of Jamaica and/or the Government of Jamaica in compulsorily taking over the assets, property and management of Blaise Trust Company and Merchant Bank Limited (hereinafter called " the Bank") without compensating them therefor under the Financial Institutions Act of 1992 which:

(i) does not make provisions for compensation;

(ii) or prescribes principles on which compensation therefor is to be determined;

(iii) or secure the applicants' rights to establish their interests and determine the compensation to which they are entitled in a Court of Law;

(iv) and enforcing their rights to any such compensation and,

(b) Compensation for the said contravention of the Applicants' constitutional rights.

2 (a) A Declaration that the Constitutional rights of the Applicants have been contravened by the action of the Minister of Finance and/or the Government of Jamaica in compulsorily taking over the assets property and/or management of Blaise Building Society (hereinafter called "the Society") and Consolidated Holdings Limited (hereiafter called "Consolidated") <u>without compensating them therefor under the Building Societies Amendment Act, 1995 and the Bank of Jamaica (Industrial and Provident Societies) Act, 1995</u> which:

(i) do not make provisions for compensation;

(ii) or prescribe the principles on which and the manner in which compensation therefor is to be determined;

(iii) or secure the Applicant's rights to establish their interests and determine the compensation to which they are entitled in a Court of Law;

(iv) and enforcing their right to any such compensation; and

(b) compensation for the said contravention of the applicants' constitutional rights.

3. A Declaration that the Bank of Jamaica (Industrial and Provident Societies) Act, 1995, the B.O.J. (Industrial and Building Societies) Regulations 1995, the B.O.J. (Building Societies) Regulations 1995, the Building Societies Amendment Act, 1995 and the Financial Insitutions Act of 1992 are all unconstitutional.

4. .....

5. .....

6. .....

The grounds of the Application are stated as follows:

(a) that the taking over of the Bank, the Society and Consolidated is a breach of Section 18 of the Constitution of Jamaica;

(b) that the Bank of Jamaica (Amendment) Act, 1995 is unconstitutional;

(c) that the Building Societies (Amendment) Act 1995 is unconstitutional;

(d) that the B.O.J. (Building Societies) Regulation, 1995 is unconstitutional;

(e) that the B.O.J. (Industrial and Provident Society) Regulations 1995 is unconstitutional;

(f) the Financial Institutions Act, 1992 is unconstitutional.

Preliminary objections to this Motion were made by Mr. Lennox Campbell, Counsel for the Respondent.

These objections were threefold:

(i) That the applicants do not have locus standi.

(ii) That there is a mandatory bar to the exercise of the court's jurisdiction to hear and determine this application by virtue of the proviso to Section 25(2) of the Constitution.

(iii) That the applicants are not alleging that there was a procedural failure as distinct from a breach of substantive law.

Locus Standi

Section 18(1) of the Constitution provides that:

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

The right of enforcement of any of the protective provisions of Section 14 to 24 is contained in Section 25(1) which reads:

> "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."

Mr. Campbell contends that the applicants are mere shareholders

and as such have no claim to the assets, property and management of the entities. Their entitlement in law he argues, is to the residue, if any, that remains after a winding up. If it is claimed that a wrong is done to the Company, then the Company is the proper legal person to bring the action. Only the injured party may sue, he submitted. He referred the court to **Salomon v. Salomon** (1897) A.C. 22 at 42 and **Macaura v. Northern Assurance Company Limited and Others** (1925) A.C. 619. In the latter case a shareholder in a timber company by insurance policies effected in his own name insured the part timber against fire. The greater/ of the timber was destroyed by fire. He sued the insurance companies to recover the loss.

Lord Buckmaster in his speech said at p.626:

> "Turning now to his position as shareholder, this must be independent of the extent of his share interest. If he were entitled to insure holding all the shares in the company, each shareholder would be equally entitled, if the shares were all in separate hands. Now no shareholder has any right to any item of property owned by the company for he has no legal or equitable interest therein....."

Lord Summer was of the same mind. He has this to say at p.630:

> "He (the shareholder) stood in no 'legal or equitable relation to' the timber at all. He had no 'concern in' the subject insured. His relation was to the company not to its goods."

This case clearly indicates that a shareholder has no legal or equitable interest in the property owned by a company.

Mr. Scott, on behalf of the applicants submitted that the applicants shareholding in the three entities is 'property' within the meaning of S.18(1) of the Constitution. He contends that if the companies themselves and/or their assets properties and management are compulsorily taken possession of pursuant to an Act of Parliament that compulsory acquisition gives the shareholder locus standi to seek relief pursuant to Section 25(1) of the Constitution.

He places reliance on the following cases: **Attorney General of St. Christopher and Nevis v. Lawrence** (1983) W.I.R. 176; **King v. Attorney General** (1992) 44 W.I.R. 52, **Attorney General of St. Christopher and Nevis v. Payne** (1982) 30 W.I.R. 88 and **R. v. Paddington Valuation Officer** (1966) 1 Q.B. 380.

In **King's case** (supra) at p.75 it was said that "property of any description" should be read in a wide sense. It would include the "ordinary case of emoluments payable under a contract of employment."

I do not find **Payne's case** (supra) of much assistance. There the motion was brought under S.98 of the Constitution of St. Christopher and Nevis. The Jamaican Constitution does not have a similar provision.

In **R. v. Paddington Valuation Officer** (supra) at p.401 Lord Denning M.R. said that the court would not listen to a mere busybody but would listen to anyone whose interests are affected by what had been done. Of the cases referred to by Mr. Scott in this regard the case of **The Attorney General v. Lawrence** is perhaps the most helpful.

Lawrence was the Managing Director and also a shareholder of The St. Kitts/Nevis/Anguilla Bank. His appointment as managing director was the result of a resolution of the board of directors. It was agreed that he should hold office until he resigned or ceased to be a director. An Act was passed purporting to remove Lawrence as a director of the board of directors of the bank. A new board of director was appointed pursuant to the Act.

He was informed by the new board that his services were terminated with immediate effect. He was ejected from his office and the keys and vehicles belonging to the company were taken from him. He was left in the position of an ordinary shareholder in the company.

Lawrence challenged the constitutionality of the Act claiming that his dismissal without notice or compensation following the enactment amounted to a deprivation of property without compensation in breach of S.6 of the Constitution (the same as S.18 of the Jamaican Constitution).

That motion was brought by virtue of S.16 of that constitution. The provisions of S.16 are the same as those of S.25 of the Jamaican Constitution.

Sir Neville Peterkin C.J. at p.185 said:

> "I am of the view that section 6 applies equally to concrete as well as abstract rights of property, and I would hold that management is an important incident of holding property."

One of the issues for determination was whether or not Lawrence had locus standi. In addressing this issue Sir Neville Peterkin C.J.

at p.185 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 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** (1870) 1 S.C.C. 248)."

I am inclined to the view that a shareholder who claims that his rights over or interests in a company or its assets and/or management have been affected by an Act of Parliament has locus standi to challenge the constitutionality of that Act pursuant to Section 25 of the Constitution.

Such a shareholder, in my view would be a person alleging a contravention of the provisions of the Constitution in relation to him.

The burden of Mr. Campbell's submission is that the applicants although asserting that their constitutional rights have been contravened have not averred any wrong done to them or in relation to them. They aver a wrong done to the companies.

It is true that the applicants in their motion do not claim that their property or their interests in or rights over property have been compulsorily acquired or taken possession of. Thus on the face of it Mr. Campbell's submission is attractive. However it is my view that the Court must look at the substance and not just the form. The applicants allege the "compulsory taking over of the assets, property and management" of the companies. To determine whether or not they have locus standi, the court is entitled to examine the evidence in support of the motion. Ordinarily this could not be determined as a preliminary issue. However because the supporting evidence is given on affidavit the court was able to determine this issue of locus

standi in limine.

Now what is the evidence in this regard? In their first affidavit the applicants claimed that they were the controlling shareholders.

By supplemental affidavit sworn to on the 16th October, 1996 by the first applicant and adopted by the second applicant (see affidavit of Janet Panton dated 16th October, 1996) the "property interest in or rights over property as it applies to Blaise Trust Company and Merchant Bank, Consolidated Holdings Limited and Blaise Building Society" in respect of each applicant is:

(i) 53,688 shares in Blaise Trust Company and Merchant Bank Limited;

(ii) One (1) proprietary share in Consolidated Holdings Limited;

(iii) One of three subscribing shareholders to the tune of one (1) proprietary share in Blaise Building Society as nominee for Blaise Trust Company and Merchant Bank which wholly owns the said Building Society.

The Minister in his affidavit of the 17th October, 1996 states that:

> ".....as far as I am aware the applicants are not the controlling shareholders of the said institutions. That in July, 1994, it was agreed between the applicants and myself that their shares in Blaise Trust Company and Merchant Bank would be sold to West Euro Corporation a Cayman company owned by Continental Petroleum Products Limited, a Bahamian company owned by M. James Eroncig of the United States of America as a consequence of the latter injecting a substantial amount of money in Blaise Trust Company and Merchant Bank."

He went on to say that as far as he was aware only two shares were issued in Blaise Building Society and the first applicant was the holder of one and that two shares were held on behalf of Consolidated Holdings Limited.

However in the Minister's affidavit sworn to on the 9th July he stated that in a meeting on the 18th August, 1994 at which he and Mr. Panton were present "the new intended majority shareholder of Blaise Trust Company and Merchant Bank James Eroncig, had decided

to sever relationship between Blaise Trust Company and Merchant Bank and Blaise Building Society."

We do not know if this decision was carried out. What was the real position at the material time? Constitutional law deals with the substance and not the form. A study of the Report on the operations of Blaise Trust Company and Merchant Bank will reveal that the institutions were to a great extent under the control of the first applicant. For example at p.39 ibid it is stated:

> "While Mr. Panton has removed himself from the Chairmanship of the Board, it is clear that he nonetheless maintains unilateral control over this licensee."

At page 1.5 paragraph 5 4 1 and 2 of the Temporary Manager's Second Report it is said that:

> "Even though Mr. Panton did not work from this office he was always instructing the Management Team what to do."

As regards the Building Society it was said that:

> "...Donald Panton was seen to be the directing authority for Blaise Building Society."

Again at p. 8.5 paragraph 3.3 it is asserted that:

> "Mr. Donald Panton and Mr. Edwin Douglas individually and together exercised dominant influence over the management of the three B.F.I.s (Blaise Financial Institutions).

In the circumstances it seems to me that it cannot be denied that if the conduct of the Minister pursuant to the impugned Act and Regulations affects the companies then that fact would be prima facie evidence that the interests of the applicants might have been affected.

I therefore hold that the applicants have alleged an infringement "in relation to them" and therefore have loci standi to challenge the constitutionality of the Act.

The Mandatory Bar

Mr. Campbell argued that the proviso to section 25(2) has a mandatory bar when adequate redress is available elsewhere.

Section 25(2) reads:

> "(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-section (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 21 (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."

Mr. Campbell contended that paragraph 2(1) of Part D of the second Schedule of the F.I.A. provides the applicants with adequate means of redress. This sub-paragraph provides that:

> "A licensee which is served with a notice under paragraph 1 may, within 10 days after the date of such service appeal to the Court of Appeal and that Court may make such order as it thinks fit."

Mr. Scott's short reply which in my view is correct, is that paragraph 2(1) above gives only the licensee access to the Court. The applicants, of course, are not licensees. This ground also failed.

Breach of Substantive Law

Mr. Campbell submitted that the averments of the applicants relate to matters of fact or substantive law and that these cannot give rise to a breach of fundamental human rights. He argued that the complaint that the Minister did not follow the provision of the legislature and that the judge erred in approving scheme of arrangements is a complaint of substantive law as distinct from procedural law.

The application must therefore fail in limine, he contended. He referred to **Maharaj v. Attorney General of Trinidad Tobago** (1978) 2 All E.R. 670 at 679. This submission, in my view, is misconceived.

The essence of the applicants' case as indicated in the Further Amended Originating Notice of Motion is the unconstitutionality of

certain Acts of Parliament which they claim provide for the compulsory acquisition or taking possession of property or interest in or rights over property without providing for compensation etc.

If the applicants can establish this then the Acts would be unconstitutional and if they can further show that their fundamental rights have been breached, they should succeed. This objection must also fail.

To be fair to Mr. Campbell, it should be stated that the motion as initially amended did not specifically seek to challenge the constitutionality of the 1992 F.I.A. Instead much emphasis was placed on the allegation that the actions of the Minister contravened the applicants' constitutional rights and the challenge to the validity of the retrospective Acts. The Further Amended Notice of Motion shifted the emphasis to the issue of constitutionality of the F.I.A. 1992. This amended Notice with supplemental affidavits was only filed in October 1996 long after the respondent's notice to rely on the preliminary objection was filed.

The Financial Institution Act 1992

Both Mr. Phipps and Mr. Ramsay told the Court that it was not their contention that the whole Act is bad. They are contending that Section 25 in particular S. 25(3)(c) as well as part D of the Second Schedule of the Act is unconstitutional in that it contravenes Section 18(1) of the Constitution.

Section 25 of the Act provides -

> (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) .....
>
> (3) As respects the conditions specified in Part B of the Second Schedule the Minister may -
>
> (a) .....
>
> (b) .....

(c) assume the temporary management of the licensee in accordance with Part D of that Schedule;

(d) .....

(e) .....

Part D of the Second Schedule is captioned "Temporary Management of a Licensee." It provides:

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:

(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.

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 - (1) 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.

The question that must be addressed is: Does the statute give the Minister power (i) to take possession compulsorily of any property or (ii) compulsorily to acquire any interest in or right over any property?

Mr. Phipps submitted that the phrase "assume temporary management

of....." must not be read in isolation but must be construed in the light of the functions given the temporary managers under Part D paragraph 1(4). He argued that the effect of this paragraph vesting in the Minister full and exclusive powers of management and control of the licensee with the powers mentioned therein is to give the Minister rights over and interests in property. Where the vesting is by virtue of statute it can only mean compulsory acquisition, he contended.

Mr. Ramsay in support submitted that the Act by giving the Minister power to "assume temporary management of the licensee was in effect vesting in him a corpus of corporeal objects to which incorporeal interests and rights were attached." In this sense it can be said that the Minister is empowered to take possession of property compulsorily as well as acquiring interests and rights pertaining to such property.

That since the statute did not provide for compensation and access to the Court it infringes S.18(1) of the Constitution and is therefore void. He contended that exclusive control is the hallmark of possession.

He argued that a company is a juridic body. The Board of Directors and the shareholders are the two organs of a company. It is the shareholders who appoint the directors hence their (the shareholders) primacy. In this organic structure management is delegated to the directors whilst the residual control resides in the shareholders. Therefore, he reasoned, by the taking over of the company the shareholders are deprived of their right to appoint directors to manage the company and their rights to vote. Relying on cases such as **Attorney General v. Lawrence** (supra), **King v. Attorney General of Barbados** (supra), **Woodlands v. Hinds** (1955) 2 All E.R. 604 and **Cooper and Others v. Union of India** (1970) S.C.C. 248 learned counsel submitted that the "bundle of rights" of the applicant shareholders was impaired in asubstantial sense by virtue of the impugned legislation.

Mr. Lennox Campbell for the respondent submitted that the F.I. Act 1992 is a part of a wider legislative framework that regulates financial institutions with a view to protecting depositors. Counsel

for the respondent contends that an examination of the terms and provisions of the impugned legislation will clearly show that the object of the legislation is regulatory and not confiscatory. The legislation does not provide for the compulsory acquisition of rights over or interests in property or for the compulsory taking possession of property. The vesting of the Minister with full and exclusive powers of management and control is not the same as compulsorily taking possession of or compulsorily acquiring rights or interests he argued. He relied on **Belfast Corporation v. O.D. Cars Limited** (1960) 1 All E.R. 65, **Charaugit Lal v. Union of India** A.I.R. 495D S.C. 41, **Societe United Docks v. Government of Mauritius et al** (1985) 1 All E.R. 864, **Government of Malaysia and Another v. Selangor Pilot Association** (1977) 2 WLR 901.

Is S.25(3)(c) in contravention of S.18 of the Constitution?

It should be noted here that the provisions of the impugned Regulations in so far as they are alleged to be in contravention of S.18 of the Constitution and those of the 1992 F.I.A. are impsissima verba. The relevant sections of these Regulations are (i) S.8(d) and Schedule B of Part III of the Bank of Jamaica (Industrial and Provident Societies) Regulations 1995 (ii) S.64(d) and Schedule B of Part XII of the B.O.J. (Building Societies) Regulations 1995. It follows that what is said in respect of S.25(3)(c) and Part D of the Second Schedule of the F.I.A. 1992 is equally applicable to the impugned provisions of the Regulations.

The financial Institution Act 1992 replaced the Protection of Depositors Act 1977 which replaced Act II of 1966. Act II of 1966 was entitled 'An Act to Regulate and control the business of accepting deposits.

S.3 of The F.I.A. places restrictions on the business of accepting deposits. It provides in part:

> 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;
>
> (b) .....

The Act gives the Minister the power to grant or refuse an application for licence. It sets out the circumstances under which a licence may or may not be granted, the duties and obligations of the licensee and the duties and powers of the Minister where the terms and conditions applicable to such licence have been breached.

S.20 gives the Minister power to regulate the shareholding in a licensee.

S.21 subjects any arrangement by which control of the licensee may be obtained, to the approval of the Minister.

S.29 makes the Bank of Jamaica responsible for the supervision of the licensee. The B.O.J. has a duty to make periodic reports on the licensee to the Minister.

The impugned section 25 falls within Part VIII of the Act. This part is captioned "Regulation against Unsafe Practices."

Before the Minister can take any step under this section he must first have consultation with the Supervisor of Banks and Financial Institutions (a person appointed under S.34B of the Bank of Jamaica Act). He may only act under Section 25(3) if he has reasonable cause to believe that any of the conditions specified in Part B of the Second Schedule exists. It might be helpful to set out the provisions of Part B: 'Conditions requiring action by the Minister under section 25(3) of the Act.'

1. The licensee, a director or any person employed (either as agent or otherwise) 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; under section 4 of the Act in respect of that licensee;

(iii) any cease or desist order or any directions issued by the Minister or the B.O.J. pursuant to this Act; or

(iv) any provision of the B.O.J. or any regulation made under that Act;

(c) has continued to take deposits in violation of a direction;

(d) has given false or misleading information in its application for a licence;

(e) has given false statements concerning the affairs of the licensee;

(f) refuses or neglects to make returns or to produce books, records or documents to an authorised officer;

(g) refuses to permit inspection of the licensee by an authorised officer;

(h) has ceased to carry on the business of taking deposits.

2. A receiver has been apointed in respect of the licensee.

The Minister may only assume temporary management of the licensee by virtue of 25(3)(c) if the Minister complies with the provisions of Part D of the Second Schedule. Among other things Part D requires the Minister:

(i) to notify the licensee of his intention to temporarily manage the licensee.

(ii) within 60 days of assuming such temporary management to apply to the Court for an Order confirming the vesting in the Minister of full exclusive powers of management.

(iii) within 60 days of the date specified in the notice:

(a) restore the licencee to its board of directors or owners, or,

(b) present a petition to the Court for the winding up of the licensee, or

(c) propose a compromise or arrangement.

I have no difficulty agreeing with Mr. Campbell that the language of the provisions I have examined is regulatory and not confiscatory. The system of licensing is used primarily to regulate in the interest of the public, the activities of companies carrying on the business of accepting deposits. The licensee is restricted in the free management of its business in the interest of the public.

The Act has as its main object the protection of depositors and provides procedures for the temporary management of companies licensed to carry on the business of accepting deposits where such companies are or appear unable to meet their financial obligations.

The vesting of the Minister with full and exclusive powers of control and management of the licensee is to enable him to perform his functions with a view to protecting the depositors.

The purpose of the Act is certainly not to deprive anyone of or take away property or interests in or rights over property but to ensure that the business of the licensee is conducted in a manner "the Minister considers best calculated to serve the public interest."

"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" per Viscount Simonds in **Belfast Corporaton v. O.D. Cars Ltd**. (1960) 1 All E.R. 65 at 69C.

Mr. Ramsay submitted that the object of the statute is not the prime consideration in a democratic country it is the individual. With respect I beg to differ. Section 13 of the Constitution does not in my view support this contention. The limitations contained in the provisions of Chapter 3 of the Constitution are 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. I think it will suffice to quote Viscount Simonds at p.69F (ibid):

> "...I would here point out that if such restrictions as the Acts..... impose cannot be enforced without

> the payment of compensation the practical effect, must be to deprive the Parliament....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."

It might well be that the vesting of the Minister with full and exclusive powers of management and control of the licensee has diminished the applicants' interests in or rights over the business but such diminution of rights or interests is not an acquisition of such rights or interests within the meaning of S.18(1) of the Constitution (See Belfast Corporation (supra) at p.70).

I am firmly of the view that the provisions of the impugned legislation are regulatory and not confiscatory. They do not authorise the compulsory taking possession of property or the acquiring of interest or rigts over property without compensation.

I therefore hold that S.25(3)(c) of the F.I.A. 1992 is constitutionally valid and does not contravene S.18(1) of the constitution.

Exemptions pursuant to S.18(2) of Constitution

Mr. Campbell submitted that even if the court should find that the impugned legislation was not regulatory in scope but confiscatory without there being any provision for compensation and access to the Court the legislation would be saved by S.18(2) (h) and (k). This sub-section 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 -
>
> (h) in the execution of judgments or orders of courts;
>
> (k) for so long only as may be necessary for the purposes of any examination, investigation, trial and inquiry.
>
> (i) .....
>
> (ii) .....

Under Section 23(3)(c) and Part D of the Second Schedule the

initial vesting of the Minister with full and exclusive powers of management and control of the licensee is to afford the Minister the opportunity of examining and investigating the practices and conduct of the licensee with a view to ascertaining whether any of the conditions specified in Part B exists. 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.

Once the Minister obtains the order of the Court then the subsequent vesting of the Minister with full and exclusive powers of management would be protected by Section 18(2)(h). The evidence of the Minister accords with paragraph (k).

In my view there is merit in Mr. Campbell's submission in this regard.

S.18(3) of The Constitution

This sub-section provides that:

> 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.

Mr. Campbell submitted that for the challenge to the constitutionality of the F.I.A. to succeed the applicants must not only show that it is confiscatory but must also prove that as such it does not provide for the reasonable restriction of the use of the applicant's property in the interests of safeguarding the interests of others.

Counsel for the applicants contended that the word 'property' in S.18(3) should be given its normal meaning and not the wide meaning as in S.18(1). As such it would have no application to incorporeal rights etc. They submitted that provisions allowing for restrictions must be narrowly and strictly construed. See **Matinkinca and Another v. Counsel of State, Ciskei and Another** (1994) BCLR 17.

Therefore they vigorously argued that a restriction of a right over or interest in property would not be caught by this provision.

This sub-section places limitations on the protection afforded by S.18(1) by excluding from its purview any Act which imposes "a reasonable restriction on the use of property in the interests of safeguarding the interests of others."

This, as I understand it, is a restatement of a common law principle. Viscount Simonds referred to this common law principle which is embodied in the latin tag sic utere tuo ut alienum non laedos (so use your own property as not injure your neighbour's) see the Belfast Corporation case supra.

The restriction of the use of property by this principle was certainly not limited to tangible property. If Counsel for the applicants are right it would mean that whereas Parliament may impose a reasonable restriction on the use of corporeal things, such as land, in the public interest without compensation if it so restricts the use of incorporeal rights over that land it must pay compensation.

A construction which would have this result cannot be sustained.

I am of the view that even if the impugned legislation affects the rights or interests of the applicants this is in a limited way and is no more than a mere restriction of their use in order to serve a greater public interest.

The Bank of Jamaica (Amendment) Act 1995

The validity of this Act is attacked on the basis that it was passed on the 14th February, 1995 but made effective retrospectively as of the 1st December, 1994. It is contended that this Act is unconstitutional and therefore the 1995 Regulations made under it are null and void.

If the Regulations are null and void, it is argued, then the assumption of temporary management of Blaise Building Society and Consolidated Holdings Limited by virtue of these Regulations is unlawful.

The Act was assented to by the Governor General on 13th February, 1995. S.1(2) and (3) of the Act reads:

> "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."

S.6 of the Act inserts two new sections viz 34E and 34F in the principal Act.

The Bank of Jamaica (Industrial and Provident Societies) Regulations 1995 and the Bank of Jamaica (Building Societies) Regulations 1995 were made in March, 1995 pursuant to powers given to the Minister by S.34F.

The temporary management of the Blaise Building Society and Consolidated Holdings Limited was assumed by virtue of these Regulations.

The import of S.1(2) is that S.6 of the amending Act and therefore S.34F of the principal Act came into operation retrospectively on the 1st December, 1994,

Mr. Phipps Q.C. submits that S.6 of the Act is unconstitutional "in that it is seeking to create legislation as being retrospective as distinct from affecting past conduct." This section he says, inserts section 34F in the Bank of Jamaica Act which stipulates that legislation created in February, 1995 is deemed to have been created in December, 1994. This he submits contravenes S.60 of the Constitution and is therefore null and void.

The relevant sub-section of S.60 is sub-section (1) which provides:

> "A Bill shall not become law until the Governor General has assented thereto in Her Majesty's name and on Her Majesty's behalf and has signed it in token of such assent."

I am in complete agreement with Mr. Laxton Robinson for the Respondent that section 60 is not concerned with the content of legislation. That all this section does is to signify the end of the legislative process.

S.20(7) of the Constitution curtails the right of Parliament

to pass penal legislationwith retrospective operation.

Apart from this sub-section the constitution does not restrict the right of Parliament to pass legislation with retrospective operation.

The learned author of Craies on Statute Law Seventh Edition at page 385 has this to say:

> "It is sometimes specially enacted that a statute is to come into operation on some day prior to the day on which it receives the Royal Assent. Thus, in **Jamieson v. Attorney General** it was held that section 1 of an Excise Act of 1830, which enacted that certain duties should be levied from March 15, 1830 but did not receive the royal assent until July 16, 1830, operated from March 15."

Lord Ashbourne in **Smith v. Callender** (1901) A.C. 297 at 305 said:

> "It is obviously competent for the legislature, in its wisdom to make the provisions of an Act of Parliament retrospective."

The combined effect of SS.2 and 6 of the Bank of Jamaica (Amendment) Act 1995 is to amend the Principal Act by adding two new sections which are deemed to have come into operation on a date antecedent to the assent of the Governor General.

This is certainly within the competence of the legislature. These sections are not in breach of any provisions of the constitution. Mr. Phipps' contention that the Act and the Regulations made thereunder are unconstitutional is, in my view, untenable.

At the end of Counsel's submissions this court indicated that the Motion would be dismissed and that the court's reason would be given later; this has now been done.