COMMONWEALTH OF THE BAHAMAS **2001**

IN THE SUPREME COURT **No. 18**

Appellate Side

IN THE MATTER of the Banks & Trust Companies Regulation (Revocation of Licence) Suisse Security Bank & Trust Ltd.) Order, 2001

AND IN THE MATTER of the Banks and Trust Companies Regulation Act, 2000

AND IN THE MATTER of an appeal from the decision Resulting in the above intituled purported Order.

B E T W E E N

SUISSE SECURITY BANK & TRUST LTD.

Appellant

AND

JULIAN W. FRANCIS, Esq.
(In The Capacity of Governor of the Central Bank of The Bahamas)

Respondent

J U D G M E N T

APPEARANCES: **Philip Davis Esq.; Damian Gomez Esq.; Derek Ryan Esq.; & Ms. Jewel Major, for the Appellant**

William Blair Esq. Q.C.; Mrs. Claire Hepburn & Ms. Rochelle Deleveaux for the Respondent

Anthony Mckinney Esq.; holding a watching brief for the Provisional Liquidator Mr. Raymond Winder

DAVIS J.

On the 2nd April 2003 I gave an oral ruling in this matter and stated that I would deliver a written judgment at a later date. This I now do.

Prelude

This case is without doubt by its very nature of considerable importance to the banking community inasmuch as its result could, depending on its outcome, impact in a very serious way the banking and financial services industry – one of the pillars of the economy of The Bahamas. The action taken seeks to challenge in a court of law a decision of the Governor of the Central Bank (the Governor) – the chief regulator of banks and trust companies in this country. The decision is the revocation of the Appellant's licence it is undoubtedly a most unusual event.

Although it was professed on all sides to be a matter which should be treated with great urgency, its gestation period took on elephantine proportions. There are several interesting features about the case. It has spawned a number of off-shoots in the form of some six satellite actions seeking one relief or another. The list of counsel and attorneys representing the parties at one stage or another numbered twenty or thereabouts. It was like a revolving cast in a theatrical production. Of them two were overseas based silks. One was later replaced by a top-ranking home-based junior. Other changes in representation were made on various occasions. The pre-trial period had some melodramatic moments. One such was an instance when the court was notified of the termination of the retainer of one of the attorneys by his client. He protested vehemently before the court and insisted that this could not be done. In due course good sense prevailed and he made his exit graciously and gracefully, albeit belatedly.

Another intriguing development occurred when counsel for one of the parties sought to have about one half of the personnel in the higher judiciary disqualified from presiding over the trial of any of the issues to be litigated in this case. The present adjudicator was also asked by one of the parties to recuse himself, but he did not oblige. Steps were taken to have the Governor committed for contempt of court. This was also unsuccessful.

There was an intractable delay in locating the record upon which the hearing of this matter should be based. A number of preliminary objections were made and

upplementary skeletons produced. Certain aspects of the case made uneventful visits to the Court of Appeal.

Synopsis of the case

The facts of the case are not in dispute but the conclusions drawn from them by the parties are.

On July 20, 1993 the Appellant (SSBT) was granted a licence to carry on banking and trust business under the predecessor to the Banks and Trust Companies Regulation Act, 2000. On March 5, 2001, the Central Bank suspended SSBT's licence and on April 2, 2001, it revoked the licence. The reasons for the revocation revolve around three main issues. The first concerns a court action in the United States against SSBT as a co-defendant wherein it paid U.S. $1.6 million into a trust account, pending the outcome of an appeal, to prevent the accrual of further interest charges. The Central Bank required SSBT to provide a collateral in support of an alleged commitment from the principal shareholder of SSBT to underwrite the amount. The Central Bank has contended that none was produced. The second issue concerns a complaint from an investor in SSBT that SSBT had failed to repay a deposit of U.S. $10 million after demand was made. The third issue is the alleged non-cooperation of SSBT in dealing with various queries from the Central Bank seeking clarification of certain matters, which behaviour the Central Bank considered to be obstructive.

In the final analysis the Governor formed the opinion that the appellant was carrying on business in a manner detrimental to the public interest and to the interests of its depositors and other creditors, and proceeded to revoke its licence.

SSBT has appealed against the decision of the Governor. The issues will become much clearer in the course of this judgment from the treatment of them by counsel as they expounded with considerable dexterity their arguments and submissions. This has caused me to apply self restraint in my own inputs lest I should burden this judgment beyond the tolerance level of its readers.

Fourteen grounds of appeal were filed on February 4, 2002, and an additional one on February 13, 2002, pursuant to section 22 (5) of the Banks and Trust Companies Regulation Act 2000 (the Act). They are as follows:

"1. The Respondent acted unlawfully when he purported to suspend

and revoke the licence of the Appellant as he had no power to do so, as the power had been suspended by virtue of an Order of the Supreme Court of the Bahamas made on the 2nd day of March 2001 granting an injunction restraining the Respondent from so doing.

2. The Governor acted illegally when he purported to suspend and revoke the licence of the Appellant as he had no power to do so, as the condition precedent to the exercise of the power had not been satisfied.

3. The Respondent in purporting to suspend the Appellant's licence pursuant to Section 14(1)(a)(i) of the Banks and Trust Companies Regulation Act 2000 did so unlawfully and in breach of Section 14 (2) of the statute, in that he failed to comply with the provision of the section as no notice was given prior to the exercise of the power.

4. The Respondent acted unlawfully when he purported to revoke the Appellant's licence as he failed to satisfy the conditions precedent to the exercise of such power as set out in Section 14(2) of the Act. That the Respondent failed to give a proper notice as the same failed to give any proper or any adequate reasons as required by the statute.

5. The Respondent clearly acted unlawfully when he purported to suspend and/or revoke the Appellant's licence as the condition precedent for so doing was not satisfied as there was no basis on which the Respondent could be of the opinion that the Appellant was carrying on business in a manner detrimental to the public interest or that of depositors or other creditors.

6. The Respondent further acted unlawfully in that he did not exercise his discretionary powers properly or for the purposes for which same has been provided for in the the statute as there was no basis on which he could

exercise the power of suspension and revocation.

7. The necessary facts to enable the Respondent to exercise the power did not exist and consequently he had no jurisdiction to exercise same.

8. The Respondent in suspending and revoking the licence of the Appellant acted unlawfully, as same was done in bad faith, for an improper purpose and in breach of a Court order restraining the Respondent from exercising the said power.

9. The exercise of his functions by the Respondent in the exercise of the power of suspending and revoking the Appellant's licence was an unlawful exercise of power as same was done on irrelevant grounds and not for the purpose for which same was conferred by the statute.

10. The Respondent in exercising the power to suspend and revoke the licence acted unlawfully in the exercise of a discretionary power on irrelevant grounds and acted without regard to relevant considerations.

11. The decision of the Respondent to suspend and revoke the Appellant's licence is manifestly unreasonable, irrational and one which no reasonable authority could justifiably make having regard to the evidence.

12. The Respondent in purporting to exercise his power pursuant to Section 14 of the Banks & Trust Companies Regulation Act failed to take into consideration that the statute has express provisions for dealing with the various situations which may arise during the supervision of banks, and that where such situations arise he ought to act under the appropriate express specific provisions in the statute dealing with same and it is manifestly unreasonable to resort to the draconian provision in Section 14 which is designed for an ultimate sanction and consequently erred when he purported to act under

Section 14 rather than under the other specific provision that was appropriate to the circumstances, and consequently an abuse of power in acting under Section 14.

13. The Respondent cannot rely on reasons or grounds which were not in existence or disclosed at the time of the suspension and revocation.

14. The decision of the Respondent to suspend and revoke the Appellant's licence pursuant to Section 14(1)(a)(i) of the Act cannot be supported or justified having regard to all the evidence in this matter."

The additional ground reads as follows:

"The action of the Respondent in suspending and/or revoking the Appellant's licence was illegal as same was not done by the Respondent as required by section 14 of the Act, but by an officer of the Central Bank who had no power so to do, and the Respondent had no power to delegate same to such an officer. Further, the purported notice and grounds issued by the Respondent were illegal as same were not issued by the Respondent as required by Section 14(2) of the Act but by another officer."

The crucial question in this case can be put in several ways. One such is whether the Governor in exercising the power of revocation was demonstrably wrong in so doing in the prevailing circumstances. It is the contention of the Appellant that he was and that of the Respondent that he was not.

For the purposes of parity of treatment and transparency I will set out hereunder in extenso the cases of the respective parties as contained in their skeleton arguments and as supplemented by their oral disputation.

The Appellant's case as presented by Mr. Davis in his skeleton argument was as follows:

Introduction

1.1 This is an appeal pursuant to Section 22(1) of the Banks and Trust Companies Regulation Act 2000 ("the Act") relating to the revocation of the appellant's licence by the Governor of the Central Bank on the 2nd April, 2001 under Section 14 of the Act. Notice of Appeal was given pursuant to Section 22(2) on the 18 April, 2001. The Appeal is in effect against the decision made by the Governor on the 5 March, 2001 pursuant to Section 14(1)(a)(i) of the Act. On this day the Governor was of the opinion that the licence should be revoked.

1.2 Whilst the Act does not contain a complete procedure for the appeal it does however provide at section 22(3) that the Attorney General shall upon receiving the Notice of Appeal transmit to the Supreme Court the Governor's decision and all papers relating to the appeal. This has been done and constitutes the record of the appeal. Further Section 22(5) provides that at the hearing of the appeal, the appellant shall before going into the case state all the grounds of the appeal on which the appellant intends to rely and shall not unless by leave of the Court go into matters not raised by such statement. The grounds of appeal have been filed from 4 February, 2002 and supplemental grounds well in advance of the time prescribed by the Act.

1.3 The jurisdiction of the Court on the hearing of the appeal is to be found in Section 22 (6) which provides that the Court can either confirm, reverse, vary or modify the decision of the respondent or remit the matter to the respondent with the opinion of the Court thereon.

1.4 The appellant is a company duly incorporated under the laws of the Commonwealth of The Bahamas, and was granted on 20 July, 1993 a licence to carry on banking and trust business within the said Commonwealth pursuant to section 4 of the Banks and Trust Companies Regulation Act Ch. 287 (now repealed) subject to the terms and conditions specified in The Banks Act Ch. 285. The capital of the appellant is US$3M divided into 3M shares with a par value of US$1. All shares have been issued and credited as fully paid up.

1.5 The appellant operated from 1993 to 5 March, 2001. The operation was not unsuccessful and audited accounts for the fiscal year ending 30 September, 1999 showed that it had retained earnings of US$2,891,280.00 and for the fiscal year ending 30 September, 2000 US$3,308,335.00. The total equity of the appellant as of 30 September, 2000 amounted to US$6,308,335.00

1.6 In 2000 the Central Bank expressed concern about the strengthening of the appellant's capital base through the introduction of an institutional shareholder, the appellant's debit card operation and its desire that the appellant maintain a maximum ratio of third party deposits to capital of 5 to 1. These concerns were expressed in writing by letters dated 24 August 2000; 12 September 2000; 1 December, 2000; 22 December, 2000; and 16 January 2001.

1.7 To each of these concerns the appellant responded in writing by letters dated 29 September, 2000; 17 November, 2000; 8 December 2000; 29 December 2000 and again on 17 January 2001. At no time did the respondent express that a penalty may be exacted in the event that his concerns were not allayed. However in a meeting on 19 February 2001 the respondent evinced an intention to suspend the appellant's licence on or before the 28 February 2001 for the matters set out in the letters mentioned.

1.8 On 22 February 2001 the appellant applied for leave to apply for judicial review seeking declaratory relief in respect of the issues raised in the letters mentioned i.e. that it was not obliged to (1) comply with the requirements of the respondent to discontinue its debit card operations (2) seek to attract a significant institutional shareholder acceptable to the respondent and (3) maintain a ratio of banking business (i.e. liability to third parties) to capital of 5 to 1. The application included a prayer for an injunction to restrain the respondent from suspending or revoking the appellant's licence pending the outcome of the proceedings.

1.9 The application was ex parte before Longley J. who required the application to be *inter partes.* On 27 February Longley J. adjourned the application to 2 March 2001 inviting the parties to seek to resolve amicably the issues. Consequently a meeting was held on 1 March 2001 attended by the respondent, the appellant and its attorneys and auditors. As noted this meeting was arranged at the suggestion of Longley J. for the purpose of resolving the issues. At this meeting, for the first time the $1.6M and $3M issues were raised by the respondent as a concern. The respondent was requested for the sake of clarity to reduce the issues in writing in order to allow an adequate response and on 2 March 2001 this was done.

1.10 As noted the respondent's concerns were reduced to writing by letter dated 2 March 2001 wherein the urgent requirements were:

(a) evidence of the appellant having received collateral satisfactory to the respondent in support of the commitment by the appellant's principal shareholder to underwrite any potential loss resulting from the $1.6M litigation.

(b) formal authorization addressed to the appellant's U.S. attorneys or any other counsel or advisor who may hold details of the US$3M litigation and transaction to release all required information relating to this dispute. The appellant was required to respond by later that day or by the morning of 5 March as the respondent needed to proceed immediately with its assessment of the US$3M issue and to be satisfied as to the US$1.6M. Notably no sanction was mentioned for failing to meet the deadline imposed.

1.11 On 2 March 2001 after hearing counsel for the appellant and respondent leave was granted to apply for judicial review and an injunction granted restraining the respondent from suspending or revoking the licence of the appellant for the reasons set out in the statement filed in the action. It was discussed to ensure that the same would not have otherwise fettered the statutory duties of the respondent.

1.12 The appellant upon receipt of the respondent's letter of 2 March 2001 responded the same afternoon indicating that the matter was referred to its legal advisors who were preparing a response. On 5 March 2001 a letter under the hand of Iqbal Singh Manager Bank Supervision Department of the Bank was sent to the appellant stating that:-

(a) the records revealed that they were not provided with those matters requested in their letter of 2 March which were required of the appellant on an urgent basis.

(b) The Bank was of the view that the failure of the appellant to comply with the Bank's aforesaid requirements, following the appellant's failure to inform the Bank of the U.S. litigation involving US$3M of the appellant's assets, demonstrated that the appellant is carrying on its business in a manner that is detrimental to the public interest and to the interest of its depositors or other creditors.

(c) In view of the appellant's conduct in relation to the aforesaid matter, the Manager, Bank Supervision Department, is of the opinion that the appellant's licence should be revoked;

(d) The appellant was invited to provide to the Manager of Bank Supervision Department written statement of any objection it may have to the proposed revocation on or before 15 March 2001:

(e) The appellant's licence was suspended and a Notice of Suspension was enclosed under the hand of the respondent.

(f) Raymond Winder has been appointed Receiver of the appellant and is authorized immediately to assume control of the affairs of the appellant in the interest of the appellant's creditors. Notice of Winder's appointment under the hand of the respondent was enclosed.

1.13 The Notice of Suspension under the hand of the respondent notified that:`

(a) the respondent is of the opinion that the appellant's licence should be revoked on the ground that the appellant is carrying on business in a manner detrimental to the public interest and to the interest of its

depositors and other creditors;

(b) the order to suspend results from the inability of the appellant, at this time, to fulfill certain prudential requirements and satisfy the Central Bank as to its affairs;

(c) the appellant is invited to submit a written statement of any objection it may have to the proposed revocation.

1.14 On 9 March 2001 the appellant's counsel wrote to the respondent to provide the particulars of the prudential requirements which were unfulfilled and the particulars of the affairs of which the respondent had not been satisfied at this time. Further particulars were requested to enable proper representation to be made. The respondent replied on 12 March 2001 drawing attention to the second full paragraph of the letter of 5 March 2001. Reference was made to the meeting of 1 March 2001 in which the requirements were discussed and asked to be put in a formal written request.

1.15 On 15 March 2001 the appellant submitted its written statement of objections attracting attention to:

(a) the fact the $1.6M issue has been reflected in the appellant's audited accounts for the fiscal years ending September 30, 1999 and 2000 and that the collateral by the principal shareholder was a letter of comfort accepted by the auditors and the Bank;

(b) a range of options were discussed as to what may satisfy the respondent as to the ability of the principal shareholder to perform his undertaking. At the end, a current or updated Financial Statement was to be requested by the respondent. Nevertheless, if advised as to the type and/or manner of collateral required and given a reasonable time, the appellant would endeavour to provide collateral satisfactory to the respondent;

(c) US attorneys of the appellant were advised to expect to be contacted by the respondent or his attorneys. However the lead

Attorney was not available but he was to be apprised. In any event instructions were given to provide the respondent or his attorneys with whatever information they may require with respect to the US$3M.

(d) The auditors have stated that in their professional opinion there is no basis upon which a provision in the appellant's financial statement is warranted;

(e) Insurance coverage with J.S. Johnson & Co in the amount of $5M was secured to cover any loss in relation to this issue;

(f) Mr. Lunn was in the process of formalizing a response but was interrupted by the Receiver when he took possession and ordered him off the property;

(g) By the letter the respondent was authorized to make whatever inquiries to Milbank, Tweed, Hadley and McCoy it deems necessary with respect to the litigation surrounding the US$3M. Further that the named attorneys are the only ones dealing with the matter;

(h) Mr. Lunn wrote on 2 March requesting directions as was promised on 1 March in the meeting. These directions arrived after 12:00 noon and a response sent at approximately 4:00 p.m.

1.16 An Inspector of the Bank wrote to the appellant's US attorneys on 19 March 2001 requesting that all the information relative to the US$3M matter in all its aspects be forwarded to them or their US attorneys. The next day the attorneys replied indicating that the lead attorney was out of office and would deal with the request on his return to office on 26 March 2001.

1.17 The Inspector of the Bank responded to the appellant's written objections on 21 March 2001 (a) requesting a copy of the letter of comfort for review, (b) indicating that acceptable collateral is either:

(i) a deposit of US$ equivalent amount with a prime bank in the Bahamas pledged irrevocably to the appellant or

(ii) a guarantee of equivalent amount issued by a prime bank in the Bahamas in favour of the appellant:
(iii) requesting a copy of the policy issued by J.S. Johnson and Co.;
(iv) allowing five working days for the collateral to be put in place.

In response the appellant on 23 March 2001 pointed out that:

(i) its letter of 15 March answered theirs of the 5 March and not 2 March;
(ii) the appellant no longer occupied its premises advising that the letter of comfort was obtainable from the Receiver;
(iii) the insurance certificate was exhibited to an affidavit of Christopher Lunn that was served on counsel for the respondent;
(iv) a directive for collateralizing the letter of comfort is outside the jurisdiction of the Inspector and vests in the respondent. Where no assertion of insolvency is made regard ought to be had to the fact the principal shareholder has funds on deposit;
(v) to provide a collateral as was requested amounts to banking business which is not permissible by March;
(vi) notwithstanding a request is made to know the position of the respondent if the matters set out in the letters are satisfied.

1.18 The U.S. attorneys responded to the request of the respondent of 19 March, 2001 by letter of 21 March 2001. They declined to comply with request as made for ethical reasons, but consented to answer the respondent's questions regarding the status of the litigation. It was their view that the authorization contained in the appellant's letter of 18 March 2001 was limited to enquiries being made and did not extend to delivering their files.

1.19 On 2 April 2001 the Manager Bank Supervision Department of the Bank enclosed a copy of a revocation order canceling the unrestricted bank and trust licence issued to the appellant. The order, under the hand of the respondent, after citing

the enabling legislation and citing the Order merely stated the licence to carry on banking and trust business granted on 20 July 1993 to the appellant is revoked.

The U.S. $1.6M Issue

1.20 In 1996 the appellant was sued as a Co-Defendant in the United States District Court for the Middle District of Florida, Fort Myers Division. There were twenty-four (24) Defendants to the suit which was brought by seven (7) Plaintiffs. The suit related to an investment scheme that was hatched and executed within the jurisdiction of Florida, U.S.A. It is alleged in the suit that the appellant was a trustee for some of the Co-Defendants.

The appellant was advised by its Bahamian lawyer that as the agreement the subject matter of the suit provided for disputes to be settled in accordance with Bahamian laws and there is no exclusive jurisdiction clause therein, inter alia, that no appearance should be entered to the suit. This advice was clearly erroneous and judgment in default was entered against the appellant. The appellant appealed the decision.

1.21 The appellant's audited accounts for the fiscal years ending September 1999 and September 2000 each noted that a judgment was entered against it and that it was under appeal; the principal shareholder had committed to underwrite any potential loss arising therefrom and the appellant believed that the ultimate resolution of the matter would not likely have a material effect on the results of its operations, financial position or liquidity. The appellant had paid U.S. $1.6 M the amount of the judgment into a trust account to prevent the occurrence of further interest charges. These accounts were provided to the respondent and the issue known from at least May 2000.

The U.S. $3M Issue

1.22 On 17 July 1998 D. Kelleher of JVW Investments Ltd. made a complaint to the Central Bank that the appellant had failed to repay a deposit of U.S. $10M.

Following a conversation with Mr. Singh of the Bank the appellant wrote to them explaining the reasons for non-compliance as the nature of the instruction had attributes of money laundering. The Bank's advice was sought. The Bank forwarded to the appellant a Suspicious Transaction Disclosure form to be completed and returned to enable the matter to be investigated by the Attorney General and the Drug Enforcement Unit. On 31 July 1998 the Bank forwarded the completed form with a summary of the main point of the report. On 2 August 1998 (sic) the appellant was advised that by letter dated 2 September 1998 the Attorney General advised of the completion of the investigation the result being that there was no interest at that time in the US$10M. It was recommended that the monies be remitted to the depositor.

1.23 Following allegations of forgeries made by Kelleher on 18 September 1998 the Bank wrote the appellant on 21 September 1998 seeking the appellant's comments to the allegations. The funds had been invested in mutual shares and the authority for the investment was questioned. The sale of the shares to facilitate the remittance resulted in a shortfall amounting to approximately US$2.4M which was being demanded together with interest.

1.24 Critically, on the 14 December 1998 the Bank wrote to the appellant observing that JVW has been pursuing relentlessly its alleged claim in the amount of $2,445,264.41 (with interest) which represented the shortfall in the sale of securities which the party alleges has occurred owing to acts of omission or commission on the part of the appellant in implementing its mandate and instructions. Pointing to the entire circumstances surrounding the transactions in the account, the Bank opined that the question of contingent liability may not be ruled out altogether, therefore it was prudent that an independent evaluation be made to determine the advisability of making an appropriate provision. Moreover, the magnitude of the claim vis a vis the appellant's net worth and its continuing viability injected a sense of urgency. The appellant was thereby advised to instruct its external auditors to carry out the examination of the question of contingent liability to report within 3 weeks from the date of the letter.

On 12 February 1999 Ernst and Young (external auditors) reported, inter alia, that it received confirmation that the appellant is not exposed to any liability.

1.25 Following an inquiry concerning the claim from the United States Senate Permanent Sub Committee on Investigation Minority Office Committee on Government Affairs, the Bank responded on 15 September 2000. It was pointed out that an investigation had been carried out by Ernst and Young as well as the Police authorities, through the Attorney General. The police ruled out the possibility of money laundering. Messrs Ernst and Young ruled out any possibility of irregularity on the part of the appellant vis a vis the opening and conduct of the accounts and confirmed that the appellant is not exposed to any contingent liability requiring provisions there. Further that a trading account was opened and the transactions thereon were supported by authorizations consistent with the mandates on record.

1.26 Civil Proceedings were initiated in the United States District Court Southern Division, New York on 16 August 1999 by Correspondent Services Corporation against JVW Investments Ltd., First Equities Corporation of Florida, J.V. Waggoner and Donald Kelleher. Waggoner and JVW filed an answer and cross claims against First Equities Corporation of Florida and Donald Kelleher on 10 November 1999. Thereafter Kelleher filed an answer and counter claims against Waggoner. The prime issue in the proceedings appears to be a determination of the ownership of JVW and its assets which principally appear to be the claim for US$2.4M. On 28 September, 2000 JVW moved to show cause for leave to add the appellant as a defendant on cross claims and moved for an attachment order against the appellant's funds at Tucker Anthony. On this date a temporary restraining order was granted attaching up to US$3M in assets. The appellant later moved to discharge the Order but failed.

1.27 On 13 December 2000 a meeting was held with the Bank following which the appellant provided a written response of the current status of the action. In that response the appellant pointed out that:

(i) a tentative trial date has been set for 3 May 2001 with a pre trial conference set for 2 May 2001;

(ii) the Bank is fully aware of the matter having earlier commenced a special audit;

(iii) the appellant's application to dismiss cross claim filed against it was dismissed on the 13 November 2000 and the preliminary order attaching US$3M was continued;

(iv) it was ordered that discoveries be completed by 18 April 2001

(v) the suit has not gone to trial but is in preliminary stages and grounds are being explored to have the action dismissed. The Bank will be updated as further development occurs.

On 23 February 2001 Pannell Kerr Forster, external auditors, upon the request of the respondent forwarded a legal letter dated 19 December, 2000 to the respondent concerning the action confirming the status thereof as was outlined by the appellant to the Bank.

1.28 Suffice to say, that when it was communicated that an opinion existed that the appellant's licence should be revoked the suits involving the US$1.6M and US$3M were not concluded.

2.0 <u>The first Issue</u> – (Ground 1)

Was the respondent's power to suspend and revoke the Appellant's licence temporarily suspended by the injunction granted on the 2 March, 2001?

2.1 The Hon. Mr. Justice Hartman Longley in suit 258/2001 on 2 March 2001 granted an injunction restraining the respondent's power from suspending or revoking the licence of the appellant until the trial of that suit or until further order. The Order was clearly inter partes as the Order shows that the respondent's counsel was present when same was made.

2.2 It is submitted that the injunction was granted in a matter between the appellant and the respondent. The order is binding on the respondent. It is the Order of the Court that is enforceable and not the reason for the Order. It is absurd to contend that the reason could ever be enforceable as a matter of law. What is binding is the order made. The order granted is clear and unequivocal that the respondent is restrained by injunction from suspending or revoking the licence of the appellant until the trial of the action or until further ordered. Contending that the respondent was enabled to suspend or revoke for reasons other than those specified for the purpose of obtaining the injunction is untenable. At the very least it would have been expected that the respondent would have approached the court for clarification if the respondent held the view bona fide.

2.3 There can be no doubt whatsoever that the injunction was in full force and effect when the respondent purported on 5 March 2001 to suspend the licence of the appellant and further to revoke same on 2 April, 2001. This was a clear breach of the injunction which restrained the respondent from so doing. The effect of the injunction is that the respondent had no power to take such action in respect of the licence of the appellant whilst same was in force. It is well established law that an injunction must be obeyed to the letter of the law. Further that an injunction even if irregular or erroneously obtained must be obeyed until it is discharged.

SEE:

(1) HALSBURY'S LAW OF ENGLAND, 4TH ED VOLUME 24, PARA 1008 TO 1010;

(2) SPOKES V. BANBURY BOARD OF HEALTH [1865] LR 1 EQ 42

(3) EASTERN TRUST COMPANY V. MCKENZIE MANN & CO LTD [1915] AC 150@760

(4) CLARKE V CHADBURN [1985] 1 WLR 78

2.4 In any event to contend that the issue of the appellant's exposure of US$4.6M fell outside the reasons for which the injunction was granted is egregiously

disingenuous. The unaudited quarterly financial statement as at 30 December 2000 showed that the appellant had a capital position of US$6.3M comprising a share capital of $3M and retained earnings of US$3.3M. Assuming but not conceding, that the exposure exists, it cannot be dissociated from the appellant's capital, consequently, directly affecting the ratio of banking business (i.e. liability to third parties) to capital. Clearly an issue for determination in the proceedings in which the injunction was granted is whether the appellant is compelled or obliged to maintain a ratio of banking business to capital of 5 to 1.

2.5 It is therefore manifestly clear that the respondent acted unlawfully by purporting to suspend and revoke the licence of the appellant as the power to do so had been suspended by virtue of the injunction and the respondent acted unlawfully in willful disobedience of an Order of the Court by suspending and revoking the licence of the appellant and consequently his act done in defiance of that order was tainted with illegality and the Orders of suspension and revocation are therefore void. The respondent is in contempt of an Order of this Honourable Court.

3.0 The Second Issue – (Grounds 2 & 3)

Was the respondent's power to suspend and revoke exercised in accordance with the Act?

3.1 Before dealing with the specific issues that arise for the determination of this Court, it is beneficial to review the provisions of the Act for its true construction is relevant to the determination of some of the issues for the Court's consideration. The Act sets out a scheme for the regulation and supervision of banks and trust companies. This is clear from a construction of the statute as a whole, as there are several provisions concerning the same for example Section 13 and the first schedule of the Act. The most relevant section for consideration is Section 14 which states:

14. (1) The Governor may –

(a) by order, revoke the licence of a licensee –

(i) if, in the opinion of the Governor, the licensee is carrying on its business in a manner detrimental to the public interest or to the interests of its depositors or other creditors or is either in The Bahamas or elsewhere contravening the provisions of this or any other Act or of any order or regulations made under this Act, or any term or condition subject to which the licence was issued,

(ii) if the licensee has ceased to carry on banking business or trust business, or

(iii) if the licensee becomes bankrupt or goes into liquidation or is wound up or otherwise dissolved,

and he shall subsequently advise the Minister of his decision.

(b) apply to the Supreme Court for an order compelling the licensee to comply with the direction, cease the contravention or to do anything required to be done where the licensee-

(i) is contravening or has failed to comply with a direction of the Governor,

(ii) is contravening the Act, or

(iii) has omitted to do anything under the Act that is required to be done by the bank or trust company;

(c) impose, amend or vary conditions upon the licence;

(d) require the substitution of any director or officer of the licensee;

(e) at the expense of the licensee, appoint a person

to advise the licensee on the proper conduct of its affairs and to report to the Governor thereon within three months of the date of his appointment;

(f) at the expense of the licensee, appoint a receiver to assume control of the licensee's affairs in the interest of creditors who will have all the powers of a receiver under the Companies Act, 1992; and

(g) require such action to be taken by the licensee as the Governor considers necessary.

(2) Whenever the Governor is of the opinion that any action under subsection (1)(a)(i) and (b) should be taken against a licensee, he may forthwith suspend the licence of such licensee and before taking such action the governor shall give that licensee notice in writing of his intention so to do setting out in such notice the grounds on which he proposes to act and shall afford the licensee within such time as may be specified therein, not being less than seven days, an opportunity of submitting to him a written statement of objection to such action, and thereafter the Governor shall advise the licensee of his decision.

(3) Whenever the Governor shall suspend a licence under subsection (2) he may cause notice of such suspension to be published in the Gazette.

(4) Any suspension of a licence under subsection (2) shall be for a period of ninety days, or until the Governor takes action under subsection (1)(a)(i) or (b) or until the Governor notifies the licensee that the suspension is removed, whichever period is the shorter.

(5) Where the Governor suspends or revokes a licence under this section, he may apply to the Supreme Court for an order that the licensee be forthwith wound up by the

Court in which case the provisions of the Companies Act, 1992 relating to the winding up of a company by the Court shall, mutatis mutandis , apply.

(6) The Governor may, in any case in which a licensee or person who has at any time been a licensee is being wound up voluntarily, apply to the Supreme Court if he considers that the winding up is not being conducted in the best interests of its depositors, the beneficiaries of any trust or other creditors, and the court shall make such order as it shall consider appropriate in the winding up of the licensee."

What has to be determined insofar as this section is concerned is what is the proper construction thereof. It is necessary to construe the section firstly as a whole and then to do so in relation to other sections of the statute.

It is also necessary to appreciate that the construction ultimately will have to be in harmony with established principles of law.

3.2 It is of paramount importance to appreciate that the jurisdiction and power of the respondent is to be found in the Act. The Act sets out the extent and ambit of the power, how it is to be exercised and the limitations thereof. The statutory provisions therefore constitute conditions precedent to the exercise of the power by the respondent. Failure by the respondent to satisfy the conditions precedent deprives the respondent of jurisdiction to exercise the power. The jurisdiction therefore of the respondent is clearly founded upon the respondent satisfying the conditions prescribed by the Act.

3.3 The scheme set out in Section 14 is in clear and unambiguous language and a careful analysis will show how the power of the respondent is to be exercised. Section 14 (1) confers power on the respondent to revoke a licence if the conditions in subsection (1)(a)(i) are satisfied. This requires the respondent to be of the opinion that the appellant is operating in a manner set out in the Act. This opinion cannot be formed capriciously or irrationally but must be founded on

existing facts which can reasonably support such opinion. If there is no factual basis for the opinion then certainly the same is without foundation and the conditions precedent are not satisfied. Further the opinion must be one which is relevant to the purposive construction of the statute and the purpose for which the statute confers such power namely the regulation and supervision of banks and trust companies.

3.4 The procedure for the exercise of the power is to be found in section 14 (2) which provides that whenever the respondent is of the opinion under 1(a)(i) or 1(b) he may forthwith suspend the licence and before taking such action shall give notice in writing of his intention so to do setting out in such notice the grounds on which he proposes to act and affording the appellant time within which to object not being less than seven days. It is submitted that a grammatical and literal interpretation of section 14 (2) clearly shows that before suspending the licence the respondent must comply with the statutory provisions by giving notice and the grounds therefor.

3.5 It appears that the respondent is of the view that he is entitled to forthwith suspend the licence of the appellant and appoint a Receiver without any prior notice or reason therefor, as he is only required to give notice and a time within which to submit a written statement of objection prior to a revocation. This is evident from the letter of the 5 March 2001. This view is misconceived. The view that the word “forthwith” in the section gives the right for suspension, but not revocation until reasons are given and a time for objection stipulated is untenable and smacks ofr arbitrariness. On a literal and purposive interpretation of the section, the word “forthwith” cannot be construed in isolation, but has to be construed in the context of the complete section which is a well known principle of statutory construction. If the word “forthwith” is to be construed as contended by the conduct of the respondent, then the words immediately thereafter, “and before taking such action” would be meaningless. It is clear that on a literal interpretation, the words “and before taking such action” must relate to the suspension of the licence. It is

well known principle of construction and also grammatical construction that "such action" in an act relates to the last act or action mentioned in the preceding words. It therefore follows that as suspension is the last act mentioned prior to the words, "such actions" has to relate to suspension and not to the earlier action of which there is no express reference in the subsection.

SEE:

(5) STROUDS JUDICIAL DICTIONARY, FIFTH EDITION PAGE 2538;

(6) WORDS AND PHRASES LEGALLY DEFINED, SIXTH EDITION PAGE 142; AND

(7) EX PARTE GEORGE STAPYLTON BARNES [1896] A.C.146 PER LORD HALSBURY AT PAGE 150.

3.6 It is manifestly clear that this has to be the correct interpretation of Section 14(2) which is supported by Section 14 (4) which provides that any suspension of the licence shall be for a period of 90 days or until the respondent takes action under subsection 1 (a) (i) or (b) or notifies the appellant that the suspension is removed whichever is shorter. There can be no doubt that the clear language of subsection (4) indicates that the suspension is to precede revocation and that revocation is to take place within a period of ninety days after suspension if suspension is not removed.

3.7 It is patently clear that construing the provisions of the Section as a whole, the following are the conditions precedent to be satisfied:

(1) The respondent must have facts upon which he can support the opinion to suspend the licence;

(2) The respondent must give notice to the appellant of the intention to suspend prior to revocation;

(3) The respondent must give reasons which can support the decision to suspend and such reasons must be within the purpose of the Act;

(4) The respondent must give the appellant time within which to object not being less

than seven days;

(5) After the appellant responds the respondent then has to make the determination as to whether or not to revoke the licence or to remove the suspension;

(6) The respondent has to make a judicial or quasi judicial determination whether to revoke or to remove the suspension by taking into consideration the grounds in support of the opinion and the appellant's response thereto.

When all of the above factors are satisfied, it is only then that the respondent can resort to exercise the draconian power of revoking the licence.

3.8 The foregoing is clearly supported by a literal and grammatical construction of Section 14, but also its purposive construction. It is also reinforced by the fact that section 8 (c) expressly provides for what is to done by the respondent if he is of the opinion that the appellant is carrying on business in a manner set out in section 14 (1) (a) (i) which prescribes what steps ought to be taken in such circumstances, rather than suspension or revocation. It is also interesting to observe Section 4 (6) which provides that before taking any action in connection with the licence granted to the appellant the respondent shall provide the appellant an opportunity to make representation regarding any proposed action.

Similarly section 7 (7) dealing with the name of a company for which the respondent proposes to take action by directing the Registrar General to strike off the name of the company, notice has to be given to the company to show cause why the company should not be struck off.

3.9 It is clear that in all of the provisions in the Act which deal with any action to be taken against a licensee, notice of same must be given to the licensee and an opportunity to respond to same. Why then should the provision for suspension in Section 14 (2) be construed that no notice is required to be given to the appellant prior to suspension, action taken appointing a receiver, petitioning the Court under section 14 (5) for winding up under section 197 (f) of the Companies Act [which provides for winding up on a suspension] and the appellant having no opportunity

whatsoever to be heard in respect of any such actions of the respondent? Such a construction clearly is contrary to the principles of natural justice and there is presumption of statutory construction that a statute should be construed as providing for the application of the rule of natural justice, unless express clear language determines otherwise.

SEE:

(8) ONG ALCHUAN V. PUBLIC PROSECUTOR [1981] A.C. 648 @ 670 B ET SEQ.

(9) CHNG SUAN TZE V. MINISTER OF HOME AFFAIRS [1989] LRC (CNST) 683 @ 7086

4.0 The Third Issue – (Ground 4)
Failure to give any or any adequate reasons as required by Section 14 (2) prior to revocation of the appellant's licence.

4.1 The reasons given by the respondent must be in accordance with the statutory provision, in that the reason must relate to the purpose for which the power is conferred on the respondent and for which it is to exercised, not reasons relating to extraneous purposes or not within the ambit of the statutory provisions. The letter of 5 March 2001 does not, on analysis, contain any reason within the ambit of the Act or for the purposes of the Act, but clearly relates to extraneous purposes.

4.2 The respondent is required to give reasons in the notice, and cannot where reasons are not adequately given rely on subsequent reasons thereafter. The respondent's duty to give reasons is breached where no reason is given or because the reasons are inadequate as is the case herein. The Court will intervene not only if no reasons are given but if they are unsatisfactory as it is the statutory duty of the respondent to give satisfactory reasons which cannot be lawfully disregarded.

The respondent cannot discharge the statutory duty by giving reasons couched by the use of vague and general words. The Court requires that proper and adequate reasons must be given which deal with the substantial points raised. Failure to give reasons or adequate reasons amounts to a denial of justice as the appellant will not be made aware of the issues in order to respond to same appropriately.

4.3 It is necessary to determine precisely the standard of reasoning required, as much depends on the particular circumstances and the statutory context in which the duty to give reason arises. General guidance may be derived from a consideration of the purpose of the duty to give reasons. Reasons should be sufficiently detailed so as to make it quite clear to the other party why the decision was made and also to indicate actually or by necessary implication that the decision was based not upon extraneous considerations rather than matters within the statutory provisions. Failure to give reasons affects the legitimacy of the entire decision making process, as reasons ought to be given when the decision is taken as it is the basis for same. Further, failure to give reasons constitutes procedural default. Moreover, where the statute requires reasons to be given prior to the taking of action same must be done at the time and not thereafter by way of ex post facto rationalization of the decision.

4.4 Further where it is sought to impugn a decision of an administrative authority that is required to give reasons either expressly or impiedly, the Court could infer that the power was exercised outside the legislative purpose.

4.5 It is contended that the respondent has failed to satisfy the provisions of the statute, as the purported notice given in the letter of 5 March, 2001 fails to give any or any adequate reasons on which the respondent could have formed the opinion to exercise the power on any of the grounds set out in Section 14(1)(a)(i). Proper notice required the respondent to state the reasons therein which constitute the appellant carrying on its business in a manner that is detrimental to public interest and detrimental to the interest of its depositors or other creditors. Mere reciting of the provisions of the Act does not constitute reasons. Further, failure

to respond in the limited time stipulated does not constitute a reason commensurate with the statutory requirement. What purports to be the reason, is that the failure to answer in the limited time demonstrates that the appellant is carrying on business in a manner that is detrimental to the public interest and detrimental to the interest of depositors and other creditors, which is clearly not a reason for the purposes of the statute as the respondent has failed to state any conduct or act on the part of the appellant and to state how same constitutes conduct which supports the opinion that the appellant is carrying on business as to warrant the exercise of the power of Section 14(1)(a)(i) of revocation. The failure of the respondent to specify the conduct which would constitute carrying on business in a manner which necessitated the exercise of the power, deprived the appellant of any opportunity to respond properly.

4.6 The scheme of Section 14 confers a right upon the appellant to make written objections to the action contemplated by the respondent, this right becomes worthless unless the appellant has knowledge in advance of the consideration, which, unless effectively challenged, may lead to an adverse finding. The appellant has been seriously prejudiced by the respondent not providing any or any adequate reasons to enable an appropriate response.

4.7 As indicated the clear language of Section 14(4) indicates that suspension is to precede revocation. Amongst the factors to be satisfied prior to revocation would be the giving of reasons sufficient to preserve the right to make written statement of objection adequately. On receipt of the appellant's written objections the respondent then has to determine whether or not to revoke. This is a judicial or quasi judicial determination taking into consideration the grounds in support of the opinion to revoke and the appellant's response thereto. Thereafter the respondent is mandated to advise of his decision. As the Act provides a right of appeal from the respondent's decision reasons are required so as to enable the appellant to exercise effectively that right. In the instant case the appellant was never advised by the respondent of his decision nor were any reasons given. On 2 April 2001 a letter under the hand of an employee of the Bank on behalf of the

Manager for Bank Supervision Department addressed to the Registered Office of the appellant enclosed a copy of the Bank and Trust Companies Regulation (Revocation of Licence) (Suisse Security Bank & Trust Ltd.) Order, 2001 which cancelled the unrestricted bank and trust licence issued to the appellant. The Order, as noted earlier, merely stated that the licence was cancelled. An order is not a decision it merely reflects the decision.

4.8 Insofar as this matter is concerned, it is clear that no reasons were given as required by the statute, as the reason given in the letter of 5 March 2001 is clearly extraneous, namely, failing to respond to the letter of 2 March in an unreasonable time stipulated by the respondent and it is merely a repetition of the statutory language.

4.9 Further and more importantly the purported reason or lack of reason in the letter of 5 March 2001 is not from the respondent in accordance with the statutory provision, but is from an officer in the Bank who has no authority so to do. It follows therefore that the respondent has given no reason whatsoever and has therefore failed to comply with the statutory provisions and has acted illegally. The fact that the order of suspension and revocation are signed by the respondent does not cure the defect as the notice itself contains no reasons whatsoever given by the respondent. If a further clue is required to support the contention that the respondent is obligated to provide reasons for his decision it is to be found at Section 22(3). Upon receiving a notice of appeal the Attorney General is obliged without delay to transmit the respondent's decision and all papers relating to the appeal. It is clear that this provision settles the record for the appeal. To argue or adjudicate an appeal on a record constituted by a decision without reasons and papers relating to the appeal would be untenable. There would be no means of ascertaining where the decision making process has gone astray and no effective means of detecting errors which would entitle the Court to intervene.

SEE:

(10) R.V. CIVIL SERVICE APPEAL BOARD, EX PARTE CUNNINGHAM [1991] AER 310

(11) REG. V SECRETARY OF STATE FOR THE HOME DEPARTMENT, EX PARTE DOODY [1994] 1 A.C. 531

(12) PADFIELD ET AL V. MINISTER OF AGRICULTURE FISHERIES & FOOD & OTHERS [1968] A.C. 997

(13) GIVAUDAN & CO. MINISTER OF HOUSING AND LOCAL GOVERNMENT AND ANOR [1967] 1WLR 250

5.0 The Fourth Issue

Whether or not the respondent had jurisdiction to exercise the power of suspension and revocation and the other actions taken in connection therewith namely, the appointment of a Receiver.

5.1 The basic idea behind this ground of appeal is fairly simple. It is in the practical application that difficulties abound. If the Act confers jurisdiction or 'powers' on an agency to be exercisable in certain defined circumstances, questions of law may arise as to precisely what those requisite factual pre-conditions are, and question of fact may arise as to whether those factual pre-conditions actually exist. Such jurisdictional questions must, naturally, be determined initially by the agency in question itself, but if jurisdiction is claimed or power asserted as a result of an erroneous decision of law or fact on such a jurisdiction question, the ensuing decision or action may be challenged as involving a wrongful usurpation of authority. One of the exceptions of the prohibition on Courts reviewing the facts upon which decisions of inferior bodies are based is where it is alleged that there is an absence of the required jurisdictional fact. Where a set of facts must exist for the exercise of the jurisdiction of the body the Courts are entitled to enquire as to the existence of those facts.

5.2 Where the statute imposes a condition precedent as to the exercise of the body's power, it is duty of the Court to ensure that the condition has been met. The exercise of the decision maker's power is dependent upon the existence of a fact or a set of facts and the court is entitled to ensure that those facts exist.

SEE:

(14) THE QUEEN V COMMISSIONER FOR SPECIAL PURPOSES OF INCOME TAX rept. (1888) 21 QBD 313 @ 319;

(15) R. V FULHAM HAMMERSMITH & KENSINGTON RENT TRIBUNAL ex parte ZEDEK (1951) 2 KB1 61;

(16) R. V JUDGE PUGH EX PARTE GRAHAM (1951) 2 KB 623 @ 623 TO 629;

(17) R. v LONDON RENT TRIBUNAL ex parte HONIG (1951) 1 KB 641 @ 645.

5.3 Further, where precedent fact is a condition to the exercise of power, the courts are not confined to intervening only when the fact-finding body has acted unreasonably. They should themselves assess whether on the balance of probabilities those facts are justified by sufficient evidence. It is well established law where a statute requires a person or a body to exercise certain powers if satisfied or if of the opinion, then it follows that the jurisdiction to exercise the power is subject to the condition precedent that that person or authority has facts which justify the opinion being satisfied or support the opinion for the exercise of the power.

5.4 Section 14 of the Act clearly provides that the respondent may exercise the power of suspension, revocation and other action taken therein, if of the opinion that the appellant was acting in a manner set out in the Act. The burden of proof is on the respondent to satisfy the Court that at the time of the exercise of the power of suspension and revocation that the jurisdictional fact requirement had been satisfied, that is, that the respondent had facts and evidence to support his opinion and decision to exercise the statutory power. There is no burden on the appellant to show that at the date of suspension or revocation the respondent had no facts or

evidence to support his action. If the respondent fails to discharge the burden of proof then the jurisdictional fact requirement has not been satisfied and the action taken illegally.

See

(18) CHNG SUAN TZE and Others v MINISTER OF HOME AFFAIRS and Others (1989) LRC(Const.) 683.

5.5 It is alleged that the appellant is carrying on business in a manner that is detrimental to the public's interest, depositors and creditors. It is a condition precedent that for the exercise of this power the respondent must have facts on which such opinion was founded. The respondent cannot exercise the power capriciously or as the respondent wishes, if there is no evidence or facts to support the opinion. Moreover, the opinion must be one which is related to the statutory provisions. The opinion cannot be founded on things extraneous to the provisions of the Act.

5.6 In this matter it is evident that there are no facts to support the opinion of the respondent. The matters stated in the letter of 5 March, 2001 at item (a) and (b) are certainly not relevant considerations so as to form the basis of the exercise of the power. It is clear that what was being sought by the respondent at items (a) and (b), as was manifested from the letter of 2 March, 2001, was information, hence it is difficult to understand how the respondent could exercise the power based on the lack of information. It therefore follows by parity of reasoning that the decision could not be made on any relevant consideration as the information necessary for same was not in the possession of the respondent.

5.7 Further, the matter becomes more manifestly clear when one examines the letter of 5 March 2001 which clearly shows that it was not written by the respondent and that the writer expresses his opinion, and that it is in that writer's opinion that the appellant is acting detrimental to the public interest, depositors or creditors not

that of the respondent. This power cannot be delegated, hence the opinion on which the decision is based not being that of the respondent, the respondent has never addressed his mind to the matter as is required by the Act. It follows therefore by parity of reasoning that the respondent was not seised of any facts on which to base an opinion, as it is someone else who was of the opinion and not the respondent. It is clear therefore that the respondent was not in possession of any fact on which he could exercise the power to suspend or revoke the appellant's licence which was a condition precedent to the exercise of such power. The action therefore in the purported exercise of power is a nullity and unlawful.

See:

(19) HALSBURY LAWS OF ENGLAND 4th Ed. Reissue Volume (1) paragraph 68

(20) SECRETARY OF STATE FOR EDUCATION AND SCIENCE vs. METROPOLITAN BOROUGH OF TAMESIDE (1976) 3 W.L.R 64 @ 665 B to D:

(21) ADMINISTRATIVE LAW by WADE and FORSYTHE 7th Ed. Page 448

(22) JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, 5th Ed. By DeSMITH WOOLF and JOWELL, paragraph 6-030 and 6-084, 6-085 pages 346 to 347.

(23) HALSBURY supra – pages 68 – 115, see Notes 13, and 15;

(24) SECRETARY OF STATE FOR EMPLOYMENT vs. A.S. C.E.F. No. 2 (1972) 2 W.L.R. 1370:

(25) R. v. MINISTER OF LABOUR and EMPLOYMENT, THE INDUSTRIAL DISPUTES TRIBUNAL, DEVON BARRETT, LIONEL HENRY and LLOYD DAWKINS EX PARTE WEST INDIES YEAST CO. LTD, (1985) 22 J.L.R. 407 at page 410:

(26) ASHBRIDGE INVESTMENT LTD. vs. MINISTER OF HOUSING and LOCAL GOVERNMENT (1965) 1 W.L.R. 1320 at 1326 B to H:

(27) ARGOSY CO. LTD. vs. INLAND REVENUE COMMISSIONER (1971) 1 W.L.R. 514;

(28) NAKKUDA ALI vs. JAYARANTE (1951) A.C.66

6.0 The Fifth Issue – (Grounds 6,7,9 & 12)

Whether the respondent took account of irrelevant considerations and failed to take account of relevant considerations.

6.1 In order to determine what are the relevant and irrelevant considerations, the Act has to be analysed to ascertain what factors or matters are required to be taken into account in reaching a decision as to the exercise of the power; and conversely what factors or matters should not be taken into account. The Court will intervene in two situations. The first is where the authority has acted on grounds which the Act has never intended to allow. The second, is where the authority has failed to take proper account of something that the Act expressly or impliedly required it to consider.

6.2 In considering whether irrelevant considerations have been taken into consideration, one looks to see whether or not the wrong test has been applied. In other words, an analysis of the statutory scheme is examined to see whether or not the authority failed to apply the right test in accordance with statutory provisions, and if the power is exercised not in accordance with the statutory scheme or in a manner not taking into consideration statutory requirements, then certainly same is irrelevant, as erroneous considerations would have been taken into account, particularly in cases where a statute requires reasons for the decision and same are not given or not adequately given. In such cases, the Court will interfere as extraneous purposes are being pursued or that the exercise of the discretion was unreasonable. Here again, the interpretation of the statutory purpose and that of the relevancy of considerations are closely related since the questions regarding the consideration taken into account in reaching a decision is clearly whether that consideration is relevant to the statutory purpose.

SEE:

(29) R. v HILLINGDON HEALTH AUTHORITY ex parte GOODWIN (1984) 1.C.R. 800 at pages 807 to 808.

6.3 It is clear from the evidence in this matter that the letter of 5 March 2001 did not emanate from the respondent but from an officer of the Bank who expressed the view in accordance with Section 14(1), that he was of the opinion that the licence should be revoked and also went on to state the purported reasons in accordance with Section 14(2). It follows therefore that the respondent has not taken into account factors as he has delegated the function to someone else who has done so and therefore has not complied with the statutory requirements.

6.4 As indicated the purpose of the Act is to control and regulate banks and trust companies. To do so certain powers and functions are conferred on the respondent. Of significance to this appeal are the provisions of Section 8(c) referred to earlier which provides:-

> ***"8(c) The Governor, in relation to a licensee which is or appears to become unable to meet its obligation or which in the opinion of the Governor is carrying on business in a manner detrimental to the public's interest or to the interest of creditors or depositors of such licensee, may by instrument in writing require the manager or authorized agent of such licensee to supply within such reasonable time as may be specified in the instrument –***
>
> ***(a) the financial statement of that licensee as of a date determined by the Governor audited by an auditor who shall be a chartered accountant or a certified public accountant approved of by the Governor; and***
>
> ***(b) such other information relating to the licensee as may be so specified, and any person who contravenes the requirements of such an instrument or who in response to such an instrument knowingly or wilfully supplies false information to the Governor shall be guilty an offence and shall be liable on summary conviction to a fine not exceeding one hundred thousand dollars***

or to imprisonment for a term not exceeding two years or both such fine and imprisonment."

It is of paramount importance to observe that this section clearly indicates that where the respondent is of the view that the appellant is carrying on business in a manner detrimental to the public interest or the interest of creditors or the depositors, the respondent may exercise its power under the section and request information to support the opinion that the appellant is so conducting its business. It is therefore clear that the purpose of the section is to enable the respondent to get such information and evidence as is necessary to determine what course of action to adopt. It is important to note that the first request at Section 8(c)(a) has to do with accounts, clearly illustrating that what is relevant is solvency and fiscal status of the licensee. The legislature therefore must have intended this to be taken into account as a relevant consideration to determine whether or not the appellant was carrying on its business in a manner detrimental to the public, its depositors and other creditors. This factor, the solvency of the appellant was not taken into account. It seems that the statutory scheme contemplated that the respondent would act pursuant to Section 8(c) and thereafter, having received the information and factual evidence proceed, if same support the opinion of the respondent to act pursuant to Section 14(1)(i)(a).

7.0 <u>The Sixth Issue – (Grounds 6 & 8)</u>

<u>The respondent's unreasonableness, abuse of power and acting in bad faith</u>

7.1 It is well established law that where a discretionary power is conferred on an authority or person they must act reasonably, in good faith and upon proper grounds. Unreasonableness is used to denote particularly extreme behaviour, such as acting in bad faith or any decision which is irrational. The terms irrational and unreasonable are often used interchangeably, for each has a common fact that they refer to the improper exercise of power. It is submitted in this matter that the facts clearly show that the respondent acted manifestly unreasonably, in bad faith and abused his discretionary power.

7.2. The facts show that the respondent by letter of 2 March 2001 stated after a meeting with representatives of the appellant, their legal and accountanting advisers requesting information concerning – (a) The $1.6M litigation and commitment by the principal shareholder to underwrite any potential loss resulting from the suit; and (b) U.S.$3M litigation by JVW Investments and requesting authorization from the appellant addressed to their U.S. Attorneys who may hold details of the transaction to release all required information relating to the dispute to the respondent or its attorney and to fully inform the Bank of any details in this regard. This letter was delivered at 3p.m. on Friday at a time as already indicated after the injunction was issued much earlier that morning restraining the respondent from suspending or revoking the appellant's licence. The letter requested an immediate response later the same day or in any event by Monday morning of 5 March 2001. Suffice it to say, the intervening days were not business or working days. The appellant responded the same day stating that the matter was referred to legal advisers who were preparing a response. On 5 March 2001 at approximately midday, the respondent purportedly issued a notice that as a consequence of not responding the licence was suspended forthwith, as he was of the opinion that same should be revoked and requested the appellant's written objection by 15 March 2001, and a Receiver was appointed who took immediate possession of the appellant.

7.3. A review of the documents filed by the respondent in the Court pursuant to Section 22(3) of the Act clearly shows that the respondent was in possession of all the information that was being requested of the appellant in the letter of 2 March 2001 and which it is alleged was not produced by 5 March 2001, and which was the basis for the suspension and opinion to revoke and appoint the receiver. This is evident from the following:

(1) The letter from Haracjhi dated 28 February 2001 giving his undertaking to pay U.S.$1.6M in the event that there was a potential loss;

(2) Audited reports of the appellant by Ernst & Young, September 1999 at page 9 which is under the heading Contingency, which refers to action

and the status thereof, further the principal shareholder's commitment to underwrite any potential loss resulting from the action;

(3) Audited report of the appellant for September 2000 prepared by Panell Kerr Forster at page 10 which shows a Contingent Liability for $1.6M and also the appellant's principal shareholder's commitment to underwrite any potential loss resulting from the suit.

It is clear therefore from the foregoing that the respondent had all the information necessary concerning that suit as the note to the accounts referred to the fact that the matter was on appeal waiting for a decision.

7.4 Insofar as the suit concerning the $3M with respect to JVW Investment, here again there was copious correspondence and documents which are exhibited on the respondent's own file concerning same as is evident from the following:-

(1) see Tabs 8 to 11;

(2) the respondent had a copy of the judgment of the U.S. District Court which shows that when the litigation was initially commenced, the appellant was not a party thereto as is evident from the ruling on 18 August, which shows that the case was between the Correspondent Service Corp – Interpleader Plaintiff and JVW Investment and others as Defendants. The judgment gives all the facts and information concerning that suit. The suit in which the appellant became involved resulted from the appellant being joined as an additional defendant.

(3) On 21 December 2000 the appellant's Manager wrote to the respondent giving details as to the status of the litigation and pointing out that the Judge had ordered discovery process to take place on 2 March 2001 and that the matter had not gone to trial, but still in preliminary stages and would keep the respondent informed.

(4) On 23 February 2001 the respondent had a detailed report of the current status report of the litigation from the United States Attorneys handling same, stating that a pre-trial hearing was to take place on 2 May 2001 and indicating all the matters that would be dealt with on that day.

It is therefore manifestly clear that the respondent had in his possession all the relevant and necessary information concerning both issues raised in the letters 2 March and 5 March 2001.

7.5. It is therefore manifestly clear that when the respondent sought to suspend the appellant's licence with a view to revoking same for not supplying information, it is not only manifestly unreasonable, but clearly indicates an abuse of power and an action in bad faith. The Act does not provide for suspension or revocation of a licence for failure to answer a letter within an unreasonable time frame set by the respondent. The respondent can only revoke or suspend for the purposes provided for in the Act. The respondent has abused the power vested in him by forthwith suspending and revoking the licence of the appellant for extraneous and ulterior purpose and has therefore acted unlawfully. It is patently clear that the respondent acted irrationally, irresponsibly and clearly in bad faith as it is indicative from the facts, for despite having full knowledge of all the relevant information, purported to suspend and revoke the licence for not having same supplied within the manifestly unreasonable time schedule stipulated.

SEE:

(3) DaCOSTA v MINISTER OF NATIONAL SECURITY
(1986) 38 W.I.R.I

7.6. Another example of bad faith is to be found in the fact that although it is neither a condition of the licence that the appellant insures against any liability involving the suits, nor is it now a requirement of the Act that the appellant does so, nevertheless, the appellant insured from August 2000 in respect of such liability. The respondent contacted the insurers enquiring whether or not the appellant had insurance for three years prior to August 2000. It is obvious that the appellant never had insurance prior to August 2000 and despite the fact that this is not a requirement or condition of the licence or the Act, the appellant nevertheless insured against such liability, yet the respondent is requiring information

concerning three prior insurance. This can only show bad faith on the part of the respondent.

7.7. An objective assessment of the respondent's conduct in this matter [failure to give reasons, failure to have any factual basis on which to form the opinion to exercise the power under Section 14(1)(a)(i), failure to adhere to the statutory scheme by invoking Section 8(c) inter alia] clearly indicates that the respondent acted unreasonably, irrationally, in bad faith and clearly an abuse of the power conferred by the Act.

The Seventh Issue – (Ground 13)

Whether the respondent could provide reasons subsequent to suspension and revocation of the licence and further, can any reliance be placed on such reasons to support retrospectively the decision.

8.1. The statutory provision in section 14(2) clearly shows that the respondent must have in his possession evidence on which to ground the opinion to suspend or revoke the licence at the time of so doing. It is clear that the letter of 5 March 2001 was issued purporting to satisfy the provisions of Section 14 (2) by stating reasons on which the respondent's opinion was based for the exercise of the power under Section 14(1)(a)(i) to revoke and to suspend under Section 14(2). It is clear that the respondent must then have had evidence in his possession in order to comply with Section 14(1) and Section 14(2). Further, the Act further provides that on an appeal being lodged the relevant papers relating to the appeal must be submitted to the Court pursuant to Section 22 (3). This was done. The Act contains no provision for any further documents or papers to be filed by the respondent.

8.2. Clearly, the statutory power for reasons to be given to the appellant is to give the reasons on which the respondent's opinion is based to enable the appellant to know how to object to those reasons as stated in the letter 5 March 2001. If new reasons are now to be given by the respondent after the appeal has been filed, then

such reasons would not be within the ambit of Section 14(2) as the respondent would not have based the opinion on those reasons then or if he did have them, did not state them, and so the appellant would have had no opportunity to respond to same. The licence would have been suspended and revoked for reasons then known to the appellant who would clearly be at a disadvantage having no opportunity to object as provided by the statute and also in breach of natural justice. Certainly, if the respondent were permitted to introduce new reasons, it would mean that same would be substantially different from the previous reasons given, which certainly raises problems and is clearly unlawful as contrary to the statutory provisions.

8.3. Moreover, the respondent would be altering what was stated in the letter of 5 March 2001 purporting to comply with Section 14(2). It is quite clear that if the Act provides that there is a duty to state reasons insofar as they exist at the time of the exercise of the power that duty must apply to give the real reasons for the decision not other reasons which are thought up afterwards. Further, the rules of natural justice certainly apply as is evident from the provisions of the statute as the appellant has a right to object based on the reasons given. It follows therefore that substitution of new reasons must clearly lead to a breach of the *audi alteram partem* principle since the new substituted reasons will obviously relate to a matter which the appellant was not given the opportunity to respond. If the original reasons stated by the respondent are bad in law, the respondent cannot now give other reasons in an endeavour to justify the decision.

8.4. The attempt by the respondent to give new reasons now, is clearly a tacit admission that the reasons given on 5 March when the power was exercised were not valid and could not support the exercise of the power. It follows therefore that the respondent cannot now rely on reasons which were not disclosed on 5 March or on reasons which came into existence subsequent thereto to support the decision to suspend and revoke as has been done in this matter. It follows therefore that such evidence is clearly inadmissible and have no value as no reliance can be placed on same by the respondent as already stated. The mere fact

that the respondent now seeks to adduce evidence having already taken an action is clear admission that the action taken cannot be supported by the reasons given then and is clearly unlawful.

8.5. This clearly supports the appellant's appeal on the ground that the respondent did not have any evidence on which to found the opinion and the position now taken is an admission of same and the appeal ought to be allowed on this admission.

9.0 <u>The Eighth Issue – (Supplementary Ground)</u>

Whether or not the notice issued was unlawful in that it was not from the respondent but from an officer in the Central Bank.

9.1. An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power so intended to be delegable. Normally, the Courts are rigorous in requiring the power to be exercised by the precise person or body stated in the statute, and in condemning as ultra vires action taken by agents, sub-committees or delegates, however expressly authorized by the authority endowed with the power. A discretionary power must, in general, be exercised only by the authority to which it has been conferred. It is a well known principle of law that when a power has been conferred on a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another.

9.2. The maxim *delegatus non potest delegare* (a presumption of statutory interpretation) does not enunciate a rule that knows no exception; it is a rule of construction which makes the presumption that "a discretion conferred by statute is prima facie intended to be exercise by the authority on which the statute has conferred it and by no other authority, but this presumption may be rebutted by any contrary indications found in the language, scope or object of the statute".

Where the exercise of a discretionary power is entrusted to a named office – e.g. a chief officer of police, a medical officer of health or an inspector – another officer cannot exercise his powers in his stead unless express statutory provision has been made for the appointment of a deputy or unless in the circumstances the administrative convenience of allowing a deputy or other subordinate to act as an authorized agent very clearly outweighs the desirability of maintaining the principle that the officer designated by the Act should act personally.

9.3. In determining whether a statute should be interpreted as authorizing or prohibiting a particular act of delegation the courts have commonly taken particularly strict view in relation to the delegation of functions of a judicial or disciplinary nature, or where they regard the statutorily designated decision-maker as having been selected because he is especially suited or qualified for the task.

9.4. Section 14(1)(a)(i) of the Act expressly provides that the respondent may by Order, revoke the licence of a licensee, if in the opinion of the respondent the licensee is carrying on business in a manner detrimental to the public interest or to the interests of depositors or other creditors. The Act confers power on the respondent to take action if he is of such opinion. The only person to whom the power to take the action stipulated is the respondent. Further, it is in his opinion that such action should be taken and not in the opinion of anyone else. The Act therefore clearly vests the power in the respondent who alone can exercise it and not delegate it to any other person. Further section 14(2) expressly provides, that where the respondent is of the opinion that any action under section 14(1)(a)(i) should be taken, the respondent shall give the licensee notice in writing of his intention to do so and setting out in such notice the grounds on which he proposes to act.

9.5. It is clear that the Act confers on the respondent the obligation to give the reasons for his opinion for the proposed action and no one else. Further, that the respondent after receiving the objection of the licensee must determine what action he will take and thereafter accordingly inform the licensee. Further, under

Section 14 (4) it is the respondent who has to decide whether to revoke the licence or remove the suspension and no one else. It is obvious that these functions are conferred expressly by the Act on the respondent and no one else.

9.6. A review of Section 14 (1) (2) and (4) clearly shows that the respondent is exercising a judicial function or quasi judicial function, in that he must first have an opinion on which reasons are given and thereafter he is to consider the objection of the licensee and make a determination accordingly. It is well established law from the cases that a judicial function cannot be delegated.

9.7. In this matter therefore, it follows by parity of reasoning that the Act specifically confers power on the respondent, as the person in whose opinion action should be taken concerning the suspension or revocation, the respondent's reasons for so doing, the respondent's consideration of the licensee's objection and to make a determination whether or not to exercise the power of revocation, are clearly vested in, and to be exercised by, the respondent and no one else. This is a judicial or quasi judicial function which cannot be delegated as is clear from the authorities.

9.8. In this matter therefore, the letter of 5 March 2001 purported to suspend forthwith the appellant's licence pursuant to Section 14(2) of the statute and for the proposed revocation issued by the Manager of the Bank's Supervision Department and not by the respondent, is a nullity and constitutes an unlawful suspension of the licence. The fact that the notice of suspension was signed by the respondent is irrelevant. The letter of 5 March 2001 states at page 2 thereof "In view of the conduct of Suisse Security Bank & Trust Co. Ltd. in relation to the matters aforesaid, I am of the opinion that the licence of the Bank should be revoked. I invite the Bank pursuant to Section 14(2) of the Bank and Trust Companies Regulation Act 2000 to provide me with a written statement of any objection it may have to the proposed revocation of its licence on or before March 15, 2001. The licence of Suisse Security Bank & Trust Company Ltd. is suspended forthwith pursuant to Section 14(2) of the Bank and Trust Companies

Regulation Act 2000, a notice of which is enclosed". The Notice in itself is not easily reconcilable with the letter and at best is reflective of the letter.

9.9 The foregoing clearly represents powers which are vested in the respondent by virtue of Sections 14(1)(a)(i) and 14(2) and no one else. However, this letter is signed by the Manager of the Bank's Supervision Department which clearly shows that it is he and not the respondent who is of the opinion that the licence should be revoked, it is he who is inviting statements to him of objections and it is he who has suspended the licence. The fact that it also enclosed a notice signed by the respondent does not detract from the fact that it is the Manager who has exercised all the powers that are conferred by the statute on the respondent because the reasons required for the exercise of the function were not given by the respondent as is required for the determination consequent on the respondent's opinion. The respondent merely signed the notice of suspension but the opinion to revoke, the grounds for same and the request for the appellant to object, the time within which to do so, and the suspension, were not done by the respondent but the Manager of Bank's Supervision Department as is clear from the letter 5 March 2001.

<u>The Respondent's Case as presented by Mr. Blair is stated as follows:</u>

1. There are a number of actions concerning this matter. The one before the Court for decision is Appeal No. 18 of 2001, which is the Appeal of Suisse Security Bank and Trust Limited ('SSBT') under s.22(1)(a) of the Banks and Trust Companies Regulation Act 2000 against the revocation of its banking licence.

   It is closely connected to Action No. 436 of 2001 being the Petition of the Central Bank of The Bahamas ('the Central Bank') to wind up SSBT consequent upon the suspension and revocation of its banking licence. Some of the relevant evidence was adduced in the winding-up Petition and following a direction of the learned judge on 29th January, will be referred to where appropriate below. There are two further

affidavits, namely that of Mr. Lunn on behalf of SSBT sworn on 31st January 2002, and that of Mr. Francis on behalf of the Central Bank sworn on 21st February 2002.

The essential facts

3. SSBT obtained a banking licence ("J.W.F. 2" tab 1) on 20th July 1993, under the predecessor to the Banks and Trust Companies Regulation Act 2000 ('the Act'). Under s. 25 of the Act that licence continued in effect after the Act came into force as if it had been granted under the Act.

4. Various regulatory issues arose in respect of SSBT, which led to a number of directions being made by the Central Bank during 1999 and 2000. Although these caused dispute between SSBT and the Central Bank and led to a judicial review application by SSBT in Action No. 258 of 2001, those matters are not directly relevant for present purposes.

5. Other matters came to the attention of the Central Bank during 2000 and 2001, which came to a head in March 2001. On 5th March 2001 the Central Bank suspended SSBT's licence ("J.W.F. 2" tab 26B) acting pursuant to s. 14(2) of the Act.

6. The notice states that it is proposed to revoke SSBT's licence and invites any representation which SSBT might have ("J.W.F. 2" tab 26B). At the same time the Central Bank appointed Mr. Raymond Winder as receiver of SSBT pursuant to s. 14(1)(f) of the Act ("J.W.F. 2" tab 27).

7. On 2nd April 2001 the Central Bank revoked SSBT's licence under section 14(1)(a)(i) of the Act ("J.W.F. 2" tab 48B).

8. On 5th April 2001 the Central Bank filed a winding-up Petition ("J.W.F. 1"tab 9) pursuant to s. 14(5) of the Act. On 9th April 2001 Mrs. Justice Allen appointed Mr. Winder as provisional liquidator of SSBT, thus superseding his receivership.

The Central Bank sought expedition of the winding-up Petition on 12th April 2001.

9. SSBT appealed against the revocation under s. 22 of the Act by Notice of Appeal dated 20th April 2001. New Grounds of Appeal were served on 1st February 2002, and Supplemental Grounds on 12th February (see the bundle of court documents).

10. SSBT argued that the winding-up Petition should not be decided before the s.22 Appeal, but there was delay in the fixing of a date for the Appeal. A date for the hearing of the Petition was originally fixed for 5th July 2001, but no date was fixed for the hearing of the Appeal. The first date for hearing the Petition was adjourned, but on 23rd July a hearing was convened before Mrs. Justice Allen in order for SSBT's lawyers to report to the Court as to the progress of the Appeal. No representative of SSBT appeared on that day and the Court fixed 3rd September 2001 for the hearing of the Petition.

11. The hearing on 3rd September was itself adjourned because Mrs. Justice Allen recused herself. The Central Bank has been strenuously attempting since then to obtain a date for the hearing of the Petition. Meanwhile, the Appeal was fixed for hearing on 1st October 2001 before the Chief Justice, but he also stepped down. A date was fixed for both matters to come before Davis J. on 5th November 2001 for hearing dates to be fixed, but the hurricane on that day caused the Courts to be shut. A replacement day could not be found until 27th November 2001, when a dispute between legal advisers both claiming to represent SSBT further delayed the fixing of the hearings.

12. On 14th December, Davis J. directed that the matter come on for hearing on 4th January 2001 and gave directions that SSBT lodge their skeleton arguments with the court and file any affidavit evidence they proposed to rely on by Friday, 21st December. SSBT failed to do this, and the hearing on the 4th January had to be postponed because the date was inconvenient to SSBT's counsel.

13. On 4th January 2002, it was agreed that the time period for SSBT to file and serve its affidavit and skeleton was extended to 11th January 2002. SSBT failed to comply with this agreement, with the result that the Central Bank had to go back before the learned judge on 29th January for further directions. On that day, he ordered SSBT's affidavit and skeleton to be served by Friday, 1st February. There were still delays in serving the evidence and skeleton, and it was not possible for the Central Bank to be ready for the hearing on 12th February, which had to be adjourned to 11 March.

14. This has meant that the Appeal has come on for hearing much later than is desirable, and indeed much later than desired by the Central Bank. This cannot be blamed in any way on the Central Bank. Although the delay is regrettable, it does not prevent the court from dealing justly with the matter.

The relevant statutory provisions

15. The regulation of banks is one of the functions of the Central Bank. Section 5(1)(b) of the Central Bank of the Bahamas Act 2000 provides that "it shall be the duty of the Bank … in collaboration with the financial institutions to promote and maintain adequate banking services and high standards of conduct and management therein".

16. The Bank's powers and duties in that regard are set out in the Banks and Trust Companies Regulation Act 2000 (the "Act"), which came into force on 29th December 2000. This is the principal statute with which the Court is concerned on the hearing of this appeal

17. Section 3(1) of the Act provides that "No banking business shall be carried on from within The Bahamas … except by a person who is in the possession of a valid licence granted by the Governor authorizing him to carry on such business." Contravention of this section is a criminal offence (section 3 (3)).

18. Section 4(2) of the Act sets out the factors to be considered by the Governor when considering whether to grant a licence. These are:

(a) that the applicant is a fit and proper person or company to carry on banking business;

(b) the nature and sufficiency of the financial resources of the applicant to provide continuing financial support for the bank;

(c) the soundness and feasibility of the business plan;

(d) the business record and experience of the applicant;

(e) whether those who will operate the bank will do so responsibly and whether such persons have the character, competence and experience for operating a bank; and

(f) the best interest of the financial system in The Bahamas.

19. There are in addition General Prudential Norms dealing with issues such as a bank's capital, various guidelines, guidance notes, reporting forms, etc. issued by the Central Bank (an example is at "J.W.F. 1" tab 1).

20. Section 14(1) (a) of the Act provides for the revocation of a licence. It provides that:

> 14. (1) The Governor may -
>
> (a) by order revoke the licence of a licensee -
>
> (i) if, in the opinion of the Governor, the licensee is carrying on its business in a manner detrimental to the public interest or to the interests of its depositors or other creditors or is either in The Bahamas or elsewhere contravening the provisions of this or any other Act or of any order or regulations made under this Act, or any term or condition subject to which the licence was issued…

21. Section 14(1)(f) of the Act provides for the appointment of a receiver. It provides that:

> 14. (1) The Governor may -

…..

(f) at the expense of the licensee, appoint a receiver to assume control of the licensee's affairs in the interest of creditors who will have all the powers of a receiver under the Companies Act, 1992;

22. Section 14(2) of the Act provides for the suspension of a licence. It provides that:

(2) Whenever the governor is of the opinion that any action under subsection (1)(a)(i) and (b) should be taken against a licensee, he may forthwith suspend the licence of such licensee and before taking such action the governor shall give that licensee notice in writing of his intention so to do setting out in such notice the grounds on which he proposes to act and shall afford the licensee within such time as may be specified therein, not being les than seven days, an opportunity of submitting to him a written statement of objection to such action, and thereafter the Governor shall advise the licensee of his decision.

23. Section 14(4) of the Act provides a time limit for suspension:

(4) Any suspension of a licence under subsection (2) shall be for a period of ninety days, or until the Governor takes action under subsection (1)(a)(i) or (b) or until the Governor notifies the licensee that the suspension is removed, whichever period is the shorter.

24. Section 14(5) of the Act provides for the bringing of a winding up petition after suspension or revocation:

(5) Where the Governor suspends or revokes a licence under this section, he may apply to the Supreme Court for an order that the licensee be forthwith wound up by the court in which case the provisions of the Companies Act 1992 relating to the winding up of a company by the court shall, *mutatis mutandis*, apply.

25. Section 22(1)(a) of the Act provides a statutory right of appeal to the Supreme Court from a decision of the Governor revoking a licence under s. 14.

26. Section 22(2) of the Act provides that:

> An appeal against the decision of the Governor shall be on motion and the appellant within twenty-one days after the day on which the Governor has given his decision shall serve on the Attorney-General a notice in writing signed by the appellant or his counsel and attorney of his intention to appeal and of the general ground for his appeal…

27. Section 22(5) of the Act requires the appellant before going into the case to state all the grounds of appeal on which he intends to rely.

28. Section 22(6) of the Act sets out the Court's powers on the hearing of the appeal. It provides that:

> The Supreme Court may adjourn the hearing of the appeal and may upon hearing thereof confirm, reverse, vary or modify the decision of the Governor or remit the matter with the opinion of the Supreme Court thereon to the Governor.

The present appeal

29. The Court is here concerned with an appeal against revocation under the abovementioned s.22(1)(a). The hearing is therefore an appeal, not a review. The appellant seeks an order that the revocation decision be reversed, and its licence restored (see the Notice of Appeal filed on 20th April 2001). The Central Bank asks the court to confirm the decision to revoke.

30. The revocation decision depends upon:
    (i) the opinion of the Governor that SSBT was carrying on its business in a manner detrimental to the public interest and to the interest of its depositors and other creditors
    (ii) and the exercise of a discretionary power to revoke.

31. As will be seen, that opinion was based on three principal issues, namely:

(a) The US$1.6million issue;

(b) The US$3 million issue;

(c) The non-cooperation and lack of information issue.

The facts in relation to each are as follows.

The US$1.6 million issue

32. SSBT's accounts for the year ended September 1999 ("J.W.F. 2" tab 15) audited by Ernst & Young state at note 9:

"

Contingency

The Bank has filed a Notice of Appeal in connection with a judgment that was eneterd against the Bank as a co-defendant, along with a former customer, in litigation in the United States. As a result and in order to prevent the accrual of further interest charges, the Bank paid US$1.6 million, the amount of the judgment plus accrued interest, into a trust account subsequent to the year end. The Bank's principal shareholder has committed to underwrite any potential loss resulting from this matter. Although there can be no assurance, the Bank believes, based on information currently available, that the ultimate resolution of this legal proceeding would not likely have a material effect on the results of its operations, financial position or liquidity."

33. This matter came to the attention of the Central Bank in May 2000, when the accounts together with the auditor's report, were produced to the Central Bank.
No further elucidation was produced by SSBT, and the same accounting treatment was repeated in the accounts for the year ended 30th September 2000 ("J.W.F. 2" tab 18), this time audited by Pannell Kerr Forster. That audit report was dated 31st January 2001. It seems that on 28th February 2001 a draft letter was prepared by SSBT, to be signed by Mr. Mohammed Harajchi, the principal shareholder,

supporting his commitment to underwrite, but even this draft letter did not emerge until the end of March 2001.

34. On 1st March 2001 SSBT met with the Central Bank, and were told that the Central Bank required collateral in support of the alleged commitment to underwrite the potential loss (Mr. Francis' affidavit paragraph 33). On the following day, 2nd March 2001 ("J.W.F. 2" tab 24) the Central Bank repeated this request formally, requiring a response on that day if at all possible, and in any event by the morning of Monday, 5th March 2001.

35. The only reply was that the matter had been referred to SSBT's lawyers ("J.W.F. 2" tab 25). When the suspension of the licence was notified on 5th March 2001 ("J.W.F. 2' tab 26B) the lack of any evidence of any collateral satisfactory to the Central Bank to secure against the potential loss of US$1.6 million was one of the matters relied upon.

36. On the 12th March 2001 the Central Bank wrote to SSBT's lawyers, Lockhart & Munroe, for the evidence which it was seeking ("J.W.F. 2" tab 23). The reply to this on 15th March 2001 ("J.W.F. 2" tab 33) claimed that the collateral was "the letter of comfort" itself, which was alleged to have been accepted by the auditors and the Central Bank in the previous year. No details were given as to anything that could properly be called collateral, i.e., financial security for the alleged undertaking. On 21st March 2001 the Central Bank wrote again ("J.W.F. 2" tab 38), stating that it would consider as acceptable either a deposit or a first class guarantee.

37. On 23rd March 2001 ("J.W.F. 2" tab 40) SSBT's lawyers protested that the Central Bank lacked authority to press for the collateral, but failed to deal with the Central Bank's request. Getting no cooperation from SSBT, the Central Bank wrote to the receiver on 29th March 2001 ("J.W.F. 2" tab 42), asking for a copy of the "letter of comfort". The receiver responded immediately ("J.W.F. 2tab 43), enclosing a copy of a draft letter with a date of 28th February 2001, but saying that

Pannell Kerr Forster did not have a copy of the letter, certainly not as sent, and that he, the receiver, was unable to locate it. Nothing else emerged from SSBT before the revocation letter of 2nd April 2001 ("J.W.F. 2" tab 48).

38. By the date of revocation, the position therefore was that:

(1) SSBT had failed to come up with any form of collateral or other support for the alleged undertaking from the principal shareholder. Attempts by the Central Bank to secure evidence of such support had been met by evasion.

(2) It had become very doubtful that there had ever been any real undertaking at all. Only a draft letter was ever found and the auditors denied ever having seen a signed copy (Ernst & Young also denied sight of any such letter, as appears from the first report of the provisional liquidator to this honourable court).

The US$3 million issue

39. In July 1998 ("J.W.F. 2" tab 2) Mr. D. Kelleher of JVW Investments Ltd. of Dominica complained to the Central Bank that SSBT had failed to repay a deposit of US$10 million. It later appeared that the money had been used by SSBT to purchase shares pursuant to authorizations which, according to JVW, were to SSBT's knowledge forgeries ("J.W.F. 2" tab 8).

40. This dispute rumbled on for a further two years. SSBT initially alleged money laundering ("J.W.F. 2" tab 3) but this was not established ("J.W.F. 2" tabs 7 and 14). An action was brought concerning the dispute, to which SSBT was joined as third-party defendant. On 28th September 2000 the US District Court in New York issued a temporary restraining order attaching US$3 million of SSBT's funds. This order was confirmed on 14th November 2000 ("J.W.F. 2" tab 19) after argument had been heard on behalf of SSBT. Whilst the court did not then finally determine the merits between JVW and SSBT, the judge did say as follows:

"SSBT claims that the authorizations were valid, and that it purchased the stock with JVW's funds before the account was frozen during the investigation. Yet the fact that a legitimate investigation was conducted by Bahamian authorities, and that SSBT as authorized to freeze the account until the resolution of that investigation, does not answer the crucial question: whether JVW authorized the stock purchase. Although these central fact questions need to be resolved at this early stage of the litigation involving SSBT, based upon the evidence presented regarding the timing of disclosure, the questionable authenticity and timing of the authorization letters, it appears that Kelleher did not authorize the purchase of stocks with these funds. For the purposes of the motion to confirm the attachment order, then JVW has met its burden of proving that it is likely to prevail on the merits," (page 4 of the report)

41. Coming on top of the US$1.6 million referred to above, this freezing of US$3 million of SSBT's funds puts at risk a total of US$4.6 million of SSBT's assets. According to the balance sheet of SSBT as at 30th December 2000 filed with the Central Bank ("J.W.F. 1" tab 6) total shareholders' funds were US$6, 308,000 consisting of US$3,000,000 paid up share capital and US$3,308,000 described as reserves. This constituted SSBT's capital for regulatory purposes.

42. Great importance is placed by bank regulators on a bank's capital adequacy. This is to protect depositors, as well as the financial system. For the same reason, in The Bahamas, as elsewhere, large exposures have to be reported to the Central Bank, and exposure to a single party in excess of 25% of a bank's capital is prohibited (see the Central Bank's General Prudential Norms at "J.W.F. 1" tab 1). If these requirements are taken as analogous to the exposure in relation to the frozen assets, US$1.6 million represented just over 25% of SSBT's capital, and US$3 million represented some 47% of SSBT's capital. Together, the amount at risk represented approximately 73% of SSBT's capital.

43. Despite this, SSBT did not tell the Central Bank that it had been joined to the action, let alone about the freezing order. It was only when enquiries were made by the Central Bank of SSBT on 29th November 2000 that the freezing order was disclosed by SSBT (Mr. Francis' affidavit, paragraph 22). Thereafter, the Central Bank found it difficult to obtain worthwhile information about the US proceedings. SSBT's accounts were issued accompanied by an audit report dated 31st January 2001 but no reference was made to the frozen US$3 million ("J.W.F. 2" tab 18). Not until February 23rd 2001 ("J.W.F. 2" tab 21) did the Central Bank see any report from SSBT's US lawyers, Milbank Tweed, and it was by then two months out of date. The Central bank was unable to obtain access to Milbank Tweed itself.

44. On 1st March 2001 at a meeting between Mr. Christopher Lunn of SSBT and the Governor of the Central Bank, the Governor urgently required formal authorisation by SSBT, addressed to Milbank Tweed, to release all required information relating to the JVW dispute (Mr. Francis' affidavit, paragraph 7). This, together with the Central Bank's requirements relating to the U.S.$1.6 million, was repeated in the letter to SSBT dated 2nd March 2001 ("J.W.F. 2" tab 24), which letter required a response on that day if at all possible, and in any event by Monday morning, 5th March 2001.

45. All that SSBT did was to reply on the same day, 2nd March 2001 ("J.W.F. 2" 25) saying that they referred the matter to their legal advisers. No attempt was made to provide the urgent response which the bank required. The bank formally suspended the licence of SSBT on 5th March 2001 ("J.W.F. 2" tab 26).

46. The Central Bank pressed again for the formal authorisation addressed to Milbank Tweed by letter dated 12th March 2001 ("J.W.F. 2" tab 32), reinforcing what was already clear to SSBT, namely that "Your client is aware that we required the foregoing information to assist us in assessing what effect the US litigation has or might have on the continued solvency and viability of SSBT."

47. This did produce an answer from Lockhart & Munroe on behalf of SSBT dated 15th March 2001 ("J.W.F. 2" tab 33), but not the formal authorisation requested. Rather, the lawyers spoke of Mr. Lunn having spoken to Milkbank Tweed, and purported to authorise the Central Bank to make enquiries of Milkbank Tweed. As SSBT well knew, this was quite useless, since what was needed was clear authority to Milkbank Tweed themselves directly from SSBT. Thus when the Central Bank wrote to Milbank Tweed on 19th March 2001 ("J.W.F. 2" tab 36), they received a predictably dusty response on 21st March 2001 ("J.W.F. 2" tab 39) to the effect that Milbank Tweed could give little assistance without their clients' permission. They had clearly received no authority whatever from SSBT, save for what contained in the copy of the letter of Lockhart & Munroe to the Central Bank ("J.W.F. 2" tab 33) which the Central Bank had sent to them.

48. On 26th March 2001, Lockhart & Munroe finally did write to Milbank Tweed ("J.W.F. 2" tab 41), but again this was wholly unsatisfactory. It merely authorised Milbank Tweed to "disclose to the Inspector of Bank and Trust Companies your considered opinion as to the need to make provision relative to the litigation…". This still fell well short of the authorisation "to release all required information" which the Central Bank had been seeking since the beginning of March. As appears below, even after the revocation SSBT continued to try to impede the flow of information from Milbank Tweed to the Central Bank.

49. In their letter of 15th March 2001 ("J.W.F. 2" tab 33), Lockhart & Munroe mentioned an insurance policy issued through J.S. Johnson and Co. ltd. which was said to cover any loss which might result from the litigation. However, no copy of the policy was provided. On 21st March 2001 ("J.W.F. 2" tab 38) the Central Bank sought a copy of the policy, but this was still not provided. On 23rd March 2001 ("J.W.F. 2" tab 40), Lockhart & Munroe referred to an insurance "certificate" which had been exhibited to an affidavit of Mr. Lunn served on the Central Bank. This appears to be a reference to Mr. Lunn's affidavit in the judicial review application by SSBT in which he says that SSBT:

".. has secured insurance coverage with a leading insurance company within this jurisdiction, viz JS Johnson & Co Ltd, to underwrite any potential loss which might materialise in respect of the transaction…"

This gave some details of the cover, but not the full policy details. The Central Bank had to write the receiver to obtain the policy ("J.W.F. 2" tab 42), and the receiver replied immediately on 29th March ("J.W.F. 2" tab 43) enclosing a copy.

50. Since the cover was only for the period incepting on 23rd August 2000, the Central Bank asked the receiver ("J.W.F. 2" tab 44) whether any similar policy had been in force during the previous two-year period, but received a response from the receiver on 30th March 2001 ("J.W.F. 2" tab 45) to the effect that there was none.

51. The policy revealed that the insurance cover could not be relied upon to protect SSBT from loss arising from the US litigation. There are numerous reasons why this is so. The insurance is Directors & Officers Liability Insurance, intended to cover directors against loss incurred by them, or by SSBT reimbursing them, whereas the litigation is against SSBT for failure to repay a deposit. The policy only covers directors' and officers' errors and omissions. It does not cover professional negligence and there is an express exclusion in relation to dishonest or fraudulent conduct (clause 4.4). Further, if the litigation liability is not based on a "wrongful act", it is not clear that cover exists. It is not apparent that breach of contract is covered. Perhaps most significantly, the exclusion clauses relating to prior and pending litigation mean that it is almost certain that cover incepting on the 23rd August would not cover a claim that had been clearly threatened since 1998, where at the inception date the litigation had already commenced and it was virtually certain that SSBT would be made a party, even if it had not yet been formally joined.

52. As at the revocation date, the position in relation to the US$3 million issue was that (especially taken together with the US$1.6 million issue) it represented a

serious threat to the solvency and viability of the institution. It had not been revealed by the institution to the Central Bank. The circumstances underlying the order of the US Court called the conduct of the institution into serious doubt. The Central Bank had encountered opposition from the institution in seeking information about the litigation and had been led to believe that an insurance policy might remove the risk of loss when in fact it was open to the gravest doubt whether that was the case.

The non-cooperation and lack of information issue

53. Between the appointment of the receiver on 5th March and the revocation on 2nd April 2001, SSBT conducted itself in an obstructive manner wholly inappropriate for a licensed bank (Mr. Francis' affidavit, paragraph 44). This emerged as early as the receiver's first report of 9th March 2001 ("J.W.F. 2" tab 30). The receiver tried to obtain access to the computer system of SSBT, but failed, despite specific and repeated requests of senior SSBT managers. The Central Bank demanded cooperation by letter of 16th March 2001 to Mr. Lunn ("J.W.F. 2" tab 34B) without effect. This has gravely impeded his ability to carry out his functions (Mr. Francis' affidavit, paragraph 43).

54. The receiver was also unable to obtain cooperation from the SSBT staff, as paragraphs 2.8 to 2.10 of his report at "J.W.F. 2" tab 30 show. It is not correct that he terminated the employees' contracts of employment ("J.W.F. 2" tab 46). His lawyers, Sears & Co., wrote on 9th, 13th and 21st March 2001 ("J.W.F. 2" tab 43) seeking assistance from SSBT, their lawyers and those representing the staff. The result of this, which was wholly negative, is set out in the letter from the receiver to the Central Bank of 30th March 2001 at ("J.W.F. 2" tab 46). On the previous day, 29th March, he had been forced to write formal letters to each of the directors and senior staff seeking to compel their cooperation and requiring them to submit a statement of affairs pursuant to sections 155 and 156 of the Companies Act 1992 ("J.W.F. 2" tab 43).

55. One major result of this lack of cooperation and absence of information is recorded in the receiver's letter to the Central Bank of 30th March 2001 at "J.W.F. 2" tab 47. After more than three weeks he had still not been allowed access to the computer systems of SSBT, and had been unable to confirm the cash and investment balances supposedly held with various banks and brokers. The returns made by SSBT as at 30th December 2000 ("J.W.F 1" tab 6) showed that these balances then exceeded $34 million. Cash balances were shown as $27, 144,000. However, under a fifth of this could be accounted for. The receiver could confirm only $5,485.467 leaving at least $21 m unaccounted for.

56. This realisation, coming on top of all the other matters listed above, confirmed the opinion formed by the Governor in March that the public interest, and the interests of the depositors and other creditors, required that SSBT's licence be revoked. This had been a very real prospect at the time of the suspension, but the events of that month underlined the problems that had earlier emerged. Accordingly, the licence was revoked on 2nd April 2001 (see Mr. Francis' affidavit, paragraph 37, 38, 39, 45 and 46).

57. The Central Bank submits that not only was the action of the Governor within the range of reasonable responses, but it was plainly right. For legal purposes, it suffices to say that he was not clearly and demonstrably wrong in reaching his opinion and that the exercise of his discretion in making the revocation does not come near to being a decision with which the Court should interfere.

58. In the many affidavits filed by them in the various actions concerning the revocation of the licence, no explanation has ever been given by SSBT as to the cash discrepancy. A misleading explanation is offered by Mr. Lunn in paragraph 51 of his affidavit of 31st January 2002. He says that Mr. Winder's inability to account for the cash was due to his termination of SSBT's employees' contracts of employment, and the fact that the 31st December 2000 figures were out of date.

59. In fact, the reason is different, and underlines SSBT's unfitness to be a licensed institution. Since the revocation, Mr. Winder's investigations have shown that there were two other companies relevant to SSBT's operations (see his affidavit filed in the winding-up proceedings on 13th July 2001, exhibited in "J.W.F. 1" tab 7). These were:

(i) Suisse Security Holdings Ltd. ("SSH"). This was a company incorporated on 13th June 1996 under the IBC Act 1989, with an authorised share capital of $10,000. The subscribing shareholders were Bates Finance Ltd. Management, President Jones Management Ltd and Ms. Lisa Patterson (paragraph 8 of the affidavit).

(ii) Suisse Security Investments Inc. ("SSI"). This was a company incorporated on 2nd February 1998 under the IBC Act 1989, with an authorised share capital of $5,000. The subscribing shareholders were Mr. Michel Harajchi, Mr. Horst Lutjen and Mr. Laurie Dames (paragraph 7 of the affidavit).

60. As is shown in paragraphs 9 – 14 of Mr. Winder's affidavit, it appears that clients of SSBT were directed to transfer their funds to deposit either at SSH's bank account at UBS Geneva or at SSI's bank accounts at Barclays Bank PLC. These balances were held for the benefit of and utilised for the operations of SSBT and constituted assets of SSBT. Transfers were made from SSI and SSH to SSBT when SSBT's funds were depleted and SSBT required funding to transact client's business Thus, clients' funds, intended by the clients to be deposited with the bank, i.e., SSBT, were in fact deposited into the accounts of SSI and SSH, separate legal entities which, though their names include the words "Suisse Security". Were not owned by SSBT, but by the principals of SSBT. This had the additional consequence that:

(1) Instead of SSBT (which was licensed) accepting the deposits SSI and SSH (neither of which was licensed) were accepting them in breach of s. 3(1) of the Banks and Trust Companies Regulation Act 2000.

(2) SSBT deposits were effectively being put beyond the reach of the regulatory authorities. They were also beyond the reach of the receiver and later the provisional liquidator, who had to obtain an order freezing the accounts in an effort to secure the funds.

61. The freezing order was granted by Hayton J on 13th July 2001 but so far as the Barclays funds are concerned it was too late, as appears from paragraph 27 of Mr. Winder's affidavit of 1st October 2001 (J.W.F. 1 tab 8). The funds held at Barclays by SSI on behalf of SSBT had been transferred out of the jurisdiction sometime late in April 2001 in an effort to obstruct the provisional liquidator in carrying out his duties as such. Neither the money in the UBS accounts nor the money in the Barclays account has yet been recovered.

SSBT's Grounds of Appeal

62. SSBT's Grounds of Appeal appear to approach the matter as though it was a judicial review, whereas the court is concerned with a statutory appeal against revocation under s. 22(1)(a). The issue for the court is whether to confirm, reverse, vary or modify the decision of the Governor. The appellant seeks an order that the revocation decision be reversed, and their licence restored (see the notice of Appeal filed on 20th April 2001). The Central Bank on the other hand respectfully asks the court to confirm the revocation decision.

63. The appeal is what it says, namely an appeal and not a review. Nevertheless, firstly the appeal is from a decision of the Governor which depends upon the Governor's opinion as the words of s.14(1)(a)(i) make clear:

"The Governor may be order revoke the licence of a licensee if, in the opinion of the Governor, the licensee is carrying on its business in a manner detrimental to the public interest or to the interests of its depositors or other creditors…"

64. Secondly, the decision to revoke is discretionary, and an appellate court should only interfere with the exercise of a discretion in exceptional circumstances.

65. Similar rights of appeal arose in *Stepney Borough Council v Joffe* [1949] 1 KB 599 and *Sagnata Investments v Norwich Corporation* [1971] 2 QB 614. Those cases held that the appeals provided by statute were not limited to considering the reasonableness of the decision-maker, but in the *Stepney* case, followed in the *Sagnata* case, Lord Goddard CJ said as follows:

> "That does not mean to say that the court of appeal, in this case the Metropolitan Magistrate, ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter, and ought not lightly, of course, to reverse their opinion. It is constantly said (although I am not sure that it is sufficiently remembered) that the function of a court of appeal is to exercise its powers when it is satisfied that the judgment below is wrong not merely because it is not satisfied that the judgment below was right."

66. The parallel English bank regulation statute, the Banking Act, 1987, is not by any means identical to the Act, but it is instructive to compare the statutory right of appeal provided under ss.27-29 of the Banking Act, 1987. On such an appeal the banking Appeal Tribunal is required to ask whether: "for the reasons addressed by the Appellant, the decision was unlawful or not justified by the evidence on which it was based." These provisions were considered by the English Court in *Shah v The Governor and company of theBank of England* [1994] 3 Bank LR 205. The court decided that the role of the Tribunal was more than that of exercising a

review of the Bank's decision, but that it should be careful to give due weight to the experience and expertise of the Bank of England before coming to a different opinion:

"However, the Bank is charged with the duty of regulating the conduct of banking business and as I see it, it is not the function of the Tribunal to substitute its own decision as to the steps which needed to be taken in the discharge of that duty for that of the Bank. It is for the Tribunal, having reviewed the evidence in the possession of the Bank, and having made its own evaluation of that evidence, to say whether the evidence afforded adequate ground for the Bank's decision – whether, as it is put in the Bank's cross-notice of appeal, the Bank's decision was within the range of what the Tribunal consider to have been justified." (page 213)

67. The revocation decision challenged on the Appeal depends upon (i) the opinion of the Governor that SSBT was carrying on its business in a matter detrimental to the public interest and to the interests of depositors and other creditors and (ii) the exercise of a discretionary power to revoke. Very high standards are expected of banks by the public, and rightly so. They must be careful and prudent not to jeopardize the interests of their depositors. What is reasonably to be expected of a bank is quite different from what can reasonably be expected of a trading or entrepreneurial company. In the present case, it is quite clear that the Governor had substantial grounds for forming his opinion, and exercised his discretion properly.

68. Taking each ground of appeal relied on consecutively, the Central Bank's submissions in answer are as follows.

Suspension and revocation was in breach of Longley J's order (ground 1)

69. It is alleged that the suspension and revocation was in breach of the order made by Longley J. on 2nd March in Action No. 258 of 2001. This is untenable. That order (which was made before the Central Bank had filed evidence) only restrained the Central Bank from suspending or revoking the licence for the

reasons set out in the Statement filed in the action pursuant to RSC order 53 ("J.W.F. 1 tab 3). It is plain that the grounds relied upon by the Governor differed from and did not overlap with any of the reasons set out in the Statement. As to the construction of the terms of an injunction where it may conflict with a Central Bank's regulatory duty, see *A v B Bank (Governor and Company of the Bank of England intervening)* [1993] QB 311 at 324-5.

70. These reasons involved the Central Bank's concerns about SSBT's debit card and visa card operations, the need to introduce a new shareholder and the bank's capital ratios, as appears clearly from the Statement issued pursuant to Order 53. The US$1.6 million and US$3 million issues fell wholly outside that action, as all parties fully understood at the time (Mr. Francis affidavit, paragraphs 9-12).

71. On 1st March 2001 SSBT had met with the Governor who had pointed out his serious concerns about the $1.6 million and $3 million issues. This is reflected in Mr. Lunn's letter of the following day at ("J.W.F. 2" tab 23), which refers to the demands of the Central Bank made in respect of these issues. The Central Bank's own letter of 2nd March 2001 also refers to the demands made at the meeting on the previous day ("J.W.F. 2" tab 24). Nonetheless, SSBT did not attempt to include in the order they sought on 2nd March 2001 any reference to these matters, but deliberately restricted themselves to the subject-matter of the Action.

72. SSBT's skeleton inaccurately states on page 6 that "no application has been made to date to vary or discharge the said injunction". The same error is repeated in paragraph 25 of Mr. Lunn's affidavit. In fact, the Central Bank applied on 7th March 2001 to discharge the injunction. A hearing took place before Longley J. Judgment has not yet been given.

Notice was required before suspension (grounds 2 and 3)

73. The contention that notice is required before *suspension* would make nonsense of the statutory provisions. It would follow that the Central Bank was obliged to leave

the management of the bank in place for at least seven days no matter what potential damage to depositors might result. This is unacceptable: see *A v B Bank (Governor and Company of the Bank of England intervening)* [1993] QB 311 at 324).

74. It is not suggested that this duty arises as a matter of general law, instead the argument is supported by a flawed construction of the statutory provisions. On both a literal and purposive construction of s. 14(2) of the Banks and Trust Companies Regulation Act 2000, no notice is required before *suspension* of a banking licence. The requirement that "… before taking such action the Governor shall give that licensee notice in writing of his intention so to do…" clearly refers to the earlier words "… any action under subsection (1)(a)(i)…", ie *revocation* of the licence. Any doubt is removed by the use of the word "forthwith". This also accords with common sense. It would be intolerable to leave the management of a bank in which the regulator had lost trust in control of the institution during the notice period, thereby putting depositor's funds at risk.

The Central Bank failed to satisfy the conditions precedent to the exercise of the statutory power because it failed to give reasons and time to respond (ground 4)

75. This argument is wrong in law, and unattractive on the merits. The notice given by the Governor under s. 14(2) on 5th March 2001 ("J.W.F. 2" tab 26B) was entirely valid. A notice under s. 14(2) must be in writing, which it was, and must:

    (1) Give notice of intention to take action under subsection (1)(a)(i), ie to revoke the licence, which it did.

    (2) Set out the grounds on which he proposes to act. By the terms of the notice, the Governor clearly stated upon what grounds, amongst several in subsection (1)(a)(i) which might have applied, he proposed to act. The grounds relied on were that SSBT was "carrying on its business in a manner detrimental to the public interest and to the interests of its depositors and other creditors".

This is a valid and correct formulation: see *R v Sec'y of State for the Home Office, ex p. Swati* [1986] 1 WLR 477 at p.490.

(3) Afford the licensee not less than seven days to submit a written statement of objection to such action. In fact, ten days was given.

76. SSBT's complaint appears to be that the notice should have stated the underlying reasoning, and that without it SSBT was "substantially prejudiced… as [it] could not meaningfully respond" (page 10). This complaint fails completely on the facts because in addition to the notice, the Central Bank sent a letter ("J.W.F. 2" tab 26A) which specifically stated why it regarded SSBT as "carrying on its business in a manner detrimental to the public interest and to the interests of its depositors and other creditors". This was because of the failure to provide collateral as regards the $1.6m judgment, and failure to give access to Milbank Tweed as regards the $3m freezing order, following SSBT's failure to disclose the latter: see paragraph 38 of Mr. Francis' affidavit. These issues had already been discussed with SSBT at length, and put in writing on 2nd March. So SSBT was afforded a full opportunity to state its objections, and in fact did submit a written statement of objection on 15th March ("J.W.F. 2" tab 33), and thereafter had a full opportunity to appeal, which it is availing itself of now. It cannot be argued that SSBT was in any way prejudiced. In any case, the notice can be read with the accompanying letter (*Turton v Turnbull* [1934] 2 KB 197).

77. SSBT has sought to meet these obstacles by a Supplemental Ground of Appeal dated 12th February 2002. This raises the spurious point that the suspension and/or revocation was not done by the Governor, but by an officer of the Central Bank. However the suspension and the revocation were done by the Governor, and the notice and the revocation order were duly signed by him: Mr. Francis' affidavit, paragraph 40. It is irrelevant that the accompanying letter was signed by the manager of the Central Bank's Bank Supervision Department.

There was no basis on which the Respondent could be of the opinion that the Appellant was carrying on its business in a manner detrimental to the public interest and to the interests of its depositors and other creditors (ground 5)

78. The evidence shows that there was ample basis. See the above analysis of the facts. The Governor's opinion was clearly "within the range" of what was justified (see Shah at page 213).

The necessary facts to enable the Respondent to exercise his discretion did not exist (grounds 6 and 7)

79. The evidence amply shows that facts concerned did exist (see the above analysis of the facts). Further the evaluation of those facts was a matter for the Governor alone *(Sec'y of State for Education v Tameside* [1976] 3 WLR 641 at 665).

The action was taken in bad faith and for an improper purpose (ground 8)

80. This appears to be linked to Longley J's order (as to which see above). In his affidavit, the Governor explains why the suspension/revocation was not in breach. There is no evidence whatsoever that the Governor acted in bad faith or for an improper purpose. The evidence clearly shows that his actions were taken to protect the public; and SSBT's depositors and creditors.

The action was taken on irrelevant grounds and relevant considerations were ignored (grounds 9 and 10)

81. The decision to revoke was based on three principal issues, namely the US$1.6 million issue, the US$3 million issue, and the non-cooperation and lack of information issue: see above. It is impossible to say that these were irrelevant. They were highly relevant to SSBT's status as a licensed banking institution. As regards the solvency of SSBT, the letter produced from the auditors dated 2nd January 2002 stating that as at 30th September 2000 the bank was solvent is of

limited assistance. It deals with the situation six months before revocation on 2nd April. At the time of revocation, the position in relation to the $1.6 million and $3 million issues was that they represented a serious threat to the solvency and viability of the institution. And crucially, the cash position had changed fundamentally since 30th December. It will be recalled that as of 30th March, the receiver could confirm only $5,485,467, as compared to $31, 799,778 according to the September 2000 accounts. At the time of revocation, the Governor was fully justified in concluding that there was no evidence that the company was viable (paragraph 48 of his affidavit).

82. In any case, SSBT is quite wrong to focus exclusively on the question whether SSBT was technically solvent or insolvent on 5th March 2001. A bank regulator cannot wait until a banking institution is unable to pay its debts as they fall due before taking action. It has to take a view as to whether the viability of the bank is threatened. Where a regulator takes such a view on substantial grounds, as plainly happened in this case, it is submitted that a court will be very slow to substitute a different view.

The Respondent's action was manifestly unreasonable, irrational and one which no reasonable authority could make having regard to the evidence (ground 11)

83. Though this ground accurately reflects the test for judicial review set out in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1KB 223 at 233-4, it is obvious that this particular decision does not come within it. It was a perfectly reasonable decision on the Governor's part to revoke the licence, and clearly "within the range" of what was justified (see *Shah* at page 213).

The Respondent should have used the powers under S. 8C of the Act rather than those under s. 14 (ground 12)

85. The argument is that if the Central Bank was permitted to introduce and rely on matters or reasons subsequent to 5th March 2001, this would constitute a breach of

the statute and of natural justice, as SSBT would have no opportunity to respond (skeleton page 21).

86. However, the Central Bank did not revoke the licence on grounds not existing or disclosed at the time of the suspension. Events between 5th March and 2nd April only confirmed to the Governor that the licence should be revoked on the grounds that SSBT was carrying on its business in a manner detrimental to the public interests and to the interest of its depositors and other creditors.

87. Further, the argument is tantamount to suggesting that matters coming between suspension and revocation cannot be taken into account by the Governor when deciding whether or not to revoke the licence.

88. This is clearly wrong. The decision to revoke is separate from the decision to suspend. In deciding whether or not to revoke the licence following suspension, the Governor has to have regard to facts as they exist at that time. Events between suspension and revocation may tend to support, or undermine, the view reached at the time of suspension that the licence should be revoked. In this case, the Governor had to, and did, take account of SSBT's response to the action required in the letter of 5th March, and to the written statement of objection given by SSBT under s. 14(2). But by 2nd April, there had been no proper response. On the contrary, SSBT's failure to cooperate with, and indeed to obstruct, the receiver, was behaviour wholly inappropriate for a licensed bank (Mr. Francis' affidavit, paragraph 44). What happened between 5th March and 2nd April therefore, confirmed the view taken at the time of suspension (Mr. Francis' affidavit, paragraph 47).

89. SSBT's complaint appears to be based on an alleged breach of natural justice. This is also wrong. There were frequent attempts to obtain SSBT's cooperation, each of which was denied. The Central Bank put SSBT on notice that cooperation was urgently required (letter of 16th March 2001, "J.W.F. 2" tab 34B), as did the receiver ("J.W.F. 2" tab 43). It is wrong to complain that because these matters

arose after the notice of suspension, SSBT was deprived of an opportunity to "meaningfully respond" (SSBT's skeleton bottom of page 10). It had every opportunity to respond, but chose not to do so.

90. A consequence of the non-cooperation was the fact that the receiver was unable to locate much of the cash that should have been held by SSBT (see his letter to the Governor of 30th March 2001, "J.W.F. 2" tab 47). As the Governor states, such a position was intolerable, and the threat to investors clear (Mr. Francis' affidavit, paragraph 45).

91. For the facts, see paragraphs 58 to 61 above. Mr. Lunn's purported explanation in paragraph 51 of his affidavit is misleading. The real reason for the discrepancy was that money that should have been in the name of SSBT was in fact in the name of SSI and SSH. The money has still not been recovered (see paragraphs 45 and 46 of Mr. Francis' affidavit, and Mr. Winder's affidavit filed on 13th July 2001 an 11th October 2001 ("J.W.F. 1" tabs 7 and 8).

92. The Governor took account of this matter when deciding to revoke (paragraphs 15 (12) and 18 of the winding-up petition, "J.W.F. 1" tab 9). In addition to his letter of 30th March 2001, the receiver referred to the matter on page 4 of his first report of 9th March ("J.W.F. 2" tab 30). It is not therefore a matter which has arisen after revocation, though some of the details have only emerged in course of Mr. Winder's investigations.

93. Further, this is a statutory appeal in which SSBT is seeking a restoration of its banking licence. The facts relating to the cash discrepancy are highly relevant to the question whether it is "a fit and proper person or company to carry on banking business" (see s. 4(2)(a) of the Banks and Trust Companies Regulation Act 2000). In circumstances such as these, the Court could not safely restore its banking licence.

The decision to revoke the licence cannot be justified having regard to the evidence (ground 14)

94. For all the reasons set out above, the Central Bank respectfully asks the court to confirm the Governor's decision to revoke SSBT's licence. Not only was his action within the range of reasonable responses, but it was plainly right. For legal purposes, it suffices to say that he was not clearly and demonstrably wrong in reaching his opinion and that the exercise of his discretion in making the revocation does not come near to being a decision with which the court should interfere.

Conclusion

95. The Appeal against the revocation should be dismissed and the Governor's decision confirmed, both on the merits and on the other technical arguments raised by the appellants.

The Duties of the Bank

In dealing with the matter it is perhaps a good starting point to remind ourselves of the duties of the Bank as stated at section 5(1) of the Central Bank of The Bahamas Act 2000. The provision reads as follows:

> "It shall be the duty of the Bank, subject to the provisions of this Act -
>
> (a) to promote and maintain monetary stability and credit and balance of payments conditions conducive to the orderly development of the economy:
>
> (b) in collaboration with the financial institutions, to promote and maintain adequate banking service and high standards of conduct and management therein;"

The Governor's Remit

Equally important for scrutiny are the matters the Act requires to be considered by the Governor in making the decision to grant a licence. They are, in part, as follows:

(a) That the Applicant is a fit and proper person or company to carry on banking business

(b) The nature and financial resources of the Applicant to provide continuing financial support for the bank;

(c) …….

(d) ……..

(e) whether those who will operate the bank will do so responsibly and whether such persons have the character, competence and experience for operating a bank; and

(f) The best interest of the financial system in The Bahamas.

In essence therefore it is clearly a shared responsibility. It is left to be seen whether at the end of my consideration of the matters put before me, it can be said that SSBT has lived up to the expectations envisaged in the above quoted statutory provisions or any other.

Counsel on both sides were given full rein to respond to each other's presentations. They took full advantage of the opportunity and were very expansive in their replies. Having put a lot of flesh on their skeletons in the opening rounds one might have thought that there was not much room left for a good deal more. However, being the skilful advocates they are they drew copiously from their reserves and added substantial finishing touches in their reply and rejoinder.

Reply and Rejoinder

Mr. Davis's reply on behalf of SSBT was quite expansive. He dealt with what he considered should be the function and approach of the Court in exercising its power. He reminded the Court of the provisions at section 14(1) of the Act which, he said, give an appellant an unrestricted right of appeal and permits the Court to substitute its own opinion for that of the Governor after making its own evaluation of the evidence and of the inference to be drawn from the primary facts found, giving due weight to the decision of the Governor. He submitted that no weight should be given to this decision as it is not reasoned or adequately reasoned. Mr. Blair's response to this was that both the decision to suspend and the decision to revoke are reasoned as can be seen in the letter of March 5, 2001 and in the reasons set out in the winding-up petition.

Mr. Davis further stated that the appellant's grounds required the Court to firstly determine the existence of the jurisdictional fact, i.e whether there is evidence to support the Governor's opinion that the Appellant was carrying on its business in a manner detrimental to the public interest or its depositors or other creditors; and if the jurisdictional facts exist whether upon a true evaluation of the evidence the decision to suspend and revoke was lawful, rational and in accord with notions of natural justice or otherwise made in good faith. He went on to say that evidence to support the above conclusion must exist before the Governor acts to suspend and revoke the licence.

Mr. Davis objected to the admissibility of certain items of evidence in the Governor's affidavit which are on information and belief. However, Mr. Blair pointed out that the objection was made after the evidence had been admitted and had been relied on by both sides. Moreover, he said, the entire affidavit of the Governor was read into the record of there proceedings.

Mr. Davis further argued that the respondent contended that the issue of the US$1.6m and US$3m at the time of suspension and revocation represented a serious threat to the solvency of the SSBT; yet the solvency of the SSBT was never mentioned in the letters of March 2 and 5, 2001. Mr. Blair refuted this by pointing out that solvency concerns had already been raised on 29 November 2000, as can be verified by the Governor's affidavit at paragraphs 23, 31, 32 and 48.

Mr. Davis further stated that the letter of March 15, 2001, provided the authorisation to contact the US Attorneys and later an enquiry was made as to the position in the event of compliance and there was no reply. Mr. Blair responded to this by pointing out that the letter of 15 March did not provide any authorisation as can be substantiated by Milbank Tweed's letter of 21 March 2001.

Moving on Mr. Davis stated that assuming but not conceding that the inability of the Receiver to locate the cash and investment of the Appellant was relevant to the decision to revoke, the concern was expressed in terms that suggested that the cash and investment had dissipated or was somehow clandestinely obscured. He said that it was not possible to reconcile this statement with the evidence. He went on to say that the Receiver confirmed that the cash and investments are noted in the accounts of the appellant but the concern seems to be that the funds are held in accounts at other banks in the names of companies "controlled" by the officers of the Appellant and the Receiver has not been able to take possession of same. He added that it has been said that the methodology was unacceptable to the Governor but the issue was never put to the Appellant and was capriciously appended to the decision, and a myriad of plausible explanations could be offered, and, if not acceptable, curable by directions.

Mr. Blair's retort to this was that whilst a myriad of plausible explanations could be offered, the important point was that none had been offered as to the whereabouts of the cash balances – not even on reply.

In responding to the Appellant's contention that the Respondent was in breach of the injunction issued by Longley J., Mr. Blair stated that neither the letter nor the spirit of the injunction was broken; it was specific and not in need of any clarification by the Court. It must be construed strictly.

In returning to the matter of the giving of notice before the order suspending the licence, Mr. Davis contended that the word "forthwith" in section 14, merely means as soon as practical within the circumstances of the case. Mr. Blair's reaction was that the meaning of the word is very clear that no notice of suspension was required and that there are good practical reasons for this.

It was a further contention of Mr. Davis that the reasons for the grounds contained in the notice are ineffectual and worthless because they deprived the Appellant of the substance of his right to make a written statement of his objection properly.

Mr. Blair did not see it that way. He stated that the cases of *Bone* and *Chatsworthy* cited by Mr. Davis do not answer the respondent's points as set out in paragraphs 73 and 76 of the skeleton. He reasserted that the Notice issued under the Governor's hand was valid and the reasons were clearly set out in the accompanying letter. In *Bone*, he said, there were no reasons other than a recitation of the statutory grounds and in *Chatsworthy* the reasons were a "bare traverse".

Mr. Davis went on to state that the provision of the statute in mandatory terms requires the Governor to advise of his decision, which should be a reasoned decision and not the order required by section 14(1) and further that it cannot be contained in an originating process which is settled in accordance with the rules governing that process. In any event, he argued, paragraph 15 of the Petition does not speak of reasons but rather "following events", nor does it contain the characteristics one would expect of a reasoned decision.

To this Mr. Blair stated the following. Whilst it is accepted that there must be reasons for the revocation, so that the party concerned should be able to decide whether or not to exercise its right to appeal, there is no formal requirements as regards how the reasons are to be given. The only formal requirement is that the revocation must be by order, which in this case it was. It is not merely permissible, he said, but essential to set out the reasons in the winding up Petition because it is the revocation that grounds the winding up. He regarded the case as showing that what matters is that the reasons are given with "reasonable precision and clarity" which, he submits, they were.

Yet another assertion made by Mr. Davis was that there was an absence of "jurisdictional fact" which must exist for the exercise of the Governor's power to suspend and revoke the Appellant's licence. He went on to say that where such an allegation is made the burden is on the decision maker (the Governor in this case) to satisfy the Court that at the time of the exercise of the power on March 5, the jurisdictional fact had been satisfied.

A further submission advanced on behalf of the Appellant was that the Governor failed to take account of the Appellant's written statement of objections. Indeed, it was asserted that viewing the Petition, the letter of 5 March and the Governor's affidavit, it is difficult to reconcile what the Governor did and did not take into account. Mr. Blair's

response to this was that, inter alia, in revoking the Appellant's licence on 2 April 2001, the Governor was entitled to take into account matters arising after suspension.

In addressing his client's final issue Mr. Davis has attributed bad faith to the Governor which, he concedes, is a serious allegation. To substantiate this he has referred to a catalogue of matters which he has drawn up and which he calls a time line. The chronology of these events may, he said, be viewed as a barometer of the *mala fides* or *bona fides* of the Governor. He contended that the only conclusion one can draw from the evidence before the Court is that the Governor acted out of an irritation and took umbrage to the Appellant for having resorted to the Court, and that clearly the Governor was no longer acting in pursuance of statutory objectives but plainly out of spite.

Mr. Blair's response to this was that there is insufficient evidence to raise, let alone prove, the allegation of bad faith and he reasserted that as has been already stated the Governor's decision to revoke SSBT's licence was based upon his opinion that SSBT was carrying on its business in a manner detrimental to the public interest and to the interests of its depositors and other creditors. This opinion is said to have been based on three principal issues, namely:

(a) The US$1.6 million issue

(b) The US$3 million issue

(c) The non-cooperation and lack of information issue.

The Court's Finding (General)

In referring to the appellant's skeleton I will use the symbol 'SK1' and for the respondent's it will be 'SK2'.

The first issue is dealt with at paragraph 1.20 of SK1. and paragraphs 32-38 of SK2. It is clear that SSBT was very envasive and elusive in its response to the Central Bank's request for a collateral or other acceptable support for the alleged undertaking from the principal shareholder relative to the U.S. litigation.

I am satisfied that as stated at paragraph 38 of SK2, by the date of revocation SSBT had failed to provide any form of collateral or other support for the alleged undertaking from the principal shareholder and that attempts made by the Central Bank to

secure evidence of such support had been met by evasion. I also accept the further statement that it had become very doubtful that there had ever been any real undertaking at all.

As to the second issue dealt with at paragraph SK 1.22 and at paragraphs 39 to 52 of SK2 (the U.S. $3 million), I am satisfied that the freezing in the U.S. District Court in New York of U.S. $3 million of SSBT's funds together with the US$1.6 million referred to above put at risk a total sum of U.S. $4.6 million of SSBT's assets. I also find that approximately 73% of SSBT's capital was at risk and that this was not disclosed to the Central Bank by SSBT as it ought to have been.

I need not dwell on the matter of the insurance policy issued by J.S. Johnson & Co Ltd which was said to clear any loss which might result from the US litigation. As stated at paragraphs 49-51 of SK2 the policy would not protect SSBT from any loss arising from the U.S. litigation.

With regard to the third issue, I find the lack of cooperation on the part of SSBT in denying the Governor the information he sought on a number of matters to be inexplicable. Indeed it denies the Governor the collaboration section 5(1)(b) of the Central Bank Act demands of it. Indeed SSBT's conduct borders on contempt in its treatment of the Governor. Its action engendered obfuscation when clarification was required.

The action of SSBT in having its client's funds deposited in SSI and SSH was clearly in breach of section 3(1) of the Banks and Trust Companies Regulation Act 2000 and put those deposits beyond the reach of the regulatory authorities.

I am greatly assisted by the *Stepney and Sagnata case*s cited by the respondents and in particular by the dicta of Lord Goddard C.J. which is reproduced at paragraph 65 of SK 2.

The Court's Findings (Specific)

I will now state seriatim my findings specifically in relation to the various grounds of Appeal. .

Ground 1

That the suspension and revocation of SSBT's licence was in breach of the order made by Longley J.

This ground has no validity. It is fully answered at paragraph 69 of SK2, to the effect that the order only restrained the Central Bank from suspending or revoking the licence for the reasons set out in the statement filed in Action No 258 of 2001. The principle in the case of *A v B Bank* (already cited) is most helpful, and I accept it.

Grounds 2 and 3

That notice was required before suspension. The authority given to the Governor to suspend the licence "forthwith" means that it was well within the power of the Governor to suspend the licence without giving any notice having regard to all the surrounding circumstances I do not accept the rationale advanced on behalf of SSBT to support a contrary interpretation.

Ground 4

That no reasons were given for the exercise of the statutory power.

I do not accept SSBT's contention. As stated at paragraph 76 of SK 2 the Central Bank's letter dated 5 March 2001 gave the reasons.

I reproduce hereunder the letter in full:

"

March 5, 2001

Suisse Security Bank & Trust Limited
Orissa House
East Bay Street
Nassau, N.P., Bahamas

Attention: Mr. Christopher E. Lunn

Dear Sirs:

Our records reveal that we have not been provided with those matters requested in our letter of the 2nd instant in which we required of you, on an urgent basis, production of the following:

(a) Evidence that the principal shareholder of Suisse Security Bank & Trust Limited transferred to the Bank, collateral satisfactory to the Central Bank to secure against any potential loss resulting from litigation which is pending in the United States of America and affects some $1.6 million of the bank's assets which were frozen by Order of a US Court.

(b) Formal authorization by Suisse Security Bank & Trust Limited, addressed to the bank's U.S. attorneys, Milbank, Tweed, Headley & McCloy LLP, New York, and any other counsel or advisors to Suisse Security who may hold details of this transaction, to release all required information relating to this dispute to The Central Bank of The Bahamas, and/or its attorneys Hogan & Hartson and to fully inform the Central Bank of any details requested in this regard.

The Central Bank is of the view that the failure of Suisse Security Bank & Trust Limited to comply with the Bank's aforesaid requirements, following the bank's failure to inform the Central Bank of the U.S. litigation involving $3.0 million of the bank's assets, demonstrates that the bank is carrying on its business in a manner that is detrimental to the public interest and detrimental to the interests of its depositors or other creditors.

In view of the conduct of Suisse Security Bank & Trust Limited in relation to the aforesaid matters, I am of the opinion that the licence of the bank should be revoked.

I invite the bank pursuant to section 14(2) of the Banks and Trust Companies Regulation Act, 2000 to provide me with a written statement of any objections it may have to the proposed revocation of its licence on or before March 15, 2001.

The licence of Suisse Security Bank & Trust Limited is suspended forthwith pursuant to Section 14(2) of the Banks and Trust Companies Regulation Act, 2000. A Notice of Suspension is enclosed.

You are hereby further notified pursuant to Section 14(1)(f) of the Banks and Trust Companies Regulation Act, 2000, that Mr. Raymond Winder has been appointed Receiver of Suisse Security Bank & Trust Limited and is authorized to immediately assume control of the affairs of the bank in the interests of the bank's creditors. The Notice of Mr. Winder's Appointment as Receiver is enclosed herewith

Yours sincerely,

Iqbal Singh
Manager
Bank Supervision Department "

Ground 5

That there was no basis on which the Respondent could be of the opinion that the Appellant was carrying on its business in a manner detrimental to the public interest and to the interests of its depositors and other creditors.

As pointed out at paragraph 79 of SK2 the evidence shows that there was ample basis. I also agree that the Governor's opinion was clearly "within the range" of what is justified as exemplified by *Shah's case.*

Grounds 6 and 7

That the necessary facts to enable the Respondent to exercise his discretion did not exist.

I find that ample facts existed which justified the Governor exercising his discretion in the manner he did after evaluating the facts. I accept the assistance given by the *Tameside* case cited at paragraph 70 of SK2.

These grounds are therefore without merit.

Ground 8

That the action was taken in bad faith and for an improper purpose. I do not accept this contention. There is no evidence to justify it. I find that there is an abundance of evidence which justifies the action taken by the Governor. This ground therefore fails.

Grounds 9 and 10

These allege that the action taken by the Governor was on irrelevant grounds and that relevant considerations were ignored.

I disagree with this contention and I reject it. It is unnecessary for me to rehash the various factors at paragraphs 81 and 82 of SK2. The combination of factors encapsulated there speaks volumes. These grounds also fail.

Ground 11

This ground contends that the respondent's action was manifestly unreasonable, irrational and one which no reasonable authority could take having regard to the evidence.

As the respondent has rightly pointed out this ground really seeks to invoke the test for judicial review which is not relevant in this case. In any event I do not consider the respondent's action to be unreasonable or irrational in all the circumstances. The case of *Shah* is more apposite than the *Wednesbury case*.

There is ample evidence in SK2 to justify the Governor's action. This ground is without merit and therefore fails.

Ground 12

It is that the respondent should have used the powers under section 8C of the Act rather than those under section 14.

There is no principle of law that ordains that the Governor is obliged to pursue a course under section 8C rather than under section 14 of the Act. In any event I frankly do not see how it would extricate SSBT from its perils.

This ground fails.

Ground 13

This ground is essentially a submission that the respondent cannot rely on reasons or grounds which were not in existence or disclosed at the time of the suspension and revocation. This submission was first made in the preliminary stages of the hearing and I ruled that the respondent is debarred from introducing or relying on any matter which was not in existence prior to the date of revocation of the licence, to wit, 2 April, 2001. Accordingly I have paid no attention to any such matter.

I hold that SSBT has failed on this ground as well.

Ground 14

This ground contends that the decision to revoke the licence cannot be justified having regard to the evidence.

This ground is a recast of some of the earlier grounds. It does not resuscitate them for they are already a spent force.

This ground is therefore without merit and fails.

The Supplementary Ground

This was to the effect that the notice issued to SSBT by the Central Bank was unlawful because it was not from the respondent but from an officer of the Bank.

In addressing this ground Mr. Davis has clearly acknowledged that the maxim *delegatus non potest delegare* does not enunciate a rule that knows no exception and that it is a rule of construction which makes the presumption that "a discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority; but that this presumption may be rebutted by any contrary indications found in the language, scope or object of the statute."

The case of *Carltona Ltd. v. Works Commissions* (1943) 2 All ER 560 illustrates circumstances when the principle might not apply. In that case it was stated by the Court of Appeal that the Secretary of State cannot personally take every decision to deport an immigrant who is in breach of his condition of entry or who is an overstayer but the decision must be taken by a person of suitable seniority in the Home Office for whom the Secretary of State accepts responsibility. This was recognised by the Court as a practical necessity in the administration of government.

Similarly in the case of *R v Secretary of State for the Home Department ex p Olahinde* [1991] 1AC 254 at page 295 G Lord Templeman stated thus:

> 'There is no express or implied statutory prohibition
> on the employment of immigration inspectors selected
> by the Secretary of State with due regard to their seniority
> and experience to authorise the service of a notice of
> intention to deport."

The circumstances of the instant case clearly indicate that Iqbal Singh is a senior officer in the Central Bank who was implicitly authorised by the Governor to write as he did. The opinion was obviously embraced and subsumed by the formal decision made by the Governor.

I find no merit in this ground.

The Rationale of the Court's finding

In this matter one must be cognizant of the importance of the role and function of the Central Bank and the heavy responsibility placed on the shoulders of the individual invested with the authority of chief regulator of banks and trust companies in The Bahamas – the Governor. By and large the powers conferred on him are discretionary; but these must be exercised in a responsible manner – devoid of malice or other improper motives, and factors such as arbitrariness or illegality. He must ensure that the confidence as well as the trust reposed in him is justified and not misplaced. He must superintend these institutions and their operators so that the financial services industry – one of the pillars of the Bahamian economy - is not compromised. The persons who operate within it must win the trust of current investors and potential investors so that they feel reasonably confident that their funds are not exposed to unacceptable risks. The most awesome of these powers is of course that which is at the heart of this litigation – the draconian power to revoke a licence.

This case clearly raises questions as to the proper understanding by the Governor of his authority, role and function under the Act. It equally raises questions as to the awareness of SSBT regarding its responsibilities in operating a financial institution under the provisions of the Act and specifically under the supervision of the Central Bank. On the totality of the evidence in this case I am satisfied that the appellant showed a complete lack of appreciation of its responsibilities. I am also satisfied that there is ample evidence to show that SSBT has fallen short in its obedience to those responsibilities. Were the Governor to treat lightly SSBT's recalcitrance he would be running the risk of being condemned for failing in his duty. It would call into question his judgment as to the appropriate standard which should be required of financial institutions. Moreover, it would be sending the wrong message to investors current and prospective if he were to condone conduct such as SSBT displayed. SSBT appears to be attempting to establish its own standard of conduct which clearly the Governor finds to be banking practices he does not wish to see followed. SSBT appears to be impervious to the proddings of the Governor and his aides. If drastic action were not taken by the Governor the situation would have got predictably worse. SSBT has adopted a *modus*

aperandi which was wholly unacceptable to the Governor. This drove him to take decisive action. In my view the drastic measure taken by the Governor was appropriate to dispel the fears of right-thinking persons who would expect the regulatory authority to act timeously, firmly and decisively. SSBT's conduct of its affairs was palpably nonchalant and apparently beyond redemption when its licence was revoked. It was not asking too much from SSBT to take steps to avoid this calamity. Its *casus belli* with the Governor was uncalled for. It was the architect of its own misfortune. I find the respondent's case to be a complete answer to the appellant's. I have found no malice, bad faith, illegality or improper motive on the part of the Governor in the action he took. He was not demonstrably wrong in so doing. It is therefore with complete equanimity that I make the finding that the appellant has failed totally in its challenge to the decisive action taken by the Governor. I dismiss the appeal and therefore confirm his decision to revoke the appellant's licence.

The several authorities cited by both counsel have been duly noted with much gratitude. However, I have not found it necessary to apply them to the circumstances of this case.

DATED this 25th day of April 2003

Austin L. Davis
Justice