



25th July 2013

NOTICE

Banking (Special Resolution Regime) Act 2013

The Bermuda Monetary Authority (“the Authority or BMA”) has proposed a statutory framework for a special resolution regime for banks licensed in Bermuda, the Banking Special Resolution Regime Act 2013 (the “Bill”).

The purpose of the special resolution regime for banks is to address the situation where all or part of the business of a bank has encountered, or is likely to encounter, financial difficulties that are not able to be resolved by any other means. The Bill therefore seeks to establish a comprehensive bank insolvency framework that would meet international standards and it is designed to operate independently from the general insolvency law.

The Bill embeds many of the provisions of the UK Banking Act 2009 and proposes to provide the authorities with the necessary stabilisation powers to transfer part or all of a failing bank’s business to a private sector purchaser, assume control of part or all of a failing bank’s business through a bridge bank and acquire temporary public ownership of a bank where required.

The proposed special resolution regime (“SRR”) consists of—

- a. the stabilisation options (Part 1),
- b. the bank insolvency procedure (Part 2),
- c. the bank administration procedure (Part 3) and
- d. Miscellaneous matters (Part 4).

I. OBJECTIVES OF THE SRR

The following objectives will be considered in using, or considering the use of, the SRR stabilisation powers:

- a. Protect and enhance the stability of the financial system of Bermuda
- b. Protect and enhance public confidence in the stability of the banking system of Bermuda
- c. Protect Depositors
- d. Protect Public Funds
- e. Avoid Interference with Constitutional Property Rights

II. MAIN FEATURES OF THE SRR

The SRR provides three key stabilisation tools, one or more of which may be used in a particular case:

Private Sector Purchaser (“PSP”)

This option involves the use of the power to direct and accelerate a transfer of part or all of a failing bank’s business to a private sector purchaser. In such a transaction, a financially healthier bank will purchase some or all of the assets and assume some or all of the liabilities of a failed bank.

Bridge Bank

This option involves the assumption of control of part or all of a failing bank’s business through a bridge bank, a company wholly-owned by the government or a public authority.

Temporary Public Ownership

This option involves the government taking control and ownership of a failing bank through the transfer of shares, in order to provide a stable platform for restructuring.

III. ROLES OF THE AUTHORITY AND MINISTRY

Both the Authority and the Ministry of Finance will be involved in the exercise of SRR powers but each will have separate roles to play. Under the proposals as they stand, the Authority would be able to exercise intervention powers where a private sector solution was available, i.e. where public funds were not involved. The only requirement is to consult the Minister. Where it is judged that the best solution is temporary nationalisation (the TPO option), then it is proposed that the Government (and not the Authority) take control of the failed bank as only the Government would have the financial resources to provide any necessary capital or liquidity support.

IV. PROPOSED LEGAL OR TECHNICAL ISSUES WITH ADOPTION OF REGIME

The Bill contains a number of provisions which are not presently part of the insolvency regime under the Companies Act 1981. The majority relate to issues arising from the proposed creation of what would be effectively two distinct standards for insolvency procedure: one applying to banks and one applying to all other companies operating in and out of Bermuda:

- a. *Qualified insolvency practitioner* – The Bill directs that only a qualified insolvency practitioner may be appointed. Bermuda Law does not provide for qualification requirements for insolvency practitioners. A specific regime would have to be developed.
- b. *Wrongful trading* – The Bill introduces the concept of wrongful trading and arises when directors continue to conduct business past the point when they knew or should have known that there was no prospect of avoiding and insolvent liquidation. This is a new legal concept that does not exist in Bermuda law.
- c. *Director disqualification* – This clause disqualifies former directors from becoming directors of similarly named banks.

- d. *Administration* – Part 3 introduces an administration procedure in relation to a residual bank to be carried out by an administrator or provisional administrator appointed by a bank resolution order, once a stabilisation power has been exercised by the Minister in accordance with Part 1.
- e. The Bill introduces provisions to deal with the following:
 - i. *Fraudulent trading* – The Bill will include a provision to empower the court to declare present or former directors of a bank liable to make contributions to the assets of a bank if before the bank enters into bank insolvency the directors know or ought to have known that there was no reasonable prospect of avoiding insolvency and allowed the bank to continue trading.
 - ii. *Transactions at an under value* – This clause makes provision for transactions that have been entered into by the bank at an under value. Under value is defined as the making of gifts, or transactions for which the bank receives no consideration. It is also defined as a consideration the value of which is significantly less than the value of the consideration provided by the bank. There is also provision for an exception where a bank enters into a transaction in good faith and for the purpose of carrying on the business of the bank and for its benefit. The court is empowered to restore the position to what it would have been if the bank had not entered into that transaction.
 - iii. *Preferences* – This clause pertains to preferences of creditors. Where a bank has given a bank's creditor a preference over other creditors by putting him in a better position than he would have been in the event of a bank insolvency, the Court is empowered under this section to revert all creditors' positions to what they would have been if the bank had not given that preference.
 - iv. *Extortionate credit transactions* - This clause makes provision for the court on the application of the bank administrator to set aside any obligation created by an extortionate credit transaction or a transaction at an under value, entered into by the bank within two years before bank insolvency. Subsection (3) describes "extortionate transactions" as transactions requiring grossly exorbitant payment to be made, or that grossly contravene ordinary principles of fair dealing.
 - v. *Avoidance of certain floating charges* - This clause invalidates a floating charge in circumstances where the value of the consideration for the creation of the charge exceeds the value of any money given, or goods and services supplied to

the bank at the time of creation of the charge; or exceeds the value of any discharge or reduction in the bank's debt; and the interest thereon.

- vi. *Voluntary arrangements* - This clause makes provision in cases where the BMA or the Minister as the case may be, notifies the bank administrator that the residual bank is no longer required in connection with the private sector purchaser or bridge bank (Objective 1 Achievement Notice) and the bank administrator has sought to achieve a better result for the residual bank's creditors (Objective 2(a)).

In such a case the bank administrator may give notice that the bank has no property for distribution to creditors or make a proposal for voluntary arrangements.

Although many of these concepts are recognised in other jurisdictions, to date they have not been incorporated into Bermuda's insolvency regime. In 1999, a law reform committee was constituted and proposed significant revisions to Bermuda's regime. Although the law reform committee report is still under review, it is recommended that the SRR incorporate many of these concepts to address current concerns that arise when dealing with a bank that is distressed. In the future, similar concepts may be adopted under the companies legislation.

Comments on the draft Bill are invited by 16th September, 2013 and should be sent to policy@bma.bm.

25th July 2013

CONSULTATION DRAFT

A BILL

Entitled

BANKING (SPECIAL RESOLUTION REGIME) ACT 2013

DRAFT - CONFIDENTIAL

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WHEREAS it is expedient to make provision for a special resolution regime to maintain financial stability in Bermuda and to protect depositors in banks; and for connected purposes:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Preliminary

Short title and commencement

1. This Act may be cited as the Banking (Special Resolution Regime) Act 2013 and shall come into operation on such day as the Minister may appoint by notice published in the Gazette; and the Minister may appoint different days for different provisions.

Commentary: *This section provides for the short title of the Bill and commencement provisions. The Bill would come into effect on a day to be appointed by the Minister. The Minister is empowered to bring all sections of the Bill into operation on a specified day or to bring different provisions of the Bill on different days.*

Part 1

SPECIAL RESOLUTION REGIME

Introduction

Overview

2. (1) The purpose of the special resolution regime for banks is to address the situation where all

or part of the business of a bank has encountered, or is likely to encounter, financial difficulties that are not able to be resolved by any other means.

(2) The special resolution regime consists of—

- (a) the stabilisation options,
- (b) the bank insolvency procedure (provided by Part 2), and
- (c) the bank administration procedure (provided by Part 3).

(3) The “stabilisation options” are—

- (a) transfer to a private sector purchaser (section 11)
- (b) transfer to a bridge bank (section 12); and
- (c) Transfer to temporary public ownership (section 13)

(4) Each of the following has a role in the operation of the special resolution regime—

- (a) the Minister, and
- (b) the BMA.

Commentary: *This section introduces the main features of the special resolution regime. The special resolution regime includes the three stabilisation options (transfer to a private sector purchaser, transfer to a bridge bank and transfer to temporary public sector ownership), the bank insolvency procedure and the bank administration procedure. The stabilisation options are exercised through the stabilisation powers, which are the powers to effect the transfer of shares and other securities or property, rights and liabilities, by*

operation of law. These stabilisation powers include the onward, supplemental and reverse transfer powers referred to below. The Minister and the BMA has a role in the operation of the special resolution regime.

Financial assistance

3. (1) In this Act, “financial assistance” includes giving guarantees or indemnities and any other kind of financial assistance (actual or contingent).

(2) The Minister may by order provide that a specified activity or transaction, or class of activity or transaction, is to be or not to be treated as financial assistance for a specified purpose of this Act; and subsection (1) is subject to this subsection.

(3) An order made under this section is subject to negative resolution procedure.

Commentary: *This section makes provision for the meaning of “financial assistance”. Such assistance will include financial guarantees or indemnities. The Minister should be empowered by order to specify activities, transactions that would or would not be treated as financial assistance.*

Special resolution objectives

4. (1) This section sets out the special resolution objectives.

(2) The relevant authorities shall have regard to the special resolution objectives in using, or considering the use of—

- (a) the stabilisation powers,
- (b) the bank insolvency procedure, or

(c) the bank administration procedure.

(3) Objective 1 is to protect and enhance the stability of the financial systems of Bermuda.

(4) Objective 2 is to protect and enhance public confidence in the stability of the banking system of Bermuda.

(5) Objective 3 is to protect depositors.

(6) Objective 4 is to protect public funds.

(7) Objective 5 is to avoid interfering with property rights in contravention of section 1 (c) of the Constitution of Bermuda.

(8) In subsection (3), the reference to the stability of the financial system of Bermuda includes, in particular, a reference to the continuity of banking services.

(9) The order in which the objectives are listed in this section is not significant; they are to be balanced as appropriate in each case.

Commentary: *This section sets out the SRR objectives and requires the BMA and the Minister to have regard to these objectives in using or considering the use of the stabilisation powers, bank insolvency procedure or bank administration procedure. The SRR objectives are to protect and enhance the stability of Bermuda's financial system, to protect and enhance public confidence in the stability of Bermuda's banking system, to protect depositors, to protect public funds and to avoid interfering with property rights in contravention of section 1 (c) of the Constitution. Subsection (8) makes it explicit that continuity of banking services is included as part of the special resolution objective to protect and enhance the stability of Bermuda's*

financial system and subsection (9) makes clear that these objectives are not listed in order of priority; rather they are to be balanced in the circumstances of any given case.

Code of practice

5. (1) The Minister shall issue a code of practice about the use of—

- (a) the stabilisation powers,
- (b) the bank insolvency procedure, and
- (c) the bank administration procedure.

(2) The code may, in particular, provide guidance on—

- (a) how the special resolution objectives are to be understood and achieved,
- (b) the choice between different options,
- (c) the information to be provided in the course of a consultation under this Part,
- (d) the giving of advice by one relevant authority to another about whether, when and how the stabilisation powers are to be used,
- (e) how to determine whether Condition 2 in section 7 is met,
- (f) how to determine whether the test for the use of stabilisation powers in section 8 is satisfied,
- (g) sections 64 and 67, and
- (h) compensation.

(3) The code must include provisions

- (a) about the management and control of bridge banks including, in particular, provision about setting objectives, the content of the memorandum of association and bye-laws, different arrangements for management and control at different stages, and eventual disposal.
- (b) about the management of banks taken into temporary public ownership under section 13.

(4) The relevant authorities shall have regard to the code.

Commentary: *This section requires the Minister to issue a code of practice about the use of the stabilisation powers, the bank insolvency procedure and the bank administration procedure. It notes the areas that the code may provide guidance on and requires that the Minister and the BMA must have regard to the code.*

Subsection (2) sets out in detail those areas that the code should specifically address. They include such matters as the manner in which the special resolution objective are to be achieved; the choice between the different options, i.e., private sector resolution or public sector resolution; the manner in which condition 2 of the general conditions (set out in section 7) would be met; the manner in which the test for the use of stabilisation powers (in section 8) would be satisfied.

Code of practice: procedure

6. (1) Before issuing the Code of Practice the Minister must consult—

- (a) the BMA, and
- (b) the BDIC

(2) As soon as is reasonably practicable after issuing the Code of Practice the Minister shall furnish the BMA with a copy.

(3) The Minister shall lay a copy of the Code of Practice before the legislature.

(4) The Minister may revise and re-issue the code of practice.

(5) Subsections (1), (2) and (3) apply to re-issue as to the first issue.

Commentary: *This section requires the Minister to consult with the BMA before issuing the code and to lay it before the legislature as soon as possible following issue. It also gives Minister the power to revise the code as appropriate.*

Exercise of powers: general

General conditions

7. (1) A stabilisation power may be exercised in respect of a bank only if the BMA is satisfied that the following conditions are met.

(2) Condition 1 is that the bank is failing, or is likely to fail, to satisfy the minimum criteria for licensing set out in the Second Schedule of the Banks and Deposit Companies Act 1999, ("the threshold conditions").

(3) Condition 2 is that having regard to timing and other relevant circumstances it is not reasonably

likely that (ignoring the stabilisation powers) action will be taken by or in respect of the bank that will enable the bank to satisfy the threshold conditions.

(4) The BMA shall treat that condition 1 and 2 are met if satisfied that they would be met but for financial assistance provided by the Crown.

(5) Before determining whether or not Condition 2 is met, the BMA must consult the Minister.

(6) The special resolution objectives are not relevant to Conditions 1 and 2.

(7) The conditions for applying for and making a bank insolvency order are set out in sections 87 and 88.

(8) The conditions for applying for and making a bank administration order are set out in sections 208 and 209.

Commentary: *This section provides that stabilisation powers can be exercised only in respect of a bank if the conditions set out in the section are met. Those conditions essentially demarcate the boundary that must be crossed before the stabilisation powers, the bank administration procedure and (normally) the bank insolvency procedure may be applied to a bank.*

The first condition, set out in subsection (2), is that, in the opinion of the BMA, the bank is failing, or is likely to fail, to satisfy its regulatory threshold conditions (as provided in the minimum criteria for licensing under the Banks and Deposit Companies Act 1999).

The second condition, set out in subsection (3), is that, in the opinion of the BMA, it is not reasonably likely that action will be taken by or in respect of the bank that will enable the bank to satisfy the threshold conditions, having regard to timing and other relevant circumstances.

Subsection (4) provides that, in making this judgement, the BMA is required to discount any financial assistance provided by the Minister. Before confirming that the second condition is met the BMA must consult the Minister. Subsection (6) provides that the special resolution regime objectives are not applicable to the BMA's decisions on whether a bank meets either of these conditions.

Specific conditions: private sector purchaser and bridge bank

8. (1) The BMA may exercise a stabilisation power in respect of a bank in accordance with section 11(2) and the Minister may exercise a stabilisation power in respect of a bank in accordance with section 12(2) only if satisfied that Condition A is met.

(2) Condition A is that the exercise of the power is necessary, having regard to the public interest in—

- (a) the stability of the financial system of Bermuda,
- (b) the maintenance of public confidence in the stability of the banking system of Bermuda, or
- (c) the protection of depositors.

(3) Before determining whether Condition A is met, and if so how to react-

- (a) the BMA in respect of the exercise of a section 11(2) power must consult with the Minister; and
- (b) the Minister must in respect of the exercise of section 12(2) power, consult with the BMA.

(4) Where the Minister notifies the BMA that the Crown has provided financial assistance in respect of a bank for the purpose of resolving or reducing a serious threat to the stability of the financial system of Bermuda, the BMA may exercise a stabilisation power in respect of the bank in accordance with section 11(2) only if satisfied that Condition B is met instead of condition A.

(5) Condition B is that-

- (a) the Minister has recommended to the BMA to exercise the stabilisation power on the grounds that it is necessary to protect the public interest; and
- (b) in the BMA's opinion, exercise of the stabilisation power is an appropriate way to provide that protection.

(6) The conditions in this section are in addition to the conditions in section 7.

Commentary: *This section sets out alternative conditions one of which must be satisfied before the BMA or the Minister can exercise stabilisation powers so as to effect a transfer of a bank or banking business to a private sector purchaser or to a bridge bank. It provides that the BMA or the Minister as the*

case may be, can exercise a stabilisation power only if it is satisfied that the exercise of the power is necessary having regard to certain public interest conditions, set out in subsection (2), namely the stability of the Bermuda's financial systems, the maintenance of public confidence in the stability of the Bermuda's banking systems and the protection of depositors. Subsection (3) states that before exercising such powers the BMA and the Minister must consult with each other.

Subsection (4) provides for the position where the Minister has provided financial assistance to a bank in order to resolve or reduce a serious threat to the stability of the Bermuda's financial system. In this situation, as set out in subsection (5), the BMA may only exercise a stabilisation power following a recommendation from the Minister on the basis of it being necessary to protect the public interest. The BMA then retains the discretion to consider whether the exercise of such a power is an appropriate way to provide that protection. Subsection (6) provides that these conditions are in addition to the conditions in section 7.

Specific conditions: temporary public ownership

9. (1) The Minister may exercise a stabilisation power in respect of a bank in accordance with section 13(2) only if satisfied that one of the following conditions is met.

(2) Condition A is that the exercise of the power is necessary to resolve or reduce a serious threat to the stability of the financial systems of Bermuda.

(3) Condition B is that the exercise of the power is necessary to protect the public interest, where the Crown has provided financial assistance in respect of the bank for the purpose of resolving or reducing a serious threat to the stability of the financial systems of Bermuda.

(4) Before determining whether a condition is met the Minister must consult the BMA.

(5) The conditions in this section are in addition to the conditions in section 7.

Commentary: *This section provides for alternative conditions one of which must be satisfied for the Minister to exercise stabilisation powers to take a bank into temporary public ownership.*

Subsection (2) provides that the first condition is that the exercise of the power is necessary to resolve or reduce a serious threat to the stability of the financial systems of Bermuda.

Subsection (3) sets the second, alternative, condition as follows: if the exercise of the power is necessary to protect the public interest, where the Minister has provided financial assistance in respect of the bank for the purposes of resolving or reducing a serious threat to the stability of the Bermuda's financial system.

Subsection (4) provides that the Minister must consult the BMA before determining whether this condition is met. Subsection (5) provides that these conditions are in addition to the conditions in section 7.

Banking Liaison Panel

10. (1) The Minister shall make arrangements for a

panel to advise the relevant authorities about the effect of the special resolution regime on—

- (a) banks,
- (b) persons with whom banks do business,
- (c) the financial markets, and
- (d) the economy of Bermuda.

(2) In particular, the panel may advise the Minister about—

- (a) the exercise of powers to make statutory instruments under or by virtue of this Part, Part 2, Part 3 or Part 4 (excluding the stabilisation powers, compensation scheme orders, resolution fund orders, third party compensation orders and orders under section 75(2)(b) and (c),
- (b) the code of practice procedure under section 6, and
- (c) anything else referred to the panel by the Minister.

(3) The Minister shall ensure that the panel includes—

- (a) a member appointed by the Minister,
- (b) a member appointed by the BMA,
- (c) a member appointed by the BDIC,
- (d) one or more persons who in the Minister's opinion represent the interests of banks,
- (e) one or more persons who in the Minister's opinion have expertise in law relating to the financial systems of Bermuda, and
- (f) one or more persons who in the

Minister's opinion have expertise in insolvency law and practice.

Commentary: *This section provides for a new Banking Liaison Panel to advise the Minister on:*

- *the effect of the special resolution regime on banks, their counterparties and the financial markets*
- *the exercise of the powers to make statutory instruments of Parts 1, 2 or 3 (excluding certain regulations and orders).*
- *the making of the code of practice*
- *any matter referred to them by the Minister*

The members of the Panel will include representatives of the Minister, the BMA, the BDIC and from the banking, legal and insolvency sectors.

Private sector purchaser

11. (1) The first stabilisation option is to sell all or part of the business of the bank to a commercial purchaser.

(2) For that purpose the BMA may make—

- (a) one or more share transfer instruments;
- (b) one or more property transfer instruments.

Commentary: *Where both the general conditions of section 7 and the specific conditions for the private sector purchaser stabilisation option of section 8 are met, subsection (1) allows the BMA to sell all or part of the business of a bank to a commercial purchaser.*

Subsection (2) provides that this transfer may be effected through either a transfer of the bank's

shares and other securities, or some or all of its property, rights and liabilities. Both types of transfer are executed by instruments made by the BMA (a share transfer instrument (see section 15) or a property transfer instrument (see section 33)).

Bridge bank

12. (1) The second stabilisation option is to transfer all or part of the business of the bank to a company which is wholly owned by the Crown (a "bridge bank").

(2) For that purpose the Minister may make one or more property transfer orders.

(3) Where property, rights or liabilities are first transferred by property transfer order to a bridge bank and later transferred (whether or not by the exercise of a power under this Part) to another company which is wholly owned by the Crown, that other company is an "onward bridge bank".

(4) An onward bridge bank—

(a) is a bridge bank for the purposes of subsection (3)

(b) ; and is not a bridge bank for the purposes of—

(i) section 30(1),

(ii) section 43(1).

Commentary: *Subsection (1) provides that, where the general conditions (section 7) and the specific conditions (section 8) for the bridge bank stabilisation option are met, the Crown may transfer all or part of the business of a bank to a bridge bank. Subsection (2) provides that a transfer to a bridge bank may be effected only through a transfer of some or all of the bank's property, rights and liabilities and is executed by one or more*

instrument(s) made by the Crown. As defined in subsection (1), a bridge bank is a company wholly owned by the Crown.

The Code of Practice to be made under section 5(1) must include provision about the management and control of bridge banks, which must address certain matters specified in section 5(3)(a).

Under subsection (3), where a property transfer is made from a bridge bank (whether or not through means of a property transfer instrument) to a company wholly owned by the Crown, that company shall be treated as an 'onward bridge bank'. Subsection (4) provides for the nature of an onward bridge bank (by setting out the provisions of Part 1 which do and do not apply to onward bridge banks).

Temporary public ownership

13. (1) The third stabilisation option is to take the bank into temporary public ownership.

(2) For that purpose the Minister may make one or more share transfer orders in which the transferee is a company wholly owned by the Crown.

Commentary: *Where the general conditions (section 7) are satisfied and the Minister is satisfied that the specific conditions for the temporary public ownership stabilisation option are met as provided in section 9, the Minister may take a bank into temporary public ownership.*

Subsection (2) provides that the transferee may be a company wholly owned by the Crown. A transfer to temporary public ownership may only be effected through a transfer of securities, and is made by a share transfer order made by statutory instrument

subject to the negative procedure (see sections 16 and 27).

The Code of Practice to be made under section 6 must include provision about the management of a bank in temporary public ownership.

Transfer of securities

Interpretation: "securities"

14. (1) In this Part "securities" includes anything falling within any of the following classes.

(2) Class 1: shares and stock.

(3) Class 2: debentures, including—

(a) debenture stock,

(b) loan stock,

(c) bonds,

(d) certificates of deposit, and

(e) any other instrument creating or acknowledging a debt.

(4) Class 3: warrants or other instruments that entitle the holder to acquire anything in Class 1 or 2.

Commentary: *Share transfer powers may be used to effect the transfer of securities. This section defines securities widely. The definition includes shares and stock; debentures; warrants or other instruments that entitle the holder to acquire such securities. The definition in this section ensures that share transfer powers can be exercised to transfer complete control of a bank.*

Share transfer instrument

15. (1) A share transfer instrument is an instrument which—

(a) provides for securities issued by a specified bank to be transferred;

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- (b) makes other provision for the purposes of, or in connection with, the transfer of securities issued by a specified bank (whether or not the transfer has been or is to be effected by that instrument, by another share transfer instrument or otherwise).
- (2) A share transfer instrument may relate to—
- (a) specified securities, or
 - (b) securities of a specified description.

Commentary: *Share transfer instruments are made by the BMA to effect the transfer of a bank to a private sector purchaser (the stabilisation option as described in section 11). This section describes provision that a share transfer instrument may make. The instrument may relate to either specified securities or securities with a specified description.*

Share transfer order

16. (1) A share transfer order is an order which—
- (a) provides for securities issued by a specified bank to be transferred;
 - (b) makes other provision for the purposes of, or in connection with, the transfer of securities issued by a specified bank (whether or not the transfer has been or is to be effected by that order, by another share transfer order or otherwise).
- (2) A share transfer order may relate to—
- (a) specified securities, or
 - (b) securities of a specified description.

Commentary: *Share transfer orders are made by the Minister to effect the transfer of a bank to*

temporary public ownership. This section describes the provision that a share transfer order may make. The order may relate to either specified securities or securities of a specified description.

Effect

17. (1) In this section “transfer” means a transfer provided for by a share transfer instrument or order.

(2) A transfer takes effect by virtue of the instrument or order (and in accordance with its provisions as to timing or other ancillary matters).

(3) A transfer takes effect despite any restriction arising by virtue of contract or legislation or in any other way.

(4) In subsection (3) “restriction” includes—

(a) any restriction, inability or incapacity affecting what can and cannot be assigned or transferred (whether generally or by a particular person), and

(b) a requirement for consent (by any name).

(5) A share transfer instrument or order may provide for a transfer to take effect free from any trust, liability or other encumbrance (and may include provision about their extinguishment).

(6) A share transfer instrument or order may extinguish rights to acquire securities falling within Class 1 or 2 in section 14.

Commentary: *This section makes further provision about the effects of a share transfer instrument or order. Subsection (2) makes clear that the transfer of securities takes place by operation of law. Subsection (3) makes provision for the transfer to take effect regardless of any restriction (including*

any requirement for consent and restrictions arising by contract-such as a non-assignment clause-or legislation). Provision is also made for the share transfer instrument or order to be carried out free from any encumbrances (such as a trust), which may be extinguished under the order (subsection (5)). Subsection (6) allows for the extinguishment of rights to acquire securities (for example, such as share options).

Continuity

18. (1) A share transfer instrument or order may provide for a transferee to be treated for any purpose connected with the transfer as the same person as the transferor.

(2) A share transfer instrument or order may provide for agreements made or other things done by or in relation to a transferor to be treated as made or done by or in relation to the transferee.

(3) A share transfer instrument or order may provide for anything (including legal proceedings) that relates to anything transferred and is in the process of being done by or in relation to the transferor immediately before the transfer date, to be continued by or in relation to the transferee.

(4) A share transfer instrument or order may modify references (express or implied) in an instrument or document to a transferor.

(5) A share transfer instrument or order may require or permit—

(a) a transferor to provide a transferee with information and assistance;

(b) a transferee to provide a transferor with information and assistance.

(6) “Transfer date” has the meaning given in section 32.

Commentary: *This section states that when a share transfer instrument or order is made, provision can be made to ensure the continuity of arrangements operating in respect of a bank.*

Subsection (1) enables the share transfer instrument or order to include provision that the transferee can be treated as the same person as the transferor for any purpose connected with the transfer.

Subsection (2) enables the share transfer instrument or order to include provision that agreements made or other things done by or in relation to a transferor are treated as made or done by or in relation to the transferee. This provision would enable for example, the transferred deposit taker to continue to benefit from arrangements entered into by the transferors, notwithstanding any rights triggered on the transfer.

Subsection (3) allows for transitional provision about things transferred to be continued. This can include continuation of legal proceedings by or in relation to the transferee.

Subsection (4) allows for the modification of references to the transferor in instruments or documents. Subsection (5) allows for provision of information to be required or permitted between the transferor and the transferee of a share transfer instrument or order.

Conversion and delisting

19. (1) A share transfer instrument or order may provide for securities to be converted from one form or class to another.

(2) A share transfer instrument or order may

provide for the listing of securities, under the Bermuda Stock Exchange Listing Regulations 2002 to be cancelled.

Commentary: *This section allows for the conversion and delisting of securities (the power applies to all of a specified bank's securities, whether transferred or not).*

A share transfer instrument or order may make provision, for example, for the conversion of securities from one form to another (to deal, for example, with the conversion of a special class of shares into ordinary shares).

Subsection (2) provides that a share transfer instrument or order may make provision for cancelling the listing of securities issued by the specified bank on the BSX.

Directors

20. (1) A share transfer instrument may enable the BMA—

- (a) to remove a director of a specified bank;
- (b) to vary the service contract of a director of a specified bank;
- (c) to terminate the service contract of a director of a specified bank;
- (d) to appoint a director of a specified bank.

(2) A share transfer order may enable the Minister—

- (a) to remove a director of a specified bank;
- (b) to vary the service contract of a

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- director of a specified bank;
 - (c) to terminate the service contract of a director of a specified bank;
 - (d) to appoint a director of a specified bank.

(3) Appointments under subsection (1)(d) are to be on terms and conditions agreed with the BMA.

(4) Appointments under subsection (2)(d) are to be on terms and conditions agreed with the Minister.

(5) "Service contract", in relation to a company, means a contract under which –

- (a) a director of the company undertakes personally to perform services (as director or otherwise) for the company, or for a subsidiary of the company; or
- (b) services (as director or otherwise) that a director of the company undertakes personally to perform are made available by a third party to the company, or to a subsidiary of the company.

Commentary: Subsections (1) and (2) allow for the BMA, in relation to a share transfer instrument, and the Minister, in relation to a share transfer order, to take various actions with regard to directors including appointment and removal, termination and variation of service contracts.

Appointments made by the Minister and BMA are made on terms and conditions agreed by the bank making the appointment. Provision is also made for

the BMA and Minister to vary or terminate service contracts of directors.

Ancillary instruments: production, registration

21. (1) A share transfer instrument or order may permit or require the execution, issue or delivery of an instrument.

(2) A share transfer instrument or order may provide for a transfer to have effect irrespective of—

(a) whether an instrument has been produced, delivered, transferred or otherwise dealt with;

(b) registration.

(3) A share transfer instrument or order may provide for the effect of an instrument executed, issued or delivered in accordance with the instrument or order.

(4) A share transfer instrument or order may modify or annul the effect of an instrument.

(5) A share transfer instrument or order may—

(a) entitle a transferee to be registered in respect of transferred securities;

(b) require a person to effect registration.

Commentary: *This section makes various provisions for share transfer instruments and orders concerning instruments and registration. It provides that the transfer has effect irrespective of production, delivery, transfer or other dealing with an instrument and irrespective of registration.*

Subsection (1) allows for an instrument or order to make provision in relation to an instrument: a share transfer instrument or order may permit or require the execution, issue or delivery of an instrument.

Subsection (2) specifies that a share transfer instrument or order may have immediate effect, regardless of registration (of the share transfer instrument or order) or the status of an instrument. Subsection (3) provides that a share transfer instrument or order may make provision for the effect of an instrument executed or issued in accordance with the provision of the share transfer instrument or order.

Subsection (4) allows for an instrument to be modified or annulled by a share transfer instrument or order.

Subsection (5) provides for how a share transfer instrument or order may entitle a transferee to be registered or require a person to effect registration in respect of the transferred securities of the specified bank.

Termination rights

22. (1) In this section “default event provision” means a Type 1 or Type 2 default event provision as defined in subsections (2) and (3).

(2) A Type 1 default event provision is a provision of a contract or other agreement that has the effect that if a specified event occurs or situation arises—

- (a) the agreement is terminated, modified or replaced,
- (b) rights or duties under the agreement are terminated, modified or replaced,
- (c) a right accrues to terminate, modify or replace the agreement,
- (d) a right accrues to terminate, modify or replace rights or duties under the

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- agreement,
 - (e) a sum becomes payable or ceases to be payable,
 - (f) delivery of anything becomes due or ceases to be due,
 - (g) a right to claim a payment or delivery accrues, changes or lapses,
 - (h) any other right accrues, changes or lapses, or
 - (i) an interest is created, changes or lapses.

(3) A Type 2 default event provision is a provision of a contract or other agreement that has the effect that a provision of the contract or agreement—

- (a) takes effect only if a specified event occurs or does not occur,
- (b) takes effect only if a specified situation arises or does not arise,
- (c) has effect only for so long as a specified event does not occur,
- (d) has effect only while a specified situation lasts,
- (e) applies differently if a specified event occurs,
- (f) applies differently if a specified situation arises, or
- (g) applies differently while a specified situation lasts.

(4) For the purposes of subsections (2) and (3) it is the effect of a provision that matters, not how it is described (nor, for example, whether it is presented in a positive or a negative form).

(5) A share transfer instrument or order may provide for subsection (6) or (7) to apply (but need not apply either).

(6) If this subsection applies, the share transfer instrument or order is to be disregarded in determining whether a default event provision applies.

(7) If this subsection applies, the share transfer instrument or order is to be disregarded in determining whether a default event provision applies except in so far as the instrument or order provides otherwise.

(8) In subsections (6) and (7) a reference to the share transfer instrument or order is a reference to—

- (a) the making of the instrument or order,
- (b) anything that is done by the instrument or order or is to be, or may be, done under or by virtue of the instrument or order, and
- (c) any action or decision taken or made under this or another enactment in so far as it resulted in, or was connected to, the making of the instrument or order.

(9) Provision under subsection (5) may apply subsection (6) or (7)—

- (a) generally or only for specified purposes, cases or circumstances;
- (b) differently for different purposes, cases or circumstances.

(10) A thing is not done by virtue of an instrument or order for the purposes of subsection (8)(b) merely by virtue of being done under a contract or other agreement, rights or obligations under which have been transferred by the instrument or order.

Commentary: *This section sets out certain provisions in relation to default event provisions of the two types set out in the section (dealing variously with termination rights, conditions precedent to performance, etc.) Subsection (6) allows for default event provisions not to be triggered in relation to a share transfer order or instrument. Subsection (7) provides default event provisions can be disapplied but with exceptions.*

Subsection (8) means that default event provisions will be disapplied when they relate to the making of an order or instrument, anything that is to be done or may be done under or by virtue of the instrument or order and any action or decision taken or made under this Act or another enactment which resulted in or was connected to the making of the order or instrument.

Incidental provisions

23. (1) A share transfer instrument or order may include incidental, consequential or transitional provisions.

(2) In relying on subsection (1) a share transfer instrument or order—

- (a) may make provision generally or only for specified purposes, cases or circumstances, and
- (b) may make different provision for different purposes, cases or circumstances.

Commentary: *This section provides for a share transfer instrument or order to include incidental, consequential or transitional provisions. Such provisions may be made generally or for a specified*

purpose or purposes.

Procedure: instruments

24. (1) As soon as is reasonably practicable after making a share transfer instrument in respect of a bank the BMA shall send a copy to—

- (a) the bank,
- (b) the Minister, and
- (c) any other person specified in the Code of Practice under section 6.

(2) As soon as is reasonably practicable after making a share transfer instrument the BMA shall publish a copy—

- (a) on the BMA's internet website, and
- (b) the Gazette and other newspapers to maximise the likelihood of the instrument coming to the attention of persons likely to be affected.

(3) Where the Minister receives a copy of a share transfer instrument under subsection (1) he shall lay a copy before the Legislature.

Commentary: *This section provides the procedure for making a share transfer instrument. The BMA must send a copy of a share transfer instrument, as soon as reasonably practicable, to the specified bank, the Minister and any other persons specified in the code of practice. The BMA should also publish the share transfer instrument. The Minister is also required to lay a copy of the transfer instrument before Legislature.*

Procedure: orders

25. (1) A share transfer order—

- (a) shall be made by statutory instrument, and

(b) shall be subject to negative resolution procedure.

(2) As soon as is reasonably practicable after making a share transfer order in respect of a bank the Minister shall send a copy to—

- (a) the bank,
- (b) the BMA, and
- (c) any other person specified in the Code of Practice under section 6.

(3) As soon as is reasonably practicable after making a share transfer order the Minister shall publish a copy—

- (a) on the Ministry's internet website, and
- (b) in newspapers to maximise the likelihood of the instrument coming to the attention of persons likely to be affected.

Commentary: *This section provides the procedure for making a share transfer order. Share transfer orders are made by statutory instrument by the Minister subject to the negative procedure. The resolution should send a copy of a share transfer order, as soon as reasonably practicable, to the specified bank, the Minister, BMA and any other persons specified in the code of practice. The Minister should also publish the share transfer order in line with the provisions of subsection (3).*

Supplemental instruments

26. (1) This section applies where the BMA has made a share transfer instrument in accordance with section 11(2) ("the original instrument").

(2) The BMA may make one or more supplemental share transfer instruments.

(3) A supplemental share transfer instrument

is a share transfer instrument which—

- (a) provides for the transfer of securities which were issued by the bank before the original instrument and have not been transferred by the original instrument or another supplemental share transfer instrument;
- (b) makes provision of a kind that a share transfer instrument may make under section 15(1)(b) (whether or not in connection with a transfer under the original instrument).

(4) Sections 7 and 8 do not apply to a supplemental share transfer instrument (but it is to be treated in the same way as any other share transfer instrument for all other purposes, including for the purposes of the application of a power under this Part).

(5) Before making a supplemental share transfer instrument the BMA must consult the Minister.

(6) The possibility of making a supplemental share transfer instrument in reliance on subsection (2) is without prejudice to the possibility of making of a new instrument in accordance with section 11(2) (and not in reliance on subsection (2) above).

Commentary: *Where the BMA has made a share transfer instrument to a private sector purchaser, it may make additional supplemental share transfer instruments. These may provide for anything that a share transfer instrument may generally provide for, including a further transfer of securities meeting the description specified in subsection (3)(a).*

The general and specific conditions (sections 7 and 8

respectively) do not apply to supplemental transfers. The BMA must consult the Minister before making the instrument.

Supplemental orders

27. (1) This section applies where the Minister has made a share transfer order, in respect of securities issued by a bank, in accordance with section 13(2) ("the original order").

(2) The Minister may make one or more supplemental share transfer orders.

(3) A supplemental share transfer order is a share transfer order which—

(a) provides for the transfer of securities which were issued by the bank before the original order and have not been transferred by the original order or another supplemental share transfer order;

(b) makes provision of a kind that a share transfer order may make under section 16(1)(b), whether in connection with a transfer under the original order or in connection with a transfer under that or another supplemental order.

(4) Sections 7 and 9 do not apply to a supplemental share transfer order (but it is to be treated in the same way as any other share transfer order for all other purposes, including for the purposes of the application of a power under this Part).

(5) Before making a supplemental share transfer order the Minister must consult the BMA.

(6) The possibility of making a supplemental share transfer order in reliance on subsection (2) is without prejudice to the possibility of making of a

new order in accordance with section 13(2) (and not in reliance on subsection (2) above).

Commentary: *Where the Minister has made a share transfer order to take a bank into temporary public ownership, he may make additional supplemental share transfer orders. These may provide for anything that a share transfer order may generally provide for, including a further transfer of securities meeting the description specified in subsection (3)(a).*

The general and specific conditions (sections 7 and 9, respectively) do not apply to supplemental transfers. The Minister must consult the BMA before making the order.

Onward transfer

28. (1) This section applies where the Minister has made a share transfer order, in respect of securities issued by a bank, in accordance with section 13(2) ("the original order").

(2) The Minister may make one or more onward share transfer orders.

(3) An onward share transfer order is a share transfer order which—

- (a) provides for the transfer of—
 - (i) securities which were issued by the bank before the original order and have been transferred by the original order or a supplemental share transfer order, or
 - (ii) securities which were issued by the bank after the original order;
- (b) makes other provision for the purposes of, or in connection with, the

transfer of securities issued by the bank (whether the transfer has been or is to be effected by that order, by another share transfer order or otherwise).

(4) An onward share transfer order may not transfer securities to the transferor under the original order.

(5) Sections 7 and 9 do not apply to an onward share transfer order (but it is to be treated in the same way as any other share transfer order for all other purposes, including for the purposes of the application of a power under this Part).

(6) Before making an onward share transfer order the Minister must consult the BMA.

(7) Section 27 applies where the Minister has made an onward share transfer order.

Commentary: *Where the Minister has made a share transfer order to bring a bank into temporary public ownership in accordance with section 13, it may make onward share transfer orders. These may provide for two things: first, for the transfer of securities meeting the description specified in subsection (3)(a); and, second, for any provision in relation to the relevant securities. Subsection (4) stipulates that the transferee may not be the transferor under the original order.*

The general and specific conditions (sections 7 and 10, respectively) do not apply to onward transfers. Subsection (6) provides that the Minister must consult the BMA before making the order.

Subsection (7) provides that the Minister may make a supplemental share transfer order (as described in

section 28) following the making of an onward share transfer order.

Reverse share transfer

29. (1) This section applies where the Minister has made a share transfer order in accordance with section 13(2) ("the original order") providing for the transfer of securities issued by a bank to a person ("the original transferee").

(2) The Minister may make one or more reverse share transfer orders in respect of securities issued by the bank and held by the original transferee (whether or not they were transferred by the original order).

(3) If the Minister makes an onward share transfer order in respect of securities transferred by the original order, the Minister may make one or more reverse share transfer orders in respect of securities—

- (a) issued by the bank, and
- (b) held by a transferee under the onward share transfer order of a company wholly owned by the Crown.

(4) A reverse share transfer order is a share transfer order which—

- (a) provides for transfer to the transferor under the original order (where subsection (2) applies);
- (b) provides for transfer to the original transferee (where subsection (3) applies);
- (c) makes other provision for the purposes of, or in connection with, the transfer of securities which are, could

be or could have been transferred under paragraph (a) or (b).

(5) Sections 7, 9 and 52 do not apply to a reverse share transfer order (but it is to be treated in the same way as any other share transfer order for all other purposes including for the purposes of the application of a power under this Part).

(6) Before making a reverse share transfer order the Minister must consult the BMA.

(7) Section 27 applies where the Minister has made a reverse share transfer order.

Commentary: *Where the Minister has made a share transfer order to bring a bank into temporary public ownership in accordance with section 13, he may make reverse share transfer orders.*

A reverse share transfer order may transfer securities in temporary public ownership back to the original transferors (i.e. the holders of the shares and other securities before the bank was taken into temporary public ownership). Alternatively, where there has been an onward transfer to a particular type of onward transferee, the order may transfer securities back from that onward transferee into temporary public ownership. The reverse share transfer powers could only be used in the case of an onward transfer, however, where the onward transferee was a company wholly owned by the BMA or a company wholly owned by the Crown. This limitation is to prevent the reverse share transfer powers from being exercisable in relation to an onward transfer to a private sector party who wished to acquire the bank from temporary public ownership.

The general and specific conditions (sections 7 and 9, respectively) do not apply to reverse transfers. Nor does section 52. Subsection (6) provides that the Minister must consult the BMA before making the order.

Subsection (7) provides that the Minister may make a supplemental share transfer order (as described in section 27) following the making of a reverse share transfer order.

Bridge bank: share transfers

30. (1) This section applies where the Minister has made a property transfer order in respect of a bridge bank in accordance with section 12(2) (“the original order”).

(2) The Minister may make one or more bridge bank share transfer orders.

(3) A bridge bank share transfer order is a share transfer order which—

- (a) provides for securities issued by the bridge bank to be transferred;
- (b) makes other provision for the purposes of, or in connection with, the transfer of securities issued by the bridge bank (whether the transfer has been or is to be effected by that order, by another share transfer order or otherwise).

(4) Sections 7 and 8 do not apply to a bridge bank share transfer order (but it is to be treated in the same way as any other share transfer order for all other purposes, including for the purposes of the application of a power under this Part).

(5) Before making a bridge bank share transfer

order the Minister must consult the BMA.

(6) Section 27 applies where the Minister has made a bridge bank share transfer order.

Commentary: *Where the Minister has made a property transfer order to effect the bridge bank stabilisation option, it may make bridge bank share transfer order. These may provide for two things: first, for securities issued by the bridge bank to be transferred; and, second, for other provision in relation to the securities of the bridge bank. Thus the Minister may transfer the securities of a bridge bank.*

The general and specific conditions (sections 7 and 8, respectively) do not apply and subsection (5) provides that the Minister must consult the BMA before making the instrument.

Subsection (6) provides that the Minister may make a supplemental share transfer instrument (as described in section 27) following the making of a bridge bank share transfer order.

Bridge bank: reverse share transfer

31. (1) This section applies where the Minister has made a bridge bank share transfer order in accordance with section 30(2) ("the original instrument") providing for the transfer of securities to a company wholly owned by the Crown.

(2) The Minister may make one or more bridge bank reverse share transfer orders in respect of securities issued by the bridge bank and held by the Crown.

(3) A bridge bank reverse share transfer order is a share transfer order which—

(a) provides for transfer to the transferor

under the original order;

- (b) makes other provision for the purposes of, or in connection with, the transfer of securities which are, could be or could have been transferred under paragraph (a).

(4) Sections 7, 8 and 53 do not apply to a bridge bank reverse share transfer order (but it is to be treated in the same way as any other share transfer order for all other purposes including for the purposes of the application of a power under this Part).

(5) Before making a bridge bank reverse share transfer order the Minister must consult the BMA.

(6) Section 27 applies where the Minister has made a bridge bank reverse share transfer order.

Commentary: *Where the Minister has made a bridge bank share transfer instrument to a company wholly owned by the Crown, the Minister may make bridge bank reverse share transfer instruments. A bridge bank reverse share transfer instrument provides for the transfer of securities of a bridge bank to be transferred back from such an onward transferee.*

The general and specific conditions (sections 7 and 8, respectively) do not apply to reverse transfer. Nor does section 53 apply. Subsection (6) provides that the Minister must consult the BMA before making the instrument.

‘Transfer date’

32. In sections 18, 35 and 36—

“transfer date” means the date or time on or at which a share transfer instrument or order (or the

relevant part of it) takes effect.

Commentary: *This section defines references to “service contract” and “transfer date”.*

Transfer of property

Property transfer instrument or order

33. (1) A property transfer instrument or order is an instrument or order which—

- (a) provides for property, rights or liabilities of a specified bank to be transferred;
- (b) makes other provision for the purposes of, or in connection with, the transfer of property, rights or liabilities of a specified bank (whether the transfer has been or is to be effected by that instrument or order, by another property transfer instrument or order or otherwise).

(2) A property transfer instrument or order may relate to—

- (a) all property, rights and liabilities of the specified bank,
- (b) all its property, rights and liabilities subject to specified exceptions,
- (c) specified property, rights or liabilities, or
- (d) property, rights or liabilities of a specified description.

Commentary: *Property transfer instruments or order may be made by the BMA or the Minister respectively to effect a transfer to a private sector purchaser or to a bridge bank as the case may be*

(sections 11 and 12). This section describes the provision that a property transfer instrument or order may make. The instrument or order may transfer some or all of the property, rights or liabilities of a specified bank. The instrument or order may relate to specified combinations of the specified bank's property, rights or liabilities, although this is subject to restrictions which may be imposed by the exercise of order making powers under section 47.

Effect

34. (1) In this section "transfer" means a transfer provided for by a property transfer instrument or order.

(2) A transfer takes effect by virtue of the instrument or order (and in accordance with its provisions as to timing or other ancillary matters).

(3) A transfer takes effect despite any restriction arising by virtue of contract or legislation or in any other way.

(4) In subsection (3) "restriction" includes—

(a) any restriction, inability or incapacity affecting what can and cannot be assigned or transferred (whether generally or by a particular person), and

(b) a requirement for consent (by any name).

(5) A property transfer instrument or order may provide for a transfer to be conditional upon a specified event or situation—

(a) occurring or arising, or

(b) not occurring or arising.

(6) A property transfer instrument or order may include provision dealing with the consequences of breach of a condition imposed under subsection

(5); and the consequences may include—

- (a) automatic vesting in the original transferor;
- (b) an obligation to effect a transfer back to the original transferor, with specified consequences for failure to comply (which may include provision conferring a discretion on a court or tribunal);
- (c) provision making a transfer or anything done in connection with a transfer void or voidable.

(7) Where a property transfer instrument or order makes provision in respect of property held on trust (however arising) it may also make provision about—

- (a) the terms on which the property is to be held after the instrument or order takes effect (which provision may remove or alter the terms of the trust), and
- (b) how any powers, provisions and liabilities in respect of the property are to be exercisable or have effect after the instrument or order takes effect.

Commentary: *A transfer of property, rights or liabilities is effected through a property transfer instrument or order (section 33). Subsections (3) and (4) make provision for the transfer to take effect regardless of any legislative or contractual restriction, including requirements for consent (or any other restrictions which might render property not transferable).*

Subsections (5) and (6) provide that a transfer may

be made conditional on events occurring or not occurring, and may provide for the consequences should such a condition be breached. Subsection (7) makes provision about trusts.

Transferable property

35. (1) A property transfer instrument or order may transfer any property, rights or liabilities including, in particular—

- (a) property, rights and liabilities acquired or arising between the making of the instrument or order and the transfer date,
- (b) rights and liabilities arising on or after the transfer date in respect of matters occurring before that date,
- (c) property outside Bermuda, and
- (d) rights and liabilities under the law of a country or territory outside Bermuda.
- (e) rights and liabilities under any statutory provision.

(2) Section 32 applies for the interpretation of this section (with the necessary modification).

Commentary: *This section makes provision for a property transfer instrument or order to transfer any property, rights or liabilities. Such property, rights and liabilities are expressed to include those acquired or arising between the making of the instrument or order and the transfer date, and any rights and liabilities arising on or after the transfer date in respect of matters occurring before that date. Paragraphs (c) and (d) of subsection (1) provide that foreign property may be transferred. Paragraph (e) provides that rights and liabilities under enactments may be the subject of a transfer.*

Continuity

36. (1) A property transfer instrument or order may provide—

- (a) for a transfer to be, or to be treated as, a succession;
- (b) for a transferee to be treated for any purpose connected with the transfer as the same person as the transferor.

(2) A property transfer instrument or order may provide for agreements made or other things done by or in relation to a transferor to be treated as made or done by or in relation to the transferee.

(3) A property transfer instrument or order may provide for anything (including legal proceedings) that relates to anything transferred and is in the process of being done by or in relation to the transferor immediately before the transfer date, to be continued by or in relation to the transferee.

(4) A property transfer instrument or order which transfers or enables the transfer of a contract of employment may include provision about continuity of employment.

(5) A property transfer instrument or order may modify references (express or implied) in an instrument or document to a transferor.

(6) In so far as rights and liabilities in respect of anything transferred are enforceable after transfer, a property transfer instrument may provide for apportionment between transferor and transferee to a specified extent and in specified ways.

(7) A property transfer instrument or order may enable the transferor and transferee by agreement to modify a provision of the instrument; but a modification—

-
- (a) must achieve a result that could have been achieved by the instrument or order, and
 - (b) may not transfer (or arrange for the transfer of) property, rights or liabilities.
- (8) A property transfer instrument or order may require or permit—
- (a) a transferor to provide a transferee with information and assistance;
 - (b) a transferee to provide a transferor with information and assistance.
- (9) Section 32 applies for the interpretation of this section (with the necessary modification).

Commentary: *This section states that, when a property transfer instrument or order is made, provision can be made to ensure the continuity of arrangements operating in respect of a bank.*

Subsection (1) enables the property transfer instrument to include provision that the transferee can be treated as the same person as the transferor for any purpose connected with the transfer and for the transfer to be treated as a succession.

Subsection (2) enables the property transfer instrument or order to include provision that agreements made or other things done by or in relation to a transferor are treated as made or done by or in relation to the transferee. This provision would enable, for example, the transferred deposit taker to continue to benefit from arrangements entered into by the transferor, notwithstanding any rights triggered on the transfer.

Subsection (3) allows for transitional provision about things relating to things transferred to be continued. This can include continuation of legal proceedings by or in relation to the transferee.

Subsection (4) allows for provision to be included in a property transfer instrument about continuity of employment.

Subsection (5) allows for the modification of references to the transferor in instruments or documents.

Subsection (6) provides that in so far as rights and liabilities in respect of anything transferred are enforceable after a transfer date, a property transfer instrument or order can apportion them as between the transferor and the transferee.

Subsection (7) provides that the transferor and the transferee may, by agreement, modify a provision of the instrument or order. However such a modification must achieve a result that could have been achieved by the instrument or order, and may not transfer (or arrange the transfer of) property rights or liabilities.

Subsection (8) allows for provision of information and assistance to be required or permitted between the transferor and the transferee under a property transfer instrument or order.

Licences

37. (1) A licence in respect of anything transferred by property transfer instrument or order shall continue to have effect despite the transfer.

(2) A property transfer instrument or order may disapply subsection (1) to a specified extent.

(3) Where a licence imposes rights or obligations, a property transfer instrument or order may apportion responsibility for exercise or compliance between transferor and transferee.

(4) In this section “licence” includes permission and approval and any other permissive document in respect of anything transferred.

Commentary: *This section makes provision in relation to licences.*

Subsection (1) provides that a licence in respect of property transferred by property instrument or order shall continue to have effect notwithstanding the transfer. Subsection (2) provides that the instrument or order may disapply subsection (1), so that a licence may be discontinued. Subsection (3) specifies that where a licence imposed rights or obligations, a property transfer instrument or order may apportion responsibility for exercise or compliances between the transferor and transferee.

Termination rights, etc.

38. (1) In this section “default event provision” means a Type 1 or Type 2 default event provision as defined in subsections (2) and (3).

(2) A Type 1 default event provision is a provision of a contract or other agreement that has the effect that if a specified event occurs or situation arises—

- (a) the agreement is terminated, modified or replaced,
- (b) rights or duties under the agreement are terminated, modified or replaced,

-
- (c) a right accrues to terminate, modify or replace the agreement,
 - (d) a right accrues to terminate, modify or replace rights or duties under the agreement,
 - (e) a sum becomes payable or ceases to be payable,
 - (f) delivery of anything becomes due or ceases to be due,
 - (g) a right to claim a payment or delivery accrues, changes or lapses,
 - (h) any other right accrues, changes or lapses, or
 - (i) an interest is created, changes or lapses.

(3) A Type 2 default event provision is a provision of a contract or other agreement that has the effect that a provision of the contract or agreement—

- (a) takes effect only if a specified event occurs or does not occur,
- (b) takes effect only if a specified situation arises or does not arise,
- (c) has effect only for so long as a specified event does not occur,
- (d) has effect only while a specified situation lasts,
- (e) applies differently if a specified event occurs,
- (f) applies differently if a specified situation arises, or
- (g) applies differently while a specified situation lasts.

(4) For the purposes of subsections (2) and (3) it is the effect of a provision that matters, not how it is described (nor, for example, whether it is

presented in a positive or a negative form).

(5) A property transfer instrument or order may provide for subsection (6) or (7) to apply (but need not apply either).

(6) If this subsection applies, the property transfer instrument is to be disregarded in determining whether a default event provision applies.

(7) If this subsection applies, the property transfer instrument or order is to be disregarded in determining whether a default event provision applies except in so far as the instrument or order provides otherwise.

(8) In subsections (6) and (7) a reference to the property transfer instrument or order is a reference to—

- (a) the making of the instrument or order,
- (b) anything that is done by the instrument or order or is to be, or may be, done under or by virtue of the instrument or order, and
- (c) any action or decision taken or made under this or another enactment in so far as it resulted in, or was connected to, the making of the instrument or order.

(9) Provision under subsection (5) may apply subsection (6) or (7)—

- (a) generally or only for specified purposes, cases or circumstances;
- (b) differently for different purposes, cases or circumstances.

(10) A thing is not done by virtue of an instrument or order for the purposes of subsection (8)(b) merely by virtue of being done under a

contract order or other agreement rights or obligations under which have been transferred by the instrument.

Commentary: *This section makes similar provision in relation to default event provisions for property transfers as that made for share transfers by section 22.*

Foreign property

39. (1) This section applies where a property transfer instrument or order transfers foreign property.

(2) In subsection (1) "foreign property" means—

- (a) property outside Bermuda, and
- (b) rights and liabilities under foreign law.

(3) The transferor and the transferee must each take any necessary steps to ensure that the transfer is effective as a matter of foreign law (if it is not wholly effective by virtue of the property transfer instrument).

(4) Until the transfer is effective as a matter of foreign law, the transferor must—

- (a) hold the property or right for the benefit of the transferee (together with any additional property or right accruing by virtue of the original property or right), or
- (b) discharge the liability on behalf of the transferee.

(5) The transferee must meet any expenses of the transferor in complying with this section.

(6) An obligation imposed by this section is enforceable as if created by contract between the transferor and transferee.

(7) The transferor must comply with any directions of the BMA or the Minister as the case may be, in respect of the obligations under subsections (3) and (4); and—

- (a) a direction may disapply subsections (3) and (4) to a specified extent, and
- (b) obligations imposed by direction are enforceable as if created by contract between the transferor and the BMA or the Crown, as the case may be.

(8) In this section “foreign law” means the law of a country or territory outside Bermuda.

Commentary: *This section describes how a property transfer instrument or order may make provision for the transfer of property situated outside Bermuda and rights and liabilities governed by foreign law.*

Subsection (3) states that both the transferor and the transferee must take any necessary steps to ensure that the transfer is effective as a matter of foreign law.

Subsection (4) makes provision for the period before a transfer may be fully effective as a matter of foreign law. For this period, the transferor must act on behalf of the transferee by holding any property or right for its benefit and discharging any liability on its behalf. Expenses incurred by the transferor in relation to these acts must be met by the transferee.

Subsections (6) and (7) relate to obligations imposed by the operation of this section. Such obligations are enforceable as contracts and the BMA may give directions in relation to those obligations, with which the transferor must comply.

Incidental provision

40. (1) A property transfer instrument or order may include incidental, consequential or transitional provision.

(2) In relying on subsection (1) an instrument or order—

- (a) may make provision generally or only for specified purposes, cases or circumstances, and
- (b) may make different provision for different purposes, cases or circumstances.

Commentary: *This section provides for a property transfer instrument or order to include incidental, consequential or transitional provision. Such provision may be made generally or for a specified purpose or purposes.*

Procedure

41. (1) As soon as is reasonably practicable after making a property transfer instrument or order in respect of a bank the BMA or the Minister, as the case may be, shall send a copy to—

- (a) the bank,
- (b) the Minister or the BMA, as the case may be, and
- (c) any other person specified in the code of practice under section 5.

(2) As soon as is reasonably practicable after making a property transfer instrument or order the BMA or the Minister as the case may be, shall publish a copy—

- (a) on their respective internet websites,

and
(b) in the Gazette.

(3) Where the Minister receives a copy of a property transfer instrument from the BMA or makes an order under subsection (1), he shall lay a copy of such instrument or order before the Legislature.

Commentary: *This section requires the BMA or the Minister to send a copy of a property transfer instrument or order, as the case may be, as soon as reasonably practicable, to the specified bank, the Minister and any other persons specified in the code of practice. The BMA or the Minister must also publish the property transfer instrument or order (as the case maybe) on its own website in line with the provisions of subsection (2). The Minister is also required to lay a copy of the transfer instrument or order before the legislature.*

Supplemental instruments and orders

42. (1) This section applies where the BMA has made a property transfer instrument in accordance with section 11(2) or where the Minister has made a property transfer order in accordance with section 12(2) ("the original instrument or order").

(2) The BMA or Minister (as the case may be) may make one or more supplemental property transfer instruments or order.

(3) A supplemental property transfer instrument or order is a property transfer instrument or order which—

(a) provides for property, rights or liabilities to be transferred from the transferor under the original instrument or order (whether accruing

or arising before or after the original instrument or order);

- (b) makes other provision of a kind that an original property transfer instrument or order may make under section 33(1)(b) (whether in connection with a transfer under the original instrument or order, or in connection with a transfer under that or another supplemental instrument or order).

(4) Sections 7 and 8 do not apply to a supplemental property transfer instrument or order (but it is to be treated in the same way as any other property transfer instrument or order for all other purposes, including for the purposes of the application of a power under this Part).

(5) Before making a supplemental property transfer instrument the BMA must consult the Minister.

(6) Before making a supplemental property transfer order the Minister must consult with the BMA.

(7) The possibility of making a supplemental property transfer instrument or order, in reliance on subsection (2) is without prejudice to the possibility of making of a new instrument in accordance with section 11(2) or order in accordance with section 12(2) (and not in reliance on subsection (2) above).

Commentary: *Where the BMA has made a property transfer instrument or the Minister has made a property transfer order it may make additional supplemental property transfer instruments. These may provide for two things: first, for property, rights and liabilities to be transferred from the original*

transferor; and, second, for anything that a property transfer instrument or order may otherwise provide for.

Subsection (4) provides that the general and specific conditions (sections 7 and 8, respectively) do not apply to supplemental transfers.

Subsection (5) provides that the BMA must consult the Minister before making the instrument, and subsection (6) provides that the Minister must consult with the BMA before making the order.

Onward transfer

43. (1) This section applies where the Minister has made a property transfer order in respect of a bridge bank in accordance with section 12(2) ("the original order").

(2) The Minister may make one or more onward property transfer orders.

(3) An onward property transfer order is a property transfer order which—

(a) provides for property, rights or liabilities of the bridge bank to be transferred (whether accruing or arising before or after the original order);

(b) makes other provision for the purposes of, or in connection with, the transfer of property, rights or liabilities of the bridge bank (whether the transfer has been or is to be effected by that order, by another property transfer order or otherwise).

(4) An onward property transfer order may relate to property, rights or liabilities of the bridge

bank whether or not they were transferred under the original order.

(5) An onward property transfer order may not transfer property, rights or liabilities to the transferor under the original order.

(6) Sections 7, 8 and 53 do not apply to an onward property transfer order (but for other purposes it is to be treated in the same way as any other property transfer order, including for the purposes of the application of a power under this Part).

(7) Before making an onward property transfer order the Minister must consult the BMA.

(8) Section 42 applies where the Minister has made an onward property transfer order.

Commentary: *Where the Minister has made a property transfer order to effect the bridge bank stabilisation option, he may make onward property transfer orders. These may provide for two things: first, for the property, rights or liabilities of the bridge bank to be transferred; and, second, for anything that a property transfer order may otherwise provide for. Subsection (5) provides that the Minister may not transfer property, rights or liabilities to the transferor under the original order.*

Under subsection (6), the general and specific conditions (sections 7 and 8) do not apply to onward transfers. Nor does section 53. Subsection (7) requires the Minister to consult the BMA before making the instrument.

Subsection (8) states that the Minister may make a supplemental property transfer order (as provided for in section 42) following the making of an onward

property transfer order.

Reverse property transfer

44. (1) This section applies where the Minister has made a property transfer order in accordance with section 12(2) ("the original order") providing for the transfer of property, rights or liabilities to a bridge bank.

(2) The Minister may make one or more reverse property transfer orders in respect of property, rights or liabilities of the bridge bank.

(3) If the Minister makes an onward property transfer order under section 43 the Minister may make one or more reverse property transfer orders in respect of property, rights or liabilities of a transferee of a company wholly owned by the Crown under the onward property transfer order.

(4) A reverse property transfer order is a property transfer order which—

- (a) provides for transfer to the transferor under the original order (where subsection (2) applies);
- (b) provides for transfer to the bridge bank (where subsection (3) applies);
- (c) makes other provision for the purposes of, or in connection with, the transfer of property, rights or liabilities that are, could be or could have been transferred under paragraph (a) or (b) (whether the transfer has been or is to be effected by that order or otherwise).

(5) Sections 7, 8 and 53 do not apply to a reverse property transfer order (but it is to be treated in the same way as any other property transfer order for all other purposes including for the

purposes of the application of a power under this Part).

(6) Before making a reverse property transfer order the Minister must consult the BMA.

(7) Section 42 applies where the Minister has made a reverse property transfer order.

Commentary: *Where the Minister has made a property transfer order to effect the bridge bank stabilisation option, it may make reverse property transfer order.*

A reverse property transfer order may transfer property, rights or liabilities of a bridge bank back to the original transferor (i.e. the failing bank). Alternatively, where there has been an onward transfer to a particular type of onward transferee, the order may transfer property back from that onward transferee to the bridge bank. The reverse property transfer powers could only be used in this case, however, where the onward transferee was a company wholly owned by the Crown. This limitation is to prevent the reverse property transfer powers from being exercisable following an onward transfer to a private sector party who wished to acquire the business of a bridge bank.

The general and specific conditions (sections 7 and 8, respectively) do not apply to reverse transfers. Subsection (6) provides that the Minister must consult the BMA before making the order.

Subsection (7) states that the Minister may make a supplemental property transfer order (as described in section 42) following the making of a reverse property transfer order.

Temporary public ownership: property transfer

45. (1) This section applies where the Minister has made a share transfer order, in respect of securities issued by a bank, in accordance with section 13(2) ("the original order").

(2) The Minister may make one or more property transfer orders.

(3) A property transfer order is an order which—

- (a) provides for property, rights or liabilities of the bank to be transferred (whether accruing or arising before or after the original order);
- (b) makes other provision for the purposes of, or in connection with, the transfer of property, rights or liabilities of the bank (whether the transfer has been or is to be effected by the order or otherwise).

(4) Sections 7, and 8 do not apply to a property transfer order.

(5) A property transfer order is to be treated—

- (a) in the same way as a share transfer order for the procedural purposes of section 25, but
- (b) as a property transfer instrument for all other purposes (including for the purposes of the application of powers under this Part).

(6) Section 40 applies where the Minister has made a property transfer order.

(7) Before making a property transfer order the Minister must consult the BMA.

Commentary: *Where the Minister has made a share transfer order to bring a bank into temporary public ownership, it may make property transfer orders. These may provide for two things: first, for the transfer of the property, rights or liabilities of the bank in temporary public ownership; and, second, for anything that a property transfer instrument may otherwise provide for. Subsection (4) provides that the general and specific conditions (sections 7 and 8) do not apply to property transfers from temporary public ownership. The BMA must consult the Minister before making the order.*

Subsection (5) provides that a property transfer order should be treated, in procedural terms, as a share transfer order (see section 16). In all other respects, however, it should be treated as a property transfer instrument (see section 33).

Subsection (7) states that the Minister may make a supplemental property transfer order (as described in section 40) following the making of temporary public ownership property transfer order.

Temporary public ownership: reverse property transfer

46. (1) This section applies where the Minister has made a property transfer order in accordance with section 45(2) ("the original order") providing for the transfer of property, rights or liabilities to a company wholly owned by the Crown.

(2) The Minister may make one or more reverse property transfer orders in respect of property, rights or liabilities of the transferee under the original order.

(3) A reverse property transfer order is a

property transfer order which—

- (a) provides for transfer to the transferor under the original order;
- (b) makes other provision for the purposes of, or in connection with, the transfer of property, rights or liabilities which are, could be or could have been transferred.

(4) Sections 7 and 8 do not apply to a reverse property transfer order.

(5) A reverse property transfer order is to be treated—

- (a) in the same way as a share transfer order for the procedural purposes of section 25, but
- (b) as a property transfer instrument for all other purposes (including for the purposes of the application of a power under this Part).

(6) Before making a reverse property transfer order the Minister must consult the BMA.

(7) Section 42 applies where the Minister has made a reverse property transfer order.

Commentary: *Where the Minister has made a property transfer to a company wholly owned by the Crown, the Minister may make reverse property transfer orders.*

A reverse property transfer order provides for the transfer of property back from such an onward transferee.

The general and specific conditions (sections 7 and 8, respectively) do not apply to onward transfers and subsection (6) provides that the Minister must

consult the BMA before making the order.

Restriction of partial transfers

47. In this Part “partial property transfer” means a property transfer instrument which provides for the transfer of some, but not all, of the property, rights and liabilities of a bank.

Commentary: *This power enables restrictions to be placed on the making of partial transfers through the property transfer powers. A partial transfer is the transfer of some, but not all, of a bank’s property, rights or liabilities .*

Power to protect certain interests

48. (1) In this section—

- (a) “security interests” means arrangements under which one person acquires, by way of security, an actual or contingent interest in the property of another,
- (b) “title transfer collateral arrangements” are arrangements under which Person 1 transfers assets to Person 2 on terms providing for Person 2 to transfer assets if specified obligations are discharged,
- (c) “set-off” arrangements are arrangements under which two or more debts, claims or obligations can be set off against each other,
- (d) “netting arrangements” are arrangements under which a number of claims or obligations can be converted into a net claim or obligation and include, in particular,

“close-out” netting arrangements, under which actual or theoretical debts are calculated during the course of a contract for the purpose of enabling them to be set off against each other or to be converted into a net debt, and

- (e) “protected arrangements” means security interests, title transfer collateral arrangements, set-off arrangements and netting arrangements.

(2) In this section “arrangements” includes arrangements which—

- (a) are formed wholly or partly by one or more contracts or trusts;
- (b) arise under or are wholly or partly governed by the law of a country or territory outside Bermuda;
- (c) wholly or partly arise automatically as a matter of law;
- (d) involve any number of parties;
- (e) operate partly by reference to other arrangements between other parties.

Commentary: *This power enables certain private law rights to be protected when the property transfer powers are exercised to effect a partial transfer. A partial transfer is the transfer of some, but not all, of a bank’s property, rights or liabilities (as defined in subsection (1) of Section 46).*

Subsection (1) broadly defines the certain interests (“protected interests”) for which the power may provide protection. This provision reflects the

extremely broad range of relevant interests which exist in this field. The interests which the exercise of the power is intended to cover may include, for example, set-off and netting arrangements.

The power is exercisable by the Minister making an order by statutory instrument subject to the affirmative resolution procedure (subsection (2)).

Creation of liabilities

49. (1) The provision that may be made by a property transfer instrument or order in reliance on section 33(1)(b), 42(3)(b), 43(3)(b), 44(4)(c), 45(3)(b), or 46(3)(b) includes provision for the creation of liabilities.

(2) The provision may be framed by reference to an agreement which has been or is to be entered into, or anything else which has been or is to be done, by any person (including a person other than the person making the instrument or order).

Commentary: *Where property transfer instruments or property transfer orders have been made, there in certain cases may include provisions for the creation of liabilities. Subsection (2) provides for such power to be exercised by reference to an agreement which has been entered into or is to be entered into or otherwise by reference to anything done or to be done.*

Restriction of Partial Property Transfers

Interpretation:general

50 (1) In sections 50 to 62 ('this group of sections')-

"banking institution" means—

-
- (a) a bank (within the meaning of section 322);
 - (b) an undertaking which was a bank immediately before the making of a share transfer order under section 13(2);
 - (c) a bridge bank; or
 - (d) a holding company;

"continuity powers" means the powers conferred by section 77(2) (including that subsection as applied by sections 78(2) and 92(2)(f) and section 80(2) (including that subsection as applied by section 81(2));

"deposit" has the meaning given by section 3 of the Banks and Deposit Companies Act 1999;

"eligible claimant" means any person who at any material time is an insured depositor.

"excluded rights" means rights—

- (a) which relate to a retail deposit made with a banking institution;
- (b) which relate to a retail liability owed to a banking institution;
- (c) which relate to a contract which was entered into by or on behalf of a banking institution otherwise than in the course of carrying on of an activity which relates solely to relevant financial instruments;
- (d) which relate to a claim for damages, an award of damages or a claim under an indemnity which arose in connection with the carrying on by a banking institution of an activity which relates solely to relevant financial instruments;
- (e) which relate to subordinated debt; or
- (f) which relate to transferable securities (other than transferable securities referred to or described in a set-off arrangement, netting arrangement or title transfer

financial collateral financial arrangement
referred to in section 52(1);
and “excluded liabilities” shall be interpreted
accordingly;
“financial instrument” means—
 (a) any option, swap, forward contract for
 differences or other derivative contract; and
 (b) any combination of any of the foregoing;
“relevant authority” means—
 (a) in relation to Case 1 or 2 (as specified in
 section 51(2) and (3), the BMA;
 (b) in relation to Case 3 (as specified in section
 51), the Minister;
“relevant financial instrument” means—
 (a) a financial instrument;
 (b) a deposit;
 (c) a loan; or
 (d) any contract for the sale, purchase or
 delivery of—
 (i) the currency of Bermuda or of any
 other country, territory or monetary
 union;
 (ii) palladium, platinum, gold, silver, or any
 other precious metal; or
 (iii) any other commodity;
“retail deposit” means a deposit in relation to which
the condition in paragraph (a) or (b) is satisfied—
 (a) the depositor is an eligible claimant; or
 (b) the deposit is held in an account of a
 particular class or brand provided by a
 particular banking institution which either—
 (i) is mainly used by eligible claimants; or
 (ii) has been mainly marketed by the
 banking institution to eligible
 claimants;

“retail liability” means a liability which is owed to a banking institution by an eligible claimant;

“title transfer financial collateral arrangements” means an agreement or arrangement, including a repurchase agreement, evidenced in writing, where—

- (a) the purpose of the agreement or arrangement is to secure or otherwise cover the relevant financial obligations owed to the collateral-taker;
- (b) the collateral-provider transfers legal and beneficial ownership in financial collateral to a collateral-taker on terms that when the relevant financial obligations are discharged the collateral-taker must transfer legal and beneficial ownership of equivalent financial collateral to the collateral-provider; and
- (c) the collateral-provider and the collateral-taker are both non-natural persons;

(2) References in this group of sections to netting arrangements include—

- (a) arrangements which provide for netting (the conversion into one net claim or obligation of different claims or obligations between participants resulting from the issue and receipt of transfer orders between them, whether on a bilateral or multilateral basis and whether through the interposition of a clearing house, central counterparty or settlement agent or otherwise); and
- (b) arrangements which include a close-out netting provision;
“close-out netting provision” means a term of a financial collateral arrangement, or of an arrangement of which a financial

collateral arrangement forms part, or any legislative provision under which on the occurrence of an enforcement event, whether through the operation of netting or set-off or otherwise—

- (i) the obligations of the parties are accelerated to become immediately due and expressed as an obligation to pay an amount representing the original obligation's estimated current value or replacement cost, or are terminated and replaced by an obligation to pay such an amount; or
- (ii) an account is taken of what is due from each party to the other in respect of such obligations and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party;

Commentary

This section makes provision defining terms and expressions used in this group of section.

Application of this group of sections

51 (1) This group of sections applies in the following cases.

(2) Case 1 is where a partial property transfer has been made by the BMA in accordance with section 11(2) or by the Minister in accordance with 12(2).

(3) Case 2 is where—

- (a) the BMA has made a property transfer instrument in accordance with section 11(2) or the Minister has made a property transfer order in accordance with section 12(2) (whether or not that

-
- instrument or order is a partial property transfer); and
- (b) a property transfer instrument or order under section 42, 43 or 44 has been made by the BMA or the Minister, as the case may be, which is a partial property transfer.
- (4) Case 3 is where—
- (a) the Minister has made a share transfer order in accordance with section 13(2) (including that section as applied by section 79); and
 - (b) a property transfer order has been made by the Minister under section 45 or 46 (including those sections as applied and modified by section 80) which by virtue of section 45(5)(b) or 46(5)(b) is to be treated as a partial property transfer.

(5) For the purposes of this group of sections, a property transfer instrument or order which purports to transfer all of the property, rights and liabilities of a banking institution shall be treated as having done so effectively (and so shall not be treated as a partial property transfer), notwithstanding the possibility that any of the property, rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or order or by virtue of steps taken under section 39.

Commentary:

This section sets out the cases in which the group of sections applies.

This group of sections restricts the making of partial property transfer instruments and orders ("partial

property transfers") under the Act. The group of sections also makes provision to protect certain interests including set-off arrangements and netting arrangements.

Set-off and netting

52

(1) A partial property transfer to which this group of sections applies may not provide for the transfer of some, but not all, of the protected rights and liabilities between a particular person ("P") and a banking institution under a particular set-off arrangement, netting arrangement within the meaning of section 48 or title transfer financial collateral arrangement.

(2) A partial property transfer to which this group of sections applies may not include provision under the continuity powers which terminates or modifies the protected rights or liabilities between P and a banking institution.

(3) For the purposes of subsections (1) and (2), rights and liabilities between P and a banking institution are protected if they are rights and liabilities which either P or the banking institution is entitled to set-off or net under a set-off arrangement, netting arrangement or title transfer financial collateral arrangement which P has entered into with the banking institution so long as they are not excluded rights or excluded liabilities.

(4) For the purposes of subsection (1), a property transfer instrument or order which purports to transfer all of the protected rights and liabilities between P and a banking institution under a particular set-off arrangement, netting arrangement or title transfer financial collateral

arrangement shall be treated as having done so effectively (and so not give rise to a contravention of subsection (1), notwithstanding the possibility that any of the protected rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or order or by virtue of steps taken under section 39.

(5) For the purposes of subsection (3), it is immaterial whether—

- (a) the arrangement which permits P or the banking institution to set-off or net rights and liabilities also permits P or the banking institution to set-off or net rights and liabilities with another person; or
- (b) the right of P or the banking institution to set-off or net is exercisable only on the occurrence of a particular event.

(6) In this section, “excluded rights” and “excluded liabilities” have the meanings given in section 50 except that the reference to subordinated debt shall be treated as if it were a reference to subordinated debt issued by P or by the banking institution.

Commentary:

Section 52 makes provision for the protection of rights and liabilities under a particular set-off arrangement, netting arrangement or title transfer financial collateral arrangement. Certain rights and liabilities are excluded from these protections including rights and liabilities which relate to a retail deposit or retail liability (as defined in section 50). These protections limit what property may be (or

may not be) transferred under a partial property transfer and what provision may be made under the powers conferred by sections 77 to 80 ("the continuity powers").

Secured liabilities

53 (1) Subject to subsection (5), subsections (2), (3) and (4) apply where an arrangement has been entered into under which one party owes a liability to the other and that liability is secured against property or rights; and it is immaterial that—

- (a) the liability is secured against all or substantially all of the property or rights of a person;
- (b) the liability is secured against specified property or rights; or
- (c) the property or rights against which the liability is secured are not owned by the person who owes the liability.

(2) A partial property transfer to which this group of sections applies may not transfer the property or rights against which the liability is secured unless that liability and the benefit of the security are also transferred.

(3) A partial property transfer to which this group of sections applies may not transfer the benefit of the security unless the liability which is secured is also transferred.

(4) A partial property transfer to which this group of sections applies may not transfer the liability unless the benefit of the security is also transferred.

(5) A partial property transfer to which this group of sections applies may not include provision under the continuity powers which terminate or modify the arrangement if the effect of that provision

is to provide that the liability is no longer secured against the property or right.

(6) Subsections (2), (3), (4) and (5) do not apply if the arrangement has been entered into by a banking institution in contravention of a [rule] prohibiting such arrangements made by the BMA under the Banks and Deposit Companies Act 1999 or otherwise than in accordance with the licence of the banking institution.

(7) For the purposes of subsections (2), (3) and (4), a property transfer instrument or order which purports to transfer any property, rights or liabilities shall be treated as having done so effectively (and so not give rise to a contravention of subsections (2) or (3), notwithstanding the possibility that any of those property, rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or order or by virtue of steps taken under section 39.

Commentary:

Section 53 makes provision for protections for secured liabilities. These protections limit what property may be (or may not be) transferred under a partial property transfer and what provision may be made under the continuity powers. In particular, section 53 provides that liabilities (whether owed by or to the banking institution) and the benefit of security relating to those liabilities may not be separated by any transfer of the banking institution's property, rights and liabilities.

Capital market arrangements

54 (1) Subject to subsection (3), a partial property transfer to which this group of sections

applies may not provide for the transfer of some, but not all, of the property, rights and liabilities which are or form part of a capital market arrangement to which the banking institution is a party.

(2) Subject to subsection (3), a partial property transfer to which this group of sections applies may not include provision under the continuity powers which terminates or modifies property, rights or liabilities which are or form part of a capital market arrangement to which the banking institution is a party.

(3) Subsections (1) and (2) do not apply where the only property, rights and liabilities transferred or not transferred, or terminated or modified (as the case may be) are property, rights and liabilities which relate to deposits.

(4) For the purposes of subsection (1), a property transfer instrument or order which purports to transfer all of the property, rights and liabilities which are or form part of a capital market arrangement to which the banking institution is a party shall be treated as having done so effectively (and so not give rise to a contravention of subsection (1)), notwithstanding the possibility that any of those property, rights or liabilities are foreign property and may not have been effectively transferred by the property transfer instrument or order or by virtue of steps taken under section 39.

(5) For the purposes of this section, an arrangement is a capital market arrangement if it –

- (a) involves a grant of security to a person holding it as trustee for a person who holds a capital market investment issued by a party to the arrangement, or
- (b) it involves a grant of security to—
 - (i) a party to the arrangement who issues a

-
- capital market investment, or
 - (ii) a person who holds the security as trustee for a party to the arrangement in connection with the issue of a capital market investment, or
 - (c) it involves a grant of security to a person who holds the security as trustee for a party to the arrangement who agrees to provide finance to another party, or
 - (d) at least one party guarantees the performance of obligations of another party, or
 - (e) at least one party provides security in respect of the performance of obligations of another party, or
 - (f) an arrangement whereby the arrangement involves an investment in options, futures and contracts for differences.

Commentary:

Section 54 provides for protections for capital market arrangements. These protections limit what property may be (or may not be) transferred under a partial property transfer and what provision may be made under the continuity powers.

Financial markets

55 (1) A property transfer order to which this group of sections applies may not transfer property, rights or liabilities or include provision under the continuity powers to the extent that to do so would have the effect of modifying, modifying the operation of or rendering unenforceable—

- (a) a market contract;
- (b) the default rules of a recognized investment exchange or recognized clearing house; or

-
- (c) the rules of a recognized investment exchange or recognized clearing house as to the settlement of market contracts not dealt with under its default rules.

Commentary:

Section 55 provides for protections for financial markets including the default rules of recognized investment exchanges and recognised clearing houses and market contracts. These protections limit what property may be (or may not be) transferred under a partial property transfer and what provision may be made under the continuity powers.

Trusts

56 A partial property transfer to which this group of sections applies which makes provision under section 34(7)(a) may remove or alter the terms of the trust (howsoever arising) only to the extent necessary or expedient for the purpose of transferring from the banking institution to the transferee-

- (a) the legal or beneficial interest of the banking institution in the property held on trust;
- (b) any power, rights or obligations of the banking institution in respect of the property held on trust.

Commentary:

This section makes provision limiting the effect of a partial property transfer under section 34(7)(a) to trusts. It provides that a partial transfer is limited to the extent necessary or expedient for the purpose of transferring to the transferee the legal or beneficial interest of the banking institution in the trust property; or to any power, rights of obligation of the banking institution in respect of the trust property.

Additional restrictions on reverse transfers

57 (1) This section applies to a partial property transfer to which this group of sections applies which is made by the Minister under section 44 or 46;

(2) Subject to subsection (3), a partial property transfer to which this section applies may not provide for the transfer of—

- (a) any property, rights or liabilities which were not transferred under the original order;
- (b) any liability which was not, at the time immediately before the original order was made, a liability owed by the banking institution; or
- (c) rights or liabilities under a relevant financial instrument.

(3) Subsection (2) does not apply to—

- (a) a transfer of property, rights or liabilities which have accrued, become or ceased to become payable, changed or lapsed as a result of the application of a default event provision which applies by virtue of the original order;
- (b) a transfer of property, rights or liabilities to which consent has been given by the transferee, the transferor and any other person whose consent for the transfer would be required were the transfer not being effected by a property transfer order;
- (c) a transfer of a claim for damages or an award of damages against the banking institution which was in existence immediately before the original order was made;
- (d) a transfer to an undertaking which has not entered insolvency; or
- (e) a transfer under section 61(6).

(4) In this section—

- (a) “original order” has the meaning given by sections 44 and 46; and
- (b) the reference to insolvency includes a reference to (i) liquidation, (ii) bank insolvency, (iii) bank administration, (iv) a composition with creditors, and (v) a scheme of arrangement.

Commentary:

Section 57 provides for additional limits to apply to reverse property transfers under sections 44 and 46. These protections limit what property may be (or may not be) transferred under a reverse transfer.

Termination rights

58 A partial property transfer to which this group of sections applies may not make provision for subsection (6) or (7) of section 38 to apply in relation to—

- (a) a relevant financial instrument to the extent that it confers rights and liabilities which either party to the instrument is entitled to set-off or net under a set-off arrangement, netting arrangement or title transfer financial collateral arrangement except in so far as those rights and liabilities are excluded rights or excluded liabilities; or
- (b) a set-off arrangement, netting arrangement or title transfer financial collateral arrangement to the extent that it confers a right to set-off or net rights and liabilities under a relevant financial instrument except in so far as those rights and liabilities are excluded rights or excluded liabilities.

Commentary:

Section 58 provides that provision may not be made in a partial property transfer for section 38(6) or (7) (termination rights etc.) to apply to certain instruments and arrangements.

Financial markets, termination rights and continuity power

59 (1) This section applies where a partial property transfer has been made in contravention of sections 55 to 58 or any other provision of this group of sections which relates to the exercise of the continuity powers.

(2) The partial property transfer is void in so far as it is made in contravention of those provisions of this group of sections.

Commentary:

This section makes provision making void any partial property transfer made in contravention of sections 55 to 58 relating to the exercise of the continuity powers.

Set-off and netting

60 (1) This section applies where a partial property transfer has been made in contravention of—

(a) section 52; or

(b) section 53, to the extent that the contravention relates to set-off arrangements, netting arrangements or title transfer financial collateral arrangements,

unless the contravention relates to the exercise of the continuity powers (in which case section 59 applies).

(2) The partial property transfer does not affect the exercise of the right to set-off or net.

Commentary:

This section makes provision giving effect to the exercise of the right of set-off and netting, notwithstanding that a partial property transfer has been made in contravention of section 52 or 53.

Contravention of other provisions of this group of sections

61 (1) Subject to subsection (2), this section applies where any person ("P") considers that a partial property transfer has been made in contravention of any provision of this group of sections and that as a result the property, rights or liabilities of P have been affected.

(2) This section does not apply to the extent that sections 59 or 60 applies.

(3) P may give notice to the relevant authority of the alleged contravention of this group of sections.

(4) The notice under subsection (3) must—

- (a) be given within 60 days of the day on which the partial property transfer took effect;
- (b) be in writing;
- (c) specify the provision of this group of sections which is alleged to have been contravened and the manner in which that contravention has occurred;
- (d) identify the property, rights or liabilities to which the alleged contravention relates; and
- (e) contain or be accompanied by such information as the relevant authority may reasonably require.

(5) Subject to subsection (8), within 60 days of receipt of a notice under subsection (3), the relevant authority must—

- (a) if it agrees that a provision of this group of sections has been contravened in the

manner specified in the notice given under subsection (3), take the steps specified in subsection (6);

- (b) if it does not agree that a provision of this group of sections has been contravened in the manner specified in the notice given under subsection (3), take the steps specified in subsection (7).

(6) The steps are to remedy the contravention by transferring property, rights or liabilities to the transferee or the transferor under the partial property transfer (whether by means of an onward property transfer order under section 43, a reverse property transfer under section 44, a property transfer order under section 45, a reverse property transfer under section 46 or by other means).

(7) The steps are to give reasons to P as to why it considers that no provision of this group of sections has been contravened in the manner specified in the notice under subsection (3).

(8) If the relevant authority considers that the matters raised in the notice under subsection (3) are of such complexity that it is impracticable to take a decision under subsection (5) within 60 days of receipt of the notice, the relevant authority may extend the period of 60 days by no more than 60 days; in such cases it must, within 60 days of receipt of the notice under subsection (3), inform P of the extension and the duration of the extension.

(9) The property, rights or liabilities which are transferred under subsection (6) may be the same property, rights or liabilities which were, in contravention of this group of sections, transferred or not transferred (as the case may be) or, if the transfer of such property, rights or liabilities is not practicable, property, rights or liabilities which, in the

opinion of the relevant authority, are equivalent to those property, rights or liabilities.

Commentary:

This section makes provision for the procedures to be followed in relation to contraventions of provisions of the group of sections and the steps to be taken by the person concerned to remedy the contraventions.

COMPENSATION

Orders

Orders

62. (1) This Part provides three methods of protecting the financial interests of transferors and others in connection with share transfer instruments and orders and property transfer instruments and orders.

(2) A "compensation scheme order" is an order—

- a. establishing a scheme for determining whether transferors should be paid compensation, or providing for transferors to be paid compensation, and
- b. establishing a scheme for paying any compensation.

(3) A "resolution fund order" is an order establishing a scheme under which transferors become entitled to the proceeds of the disposal of things transferred—

- (a) in specified circumstances, and
- (b) to a specified extent.

(4) A "third party compensation order" is provision made in accordance with section 60 for compensation to be paid to persons other than

transferors.

Commentary: *This section describes three types of orders which may be made for the purposes of providing compensation in consequence of the exercise of the stabilisation powers.*

Subsection (2) describes a compensation scheme order. It may establish a scheme simply for paying compensation to transferors, or it may establish a scheme for determining whether transferors should be paid compensation. The identity of the transferor or transferors depends on the stabilisation power exercised. In the case of share transfer powers, the transferors will be the holders of the securities which were transferred under the order. In the case of property transfer powers, the transferor will be the bank from whom property, rights or liabilities were transferred.

Subsection (3) describes the resolution fund order, which establishes a scheme under which the transferors may become entitled to the proceeds of resolution of a bridge bank or of a bank in temporary public sector ownership.

Subsection (4) describes a third party compensation order, which establishes a scheme for paying compensation to third parties (persons who are not transferors), for example counterparties of a bank whose property rights are interfered with in a compensatable way section 1 of the Constitution as a result of the transfer.

Sale to private sector purchaser

63. (1) This section applies if the BMA makes a

share transfer instrument or a property transfer instrument in accordance with section 11(2).

(2) The Minister shall make a compensation scheme order.

(3) An order made by virtue of subsection (2) may include a third party compensation order.

(4) In the case of a partial property transfer, an order made by virtue of subsection (2) must include a third party compensation order.

Commentary: *This section requires the Minister to make a compensation scheme order, on the exercise by the BMA of the private sector purchaser stabilisation option (section 11) (a property or share transfer instrument to such a purchaser). Subsection (3) sets out that the order may include a third party compensation order.*

Transfer to temporary public ownership

64. (1) This section applies if the Minister makes a share transfer order in accordance with section 13(2).

(2) The Minister shall make either—

- a. a compensation scheme order, or
- b. a resolution fund order.

(3) A resolution fund order made by virtue of subsection (2)(b) may include—

- (a) a compensation scheme order;
- (b) a third party compensation order (which may, in particular, make provision, in respect of specified classes of creditor, for rights in addition to any rights they may have by virtue of the resolution fund order).

(4) A compensation scheme order made by virtue of subsection (2) may include a third party compensation order.

Commentary: *This section requires, on the exercise by the Minister of the temporary public ownership stabilisation option, the Minister to make either a resolution fund order (which may include a compensation scheme order) or a compensation scheme order. In either case, the order may include a third party compensation order.*

Transfer to bridge bank

65. (1) This section applies if the Minister makes a property transfer order in accordance with section 12(2).

(2) The Minister shall make a resolution fund order.

(3) An order made by virtue of subsection (2) may include—

- (a) a compensation scheme order;
- (b) a third party compensation order (which may, in particular, make provision, in respect of specified classes of creditor, for rights in addition to any rights they may have by virtue of the resolution fund order).

(4) In the case of a partial property transfer, the resolution fund order must include a third party compensation order.

Commentary: *This section requires, on the exercise by the Minister of the bridge bank stabilisation option (section 12), the Minister to make a resolution fund order (further considered under section 60 below).*

Subsection (3) provides that the order may include a compensation scheme order and a third party compensation order.

Onward and reverse transfers

66. (1) This section applies where—

- (a) the Minister makes an onward share transfer order under section 28,
- (b) the Minister makes a reverse share transfer order under section 29,
- (c) the Minister makes a bridge bank share transfer order under section 30,
- (d) the Minister makes a bridge bank reverse share transfer order under section 31,
- (e) the Minister makes an onward property transfer order under section 43,
- (f) the Minister makes a reverse property transfer order under section 44,
- (g) the Minister make a property transfer order under section 45, or
- (h) the Minister make a reverse property transfer order under section 46.

(2) The Minister may make—

- a. a compensation scheme order;
- b. a third party compensation order.

Commentary: *Where there is an onward or reverse transfer from either a bridge bank or a bank in temporary public sector ownership, This section enables the Minister to make a compensation scheme order or a third party compensation order.*

Independent valuer

67. (1) A compensation scheme order may provide

for the amount of any compensation payable to be determined by a person appointed in accordance with the order (the “independent valuer”); and subsections (2) to (5) apply to an order which includes provision for an independent valuer.

(2) An order must provide for the independent valuer to be appointed by a person appointed by the Minister (“the appointing person”).

(3) An order may either—

(a) require the Minister to make arrangements to identify a number of possible independent valuers, one of whom is to be selected by the appointing person, or

(b) require the appointing person to make arrangements to select the independent valuer, having regard to any criteria specified in the order.

(4) The independent valuer may be removed only—

(a) on the grounds of incapacity or serious misconduct, and

(b) by a person specified by the Minister in accordance with the compensation scheme order.

(5) An order must include provision for resignation and replacement of the independent valuer (and subsections (2) and (3) apply to replacement as to the first appointment).

Commentary: Subsection (1) allows a compensation scheme order and a third party compensation order to include provision for the amount of compensation to be determined by an independent valuer. Subsection (2) requires the Minister to appoint a person to appoint the

independent valuer, and in practice the Government anticipates that an appointments panel will be convened for this purpose. Two different methods for appointing the valuer are provided in subsection (3); namely, for the Minister to arrange to identify candidates or provide that another person will arrange to appoint a valuer.

Subsection (4) states that the independent valuer can be removed only on grounds of incapacity or serious misconduct. The removal must be made by a person specified by the Minister in accordance with the order. Subsection (5) states that the order must include provision for resignation and replacement of the independent valuer.

Independent valuer: supplemental

68. (1) An independent valuer may do anything necessary or desirable for the purposes of or in connection with the performance of the functions of the office.

(2) The Minister may by order confer specific functions on independent valuers; in particular, the order may—

- a. enable an independent valuer to apply to a court or tribunal for an order requiring the provision of information or the giving of oral or written evidence;
- b. enable or require independent valuers to publish, disclose or withhold information.

(3) Provision under subsection (2) may—

- (a) confer a discretion on independent valuers;
- (b) confer jurisdiction on a court or

-
- tribunal;
- (c) make provision about oaths, expenses and other procedural matters relating to the giving of evidence or the provision of information;
 - (d) create a criminal offence;
 - (e) make other provision about enforcement.
- (4) An independent valuer may appoint staff.
- (5) The Minister may by order make provision about the procedure to be followed by independent valuers.
- (6) The Minister shall by order make provision for—
- (a) reconsideration of a decision of an independent valuer, and
 - (b) appeal to Supreme Court against a decision of an independent valuer.
- (7) Independent valuers (and their staff) are neither servants nor agents of the Crown (and, in particular, are not civil servants).
- (8) An order under this section shall be made by statutory instrument, and shall be subject to negative resolution procedure.
- (9) But subsection (8) does not apply if the order is contained in a statutory instrument that contains an order to which section 63 applies.

Commentary: *Subsection (1) enables the independent valuer to do anything necessary or desirable in relation to the performance of his functions. Subsections (2) to (4) enable the Minister by order to make provision to assist the independent valuer in the discharge of his functions, for example by providing him with certain powers.*

Subsection (4) gives the independent valuer the power to appoint staff.

Subsection (6) requires the order to provide for the reconsideration of the decisions of the valuer, and for onward rights of appeal from the valuer to the Supreme Court.

Under Subsection (7) the independent valuer and his staff are not servants of the Crown.

Independent valuer: remuneration and allowances

69. (1) The Minister may by order provide for the payment by the Minister of remuneration and allowances to—

- a. independent valuers,
- b. staff of independent valuers,
- c. appointing persons,
- d. persons mentioned in section 55(4)(b), and
- e. monitors.

(2) An order—

- (a) must provide for the appointment by the Minister of a person to monitor the operation of the arrangements for remuneration and allowances for independent valuers;
- (b) may require, or enable a compensation scheme order or third party compensation order to require, the monitor's approval before specified things may be done in the course of those arrangements;
- (c) may include provision about records and accounts;

(d) may make provision about numbers of staff and the terms and conditions of their appointment (which may include provision requiring the approval of the Minister or the monitor).

(3) In subsection (1) a reference to the payment of allowances to a person includes a reference to the payment to or in respect of the person of sums by way of or in respect of pension.

(4) Independent valuers (and their staff) are not liable for damages in respect of anything done in good faith for the purposes of or in connection with the functions of the office.

(5) An order under this section shall be made by statutory instrument, and shall be subject to negative resolution procedure.

(6) But subsection (5) does not apply if the order is contained in a statutory instrument that contains an order to which section 75 applies.

Commentary: *Subsection (1) allows the order to make provision for the remuneration and allowances of the independent valuer, his staff, appointing persons or monitors. Although such payments will be made by the Minister, the order will require the Minister to appoint a person to monitor the arrangements made for the remuneration and allowances (subsection (2)). Further functions may be conferred on the monitor, such as requiring his approval to certain actions.*

Subsections (2)(c) and (d) give the Minister a power to include provision in the order about records, accounts and staff resources. This section also provides that the independent valuer and his staff

are not liable for damages for anything done in good faith when undertaking their respective roles in relation to independent valuation.

Valuation principles

70. (1) A compensation scheme order may specify principles ("valuation principles") to be applied in determining the amount of compensation.

(2) Valuation principles may, in particular, require an independent valuer—

- a. to apply, or not to apply, specified methods of valuation;
- b. to assess values or average values at specified dates or over specified periods;
- c. to take specified matters into account in a specified manner;
- d. not to take specified matters into account.

(3) In determining an amount of compensation (whether or not in accordance with valuation principles) an independent valuer must disregard actual or potential financial assistance provided by the Crown.

(4) Valuation principles may require or permit an independent valuer to make assumptions; such as, for example, that the bank—

- (a) has had a licence under the Banks and Deposit Companies Act 1999 restricted or cancelled,
- (b) is unable to continue as a going concern, or
- (c) is being wound up.

(5) There is nothing to prevent the application of the valuation principles in an order from resulting in no compensation being payable to a transferor.

Commentary: Subsection (1) allows a compensation scheme order to specify valuation principles to be applied during the determination of the amount of compensation. Subsection (2) provides that valuation principles may require an independent valuer to apply specific methods of valuation, assess values at specified dates or periods, take specified matters into account or not take specified matters into account.

Subsection (3) requires the valuer to disregard actual or potential financial assistance provided by the Crown.

Subsection (4) sets out assumptions as to the position of the bank that can or may be required to be taken into account by the valuer. These include that the bank has had a licence restricted or cancelled; that it is unable to continue as a going concern; or that it is being wound up. Subsection (5) provides that there is nothing to prevent the application of valuation principles from resulting in no compensation being payable.

Resolution fund

71. (1) A resolution fund order must include provision for determining—

- a. who will be entitled to a share of the proceeds on disposal of things transferred,
- b. the way in which the proceeds will be calculated, and
- c. the way in which shares will be calculated.

(2) Provision under subsection (1)(b) may, in

particular, provide for proceeds to be calculated net of—

- (a) amounts required for the repayment of loans from public funds or for other payments in respect of public financial assistance;
- (b) some or all of the administrative or other expenses incurred in connection with the provisions of this Part.

(3) A resolution fund order may include provision for—

- (a) an independent valuer to make a determination under the order (in which case sections 67(2) to (5), 68 and 69 shall apply);
- (b) valuation principles to be applied in making a determination (in which case section 70(2) shall apply).

(4) A resolution fund order may confer a discretionary function on—

- (a) the Minister
- (b) the BMA, or
- (c) any other specified person.

(5) A resolution fund order may include provision for the determination of disputes about the application of its provisions (whether by conferring jurisdiction on a court or tribunal or otherwise).

(6) A resolution fund order may require the Crown in managing a bridge bank to aim to maximise the proceeds available for distribution in accordance with the order; and an order which includes a requirement must—

- (a) specify its extent, and

-
- (b) include provision about how the Crown is to comply with it.

(7) A resolution fund order may require the Crown to ensure that a bank in temporary public ownership in accordance with section 13(2) is managed with the aim of maximising the proceeds available for distribution in accordance with the order; and an order which includes a requirement must—

- (a) specify its extent, and
- (b) include provision about how the Crown is to comply with it.

(8) A requirement under subsection (6) or (7) is to be complied with only in so far as is compatible with—

- (a) pursuit of the special resolution objectives, and
- (b) compliance with the code of practice under section 5.

Commentary: *A resolution fund order may provide for persons to share in the proceeds of the disposal of things transferred (for example, the full or partial sale of a bridge bank whether through business or share transfer). Subsection (1) further provides for the order to provide for how proceeds and shares are to be calculated.*

Subsection (2) allows for any payments to be net of resolution costs, which include public financial assistance or administrative expenses.

Subsection (3) provides that a third party compensation order may include provisions for

arranging to appoint an independent valuer and to apply the valuation principles. Subsection (4) provides that a resolution fund order can confer discretion on persons and subsection (5) provides that it may include provision for the determination of disputes about the application of its provisions.

Subsection (6) allows for the placing of a management duty on the Crown in managing the bridge bank and set out how the Crown is to meet this duty.

Subsection (7) enables a similar duty to be imposed on the Crown, in cases where the Minister elects to make a resolution fund order following a transfer of a bank to temporary public ownership.

Subsection (8) provides that the duties are only to be complied with to the extent that this is compatible with the pursuit of the special resolution objectives and compliance with the code of practice.

Third party compensation: discretionary provision

72. (1) A power or duty in this Part to make a third party compensation order is a power or duty to make provision establishing a scheme for paying compensation to persons other than a transferor.

- (2) A third party compensation order may—
- a. form part of a compensation scheme order or resolution fund order, or
 - b. be a separate order.

(3) A third party compensation order may include provision for—

-
- (a) an independent valuer (in which case sections 67 to 69 shall apply);
 - (b) valuation principles (in which case section 70(2) to (5) shall apply).

Commentary: *Subsection (1) provides that a third party compensation order is about setting up a scheme for determining any compensation to be paid to persons other than a transferor, for example, any creditors of the failed bank who have suffered compensatable interference with a property right. Compensation for transferors is dealt with under compensation scheme orders.*

Subsection (2) provides that a third party compensation order can be a part of a compensation scheme order or a resolution fund order or may be separate.

Subsection (3) provides that a third party compensation order may include provisions for arranging to appoint an independent valuer and to apply the valuation principles.

Third party compensation: mandatory provision

73. (1) The Minister may make regulations about third party compensation arrangements in the case of partial property transfers.

(2) In making regulations the Minister shall, in particular, have regard to the desirability of ensuring that if a residual bank enters insolvency after transfer, pre-transfer creditors do not receive less favourable treatment than they would have received had it entered insolvency immediately before transfer.

(3) In subsection (2)—

-
- (a) “residual bank” means a bank that is a transferor under a property transfer instrument or order,
 - (b) “pre-transfer creditor” means a person who—
 - (i) is a creditor of a residual bank immediately before a property transfer instrument or order takes effect, and
 - (ii) satisfies conditions specified by the regulations, and
 - (c) the reference to insolvency includes a reference to (i) liquidation, (ii) bank insolvency, (iii) bank administration, (iv) a composition with creditors, and (v) a scheme of arrangement.

(4) The regulations may—

- (a) require a compensation scheme order or a resolution fund order to include a third party compensation order;
- (b) require a third party compensation order to include provision of a specified kind or to specified effect;
- (c) make provision which is to be treated as forming part of a third party compensation order (whether (i) generally, (ii) only if applied, (iii) unless disapplied, or (iv) subject to express modification).

(5) Regulations may provide for whether compensation is to be paid, and if so what amount is to be paid, to be determined by reference to any factors or combination of factors; in particular, the regulations may provide for entitlement—

-
- (a) to depend in part upon the amounts which are or may be payable under a resolution fund order;
 - (b) to be contingent upon the occurrence or non-occurrence of specified events;
 - (c) to be determined wholly or partly by an independent valuer (within the meaning of sections 67 to 69) appointed in accordance with a compensation scheme order or resolution fund order.

(6) Regulations may make provision about payment including, in particular, provision for payments—

- (a) on account subject to terms and conditions;
- (b) by installment.

(7) Regulations—

- (a) shall be made by statutory instrument, and
- (b) shall be subject to affirmative resolution procedure.

Commentary: *This section contains a power to make regulations about third party compensation orders made in the circumstances where a partial transfer of the property of a failed bank has taken place.*

Subsection (2) sets out the principle that where a residual bank enters an insolvency procedure following such a transfer, pre-transfer creditors (defined in subsection (3)(b)) should not receive less favourable treatment than they would have received

had the bank entered an insolvency procedure prior to the partial transfer. The Minister is to have regard to the principle in making regulations under the section.

Subsection (4) provides that the regulations may require a third party compensation order to be made. The regulations may also require a third party compensation order to include certain provisions or the regulations may make provisions that are deemed to be a part of the third party compensation orders.

Subsection (5) enables the regulations to provide for whether compensation is to be paid, its amount and the factors upon which the determination of the amount is to be made. Any factors could be included, particular factors are, in part, the amount payable under a resolution fund order, contingent events and a determination by an independent valuer. The regulations are to be made by the affirmative resolution procedure.

Sources of compensation

74. (1) This section applies to—

- a. compensation scheme orders,
- b. resolution fund orders,
- c. third party compensation orders, and
- d. regulations under section 73.

(2) An order or regulations may provide for compensation or other payments to be made by—

- (a) the Minister,
- (b) the BDIC
- (c) any other specified person.

Commentary: This section confers an express power on the Minister to make provision as to who should pay compensation under a compensation scheme order, resolution fund order, third party compensation order or under regulations made under section 61. It enables provision to be made for the DIC, the Minister or another person (e.g. a purchaser) to pay compensation.

Procedure

75. (1) This section applies to—
- a. compensation scheme orders,
 - b. resolution fund orders, and
 - c. third party compensation orders.
- (2) An order—
- (a) shall be made by statutory instrument, and
 - (b) shall be subject to affirmative resolution procedure.

Commentary: The procedure for a compensation scheme order, a resolution fund order and a third party compensation order is that they must be made by statutory instrument subject to affirmative resolution procedure.

Incidental functions

General continuity obligation: property transfers

76. (1) In this section and section 77—
- a. “group company” in relation to a company that is a residual bank means any company which is, or was immediately before the transfer—
 - i. a parent company or subsidiary company of that company, or

-
- ii. a subsidiary company of any parent company of that company.
 - b. "the transferred business" means the part of the bank's business that has been transferred, and
 - c. "transferee" means a commercial purchaser or bridge bank to whom all or part of the transferred business has been transferred.

(2) The residual bank and each group company must provide such services and facilities as are required to enable a transferee to operate the transferred business, or part of it, effectively.

(3) The duty under subsection (2) (the "continuity obligation") may be enforced as if created by contract between the residual bank or group company and the transferee.

(4) The duty to provide services and facilities in pursuance of the continuity obligation is subject to a right to receive reasonable consideration.

(5) The continuity obligation is not limited to the provision of services or facilities directly to a transferee.

(6) The BMA in the case of a transfer under section 11(2) may with the consent of the Minister; and the Minister, in the case of a transfer under section 12(2), by notice to the residual bank or a group company, state that in the BMA's or the Minister's opinion (as the case may be)—

- (a) specified activities are required to be undertaken in accordance with the continuity obligation;
- (b) activities are required to be undertaken in accordance with the continuity obligation on specified terms.

(7) A notice under subsection (6) shall be determinative of the nature and extent of the continuity obligation as from the time when the notice is given.

Commentary: *This section provides for services to be provided to a transferee from the transferor and other companies within the group through means of a general obligation, following a transfer of property. Subsection (5) provides that the obligation is not limited to the provision of services and facilities directly to the transferee.*

Subsection (2) provides that the residual bank and each group company (as defined in subsection (1)) must provide such services and facilities as required to enable the transferee to operate the transferred business effectively. This duty may be enforced as a contract (subsection (3)).

Subsection (4) provides that the residual bank or group company has a right to reasonable consideration.

As provided by subsection (6), the BMA may with the consent of the Minister, and the Minister may in accordance with section 12 (2) by notice to the residual bank or group company; require specific activities to be undertaken (or provide that activities are to be undertaken on specific terms).

Special continuity obligations: property transfers

77. (1) Expressions in this section have the same meaning as in section 76.

(2) The BMA in respect of a transfer under section 11(2) and the Minister in respect of a transfer under section 12(2) may—

- a. cancel a contract or other arrangement between the residual bank and a group company (whether or not rights or obligations under it have been transferred to a transferee);
- b. modify the terms of a contract or other arrangement between the residual bank and a group company (whether or not rights or obligations under it have been transferred to a transferee);
- c. add or substitute a transferee as a party to a contract or other arrangement between the residual bank and a group company;
- d. confer and impose rights and obligations on a group company and a transferee, which shall have effect as if created by contract between them;
- e. confer and impose rights and obligations on the residual bank and a transferee which shall have effect as if created by contract between them.

(3) In modifying or setting terms under subsection (2) the BMA or the Minister, as the case may be, shall aim, so far as is reasonably practicable, to preserve or include—

- (a) provision for reasonable consideration, and
- (b) any other provision that would be expected in arrangements concluded between parties dealing at arm's

length.

(4) The power under subsection (2)—

- (a) may be exercised by the BMA in relation to a transfer under section 11(2) and by the Minister in relation to a transfer under section 12(2); if the Minister or the BMA as the case may be thinks it necessary to ensure the provision of such services and facilities as are required to enable the transferee to operate the transferred business, or part of it, effectively,
- (b) may be exercised only with the consent of the Minister by the BMA in the case of a property transfer instrument or the Minister in the case of a property transfer order, and
- (c) must be exercised by way of provision in a property transfer instrument or supplemental instrument or order as the case may be.

Commentary: This section provides for the BMA , through a property transfer instrument or the Minister through a property transfer order, to create or vary rights and obligations between a transferee, a residual bank and group companies. It applies following the exercise of property transfer powers.

Subsection (2) describes the particular provision which the BMA or the Minister as the case may be can make in a property transfer instrument or order in this connection.

Subsection (3) provides that the BMA or the Minister shall aim, so far as is reasonably practicable, to

preserve or include provision for reasonable consideration and terms.

Subsection (4) provides that the powers under subsection (2) may be exercised only in so far as the BMA or as the case may be, the Minister thinks it necessary to ensure the provision of such services and facilities as are required to operate the transferred business effectively. The power may be exercised by the BMA only with the consent of the Minister in the case of a property transfer instrument or by the Minister in the case of a property transfer order.

Continuity obligations: onward property transfers

78. (1) In this section—

(a) “onward transfer” means a transfer of property, rights or liabilities (whether or not under a power in this Part) from—

- i. a person who is a transferee under a property transfer order under section 12(2) (an “original transferee”), or
- ii. a bank, securities issued by which were earlier transferred by a share transfer order under section 13(2), and

(b) the person to whom the onward transfer is made is referred to as an “onward transferee”.

(2) The continuity authority may—

- (a) provide for an obligation under section 76 to apply in respect of an onward transferee;

-
- (b) extend section 77 so as to permit action to be taken under section 77(2) for the purpose of enabling an onward transferee to operate transferred business, or part of it, effectively.
- (3) "The continuity authority" means the Minister.
- (4) Subsection (2) may be relied on to impose obligations on—
- (a) an original transferee (where the original transfer was a property transfer),
 - (b) a residual bank (where the original transfer was a property transfer),
 - (c) the bank (where the original transfer was a share transfer),
 - (d) anything which is or was a group company of anything within paragraphs (a) to (c), or
 - (e) any combination.
- (5) Subsection (2) may be used to impose obligations—
- (a) in addition to obligations under or by virtue of section 76 or 77, or
 - (b) replacing obligations under or by virtue of either of those sections to a specified extent.
- (6) A power under subsection (2) is exercisable by giving a notice to each person—
- (a) on whom a continuity obligation is to be imposed under the power, or
 - (b) who is expected to benefit from a continuity obligation under the power.
- (7) Sections 76(3) to (7) and 77(3) and (4) apply to an obligation as applied under subsection (2)—

-
- (a) construing “transferred business” as the business transferred by means of the onward transfer, and
 - (b) with any other necessary modification.

Commentary: *This section provides for the Minister to extend the general continuity obligation of section 76 or special continuity obligations of section 65 in the circumstances of an onward transfer of property, rights or liabilities (so, for example, continuity obligations could be owed to the onward transferee).*

Subsection (1) defines the terms “onward transfer” and “onward transferee”. Subsection (4) provides that onward obligations may be imposed on an original transferee, a residual bank, a bank transferred by share transfer or anything which is or was a group undertaking of the foregoing. Subsection (5) provides that onward obligations may be in addition to, or replace, initial obligations.

The power under this section is exercisable by giving a notice both to each person on whom a continuity obligation is to be imposed, and the person who is expected to benefit from it. [The Minister may exercise the power only with the consent of the BMA.]

General continuity obligation: share transfers

79. (1) In this section and section 80—

- (a) “transferred bank” means a bank all or part of the ownership of which has been transferred in accordance with section 11(2)(a) or 13(2),
- (b) “former group company” means any

undertaking which was a group undertaking in relation to the transferred bank immediately before the transfer (whether or not it is also a group company in relation to the transferred bank immediately after the transfer),

- (c) “group company” has the meaning given in section 76,
- (d) “the continuity authority” means—
 - i. the BMA, where ownership was transferred in accordance with section 11(2)(a), and
 - ii. the Minister, where ownership was transferred in accordance with section 13(2).

(2) Each former group company must provide such services and facilities as are required to enable the transferred bank to operate effectively.

(3) The duty under subsection (2) (the “continuity obligation”) may be enforced as if created by contract between the transferred bank and the former group company.

(4) The duty to provide services and facilities in pursuance of the continuity obligation is subject to a right to receive reasonable consideration.

(5) The continuity obligation is not limited to the provision of services or facilities directly to the transferred bank.

(6) The continuity authority may by notice to a former group company state that in the authority’s opinion—

- (a) specified activities are required to be undertaken in accordance with the continuity obligation;
- (b) activities are required be undertaken

in accordance with the continuity obligation on specified terms.

(7) A notice under subsection (6) shall be determinative of the nature and extent of the continuity obligation as from the time when the notice is given.

(8) The BMA may act under or by virtue of subsection (6) only with the consent of the Minister.

Commentary: *This section makes provision for services to be provided in respect of a bank transferred by share transfer from former group companies through means of a general obligation.*

Subsection (2) provides that each former group company (as defined in subsection (1)) must provide such services and facilities as required to enable the transferred bank to operate effectively. This duty may be enforced as a contract (subsection (3)).

Subsection (4) provides that the former group company has a right to reasonable consideration.

Subsection (5) provides that the obligation is not limited to the provision of services and facilities directly to the transferee.

As provided by subsection (6), the Minister or the BMA (with the consent of the Minister), may by notice to the former group company (as described in subsection (7)), state that specific activities on specific terms should be undertaken.

Special continuity obligations: share transfers

80. (1) Expressions in this section have the same meaning as in section 79.

(2) The continuity authority may—

- a. cancel a contract or other arrangement between the transferred bank and a former group company;
- b. modify the terms of a contract or other arrangement between the transferred bank and a former group company;
- c. confer and impose rights and obligations on a former group company and the transferred bank, which shall have effect as if created by contract between them.

(3) In modifying or setting terms under subsection (2) the continuity authority shall aim, so far as is reasonably practicable, to preserve or include—

- (a) provision for reasonable consideration, and
- (b) any other provision that would be expected in arrangements concluded between parties dealing at arm's length.

(4) The power under subsection (2)—

- (a) may be exercised only in so far as the continuity authority thinks it necessary to ensure the provision of such services and facilities as are required to enable the transferred bank to operate effectively,
- (b) may be exercised by the BMA only with the consent of the Minister, and
- (c) must be exercised by way of provision in a share transfer instrument or order (or supplemental instrument or order).

Commentary: *This section provides for the relevant continuity authority, through share transfer instrument or order, to create or vary rights and obligations between a transferred bank and former group companies. It applies following the exercise of share transfer powers.*

Subsection (2) provides for how the Minister or the BMA (with the consent of the Minister) may create, modify or cancel contracts between the transferee, and the group company (as defined in section 77).

Subsection (3) provides that the continuity authority shall aim, so far as is reasonably practicable, to preserve or include provision for reasonable consideration and terms.

Subsection (4) provides that the powers under subsection (2) may be exercised only in so far as the BMA or Minister thinks it necessary to ensure the provision of such services and facilities as are required to enable the transferred bank to operate effectively.

Continuity obligations: onward share transfers

81. (1) In this section “onward transfer” means a transfer (whether or not under a power in this Part) of securities issued by a bank where—

- a. securities issued by the bank were earlier transferred by share transfer order under section 13(2), or
- b. the bank was the transferee under a property transfer order under section 12(2).

(2) The continuity authority may—

-
- (a) provide for an obligation under section 79 to apply in respect of the bank after the onward transfer;
 - (b) extend section 80 so as to permit action to be taken under section 80(2) to enable the bank to operate effectively after the onward transfer.
- (3) In this section “continuity authority” means the Minister.
- (4) Subsection (2) may be relied on to impose obligations on—
- (a) the bank,
 - (b) anything which is or was a group company (within the meaning of section 79) of the bank,
 - (c) anything which is or was a group company of the residual bank (in a case to which subsection (1)(b) applies), or
 - (d) any combination.
- (5) Subsection (2) may be used to impose obligations—
- (a) in addition to obligations under or by virtue of section 79 or 80, or
 - (b) replacing obligations under or by virtue of either of those sections to a specified extent.
- (6) A power under subsection (2) is exercisable by giving a notice to each person—
- (a) on whom a continuity obligation is to be imposed under the power, or
 - (b) who is expected to benefit from a continuity obligation under the power.
- (7) Sections 79(3) to (7) and 80(3) and (4) apply to an obligation as applied under subsection (2) with any necessary modification.

Commentary: *This section provides for the Minister to extend the general continuity obligation of section 79 or special continuity obligations of section 80 in the circumstances of an onward transfer of securities (so, for example, continuity obligations could be owed to the transferred bank following the onward transfer).*

Subsection (1) defines the term “onward transfer”. Subsection (4) provides onward obligations may be imposed on the bank, anything which is or was a group undertaking of the bank, anything which is or was a group undertaking of a residual bank, or any combination. Subsection (5) provides that onward obligations may be in addition to, or replace, initial obligations.

The power under this section is exercisable by giving a notice both to each person on whom a continuity obligation is to be imposed, and the person who is expected to benefit from it.

Continuity obligations: consideration and terms

82. (1) The Minister may by order specify matters which are to be or not to be considered in determining—

- a. what amounts to reasonable consideration for the purpose of sections 76 to 81;
- b. what provisions to include in accordance with section 77(3)(b) or 80(3)(b).

(2) An order under subsection (1)—

- (a) shall be made by statutory instrument, and

(b) shall be subject to negative resolution procedure.

(3) A continuity authority may give guarantees or indemnities in respect of consideration for services or facilities provided or to be provided in pursuance of a continuity obligation.

(4) In this section "continuity authority in relation to sections 76 to 81", mean the BMA or the Minister as the case may be.

Commentary: *This section provides the Minister with a power, by order, to specify matters which are to be or not to be considered in determining what amounts to reasonable consideration for the purposes of general continuity obligations. Secondary legislation may also specify matters which are to be or not to be considered in determining what provisions would be expected in arrangements concluded between parties dealing at arm's length (with regard to special continuity obligations).*

The power is subject to the negative resolution procedure.

Continuity obligations: termination

83. (1) The continuity authority may by notice terminate an obligation arising under section 76 or 79.

(2) The power under subsection (1) is exercisable by giving a notice to each person—

- (a) on whom the obligation is imposed, or
- (b) who has benefited or might have expected to benefit from the obligation.

(3) In this section "continuity authority"—

- (a) in relation to section 76, means the

BMA or the Minister, as the case may be, and

- (b) in relation to section 79, has the same meaning as in that section.

(4) A reference in subsection (1) to obligations under a section includes a reference to obligations under that section as applied under section 78 or 81.

Commentary: *This section provides that the continuity authority may by notice terminate a general continuity obligation.*

Pensions

84. (1) This section applies to—

- a. share transfer orders or share transfer instruments, and
- b. property transfer instruments or orders.

(2) An order or instrument may make provision—

- (a) about the consequences of a transfer for a pension scheme;
- (b) about property, rights and liabilities of any pension scheme of the bank.

(3) In particular, an order or instrument may—

- (a) modify any rights and liabilities;
- (b) apportion rights and liabilities;
- (c) transfer property of, or accrued rights in, one pension scheme to another (with or without consent).

(4) Provision by virtue of this section may (but need not) amend the terms of a pension scheme.

(5) A share or property transfer instrument may make provision in reliance on this section only with the consent of the Minister.

(6) In this section—

- (a) “pension scheme” includes any arrangement for the payment of pensions, allowances and gratuities, and
- (b) a reference to a pension scheme of a bank is a reference to a scheme in respect of which the bank, or a group company of the bank, is or was an employer.

(7) In subsection (6)(b) the reference to a group company of the bank is a reference to anything that is or was a group company in relation to the bank within the meaning given by section 76.

Commentary: *This section allows for a share transfer instrument or order or a property transfer Instrument or order to make provision in relation to pensions. The power may be exercised to make provision about the consequences of a transfer of securities or property etc. for pension schemes. For example, the need to make such provision could arise when the pension schemes of employees who are subject to the transfer form part of the pension scheme of a wider corporate group.*

Subsection (5) provides that this power may be exercised only by the BMA, with the consent of the Minister.

Enforcement

85. (1) The Minister may by regulations make provision for the enforcement of obligations imposed

by or under—

- a. a share transfer order,
- b. a share transfer instrument, or
- c. a property transfer instrument or order.

(2) Regulations—

- (a) may confer jurisdiction on a court or tribunal;
- (b) may not impose a penalty or create a criminal offence;
- (c) may make provision which has effect in respect of an order or instrument only if applied by the order or instrument.

(3) Regulations—

- (a) shall be made by statutory instrument, and
- (b) shall be subject to negative resolution procedure.

Commentary: *The purpose of this section is to enable provision to be made as to the enforcement obligations arising under share transfer instruments and orders and property transfer instruments.*

Provision may not create a criminal offence or impose a penalty, but may impose jurisdiction on a court or tribunal, this may include a creating an enforceable private law right or statutory duty.

Disputes

86. (1) This section applies to—

- a. share transfer orders,
- b. share transfer instruments, and
- c. property transfer instruments or orders.

(2) An order or instrument may include provision for disputes to be determined in a specified manner.

(3) Provision by virtue of subsection (2) may, in particular—

- (a) confer jurisdiction on a court [or tribunal];
- (b) confer discretion on a specified person.

Commentary: *This section makes provision for share transfer orders or instruments or property transfer instrument or orders made by the Minister to include a method for disputes to be determined. Such a method may include conferring jurisdiction on a particular court or tribunal or discretion on a specified person.*

Power to change law

87. (1) The Minister may by order amend the law for the purpose of enabling the powers under this Part to be used effectively, having regard to the special resolution objectives.

(2) An order may be made—

- a. for the general purpose of the exercise of powers under this Part,
- b. to facilitate a particular proposed or possible use of a power, or
- c. in connection with a particular exercise of a power.

(3) An order under subsection (2)(c) may make provision which has retrospective effect in so far as the Minister considers it necessary or desirable for giving effect to the particular exercise of a power under this Act in connection with which the order is made (but in relying on this subsection the Minister

shall have regard to the fact that it is in the public interest to avoid retrospective legislation).

(4) In subsection (1) “amend the law” means—

- (a) disapply or modify the effect of a provision of an enactment (other than a provision made by or under this Act),
- (b) disapply or modify the effect of a rule of law not set out in legislation, or
- (c) amend any provision of an instrument or order made in the exercise of a stabilisation power.

(5) Provision under this section may relate to this Part as it applies—

- (a) to banks,
- (b) to credit unions (by virtue of section 97), or
- (c) to any combination.

(6) Specific powers under this Part are without prejudice to the generality of this section.

(7) An order—

- (a) shall be made by statutory instrument, and
- (b) shall be subject to affirmative resolution procedure.

(8) But if the Minister thinks it necessary to make an order without complying with subsection (7)(b)—

- (a) the order may be made,
- (b) the order shall lapse unless approved by resolution of each House of the Legislature during the period of [28 days (ignoring periods of dissolution, prorogation or adjournment of either House for more than [4] days)] beginning with the day on which the order is made,

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- (c) the lapse of an order under paragraph (b) does not invalidate anything done under or in reliance on the order before the lapse and at a time when neither House has declined to approve the order, and
 - (d) the lapse of an order under paragraph (b) does not prevent the making of a new order (in new terms).

Commentary: *This section enables the Minister to modify legislation (both primary and secondary, excluding, however, the provisions of this Act, and secondary legislation to be made under it (other than orders and instruments made in exercise of a stabilisation power) and the provisions of common law for the purpose of enabling the powers in Part 1 to be used effectively, having regard to the objectives of the special resolution regime. Subsection (3) provides that such an order may make provision which has retrospective effect, although the Minister is to have regard to the fact that it is in the public interest to avoid retrospective legislation).*

The power is to be exercised by order and is subject to the affirmative procedure. In cases of necessity (in practice, where the power needed to be exercised urgently), the section makes provision for the Minister to make the order immediately, following which there are 28 days for both Houses of the legislature to approve the order, failing which, the order would lapse. Subsection (7) states that a lapse of an order does not prevent another order being made in new terms.

International obligation notice: general

88. (1) The BMA may not exercise a stabilisation power in respect of a bank if the Minister notifies the BMA that the exercise would be likely to contravene an international obligation of the Crown in right of Bermuda.

(2) A notice under subsection (1)—

- a. must be in writing, and
- b. may be withdrawn (generally, partially or conditionally).

Commentary: *This section makes provision about the role of the Minister in meeting international obligations when the stabilisation powers are being exercised.*

Subsection (1) provides that the Minister, by notice in writing, may require the BMA not to exercise a stabilisation power where that exercise would be likely to contravene an international obligation of Bermuda. Subsection (2) sets out the procedure for such notices.

Public funds: general

89. (1) The BMA may not exercise a stabilisation power in respect of a bank without the Minister's consent if the exercise would be likely to have implications for public funds.

(2) In subsection (1)—

- a. "public funds" means the Consolidated Fund and any other account or source of money which cannot be drawn or spent other than by, or with the authority of, the Minister, and
- b. action has implications for public funds if it would or might involve or lead to a need for the application of

public funds.

(3) The Minister may by order specify considerations which are to be, or not to be, taken into account in determining whether action has implications for public funds for the purpose of subsection (1).

(4) If the Minister refuses consent under subsection (1), the BMA must consider other exercises of the stabilisation powers with a view to—

- (a) pursuing the special resolution objectives, and
- (b) avoiding the objections on which the Minister's refusal was based.

(5) The Minister may by notice to the BMA disapply subsection (4) in respect of a bank; and a notice may be revoked by further notice.

(6) An order under subsection (3)—

- (a) shall be made by statutory instrument, and
- (b) shall be subject to negative resolution procedure.

Commentary: *This section makes provision about the role of the Minister with regard to public funds when the stabilisation powers are being exercised. It provides that the BMA may not exercise a stabilisation power without the Minister's consent if the exercise would be likely to have implications for public funds.*

Subsection (2) defines public funds and implications for public funds.

Subsection (3) provides the Minister with the power, by order, to specify considerations that should or

should not be taken into account in determining whether action has implications for public funds.

Subsection (4) requires the BMA to consider another exercise of the stabilization powers if the Minister has refused consent. In doing so the BMA must pursue the special resolution regime objectives and avoid the objections that the Minister first made.

Subsection (5) allows the Minister, by notice, to disapply the requirement to consider alternative actions (as set out in subsection (4)). Such notice may be revoked.

Temporary public ownership: report

90. (1) Where the Minister makes one or more property transfer orders under section 12(2), or makes one or more share transfer orders under section 13(2) in respect of a bank, the Minister must lay before the Legislature a report about the activities of the bank.

(2) The first report must be made as soon as is reasonably practicable after the end of one year beginning with the date of the first property transfer order or share transfer order.

(3) A subsequent report must be made as soon as is reasonably practicable after the end of each subsequent year.

(4) The obligation to produce reports continues to apply in respect of each year until the first during which no property of the bank or securities issued by the bank are owned by a company wholly owned by [the Crown].

Commentary: *This section requires the Minister to lay before the legislature an annual report about*

bridge banks and banks in temporary public ownership.

Holding companies

Temporary public ownership

91. (1) The Minister may take the holding company of a bank into temporary public ownership, in accordance with section 13(2), if the following conditions are met.

(2) Condition 1 is that the BMA are satisfied that the general conditions for the exercise of a stabilisation power set out in section 7 are met in respect of the bank.

(3) Condition 2 is that the Minister is satisfied that it is necessary to take action in respect of the holding company for the purpose specified in Condition A or B of section 9.

(4) Condition 3 is that the holding company is an undertaking incorporated in, or formed under the law of Bermuda.

(5) Before determining whether Condition 2 is met the Minister must consult the BMA.

Commentary: *Section 91 provides that the Minister may take a holding company of a bank into temporary public ownership if three conditions are met. These conditions are that the BMA are satisfied that the general conditions set out in section 7 are met in relation to the bank; that the Minister is satisfied that it is necessary to take action in respect of the holding company to resolve or reduce a serious threat to the stability of the financial systems of Bermuda or to protect the public interest where financial assistance has been provided in certain circumstances; and that the holding company is an*

undertaking incorporated in or formed under the law of Bermuda.

In determining whether the second condition is met, the Minister must consult the BMA.

Supplemental

92. (1) In the following provisions references to banks include references to holding companies—

- (a) section 5(3)(b)
- (b) section 9(1),
- (c) section 16(1), and
- (d) section 75(5)(a).

(2) Where the Minister takes a bank's holding company into temporary public ownership in reliance on section 79—

- (a) section 20(2) applies to (i) directors of the holding company, (ii) directors of the bank, and (iii) directors of a bank in the same group,
- (b) section 25(2) applies as if references to a bank were references to a holding company,
- (c) sections 27 to 29 apply as if references to a bank were references to a holding company,
- (d) a share transfer may be made in respect of securities which were issued by the bank or by another bank which is or was in the same group; and a transfer—
 - (i) shall be made by onward share transfer order under section 28 or by reverse share transfer order under section 29 (in addition to any that may be made under those sections as applied by

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- paragraph (c) above),
 - (ii) may be made under section 28 only in respect of securities held by (or for the benefit of) the holding company or a subsidiary undertaking of the holding company,
 - (iii) is not subject to section 28(4),
 - (iv) may be made under section 30 only in respect of securities held by a person of a kind listed in section 29(3)(b), and
 - (v) is not (otherwise) subject to section 29(3),
 - (e) section 45 applies as if—
 - (i) the reference to a bank in subsection (1) were a reference to a holding company, and
 - (ii) a reference to the bank in subsection (3) were a reference to the holding company, the bank and any other bank which is or was in the same group,
 - (f) sections 78 to 81 apply, with—
 - (i) references to the bank or the transferred bank taken as references to the bank, the holding company and any other bank which is or was in the same group, and
 - (ii) references to securities of the bank taken as including references to securities of the holding company (so that, in particular, sections 78(1)(a)(ii) and 81(1)(a) include references

-
- to the earlier transfer of securities issued by the holding company),
- (g) other provisions of this Act about share transfer orders apply with any necessary modifications.

(3) A reference in this Act or another enactment to a share transfer order in respect of securities issued by a bank includes (so far as the context permits) a reference to a share transfer order in respect of securities issued by a holding company.

(4) In so far as sections 47 and 61 apply in relation to orders treated as property transfer instruments by virtue of section 44(5)(b) or 46(5)(b) (including those sections as applied by virtue of subsection (2) above) the reference in section 47(1) to the property of a bank includes a reference to the property of a holding company and of any other bank which is or was in the same group.

[(5) Expressions used in this section have the same meaning as in the Companies Act 1981.]

(6) A reference to two banks being in the same group is a reference to their being group undertakings in respect of each other.

Commentary: *This section specifies how various provisions of Part 1 of the Act (including the powers to make supplementary, onward and reverse transfers) apply where the Minister take a bank's holding company into temporary public ownership.*

Contribution to costs of special resolution regime

93. (1) This section applies if -

-
- a. a stabilisation power under this Part has been exercised in respect of a bank, and
 - b. the Minister is of the opinion that the bank was or likely to have been, or but for the exercise of the power would have become, unable to satisfy claims against it.

(2) The Minister may require the BDIC to make payments (to the Minister or the BMA) in respect of expenses of a prescribed description incurred (by the Minister or the BMA) in connection with the exercise of the power.

(3) Subsection (2) is subject to section 94 (limit on amount of special resolution regime payments).

(4) In subsection (2) “expenses” includes interest at a specified rate on the difference, at any time, between-

- (a) the total amount of expenses (including interest) incurred at or before that time; and
- (b) the total amount recovered, or received from the BDIC, in respect of the bank at or before that time, by-
 - (i) the Minister; and
 - (ii) the BMA,who has incurred expenses in connection with the exercise of the power that are of a description prescribed under subsection (2).

(5) Any payment made by the BDIC under subsection (2) is to be treated for the purposes of this Part as an expense under the compensation scheme.

(6) In this section and section 94 “specified

rate" means a rate specified by the Minister.

(7) Different rates may be specified under different provisions or for different periods.

(8) A rate may be specified by reference to a rate set (from time to time) by any person.

(9) References in this section to the bank are treated as including references to any other bank which is also a subsidiary undertaking of the holding company (but not the holding company).

Commentary: *This section makes provision for the BDIC to contribute to the cost of special resolution regime or in the case of a bank that is or has become unable to satisfy claims against it.*

Subsection (2) enables the Minister to require the BDIC to make such payments either to the Minister or the BMA in respect of expenses incurred by the Minister or the BMA connected with the exercise of the power.

Such payments are however subject to the limit posed by virtue of section 94.

Limit on amount of special resolution regime payments

94. (1) The total amount of special resolution regime payments required to be made in respect of a bank may not exceed-

(a) notional net expenditure (see subsection (3)), minus

(b) actual net expenditure (see subsection (4))

(2) A "special resolution regime payment" is –
a. a payment under section 93(2)
b. a payment required to be made by

the BDIC by virtue of section 62 (2)
(sources of compensation)

(3) Notional net expenditure is –

- (a) the total amount of expenses that would have been incurred under the compensation scheme in respect of the bank if the stabilisation power had not been exercised and the bank had been unable to satisfy claims against it, minus
- (b) the total amount that would have been likely, at the time when the power was exercised, to be recovered by the BDIC in respect of the bank in those circumstances.

(4) Actual net expenditure is-

- (a) the total amount of expenses (other than resolution regime payments) actually incurred by the BDIC in respect of the bank, minus
- (b) the total amount actually recovered by the BDIC in respect of the bank.

(5) In subsection (3)(a) “expenses” includes interest at a specified rate on the difference, at any time, between-

- (a) the total amount of expenses (including interest) that would have been incurred as mentioned in subsection (3)(a) at or before that time; and
- (b) the total amount that would have been likely to have been recovered as mentioned in subsection (3)(b) at or before that time.

(6) In subsection (4)(a) “expenses” includes interest at a specified rate on the difference, at any time, between-

- (a) the total amount of expenses (including special resolution regime payments and interest) actually incurred by the BDIC in respect of the bank at or before that time; and
- (b) the total amount actually recovered by the BDIC in respect of the bank at or before that time.

(7) In paragraph (b) of subsections (3) to (6) references to amounts recovered (or likely to have been recovered) by the scheme manager do not include any levy received (or likely to have been received by it).

Commentary: *This section imposes a limit on the amount of special resolution regime payments that can't be made under section 93 and payments required to be paid in connection with the expenses of compensation awards made by the BDIC peruse into an order under section 74.*

Subsection (1) provides that the limit must not exceed the difference between the notional net expenditure and the actual net expenditure.

Part 2
Bank Insolvency
Introduction

Overview

95. (1) This Part provides for a procedure to be known as bank insolvency.

(2) The main features of bank insolvency are that—

- (a) a bank enters the process by court order,
- (b) the order appoints a bank liquidator,
- (c) the bank liquidator aims to arrange for the bank's eligible depositors to have their accounts transferred or to receive their compensation from the BDIC,
- (d) the bank liquidator then winds up the bank, and

(3) The Table describes the provisions of this Part.

<i>Sections</i>	<i>Topic</i>
Sections [95] to [96]	Introduction
Sections [97] to [101]	Bank insolvency order
Sections [102] to [186]	Process of bank liquidation
Sections [187] to [193]	Tenure of bank liquidator
Sections [194] to [206]	Termination of process, &c
Sections [207] to [211]	Other processes
Sections [212] to [213]	Miscellaneous

Commentary: *This section introduces the main features of the bank insolvency procedure. Subsection (2) identifies the main features of bank insolvency. Bank insolvency commences with the making of a bank insolvency order by the Supreme Court and ending with the winding up of the bank by the bank liquidator.*

Bank insolvency order

The order

96. (1) A bank insolvency order is an order appointing a person as the bank liquidator of a bank.

(2) A person is eligible for appointment as a bank liquidator if qualified to act as an insolvency practitioner.

(3) An appointment may be made only if the person has consented to act.

(4) A bank insolvency order takes effect in accordance with section 100; and—

- (a) the process of a bank insolvency order having effect may be described as “bank insolvency” in relation to the bank, and
- (b) while the order has effect the bank may be described as being “in bank insolvency”.

Commentary: *This section describes a bank insolvency order as an order appointing a person as the bank liquidator. It takes effect in accordance with section 100.*

Subsection (2) imposes a qualification on the appointment of such persons. To be eligible for appointment a bank liquidator, a person must be qualified to act as an insolvency practitioner.

Subsection (3) provides that the appointment of a bank liquidator may only be made with the consent of the person concerned.

Application

97. (1) An application for a bank insolvency order may be made to the Court by—

- a. the BMA, or
- b. the Minister,

(2) An application must nominate a person to be appointed as the bank liquidator.

Commentary: *This section provides for either the Minister or the BMA to apply to the Supreme Court for a bank insolvency order. Subsection (2) requires the application to nominate the person who would be appointed bank liquidator.*

Grounds for applying

98. (1) In this section—

- a. Ground A is that a bank is unable, or likely to become unable, to pay its debts,
- b. Ground B is that the winding up of a bank would be in the public interest, and
- c. Ground C is that the winding up of a bank would be just and equitable.

(2) The BMA may apply for a bank insolvency order only if—

- (a) it is satisfied that Conditions 1 and 2 in section 7 are met,
- (b) that the bank has eligible depositors, and
- (c) that Ground A or C applies.

(3) The Minister may apply for a bank

insolvency order only if satisfied—

- (a) that the bank has eligible depositors,
and
- (b) that Ground B applies.

(4) The sources of information on the basis of which the Minister may be satisfied of the matters specified in subsection (3) include—

- (a) any report made or information obtained under section 108 of the Companies Act 1981;
- (b) any report made or information obtained under sections 41 or 42 of the Banks and Deposit Companies Act 1999.

Commentary: *This section makes provision for the grounds for applying for a bank insolvency order. Subsection (1) provides three grounds for applying for an order. These are where a bank is unable to pay its debts, or the winding-up is in the public interest or is otherwise just and equitable.*

Only the BMA or the Minister may make application for a bank insolvency order. The BMA may apply for a bank insolvency order only if the criteria set out in subsection (2) are satisfied.

The Minister may apply for an insolvency order only if the criteria set out in subsection 3 are satisfied.

Grounds for making

99. (1) The court may make a bank insolvency order on the application of the BMA if satisfied—

- a. that the bank has eligible depositors,
and
- b. that Ground A or C of section 98

applies.

(2) The court may make a bank insolvency order on the application of the Minister if satisfied—

- (a) that the bank has eligible depositors, and
- (b) that Grounds B and C of section 98 apply.

(3) On an application for a bank insolvency order the court may—

- (a) grant the application in accordance with subsection (1) or (2),
- (b) adjourn the application (generally or to a specified date), or
- (c) dismiss the application.

Commentary: *This section sets out the grounds for making a bank insolvency order by the Supreme Court.*

Different grounds apply depending on whether the application is being made by the BMA or the Minister.

Subsection (1) sets out the grounds for making the insolvency order on the application or the BMA.

Subsection (2) set out the grounds for making an insolvency order on the application of the Minister.

Subsection (3) empowers the court to grant the application, adjourn the application or dismiss it.

Commencement of bank insolvency order

100. (1) A bank insolvency order shall be treated as having taken effect in accordance with this section.

(2) In the case where—

- (a) notice has been given to the BMA

-
- under section 197 of a petition for a winding up order, and
- (b) the BMA applies for a bank insolvency order in the period of 2 weeks specified in Condition 3 in that section,

the bank insolvency order is treated as having taken effect when the petition was made or presented.

(3) In any other case, the bank insolvency order is treated as having taken effect when the application for the order was made.

(4) Unless the court directs otherwise on proof of fraud or mistake, proceedings taken in the bank insolvency, during the period for which it is treated as having had effect, are treated as having been taken validly.

Commentary: *This section provides for the time when a bank insolvency order is treated as having come into force.*

Subsection (1) and (2) provides that a bank insolvency order is treated as having come into force at the time when a petition for winding up was made or presented.

Subsection (3) provides that in other cases the bank insolvency order is treated as having come into force when the application for the order was made.

Process of bank liquidation

Objectives

101. (1) A bank liquidator has two objectives.

(2) Objective 1 is to work with the BDIC so as

to ensure that as soon as is reasonably practicable each eligible depositor—

- a. has the relevant account transferred to another bank, or
- b. receives payment from (or on behalf of) the BDIC.

(3) Objective 2 is to wind up the affairs of the bank so as to achieve the best result for the bank's creditors as a whole.

(4) Objective 1 takes precedence over Objective 2 (but the bank liquidator is obliged to begin working towards both objectives immediately upon appointment).

Commentary: *This section provides for the objectives of a bank liquidator. Subsection (2) provides for two objectives. The first which takes precedence is to ensure that eligible depositors have their accounts transferred to another bank, or receive payment from the BDIC. The second objective is to wind up the bank with a view to achieving the best result for the bank's creditors as a whole.*

Liquidation committee

102. (1) Following a bank insolvency order a liquidation committee must be established, for the purpose of ensuring that the bank liquidator properly exercises the functions under this Part.

(2) The liquidation committee shall consist initially of 3 individuals, one nominated by each of—

- a. the BMA,
- b. the Minister, and
- c. the BDIC.

(3) The bank liquidator must report to the

liquidation committee about any matter—

- (a) on request, or
- (b) which the bank liquidator thinks is likely to be of interest to the liquidation committee.

(4) In particular, the bank liquidator—

- (a) must keep the liquidation committee informed of progress towards Objective 1 in section 101, and
- (b) must notify the liquidation committee when in the bank liquidator's opinion Objective 1 in section 101 has been achieved entirely or so far as is reasonably practicable.

(5) As soon as is reasonably practicable after receiving notice under subsection (4)(b) the liquidation committee must either—

- (a) resolve that Objective 1 in section 90 has been achieved entirely or so far as is reasonably practicable (a "full payment resolution"), or
- (b) apply to the court under section 128(5).

(6) Where a liquidation committee passes a full payment resolution—

- (a) the bank liquidator must summon a meeting of creditors,
- (b) the meeting may elect 2 or 4 individuals as new members of the liquidation committee,
- (c) those individuals replace the members nominated by the BMA and the Minister,
- (d) the BDIC may resign from the liquidation committee (in which case 3 or 5 new members may be elected

-
- under paragraph (b)), and
- (e) if no individuals are elected under paragraph (b), or the resulting committee would have fewer than 3 members or an even number of members, the liquidation committee ceases to exist at the end of the meeting.

(7) Subject to provisions of this section, rules under section 320 may make provision about—

- (a) the establishment of liquidation committees,
- (b) the membership of liquidation committees,
- (c) the functions of liquidation committees, and
- (d) the proceedings of liquidation committees.

Commentary: *This section makes provisions for the establishment of a liquidation committee whose function is to ensure that the bank liquidator properly exercises his functions under the Act.*

Subsection (2) sets out the composition of the committee. Initially the committee will consist of three individuals nominated by the BMA, the Minister and the BDIC.

Subsection (3) requires the bank liquidator to report to the committee about any matter that may be requested by the committee, or which the bank liquidator thinks is likely to be of interest to the committee.

Subsection (4) requires the bank liquidator to keep the committee informed of progress on objective in section 103 (transfer of accounts of eligible depositors or payment to eligible depositors to another bank from the BDIC).

Subsection (5) requires the liquidation committee (on being notified by the bank liquidator that objective 1 has been achieved) to confirm whether or not objective 1 has been entirely or partly achieved or make application to the Court under section 130(5) if aggrieved by the decision of the bank liquidator.

Subsection (6) provides that where the liquidation committee has passed a full payment resolution it must call a meeting of creditors, which must elect 2 or 4 new members of the committee. These members would then replace the members nominated by the BMA and the Minister; and where the BDIC resigns from membership of the committee then 3 or 5 new members may be elected by the meeting of the creditors.

Subsection (7) makes provisions for rules to be made by the Minister under section 320 on membership of the liquidation committee its functions and procedures.

Liquidation committee: supplemental

103. (1) A meeting of the liquidation committee may be summoned—

- (a) by any of the members, or
- (b) by the bank liquidator.

(2) While the liquidation committee consists of the initial members (or their nominated

replacements) a meeting is quorate only if all the members are present.

(3) A person aggrieved by any action of the liquidation committee before it has passed a full payment resolution may apply to the court, which may make any order (including an order for the repayment of money).

(4) The court may (whether on an application under subsection (3), on the application of a bank liquidator or otherwise) make an order that the liquidation committee is to be treated as having passed a full payment resolution.

(5) If a liquidation committee fails to comply with section 102(2) the bank liquidator must apply to the court—

- (a) for an order under subsection (4) above, or
- (b) for directions under or by virtue of section 128(3).

(6) A nominating body under section 102(2) may replace its nominee at any time.

(7) After the removal of the nominated members under section 102(6)(c) the BMA—

- a. may attend meetings of the liquidation committee,
- b. are entitled to copies of documents relating to the liquidation committee's business,
- c. may make representations to the liquidation committee, and
- d. may participate in legal proceedings relating to the bank insolvency.

(8) Where a liquidation committee ceases to exist by virtue of section 102(6)(e)—

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- (a) it may be re-formed by a creditors' meeting summoned by the bank liquidator for the purpose, and
 - (b) the bank liquidator must summon a meeting for the purpose if requested to do so by one-tenth in value of the bank's creditors.

(9) Where a liquidation committee ceases to exist by virtue of section 102 and has not been re-formed under subsection (8) above or under section 111(2) —

- (a) ignore a reference in this Part to the liquidation committee,
- (b) for section 193(2) to (4) substitute requirements for the bank liquidator, before making a proposal—
 - i. to produce a final report,
 - ii. to send copies in accordance with section 193(2)(b),
 - iii. to make it available in accordance with section 193(2)(c), and
 - iv. to be satisfied as specified in section 193(4)(b),
- (c) ignore Condition 2 in section 220(3), and
- (d) for section 204(1) to (5) substitute a power for the bank liquidator to apply to the Minister for release and requirements that before making an application the bank liquidator must—
 - (i) produce a final report,
 - (ii) send copies in accordance with section 204(2)(b),
 - (iii) make it available in accordance with section 204(2)(c), and
 - (iv) notify the court and the registrar

of companies of the intention to vacate office and to apply for release.

Commentary: *This section makes supplementary provisions for the liquidation committee dealing with the manner in which meetings of the committee may be summoned, and the quorum for meetings. It also provides for appeals to the court against actions of the committee.*

Subsection (5) requires the bank liquidator to apply to the court if a liquidation committee fails to comply with section 102(2).

Subsection (6) allows the BMA, the Minister and the BDIC to replace their nominees on the committee at any time.

Subsection (7) permits the BMA to attend meetings of the committee and to receive documents relating to committee business and to otherwise participate in meetings of the committee, after it has removed its nominee from the committee.

Subsection (8) provides for re-forming a committee after it has ceased to exist.

Subsection (9) makes provision for the application of provisions of this Part where a committee has ceased to exist and was not re-formed.

Objective 1: (a) or (b)?

104. (1) As soon as is reasonably practicable, a liquidation committee must recommend the bank liquidator to pursue—

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- a. Objective 2(a) in section 101,
 - b. Objective 2(b) in section 101, or
 - c. Objective 2(a) for one specified class of case and Objective 2(b) for another.

(2) In making a recommendation the liquidation committee must consider—

- (a) the desirability of achieving Objective 1 as quickly as possible, and
- (b) Objective 2 in section 101.

(3) If the liquidation committee thinks that the bank liquidator is failing to comply with their recommendation, they must apply to the court for directions under section 128(5).

(4) Where the liquidation committee has not made a recommendation the bank liquidator may apply to the court under section 92(3); and the court may, in particular, make a direction in lieu of a recommendation if the liquidation committee fail to make one within a period set by the court.

Commentary: *This section requires the liquidation committee to recommend to the bank liquidator which of the two objectives set out in section 101 to pursue.*

Subsection (2) requires the liquidation committee to take into account various matters in making its recommendation to the bank liquidator on the choice of objectives.

Subsection (3) provides for the liquidation committee to apply to the court if it thinks that the bank liquidator is failing to comply with their recommendation.

Subsection (4) provides for the bank liquidator to apply to the court if the liquidation committee has failed to make a recommendation as required by subsection (1).

General powers, duties and effect

105. (1) A bank liquidator may do anything necessary or expedient for the pursuit of the Objectives in section 101.

(2) Powers conferred by this Act are in addition to, and not in restriction of, any existing powers of instituting proceedings against a contributory or debtor of a bank, or the estate of any contributory or debtor, for the recovery of any call or other sum.

Commentary: *This section makes provision for the general powers, and duties of the bank liquidator. A bank liquidator may do anything necessary or expected for the pursuit of Objectives in Section 101.*

Avoidance of property dispositions, etc.

106. In an imposition of bank insolvency by order of the court, any disposition of the bank's property, and any transfer of shares, or alteration in the status of the bank's members, made after the commencement of the bank insolvency, unless the court otherwise orders, is void.

Commentary: *This section seeks to make void any dispositions of property, shares, etc. made after the commencement of bank insolvency.*

Avoidance of attachments, etc.

107. Where a bank is subject to the imposition of bank insolvency order of the court, any attachment, sequestration, distress or execution put in force against the estate or effects of the bank after the commencement of bank insolvency is void.

Commentary: *This section makes void any attachment, sequestration etc. put in force against the bank after the commencement of bank insolvency.*

Consequences of bank insolvency order

108. (1) On the making of a bank insolvency order a copy of the order must forthwith be forwarded by the bank (or otherwise as may be prescribed) to the Registrar of Companies, who shall enter it in his records relating to the bank.

(2) When a bank insolvency order has been made or a provisional bank liquidator has been appointed, no action or proceeding shall be preceded with or commenced against the bank or its property, except by leave of the court and subject to such terms as the court may impose.

Commentary: *This section requires a copy of a bank solvency order to be forwarded to the Registrar of Companies.*

Subsection (2) prohibits any action or proceedings against the bank to be taken except with leave of the court.

Banks statement of affairs

109. (1) Where the court has made a bank

insolvency order or appointed a provisional bank liquidator, the bank liquidator may require some or all of the persons mentioned in subsection (3) below to make out and submit to him a statement in the prescribed form as to the affairs of the bank.

(2) The statement shall show-

- (a) particulars of the bank's assets, debts and liabilities;
- (b) the names and addresses of the banks creditors;
- (c) the securities held by them respectively;
- (d) the dates when the securities were respectively given; and
- (e) such further or other information as may be prescribed or as the bank liquidator may require.

(3) The statement shall be verified by the persons required to submit it-

- (a) in the case of an appointment of a provisional bank liquidator or the imposition of bank insolvency by order of the court, by affidavit.
- (b) the persons referred to in subsection (1) are-
 - (i) those who are or have been officers of the bank;
 - (ii) those who have taken part in the formation of the bank at any time within one year before the relevant date;
 - (iii) those who are in the bank's employment, or have been in its employment within that year, and are in the bank liquidator's

opinion capable of giving the information required;

- (iv) those who are or have been within that year officers of, or in the employment of, a company which is, or within that year was, an officer of the bank.

(4) Where any persons are required under this section to submit a statement of affairs to the bank liquidator, they shall do so (subject to the next subsection) before the end of the period of 21 days beginning with the day after that on which the prescribed notice of the requirement is given to them by the bank liquidator.

(5) A creditor or contributory of the bank is entitled to receive a copy of a statement under this section on request to the bank liquidator.

(6) The bank liquidator, if he thinks fit, may-

- (a) at any time release a person from an obligation imposed on him under subsection (1) or (2) above; or
- (b) either when giving the notice mentioned in subsection (4) or subsequently, extend the period so mentioned;

and where the bank liquidator has refused to exercise a power conferred by this subsection, the court, if it thinks fit, may exercise it.

(7) In this section-

“employment” includes employment under a contract for services; and

“the relevant date” means-

- (a) in a case where a provisional bank liquidator is appointed, the date of his appointment; and
- (b) in a case where no such appointment is made, the date of the bank insolvency order.

(8) If a person without reasonable excuse fails to comply with any obligation imposed under this section, he is guilty of an offence and liable on summary conviction to a fine of \$20,000 and a daily default fine of \$500.

Commentary: *This section imposes an obligation on persons connected with the bank such as officers and employees (and former officers and employees) of the bank to make out and submit to the bank liquidator statements of affairs of the bank relating to assets and liabilities, names of bank creditors, securities held by them and the dates when they were given.*

Subsection (5) entitles creditors and contributories to copies of such statements.

Appointment of Liquidators

Appointment and powers of provisional liquidator

110. (1) Subject to the provisions of this section, the court may, at any time after the presentation of an application for a bank insolvency order, appoint a bank liquidator provisionally.

(2) The appointment of a provisional bank liquidator may be made at any time before the

making of a bank insolvency order.

(3) Only a person who is qualified to act as an insolvency practitioner and who consents to act may be appointed provisional bank liquidator.

(4) A provisional bank liquidator may not pay dividends to creditors.

(5) The appointment of a provisional bank liquidator lapses on the appointment of a bank liquidator.

(6) The provisional bank liquidator shall carry on such functions as the court may confer on him.

(7) When a bank liquidator is provisionally appointed by the court, his powers may be limited by the order appointing him.

Commentary: *This section makes provision for the Court to appoint a provisional bank liquidator at any time after the presentation of an application for a bank insolvency order, and for the qualifications and functions of the provisional bank liquidator.*

Under subsection (5) the appointment of a provisional bank liquidator lapses on the appointment of a bank liquidator.

Under subsection (6) the provisional liquidator has such functions as the Supreme Court may confer on him.

Liquidation Committees

Liquidation committee

111. (1) Subject to sections 102, 103 and 189 where a bank in solvency order has been made by the court and separate meetings of creditors and

contributories have been summoned for the purpose of choosing a person to be bank liquidator, those meetings may establish a committee ("the liquidation committee") to exercise the functions conferred on it by or under this Act.

(2) The bank liquidator may at any time, if he thinks fit, summon separate general meetings of the bank's creditors and contributories for the purpose of determining whether such a committee should be established and, if it is so determined, of establishing it.

(3) The bank liquidator shall summon such a meeting if he is requested, in accordance with the rules, to do so by one-tenth, in value, of the bank's creditors.

(4) Where meetings are summoned under this section, or for the purpose of choosing a person to be bank liquidator, and either the meeting of creditors or the meeting of contributories decides that a liquidation committee should be established, but the other meeting does not so decide or decides that a committee should not be established, the committee shall be established in accordance with the rules, unless the court otherwise orders.

(5) Where there is for the time being no liquidation committee, the functions of such a committee are vested in the Minister, except to the extent that the rules otherwise provide.

(6) This section is subject to rules made under section 320.

Commentary:

Subsection (1) makes provision for the establishment to liquidate this committee. The liquidation committee would be established by the meeting of creditors and contributors summoned

following the making of a bank insolvency order.

Subsection (2) makes provision for the liquidator to summon separate general meetings of the bank creditors and contributors to determine whether liquidation committees would be established.

Subsection (3) requires the bank liquidator to summon a liquidation committee when requested to do so by creditors in one-tenth in value of the banks creditors.

Subsection (4) provides that where the meeting of creditors and the meeting of contributors are unable to agree on the establishment of a liquidation committee, then the committee must be established in accordance with the rules.

Subsection (5) provides that in the absence of the time being of a liquidation committee, that functions would be performed by the Minister.

General functions of liquidator in bank insolvency in winding up

112. The functions of the liquidator of a bank which is subject to bank insolvency, subject to objective 1 in section 101 are to secure that the assets of the bank are got in, realized and distributed to the bank's creditors and, if there is a surplus, to the persons entitled to it.

Commentary: *This section makes provision for general functions of the bank liquidator. It provides that the functions are to secure that the assets of the bank are got in, realized and distributed to the*

banks creditors.

Custody of bank's property

113. When a bank insolvency order has been made, or where a provisional bank liquidator has been appointed, the bank liquidator or the provisional bank liquidator (as the case may be) shall take into his custody or under his control all the property and things in action to which the bank is or appears to be entitled.

Commentary: *This section requires either the bank liquidator to take into their custody or control all property to which the bank is entitled.*

Vesting of bank property in liquidator

114. (1) When a bank is subject to a bank insolvency order of the court, the court may on the application of the bank liquidator by order direct that all or any part of the property of whatsoever description belonging to the bank or held by trustees on its behalf shall vest in the bank liquidator by his official name; and thereupon the property to which the order relates vests accordingly.

(2) The bank liquidator may, after giving such indemnity (if any) as the court may direct, bring or defend in his official name any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the bank and recovering its property.

Commentary: *This section makes provision for the vesting in the bank liquidator of all properties belonging to the bank.*

Subsection (2) makes provision for the bank liquidator to bring or defend any action or other legal proceedings which relates to the property.

Power to stay bank insolvency

115. (1) The court may at any time after the imposition of a bank insolvency order on the application either of the bank liquidator, the BMA, the BDIC or a creditor (but only if the liquidation committee has passed a full payment resolution) and on proof to the satisfaction of the court that all proceedings in the bank insolvency ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit.

(2) The court may, before making an order, require the bank liquidator to furnish to it a report with respect to any facts or matters which are in his opinion relevant to the application.

(3) A copy of every order made under this section shall forthwith be forwarded by the bank, or otherwise as may be prescribed, to the registrar of companies, who shall enter it in his records relating to the bank.

Commentary: *This section makes provision for the court to stay bank insolvency proceedings either altogether or for a limited time on the application of a bank liquidator, the BMA, the BDIC or a creditor.*

Settlement of list of contributories and application of assets

116. (1) As soon as may be after making a bank insolvency order, the court shall settle a list of

contributories, with power to rectify the register of members in all cases where rectification is required, and shall cause the bank's assets to be collected, and applied in discharge of its liabilities.

(2) If it appears to the court that it will not be necessary to make calls on or adjust the rights of contributories, the court may dispense with the settlement of a list of contributories.

(3) In setting the list, the court shall distinguish persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

Commentary: *This section makes provision for the court to settle the list of contributors and for the court to collect the bank's assets (which would be applied in discharging the banks liabilities).*

Under subsection (2) the court is not to settle a list of contributors if the court thinks that is necessary to make calls on contributories.

Debts due from contributory to bank

117. (1) The court may, at any time after making a bank insolvency order, make an order on any contributory for the time being on the lists of contributories to pay, in manner directed by the order, any money due from him (or from the estate of the person who he represents) to the bank exclusive of any money payable by him or the estate by virtue of any call.

(2) When all the creditors are paid in full (together with interest at the [official rate], any money due on any account whatever to a contributory from the bank may be allowed to him by

way of set-off against any subsequent call.

Commentary: *This section makes provision for the court to order a contributory to pay any money due from him to the bank but where the creditors are paid in full with interest, then any money due on any account to the contributory from the bank may be allowed to the contributory by way of set-off against subsequent call.*

Power to make calls

118. (1) The court may, at any time after making a bank insolvency order, and either before or after it has ascertained the sufficiency of the bank's assets, make calls on all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the court considers necessary to satisfy the bank's debts and liabilities, and the expenses of bank insolvency, and for the adjustment of the rights of the contributories among themselves, and make an order for payment of any calls so made.

(2) In making a call the court may take into consideration the probability that some of the contributories may partly or wholly fail to pay it.

Commentary: *This section empowers the court after making a bank insolvency order, to make calls on all or any of the contributories to the extent of their liability, for the payment of money to satisfy the bank's debts and liabilities.*

Order on contributory to be conclusive evidence

119. (1) An order made by the court on a contributory is conclusive evidence that the money

(if any) thereby appearing to be due or ordered to be paid is due, but subject to any right of appeal.

(2) All other pertinent matters stated in the order are to be taken as truly stated as against all persons and in all proceedings.

Commentary: *This section provides that orders of the court on a contributor are conclusive evidence that the money is due from the contributory.*

Power to exclude creditors not proving in time

120. The court may fix a time or times within which creditors are to prove their debts or claims or to be excluded from the benefit of any distribution made before those debts are proved.

Commentary: *This section empowers the court to fix a time for creditors to prove their debt or claims.*

Adjustment of rights of contributories

121. The court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled to it.

Commentary: *This section empowers the court to adjust the rights of contributories against themselves and to distribute surplus monies amongst those entitled to it.*

Inspection of books by creditors, etc.

122. (1) The court may, at any time after making a bank insolvency order, make such order for inspection of the bank's books and papers by creditors and contributories as the court thinks just; and any books and papers in the bank's possession

may be inspected by creditors and contributories accordingly, but not further or otherwise.

(2) In making or considering whether to make an order under this section the court shall have regard to objective 1 in section 101.

Commentary: *This section makes provisions for the court to order an inspection of the bank's books and papers by creditors and contributories.*

Subsection (2) requires the court to have regard to objective 1 in section 101 in making the order.

Payment of expenses of bank insolvency

123. The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the expenses incurred in the bank insolvency in such order of priority as the court thinks just.

Commentary: *This section makes provision for the court to order payment of expenses in the bank insolvency where the assets are insufficient to satisfy the liabilities. Such order would require payments to be made out of assets.*

Power to arrest absconding contributory

124. The court, at any time either before or after imposing a bank insolvency order on proof of probable cause for believing that a contributory is about to quit Bermuda or otherwise to abscond or to remove or conceal any of his property for the purpose of evading payment of calls, may cause the contributory to be arrested and his books and papers and movable personal property to be seized and him and them to be kept safely until such time as the

court may order.

Commentary: *This section empowers the court to arrest an absconding contributory together with his books, papers and movable property.*

Delegation of powers to liquidator

125. (1) Provision may be made by rules under section 320 for enabling or requiring all or any of the powers and duties conferred and imposed on the court in respect of the following matters-

- (a) the holding and conducting of meetings to ascertain the wishes of creditors and contributories,
- (b) the settling of lists of contributories and the rectifying of the register of members where required, and the collection and application of the assets,
- (c) the payment, delivery, conveyance, surrender or transfer of money, property, books or papers to the liquidator,
- (d) the making of calls,
- (e) the fixing of a time within which debts and claims must be proved, to be exercised or performed by the bank liquidator, and subject to the court's control.

(2) But the bank liquidator shall not, without the special leave of the court, rectify the register of members, and shall not make any call without either that special leave or sanction of the liquidation committee.

Commentary: *This section makes provision for rules*

to be made under section 320 authorising the court to delegate to the bank liquidator, the exercise of its powers in relation to meetings of creditors and contributories; settling of lists of contributories; the payment, delivery, etc. of money, books, property and so on; the making of calls and the fixing of time for proving debts and claims.

Bank insolvency order

126. (1) Where a bank is subject to the imposition of a bank insolvency order by the court the bank liquidator may-

- (a) with the sanction of the court or the liquidation committee, exercise any of the powers specified in Parts I and II of Schedule 1 to this Act (payment of debts; compromise of claims, etc.; institution and defence of proceedings; carrying on of the business of the bank, and
- (b) with or without that sanction, exercise any of the general powers specified in Part III of that Schedule.

(2) Where the bank liquidator, in exercise of the powers conferred on him by this Act-

- (a) disposes of any property of the bank to a person who is connected with the bank; or
- (b) employs a barrister or attorney to assist him in the carrying out of his functions,

he shall, if there is for the time being a liquidation committee, give notice to the committee of that exercise of his powers.

(3) The exercise by the bank liquidator in a bank insolvency of the powers conferred by this

section is subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.

(4) An application to the court may not be made under subsection (3) unless the liquidation committee has passed a full payment resolution (although a creditor or contributory may apply to the court with respect to any action (or inaction) of the liquidation committee, under section 103(3) above).

(5) In exercising or considering whether to exercise a power under Schedule 2 the bank liquidator shall have regard to Objective 1 in section 101.

(6) For the purposes of this section, a person is connected with a bank if-

- (a) he is a director of the bank or an associate of such a director or
- (b) he is an associate of the bank;

Commentary: *This section authorizes a bank liquidator with the sanction of the court or the bank liquidation committee to exercise powers specified in Part I and II of Schedule 1 and to exercise without such sanction any of the general powers specified in Part III of the schedule.*

Provision is also made under subsection (2) for the bank liquidator to notify the committee if he disposes of any liquidation property of the bank to a person connected to the bank; and to notify the committee if he employs a barrister attorney to assist him.

Subsection (3) affirms that the powers conferred on a bank liquidator is subject to control of the court and that creditors and contributors may apply to the

court with respect to the manner of exercise of those powers by the bank liquidator.

Subsection (4) however, precludes such an application being made unless the liquidation committee has passed a full payment resolution.

Subsection (5) requires the bank liquidator to have regard to objective 1 in section 101 in exercising a power under schedule 2.

Subsection (6) defines 'a person connected with a bank.'

Meaning of associate

127. (1) For the purposes of this Part, any question whether a person is an associate of another person is to be determined in accordance with the following provisions of this section (any provision that a person is an associate of another person being taken to mean that they are associates of each other).

(2) A person is an associate of an individual if that person is-

- (a) the individual's husband or wife,
- (b) a relative of-
 - (i) the individual, or
 - (ii) the individual's husband or wife, or
- (c) the husband or wife or a relative of-
 - (i) the individual, or
 - (ii) the individual's husband or wife .

(3) A person is an associate of any person with whom he is in partnership, and of husband or wife or a relative or any individual with whom he is in partnership.

(4) A person is an associate of any person whom he employs or by whom he is employed.

(5) A person with this capacity as trustee of a trust other than a pension scheme or an employees' share scheme is an associate of another person if the beneficiaries of the trust include, or the terms of the trust confer a power that may be exercised for the benefit of, that other person or an associate of that other person.

(6) A company is an associate of another company-

(a) if the same person has control of both, or a person has control of one and persons who are his associates, or he and persons who are his associates, have control of the other, or

(b) if a group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is associate.

(7) A company is an associate of another person if that person has control of it or if that person and persons who are his associates together have control of it.

(8) For the purposes of this section a person is a relative of an individual if he is that individual's brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant, treating any relationship of the half-blood as a relationship of the

whole blood and the stepchild or adopted child of any person as his child.

and references in this section to a husband or wife include a former husband or wife and a reputed husband or wife.

(9) For the purposes of this section any director or other officer of a company is to be treated as employed by that company.

(10) For the purpose of this section a person is to be taken as having control of a company if –

- (a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his direction or instructions, or
- (b) he is entitled to exercise or control the exercise of, one third or more of the voting power at any general meeting of the company or of another company which has control of it;

and where two or more persons together satisfy either of the above conditions, they are to be taken as having control of the company.

(11) In this section “company” includes anybody corporate (whether incorporated in Bermuda or elsewhere); and reference to directors and other officers of a company and to voting power at any general meeting of a company have effect with any necessary modifications.

Commentary: *This section defines the meaning of associate as used in this Part. It sets out in some detail the application of this definition in respect of individuals and to companies.*

Supplementary powers

128. (1) The bank liquidator may summon a general meeting of the creditors or contributories for the purpose of ascertaining their wishes; and it is his duty to summon meetings at such times as the creditors or contributories by resolution (either at the meeting appointing the liquidator or otherwise) may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories (as the case may be).

(2) The bank liquidator may apply to the court (in the prescribed manner) for directions in relation to any particular matter arising in the bank insolvency.

(3) Subject to provisions of this part of the Act, the bank liquidator shall use his own discretion in the management of the assets and their distribution among the creditors.

(4) If any person is aggrieved by an act or decision of the bank liquidator that person may apply to the court; and the court may confirm, reverse or modify the act or decision complained of, and make such order in the case as it thinks just.

(5) A direction or request under subsection (2) has no effect unless the liquidation committee has passed a full payment resolution.

(6) An application to the court may not be made under subsection (5) unless the liquidation committee has passed a full payment resolution (except as provided in section 102 or 104 above).

Commentary: *This section makes further provisions following the imposition of a bank insolvency order.*

Subsection (2) provides that the bank liquidator may summon a general meeting of the creditors or

contributories to ascertain their wishes, either at their direction or request.

Under subsection (3) the bank liquidator is empowered to apply to the court for directions. But such direction or request has no effect until the Liquidation Committee has passed a full payment resolution (subsection 6).

Subsection (4) requires the bank liquidator to use his discretion in managing the assets and their distribution to creditors.

Subsection (5) allows any person aggrieved by an act or decision of the bank liquidator to apply to the court.

Under subsection (7) such an application may only be made after the liquidation committee has passed a full payment resolution.

Enforcement of bank liquidator's duty to make returns, etc.

129. (1) If a bank liquidator who has made any default-

(a) in filing, delivering or making any return, account or other document, or
(b) in giving any notice which he is by law required to file, deliver, make or give,
fails to make good the default within 14 days after the service on him of notice requiring him to do so, the court has the following powers.

(2) On an application made by any creditor or contributory of the bank, or by the liquidation committee, or by the registrar of companies, the court may make an order directing the bank

liquidator to make good the default within such time as may be specified in the order.

(3) The court's order may provide that all costs of and incidental to the application shall be borne by the liquidator.

(4) Nothing in this section prejudices the operation of any enactment imposing penalties on a liquidator in respect of any such default as is mentioned above.

Commentary: *This section makes provisions for enforcement action against a bank liquidator who fails to notify any default in filing returns or in giving notice.*

Subsection (2) empowers the court on the application of a creditor or contributory of a bank, or the liquidation committee or the registrar of companies, to direct the bank liquidator to make good the default.

Subsection (3) empowers the court to order costs of the application to be paid by the liquidator.

Subsection (4) saves the application of any other enactment empowering the Court to impose penalties on the liquidator for such defaults.

Removal of provisional bank liquidator

130. (1) This section applies with respect to the removal from office and vacation of office of the provisional bank liquidator.

(2) Subject as follows, the provisional bank liquidator may be removed from office only by an order of the court.

(3) A provisional bank liquidator, shall

vacate office if he ceases to be a person who is qualified to act as an insolvency practitioner in relation to the bank.

Commentary: *This section makes provisions for the removal of a provisional bank liquidator.*

Subsection (2) provides that such liquidation can only be removed from office by order of the court.

Subsection (3) provides for the bank liquidator to vacate his offices if he ceases to be an insolvency practitioner.

PROVISIONS OF GENERAL APPLICATION IN BANK INSOLVENCY

Preferential debts

Preferential debts (general provision)

131. (1) In a bank insolvency, the bank's preferential debts shall be paid in priority to all other debts.

(2) Preferential debts-

- (a) rank equally among themselves after the expenses of the bank insolvency and shall be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions; and
- (b) so far as the assets of the bank available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures secured by, or

holders of, any floating charge created by the bank, and shall be paid accordingly out of any property comprised in or subject to that charge.

(3) In this section references to preferential debts of the bank is to debts listed in Schedule 2 to this Act, and references to preferential condition are to be used accordingly.

Commentary: *This section makes provisions for preferential debts. Subsection (1) provides that such debts must be paid in priority to all other debts.*

Subsection (2) ranks preferential debts. They rank equally amongst themselves after payment of expenses; and have priority over the claims of holder of debentures secured by any floating charge.

Subsection (3) gives effect to [Schedule 3]. [Schedule 3] sets out the categories of preferential debts.

Preferential charge on goods distrained

132. (1) This section applies where a bank is subject to a bank insolvency by order of the court and is without prejudice to section 107 (avoidance of attachments, etc.)

(2) Where any person (whether or not a landlord or person entitled to rent) had distrained upon the goods or effects of the bank in the period of 3 months ending with the date of the commencement of bank insolvency order, those goods or effects, or the proceeds of their sale, shall be charged for the benefit of the bank with the preferential debts of the bank to the extent that the

bank's property is for the time being insufficient for meeting them.

(3) Where by virtue of a charge under subsection (2) any person surrenders any goods or effects to a bank or makes a payment to a bank, that person ranks, in respect of the amount of the proceeds of sale of those goods or effects by the liquidator or (as the case may be) the amount of the payment, as a preferential creditor of the bank, except as against so much of the property as is available for the payment of preferential creditors by virtue of the surrender or payment.

Commentary: *This section makes provision for giving preferential debts a preferential charge on goods belonging to the bank that have been distained by landlords.*

Subsection (2) imposes a charge on goods that have been distrained for unpaid rent, or the proceeds of their sale, for the benefit of the bank with the preferential debts of the bank.

Where such goods (or their proceeds) are surrendered to the bank, the person concerned would rank as a preferential creditor in respect of the amount of the proceeds or the proceeds of the sale of those goods.

[Payment of expenses of bank insolvency]

133. (1) The expenses of bank insolvency, so far as the assets of the bank available for payment of general creditors are insufficient to meet them, have priority over any claims to property comprised in or subject to any floating charge created by the bank and shall be paid out of any such property

accordingly.

(2) In subsection (1)-

- (a) the reference to assets of the bank available for payment of general creditors does not include any amount made available under section 134 (2) (a);
- (b) the reference to claims to property comprised in or subject to a floating charge is to the claims of-
 - (i) the holders of debentures secured by, or holders of, the floating charge, and
 - (ii) any preferential creditors entitled to be paid out of that property in priority to them.

(3) Provision may be made by rules restricting the application of subsection (1), in such circumstances as may be prescribed, to expenses authorized or approved-

- (a) by the holders of debentures secured by, or holders of, the floating charge and by any preferential creditors entitled to be paid in priority to them, or
- (b) by the court.

(4) References in this section to the expenses of the bank are to all expenses properly incurred in the bank insolvency including the remuneration of the bank liquidator.

Commentary: *This section provides for the payment of expenses of bank insolvency to have priority over claims to property comprised in any floating charge, if the assets of the bank available for general creditors are insufficient.*

Subsection (2) defines expressions used in subsection (1).

Subsection (3) makes provision for rules to be made restricting the application of this section.

Share of assets for unsecured creditors

134. (1) This section applies where a floating charge relates to property of a bank-

- (a) which has entered bank insolvency, or which is in bank administration,
- (b) of which there is a provisional liquidator.

(2) The bank liquidator -

- (a) shall make a prescribed part of the bank's net property available for the satisfaction of unsecured debts, and
- (b) shall not distribute that part to the proprietor of a floating charge except in so far as it exceeds the amount required for the satisfaction of unsecured debts.

(3) Subsection (2) shall not apply to a bank if-

- (a) the bank's net property is less than the prescribed minimum, and
- (b) the bank liquidator or administrator thinks that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits.

(4) Subsection (2) shall also not apply to a bank if or in so far as it is disapplied by-

- (a) a voluntary arrangement in respect of

-
- the bank, or
- (b) a compromise or arrangement agreed under Part VIII of the Companies Act 1981 (arrangements and reconstructions).
- (5) Subsection (2) shall also not apply to a bank if-
- (a) the bank liquidator or administrator applies to the court for an order under this subsection on the ground that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits, and
 - (b) the court orders that subsection (2) not apply.
- (6) In subsections (2) and (3) a bank's net property is the amount of its property which would, but for this section, be available for satisfaction of claims of holders of debentures secured by, or holders of, any floating charge created by the bank.
- (7) The Minister may by order prescribe the part of a bank's net property that shall be available for the satisfaction of unsecured debts as provided in subsection (2) and such order may, in particular, provide for its calculation-
- (a) as a percentage of the bank's net property, or
 - (b) as an aggregate of different percentages of different parts of the bank's property.
- (8) An order under this section-
- (a) must be made by statutory instrument, and
 - (b) shall be subject to negative resolution procedures
- (9) In this section-

“floating charge” means a charge which is a floating charge on its creation and which is created after the first order under subsection (7) (a) comes into force, and

“prescribed” means prescribed by order by the Minister.

(10) An order under this section may include transitional or incidental provision.

Commentary: *This section seeks to ensure that notwithstanding the existence of a floating charge a part of the banks property is made available for the satisfaction of unsecured debts.*

Subsection (2) imposes a duty on the bank liquidator and bank administrator to make a prescribed part of the banks net property available for the satisfaction of unsecured debts and precludes the liquidator from distributing that part to the proprietor of a floating charge except where it exceeds the amount required for the satisfaction of unsecured debts. Subsection (7) empowers the Minister to prescribe the part of a bank’s net property that would be available to satisfy unsecured debts.

Subsection (3) disapplies subsection (2) in circumstances where the banks net property is less than the prescribed minimum, or where the liquidator thinks that the cost of making a distribution is disproportionate to the benefits.

Subsection (4) makes provision for the disapplication of subsection (2) if disapplied by a voluntary arrangement or a compromise or arrangement under Part VIII of the Companies Act 1981.

Subsection (5) also provides for the disapplication of subsection (2) by order of the court on the application of bank liquidator or administrator.

Subsection (6) defines a bank's net property.

Power to appoint special manager

135. (1) Where a bank has gone into bank insolvency or a provisional bank liquidator has been appointed, the court may, on an application under this section, appoint any person to be the special manager of the business or property of the bank.

(2) The application may be made by the bank liquidator or provisional bank liquidator in any case where it appears to him that the nature of the business or property of the bank, or the interests of the bank's creditors or contributories or members generally, require the appointment of another person to manage the bank's business or property.

(3) The special manager has such powers as may be entrusted to him by the court.

(4) The court's power to entrust powers to the special manager includes power to direct that any provisions of this Act that has effect in relation to the provisional bank liquidator or bank liquidator of a bank shall have the like effect in relation to the special manager for the purposes of the carrying out by him of any of the functions of the provisional bank liquidator or bank liquidator.

(5) The special manager shall-

- (a) give such security as may be prescribed;
- (b) prepare and keep such accounts as may be prescribed; and
- (c) produce those accounts in accordance

with the rules to the Minister or to such persons as may be prescribed.

Commentary: *This section makes provision for the appointment by the court on the application of a bank liquidator or a provisional bank liquidator, of a special manager of the business or property of a bank.*

Subsections (3) and (4) provide for the special manager to have such powers and may be entrusted to him by the court, including powers to direct that provisions of the Act having effect in relation to provisional bank liquidators and bank liquidators have like effect in relation to the special manager.

Subsection (5) requires the special manager to give such security and may be prescribed and to prepare and keep accounts which he is required to produce for the Minister or other person as may be prescribed.

Disclaimer

Power to disclaim onerous property

136. (1) This and the next two sections apply to a bank that is being made, the subject on an insolvency order.

(2) Subject as follows, the bank liquidator may, by the giving of the prescribed notice, disclaim any onerous property and may do so notwithstanding that he has taken possession of it, endeavored to sell it, or otherwise exercised rights of ownership in relation to it.

(3) The following is onerous property for the purposes of this section-

- (a) any unprofitable contract, and

-
- (b) any other property of the bank which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act.
 - (4) A disclaimer under this section-
 - (a) operates so as to determine, as from the date of the disclaimer, the rights, interest and liabilities of the bank in or in respect of the property disclaimed; but
 - (b) does not, except so far as is necessary for the purpose of releasing the bank from any liability, affect the rights or liabilities of any other person.
 - (5) A notice of disclaimer shall not be given under this section in respect of any property if-
 - (a) a person interested in the property has applied in writing to the bank liquidator or one of his predecessors as bank liquidator requiring the bank liquidator of that predecessor to decide whether he will disclaim or not, and
 - (b) the period of 28 days beginning with the day on which that application was made, or such longer period as the court may allow, has expired without a notice of disclaimer having been given under this section in respect of that property.
 - (6) Any person sustaining loss or damage in consequence of the operation of a disclaimer under this section is deemed a creditor of the bank to the extent of the loss or damage and accordingly may

prove for the loss or damage in the bank insolvency.

Commentary: *This section empowers the bank liquidator to disclaim any onerous property of the bank subject to the giving of the prescribed notice.*

Subsection (3) defines onerous property as being (a) any unprofitable contract; and (b) other property of the bank which is un-saleable or may give rise to a liability to pay money.

Subsection (4) provides that the disclaimer would operate to determine the rights and liabilities of the bank in respect of the property disclaimed but does not affect the rights and abilities of any other person.

But no notice need be given if a person interested in the property applies to the bank administrator requiring him to decide whether or not he proposes to disclaim the property and no notice of disclaimer is given within 28 days.

Subsection (7) reserves the right of any person who suffers damage as a result of the disclaimer to claim as a creditor in the insolvency.

Disclaimer of leaseholds

137. (1) The disclaimer under section 138 of any property of a leasehold nature does not take effect unless a copy of the disclaimer has been served (so far as the bank liquidator is aware of their addresses) on every person claiming under the bank as underlessee or mortgagee and either-

- (a) no application under section 127 below is made with respect to that property before the end of the period

of 14 days beginning with the day on which the last notice served under this subsection was served; or

- (b) where such an application has been made, the court directs that the disclaimer shall take effect.

(2) Where the court gives a direction under subsection (1) (b) it may also, instead of or in addition to any order it makes under section 139, make such orders with respect to fixtures, tenant's improvements and other matters arising out of the lease as it thinks fit.

Commentary: *This section provides that no disclaimer of property of a leasehold nature shall have effect unless a copy of the disclaimer has been served on every person claiming under the bank as an under leaser or mortgage and no application is made under section 139 by either of them claiming an interest in the disclaimed property or the court otherwise directs that the disclaimer shall take effect.*

Land subject to rentcharge

138. (1) The following applies where, in consequence of the disclaimer under section 137 of any land subject to a rentcharge, that land vests by operation of law in the Crown or any other person (referred to in the next subsection as "the proprietor").

(2) The proprietor and the successors in title of the proprietor are not subject to any personal liability in respect of any sums becoming due under

the rentcharge except sums becoming due after the proprietor, or some person claiming under or through the proprietor, has taken possession or control of the land or has entered into occupation of it.

Commentary: *Where the property disclaimed under section 138 is land subject to a rentcharge, it will vest in either the Crown or some other proprietor. In those circumstances, subsection (2) provides that neither the Crown nor other proprietor would be subject to any liability for sums due under the rentcharge, unless the liability arose after the Crown or proprietor took possession of the land.*

Powers of court (general)

139. (1) This section and the next apply where the bank liquidator has disclaimed property under section 136.

(2) An application under this section may be made to the court by-

- (a) any person who claims an interest in the disclaimed property, or
- (b) any person who is under any liability in respect of the disclaimed property, not being a liability discharged by the disclaimer.

(3) Subject as follows, the court may on the application make an order, on such terms as it thinks fit, for the vesting of the disclaimed property in, or for its delivery to-

- (a) a person entitled to it or a trustee for such a person, or

(b) a person subject to such a liability as is mentioned in subsection (2)(b) or a trustee for such a person.

(4) The court shall not make an order under subsection (3)(b) except where it appears to the court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer.

(5) The effect of any order under this section shall be taken into account in assessing for the purpose of section 136 (6) the extent of any loss or damage sustained by any person in consequence of the disclaimer.

(6) An order under this section vesting property in any person need not be completed by conveyance, assignment or transfer.

Commentary: *This section makes provision empowering the court on the application of a person who claims an interest in disclaimed property or a person who is under a liability in respect of the disclaimed property to make an order for the vesting of the disclaimed property in the person entitled to it or a person subject to such a liability.*

Powers of court (leaseholds)

140. (1) The court shall not make an order under section 139 vesting property of a leasehold nature in any person claiming under the bank as underlessee or mortgagee except on terms making that person—

(a) subject to the same liabilities and obligations as the bank was subject to under the lease at the

-
- commencement of the bank insolvency, or
- (b) if the court thinks fit, subject to the same liabilities and obligations as that person would be subject to if the lease had been assigned to him at the commencement of the bank insolvency.

(2) For the purposes of an order under section 1398 relating to only part of any property comprised in a lease, the requirements of subsection (1) apply as if the lease comprised only the property to which the order relates.

(3) Where subsection (1) applies and no person claiming under the bank as underlessee or mortgagee is willing to accept an order under section 139 on the terms required by virtue of that subsection, the court may, by order under that section, vest the bank's estate or interest in the property in any person who is liable (whether personally or in a representative capacity, and whether alone or jointly with the bank) to perform the lessee's covenants in the lease.

(4) The court may vest that estate and interest in such a person freed and discharged from all estates, encumbrances and interests created by the bank.

(5) Where subsection (1) applies and a person claiming under the bank as underlessee or mortgagee declines to accept an order under section 139, that person is excluded from all interest in the property.

Commentary: *This section makes provisions*

constraining the powers of the court under section 139 to vest disclaimed property of a leasehold nature on a person claiming as an underlessee or mortgagee.

In such cases, the court is required to vest the property only on condition that the person claiming is subject to the same liabilities and obligations as the bank was subject to under the lease; and if the court considers it appropriate subject to the same liabilities and obligations that that person would be subject to if the lease had been assigned to him at the commencement of bank insolvency.

Effect of execution or attachment

141. (1) Where a creditor has issued execution against the goods or land of a bank or has attached any debt due to it, and the bank is subsequently made the subject of bank insolvency, he is not entitled to retain the benefit of the execution or attachment against the bank liquidator unless he has completed the execution or attachment before the commencement of the bank insolvency.

(2) However—

- (a) if a creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which he had notice is substituted, for the purpose of subsection (1), for the date of commencement of the bank insolvency;
- (b) a person who purchases in good faith under a sale by an officer charged with the execution of the writ any

goods of a bank on which execution has been levied in all cases acquires a good title to them against the bank liquidator; and

- (c) the rights conferred by subsection (1) on the bank liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit.

(3) For purposes of this Act—

- a. an execution against goods is completed by seizure and sale
- b. an attachment of a debt is completed by receipt of the debt; and
- c. an execution against land is completed by seizure, by the appointment of a receiver.

Commentary: *This section precludes a creditor from benefitting from any execution or attachment against the property of a bank, if the creditor has failed to compute the execution or attachment before the making of the bank insolvency order.*

Subsection (2) makes provisions for exceptions, in cases of voluntary winding-up, purchases in good faith and when the court orders otherwise.

Subsection (3) defines "execution" and "attachment".

Duties of officers charged with execution of writs and other processes

142. (1) The following applies where a bank's goods are taken in execution and, before their sale or the

completion of the execution (by the receipt or recovery of the full amount of the levy), notice is served on the bank officer, charged with execution of the writ or other process, that a provisional bank liquidator has been appointed or that a bank insolvency order has been made.

(2) The officer shall, on being so required, deliver the goods and any money seized or received in part satisfaction of the execution to the bank liquidator; but the costs of execution are a first charge on the goods or money so delivered, and the bank liquidator may sell the goods, or a sufficient part of them for the purpose of satisfying the charge.

(3) If under an execution in respect of a judgment for a sum exceeding \$500 a bank's goods are sold or money is paid in order to avoid sale, the officer shall deduct the costs of the execution from the proceeds of sale or the money paid and retain the balance for 14 days.

(4) The rights conferred by this section on the bank liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit.

(5) In this section, "goods" includes all chattels personal.

(6) The money sum for the time being specified in subsection (3) is subject to increase or reduction by order under section [X].

Commentary: *This section makes provision for cases where a bank's goods are taken in execution but before their sale or completion of the execution, notice is served on the bank office that a bank insolvency order has been made.*

In those circumstances subsection (2) requires that the officer delivers the goods and money seized in satisfaction of the execution to the bank liquidator.

Miscellaneous

Rescission of contracts by the court

143. (1) The court may, on the application of a person who is, as against the bank liquidator, entitled to the benefit or subject to the burden of a contract made with the bank, make an order rescinding the contract on such terms as to payment by or to either party of damages for the nonperformance of the contract, or otherwise as the court thinks just.

(2) Any damages payable under the order to such a person may be proved by him as a debt in the bank insolvency.

Commentary: *This section empowers the Court to rescind a contract. Such a power is exercisable on the application of a person who is entitled to the benefit of the contract with the bank or is subject to the burden of the contract.*

The court can rescind the contract on such terms as to payment of damages for the non-performance of the contract.

Notification that bank is in bank insolvency

144. (1) When a bank is subject to a bank insolvency order—

- (a) every invoice, order for goods or services, business letter or order form (whether in hard copy, electronic or

-
- any other form) issued by or on behalf of the bank, or a bank liquidator of the bank; and
- (b) all the bank's websites

must contain a statement that the bank is subject to a bank insolvency order.

(2) If default is made in complying with this section, the bank and any of the following persons who knowingly and willfully authorises or permits the default, namely, any officer of the bank, any bank liquidator [and any receiver or manager] is guilty of an offence and is liable to a summary conviction to a fine of \$10,000.

Commentary: *This section makes provision requiring a bank to insert a statement saying that the bank is subject to a bank insolvency order on all its invoices, order forms, letters etc. and on its website. Non-compliance with this requirement attracts a fine.*

Interest on debts

145. (1) In a bank insolvency interest is payable in accordance with this section on any debt proved in the bank insolvency, including so much of any such debt as represents interest on the remainder.

(2) Any surplus remaining after the payment of the debts proved in bank insolvency shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the bank entered bank insolvency.

(3) All interest under this section ranks equally, whether or not the debts on which it is

payable rank equally.

(4) The rate of interest payable under this section in respect of any debt ("the official rate" for the purposes of any provision of this Act in which that expression is used) is whichever is the greater of—

- (a) the rate specified in rules on the day on which the bank entered bank insolvency, and
- (b) the rate applicable to that debt apart from the bank insolvency.

Commentary: *This section provides for interest on any debt proved in the bank insolvency to be payable.*

Subsection (2) makes provision for any surplus after payment of debts to be applied in payment of the interest.

Subsection (3) provides that the interest on the debt is to rank equally regardless of whether the debts on which they are payable rank equally.

Subsection (4) provides for the rate of interest to be at the rate which is the greater of the rate specified in rules at the time of entering bank insolvency and the rate applicable to that debt apart from bank insolvency.

Documents exempt from stamp duty

146. (1) In the case of a bank insolvency by order of the court, the following has effect as regards exemption from duties chargeable under the enactments relating to stamp duties.

(2) The following documents are exempt from

stamp duty—

- (a) every assurance relating solely to freehold or leasehold property, or to any estate, right or interest in, any real or personal property, which forms part of the bank's assets and which, after the execution of the assurance, either at law or in equity, is or remains part of those assets, and
- (b) every writ, order, certificate, or other instrument or writing relating solely to the property of any bank which is the subject of a bank insolvency order as mentioned in subsection (1), or to any proceeding under such an insolvency.

(3) In this section, "Assurance" includes deed, conveyance, assignment and surrender.

Commentary: *This section exempts from stamp duty deeds, conveyances, assignments and surrenders relating to the bank's freehold or leasehold property and other interests in property; it also exempts from stamp duty or certificates and other instruments relating to the property of the bank.*

Bank's books to be evidence

147. Where a bank is subject to a bank insolvency order by the court, all books and papers of the bank and of the bank liquidators are, as between the contributories of the bank, prima facie evidence of the truth of all matters purporting to be recorded in them.

Commentary: *This section provides that all books and papers of the bank are prime facie evidence of the truth of all matters purporting to be recorded in them.*

Information as to pending bank insolvency

148. (1) If the bank insolvency is not concluded within one year after its commencement, the bank liquidator shall, at such intervals as may be prescribed, until the bank insolvency is concluded, send to the Registrar of Companies a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in, and position of, the bank insolvency.

(2) If a bank liquidator fails to comply with this section, he shall be guilty of an offence and liable on summary conviction to a fine of \$10,000; and, for continued contravention, to a daily default fine of \$200.

Commentary: *This section requires the bank liquidator to send a statement in the prescribed forms containing prescribed particulars with respect to proceedings in the position of the bank insolvency where the insolvency is not concluded within one year.*

Non-compliance with the provision attracts a penalty.

Resolutions passed at adjourned meetings

149. Where a resolution is passed at an adjourned meeting of a bank's creditors or contributories, the resolution is treated for all purposes as having been passed on the date on which it was in fact passed, and not as having been passed on any earlier date.

Commentary: *This section provides that the date of resolution passed at are adjourned meetings of a banks creditors or contributories is the date on which the resolution is passed and not an earlier date.*

Meetings to ascertain wishes of creditors or contributories

150. (1) Subject to Objective 1 in section 102 the court may—

- (a) as to all matters relating to the bank insolvency of a bank, have regard to the wishes of the creditors or contributories (as proved to it by any sufficient evidence), and
- (b) if it thinks fit, for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the court directs, and appoint a person to act as chairman of any such meeting and report the result of it to the court.

(2) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3) In the case of contributories, regard shall be had to the number of votes conferred on each contributory.

Commentary: *This section empowers the court (subject to objective 1 in section 101) to have regard to the wishes of creditors and contributories in relation to bank insolvency matters; and empowers the court to call meetings of creditors and contributories to ascertain those wishes.*

Judicial notice of court documents

151. In all proceedings under this Part, all courts,

judges and persons judicially acting, and all officers, judicial or ministerial, of any court, or employed in enforcing the process of any court shall take judicial notice—

- a. of the signature of any officer of the Supreme Court, and also
- b. of the official seal or stamp of Supreme Court appended to or impressed on any document made, issued or signed under the provisions of this Act or any official copy of such a document.

Commentary: *This section requires the courts and judges to take judicial notice of the signature of an officer of the Supreme Court and of the official seal of the Supreme Court in insolvency proceedings under this Part.*

Affidavits etc. in Bermuda and overseas

152. (1) An affidavit required to be sworn under or for the purposes of this Part may be sworn in Bermuda, or elsewhere in Her Majesty's dominions, before any court, judge or person lawfully authorised to take and receive affidavits, or before any of Her Majesty's consuls or vice-consuls in any place outside Her dominions.

(2) All courts, judges, justices, commissioners and persons acting judicially shall take judicial notice of the seal or stamp or signature (as the case may be) of any such court, judge, person, consul or vice-consul attached, appended or subscribed to any such affidavit, or to any other document to be used for the purposes of this Part.

Commentary: *This section provides for affidavits to be sworn in Bermuda or elsewhere in her Majesty's dominions before any Court, Judge or Consular officer outside Bermuda.*

Subsection (2) requires courts, justices, etc. to take judicial notice of seals, stamps, or signatures of such.

Fraud, etc. in anticipation of bank insolvency

153. (1) When a bank is made the subject of a bank insolvency order by the court, any person, being a past or present officer of the bank, is deemed to have committed an offence if, within the 12 months immediately preceding the commencement of the bank insolvency, he has—

- (a) concealed any part of the bank's property to the value of [\$500] or more, or concealed any debt due to or from the bank, or
- (b) fraudulently removed any part of the bank's property to the value of [\$500] or more, or
- (c) concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the bank's property or affairs, or
- (d) made any false entry in any book or paper affecting or relating to the bank's property or affairs, or
- (e) fraudulently parted with, altered or made any omission in any document affecting or relating to the bank's property or affairs, or
- (f) pawned, pledged or disposed of any property of the bank which has

been obtained on credit and has not been paid for (unless the pawning, pledging or disposal was in the ordinary way of the bank's business).

(2) Such a person is deemed to have committed an offence if within the period above mentioned he has been privy to the doing by others of any of the things mentioned in paragraphs (c), (d) and (e) of subsection (1); and he commits an offence if, at any time after the commencement of the bank insolvency, he does any of the things mentioned in paragraphs (a) to (f) of that subsection, or is privy to the doing by others of any of the things mentioned in paragraphs (c) to (e) of it.

(3) It is a defence—

(a) for a person charged under paragraph (a) or (f) of subsection (1) (or under subsection (2) in respect of the things mentioned in either of those two paragraphs) to prove that he had no intent to defraud, and

(b) for a person charged under paragraph (c) or (d) of subsection (1) (or under subsection (2) in respect of the things mentioned in either of those two paragraphs) to prove that he had no intent to conceal the state of affairs of the bank or to defeat the law.

(4) Where a person pawns, pledges or disposes of any property in circumstances which amount to an offence under subsection (1)(f), every person who takes in pawn or pledge, or otherwise receives, the property knowing it to be pawned, pledged or disposed of in such circumstances, is guilty of an offence.

(5) A person guilty of an offence under this section is liable-

- (a) on summary conviction to a fine of \$50,000 or 2 years imprisonment or both; and
- (b) on conviction on indictment to a fine of \$500,000 or imprisonment for 5 years or both.

(6) The Minister may by order subject to negative resolution procedure increase or reduce the money sums specified in paragraphs (a) and (b) of subsection (1).

Commentary: *This section makes provision for offences in relation to persons seeking to conceal bank property, or to fraudulently remove out of the jurisdiction bank property or cancel or destroy bank books or falsify entries in bank books or fraudulently part with or alter any documents relating to the bank's property or pawn or pledge any bank property – where such action occurs within 12 months preceding bank insolvency.*

Transactions in fraud of creditors

154. (1) When a bank is made the subject of a bank insolvency order by the court, a person is deemed to have committed an offence if he, being at the time an officer of the bank—

- (a) has made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the bank's property, or
- (b) has concealed or removed any part of the bank's property since, or within 2 months before, the date of any

unsatisfied judgment or order for the payment of money obtained against the bank.

(2) A person is not guilty of an offence under this section—

- (a) by reason of conduct constituting an offence under subsection (1)(a) which occurred more than 5 years before the commencement of the bank insolvency, or
- (b) if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud the bank's creditors.

(3) A person guilty of an offence under this section is liable -

- (a) on summary conviction to a fine of \$50,000 or 2 years imprisonment or both; and
- (b) on conviction on indictment to a fine of \$500,000 or imprisonment for 5 years or both.

Commentary: *This section makes provision for offences in relation to the making of gifts or transfers of bank property, etc. or where a person cancels or removes bank property within two months of the date of any unsatisfied judgment.*

Subsection (2) provides for a defence where the conduct complained of occurred more than 5 years before onset of insolvency or where it is shown that there was no intent to defraud.

Misconduct in course of bank insolvency

155. (1) When a bank is subject to bank

insolvency, by the court, any person, being a past or present officer of the bank, commits an offence if he—

- (a) does not to the best of his knowledge and belief fully and truly discover to the bank liquidator all the bank's property, and how and to whom and for what consideration and when the bank disposed of any part of that property (except such part as has been disposed of in the ordinary way of the bank's business), or
- (b) does not deliver up to the liquidator (or as he directs) all such part of the bank's property as is in his custody or under his control, and which he is required by law to deliver up, or
- (c) does not deliver up to the bank liquidator (or as he directs) all books and papers in his custody or under his control belonging to the bank and which he is required by law to deliver up, or
- (d) knowing or believing that a false debt has been proved by any person in the bank insolvency, fails to inform the bank liquidator as soon as practicable, or
- (e) after the commencement of the bank insolvency, prevents the production of any book or paper affecting or relating to the bank's property or affairs.

(2) Such a person commits an offence if after the commencement of bank insolvency he attempts to account for any part of the bank's property by fictitious losses or expenses; and he is

deemed to have committed that offence if he has so attempted at any meeting of the bank's creditors within the 12 months immediately preceding the commencement of the bank insolvency.

(3) It is a defence—

- (a) for a person charged under paragraph (a), (b) or (c) of subsection (1) to prove that he had no intent to defraud, and
- (b) for a person charged under paragraph (e) of that subsection to prove that he had no intent to conceal the state of affairs of the bank or to defeat the law.

(4) A person guilty of an offence under this section is liable—

- (a) on summary conviction to a fine of \$50,000 or 2 years imprisonment or both; and
- (b) on conviction on indictment to a fine of \$500,000 or imprisonment for 5 years or both.

Commentary: *This section makes provision for offences in relation to officers of the bank who fail to fully disclose to the bank liquidator all the bank's property (and of any disposals) or who fail to deliver to the bank liquidator bank property or bank books, and papers; fails to notify the bank liquidator of any false claims or otherwise prevents the production to the bank liquidator of the books or papers.*

Falsification of bank's books.

156. (1) When a bank is being made the subject of a bank insolvency order by the court, an officer or contributory of the bank commits an offence if he

destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the bank with intent to defraud or deceive any person.

(2) A person guilty of an offence under this section is liable-

- (a) on summary conviction to a fine of \$50,000 or 2 years imprisonment or both; and
- (b) on conviction on indictment to a fine of \$500,000 or imprisonment for 5 years or both.

Material omissions from statement relating to bank's affairs.

157. (1) When a bank is being made the subject of a bank insolvency order by the court, any person, being a past or present officer of the bank, commits an offence if he makes any material omission in any statement relating to the bank's affairs.

(2) When a bank has been made the subject of a bank insolvency order by the court, any such person is deemed to have committed that offence if, prior to the making of the bank insolvency order, he has made any material omission in any such statement.

(3) It is a defence for a person charged under this section to prove that he had no intent to defraud.

(4) A person guilty of an offence under this section is liable-

-
- (a) on summary conviction to a fine of \$50,000 or 2 years imprisonment or both; and
 - (b) on conviction on indictment to a fine of \$500,000 or imprisonment for 5 years or both.

Commentary: *This section makes provision for offences in relation to past and present officers of the bank who make material omissions in any statements relating to the bank's affairs.*

False representations to creditors.

158. (1) When a bank is the subject of a bank insolvency order by the court, any person, being a past or present officer of the bank—

- (a) commits an offence if he makes any false representation or commits any other fraud for the purpose of obtaining the consent of the bank's creditors or any of them to an agreement with reference to the bank's affairs or to the bank insolvency, and
- (b) is deemed to have committed that offence if, prior to the bank insolvency, he has made any false representation, or committed any other fraud, for that purpose.

(2) A person guilty of an offence under this section is liable—

- (a) on summary conviction to a fine of \$50,000 or 2 years imprisonment or both; and

-
- (b) on conviction on indictment to a fine of \$500,000 or imprisonment for 5 years or both.

Commentary: *This section makes provision for offences in relation to past or present officers of the bank who make false representations or commit frauds for the purpose of obtaining consent of the creditors to an agreement on the bank's affairs or bank insolvency.*

Penalisation of directors and officers

Summary remedy against delinquent directors, bank liquidators, etc.

159. (1) This section applies if in the course of the bank insolvency it appears that a person who—

- (a) is or has been an officer of the bank,
- (b) has acted as bank liquidator, or
- (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the bank,

has misapplied or retained, or become accountable for, any money or other property of the bank, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the bank.

(2) The reference in subsection (1) to any misfeasance or breach of any fiduciary or other duty in relation to the bank includes, in the case of a person who has acted as bank liquidator, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as bank liquidator of the bank.

(3) The court may, on the application of [the official receiver or] the bank liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—

- (a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or
- (b) to contribute such sum to the bank's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.

(4) The power to make an application under subsection (3) in relation to a person who has acted as bank liquidator of the bank is not exercisable, except with the leave of the court, after he has had his release.

(5) The power of a contributory to make an application under subsection (3) is not exercisable except with the leave of the court, but is exercisable notwithstanding that he will not benefit from any order the court may make on the application.

Commentary: *This section makes provision for offences in relation to past or present officers of the bank, former liquidators or persons concerned in the production or formation of the bank who have misapplied or retained monies or other property of the bank or otherwise have been guilty of misfeasance or such of fiduciary duties. In such cases, the court is empowered to enquire into their*

conduct and to order them to repay or compensate the bank.

Fraudulent trading

160. (1) If in the course of the bank insolvency it appears that any business of the bank has been carried on with intent to defraud creditors of the bank or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2) The court, on the application of the bank liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the bank's assets as the court thinks proper.

Commentary: *This section makes provision for offences in relation to persons responsible for allowing any business of the bank to be conducted fraudulently, to be liable to make contributions to the bank's assets.*

Wrongful trading

161. (1) Subject to subsection (3) below, if in the course of the bank insolvency it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the bank, the court, on the application of the bank liquidator, may declare that that person is to be liable to make such contribution (if any) to the bank's assets as the court thinks proper.

(2) This subsection applies in relation to a person if—

- (a) the bank has entered bank insolvency,

-
- (b) at some time before the commencement of the bank insolvency, that person knew or ought to have concluded that there was no reasonable prospect that the bank would avoid entering bank insolvency, and
 - (c) that person was a director of the bank at that time;

(3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that that person took every step with a view to minimizing the potential loss to the bank's creditors as (assuming him to have known that there was no reasonable prospect that the bank would avoid entering bank insolvency, he ought to have taken.

(4) For the purposes of subsections (2) and (3), the facts which a director of a bank ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both—

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the bank, and
- (b) the general knowledge, skill and experience that that director has.

(5) The reference in subsection (4) to the functions carried out in relation to a bank by a director of the bank includes any functions which he does not carry out but which have been entrusted to

him.

(6) For the purposes of this section a bank enters bank insolvency if it enters bank insolvency at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the bank insolvency.

(7) This section is without prejudice to section 161.

Commentary: *This section empowers the court to declare present or former directors of a bank liable to make contributions to the assets of a bank if before the bank enters into bank insolvency the directors know or ought to have known that there was no reasonable prospect of avoiding insolvency and allowed the bank to continue trading.*

Proceedings under ss. 160, 161

162. (1) On the hearing of an application under section 160 or 161, the bank liquidator may himself give evidence or call witnesses.

(2) Where under either section the court makes a declaration, it may give such further directions as it thinks proper for giving effect to the declaration; and in particular, the court may—

- (a) provide for the liability of any person under the declaration to be a charge on any debt or obligation due from the bank to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the bank held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf, and

(b) from time to time make such further order as may be necessary for enforcing any charge imposed under this subsection.

(3) For the purposes of subsection (2), "assignee"—

(a) includes a person to whom or in whose favour, by the directions of the person made liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but

(b) does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(4) Where the court makes a declaration under either section in relation to a person who is a creditor of the bank, it may direct that the whole or any part of any debt owed by the bank to that person and any interest thereon shall rank in priority after all other debts owed by the bank and after any interest on those debts.

(5) Sections 160 and 161 have effect notwithstanding that the person concerned may be criminally liable in respect of matters on the ground of which the declaration under the section is to be made.

Commentary: *This section makes provision in relation to proceedings before the court under sections 160 and 161. It provides for the bank liquidator to give evidence or call witnesses. It*

provides for the court to give directions to give effect to the declaration.

Restriction on re-use of bank names.

163. (1) This section applies to a person where a bank ("the liquidating bank") has entered into bank insolvency on or after the appointed day and he was a director of the bank at any time in the period of 12 months ending with the day before it went into bank insolvency.

(2) For the purposes of this section, a name is a prohibited name in relation to such a person if—

- (a) it is a name by which the liquidating bank was known at any time in that period of 12 months, or
- (b) it is a name which is so similar to a name falling within paragraph (a) as to suggest an association with that bank.

(3) Except with leave of the court or in such circumstances as may be prescribed, a person to whom this section applies shall not at any time in the period of 5 years beginning with the day on which the liquidating bank entered bank insolvency—

- (a) be a director of any other bank that is known by a prohibited name, or
- (b) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of any such bank, or
- (c) in any way, whether directly or indirectly, be concerned or take part in the carrying on of a business carried on (otherwise than by a bank) under a prohibited name.

(4) If a person acts in contravention of this

section, he is guilty of offence and liable on summary conviction to a fine of \$10,000 or imprisonment of six months or both.

(5) References in this section, in relation to any time, to a name by which a bank is known are to the name of the bank at that time or to any name under which the bank carries on business at that time.

(6) For the purposes of this section a bank enters bank insolvency upon the imposition of bank insolvency by order of the court.

Commentary: *This section makes provision prohibiting a former director of a bank that has entered bank insolvency from being a director of a bank with a name similar to that of the insolvent bank, or taking part in promoting or forming a bank with such name, or being concerned in carrying on a business under such name.*

***Personal liability for debts, following
contravention of s. 163***

164. (1) A person is personally responsible for all the relevant debts of a bank if at any time—

- (a) in contravention of section 163, he is involved in the management of the bank, or
- (b) as a person who is involved in the management of the bank, he acts or is willing to act on instructions given (without the leave of the court) by a person whom he knows at that time to be in contravention in relation to the bank of section 163.

(2) Where a person is personally responsible

under this section for the relevant debts of a bank, he is jointly and severally liable in respect of those debts with the bank and any other person who, whether under this section or otherwise, is so liable.

(3) For the purposes of this section the relevant debts of a bank are—

- (a) in relation to a person who is personally responsible under paragraph (a) of subsection (1), such debts and other liabilities of the bank as are incurred at a time when that person was involved in the management of the bank, and
- (b) in relation to a person who is personally responsible under paragraph (b) of that subsection, such debts and other liabilities of the bank as are incurred at a time when that person was acting or was willing to act on instructions given as mentioned in that paragraph.

(4) For the purposes of this section, a person is involved in the management of a bank if he is a director of the bank or if he is concerned, whether directly or indirectly, or takes part, in the management of the bank.

(5) For the purposes of this section a person who, as a person involved in the management of a bank, has at any time acted on instructions given (without the leave of the court) by a person whom he knew at that time to be in contravention in relation to the bank of section 163 is presumed, unless the contrary is shown, to have been willing at any time thereafter to act on any instructions given by that person.

Commentary: *This section imposes a liability on persons who contravene section 163.*

Subsection (2) makes such person personally liable for the debts of the bank.

Subsection (3) specifies those debts as debts of the bank incurred at a time when such person was involved in the management of the bank.

Investigation and prosecution of malpractice

Prosecution of delinquent officers and members of bank.

165. (1) If it appears to the court in the course of imposition of bank insolvency by the court that any past or present officer, or any member, of the bank has been guilty of any offence in relation to the bank for which he is criminally liable, the court may (either on the application of a person interested in the bank insolvency or of its own motion) direct the bank liquidator to refer the matter to the Minister.

(2) If in the case of a bank insolvency by the court it appears to the bank liquidator, [not being the official receiver], that any past or present officer of the bank, or any member of it, has been guilty of an offence in relation to the bank for which he is criminally liable, the bank liquidator shall report the matter to the Minister.

(3) Where a report is made to the Minister under subsection (2) he may, for the purpose of investigating the matter reported to him and such other matters relating to the affairs of the bank as appear to him to require investigation, exercise any of the powers which are exercisable by inspectors appointed under section 110 of the Companies Act 1981 to investigate a company's affairs.

Commentary: *This section makes provision for the court or a bank liquidator to report to the Minister that a past or present officer of the bank has been found guilty of a criminal offence in relation to the bank.*

Subsection (3) makes provision for the Minister in such cases, to appoint an inspector to investigate the matter.

Obligations arising under s. 166

166. (1) For the purpose of an investigation by the Minister in consequence of a report made to him under section 165(2), any obligation imposed on a person by any provision of the Companies Act 1981 to produce documents or give information to, or otherwise to assist, inspectors appointed as mentioned in section 165(3) is to be regarded as an obligation similarly to assist the Minister in his investigation.

(2) An answer given by a person to a question put to him in exercise of the powers conferred by section 165(3) may be used in evidence against him.

(3) However, in criminal proceedings in which that person is charged with an offence to which this subsection applies—

- (a) no evidence relating to the answer may be adduced, and
- (b) no question relating to it may be asked,

by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.

(4) Subsection (3) applies to any offence other than false statements made on oath otherwise than in judicial proceedings or made otherwise than on oath.

(5) Where criminal proceedings are instituted by the Director of Public Prosecutions, or the Minister following any report or reference under section 165, it is the duty of the bank liquidator and every officer and agent of the bank past and present (other than the defendant) to give to the Director of Public Prosecutions or the Minister (as the case may be) all assistance in connection with the prosecution which he is reasonably able to give.

(6) For the purpose of subsection (5), "agent" includes any barrister and attorney of the bank and any person employed by the bank as auditor, whether that person is or is not an officer of the bank.

(7) If a person fails or neglects to give assistance in the manner required by subsection (3), the court may, on the application of the Director of Public Prosecutions, or the Minister (as the case may be) direct the person to comply with that subsection; and if the application is made with respect to a bank liquidator, the court may (unless it appears that the failure or neglect to comply was due to the bank liquidator not having in his hands sufficient assets of the bank to enable him to do so) direct that the costs shall be borne by the bank liquidator personally.

Commentary: *This section applies the provisions of section 110 of the Companies Act 1981 (Investigation of the affairs of a company) to investigations by the Minister under section 165(3). The obligations under section 110 Companies Act*

1981 to provide information, produce documents requested by an inspector, or to answer questions put by an inspector, in the course of an investigation under that section apply especially in the case of the Minister investigating a matter under section 165(3). Subsection (2) provides for answers to be used in evidence against the maker in regulatory proceedings; but subsection (3) precludes their admission in criminal proceedings. Subsection (4) however allows the evidence to be admitted in criminal proceedings for perjury. Subsection (5) requires the bank liquidator and officers of the bank to give every assistance in a criminal prosecution resulting from the report.

Appointment to office of two or more persons

167. (1) This section applies if an appointment or nomination of any person to the office of the bank liquidator or provisional bank liquidator—

- (a) relates to more than one person, or
- (b) has the effect that the office is to be held by more than one person.

(2) The appointment or nomination shall declare whether any act required or authorised under any enactment to be done by the bank liquidator or provisional bank liquidator is to be done by all or any one or more of the persons for the time being holding the office in question.

Commentary: *This section provides that where more than one bank liquidator or provisional bank liquidator is appointed, then such appointment is required to declare whether their acts are to be done by all of them or any one or more of them.*

Validity of office-holder's acts

168. The acts of an individual as bank liquidator or provisional bank liquidator of a bank are valid notwithstanding any defect in his appointment, nomination or qualifications.

Commentary: *This section provides for the validity of acts of the bank liquidator or provisional bank liquidator notwithstanding any defect in their appointment.*

Management by administrators, liquidators, etc.

Supplies of gas, water, electricity, etc.

169. (1) This section applies in the case of a bank where—

- (a) the bank is being made the subject of a bank insolvency order; or
- (b) a provisional bank liquidator is appointed;

and “the office-holder” means the bank liquidator, or the provisional bank liquidator, as the case may be.

(2) If a request is made by or with the concurrence of the office-holder for the giving, after the effective date, of any of the supplies mentioned in the next subsection, the supplier—

- (a) may make it a condition of the giving of the supply that the office-holder personally guarantees the payment of any charges in respect of the supply, but
- (b) shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a

condition of the giving of the supply, that any outstanding charges in respect of a supply given to the bank before the effective date are paid.

(3) The supplies referred to in subsection (2) are—

- (a) a supply of gas by a gas supplier
- (b) a supply of electricity by an electricity supplier
- (c) a supply of water by a water service provider
- (d) a supply of communications services by a provider of a public electronic communications service.

(4) “The effective date” for the purposes of this section is whichever is applicable of the following dates—

- (a) the date on which the bank becomes subject of a bank insolvency order;
- (b) the date on which the provisional bank liquidator was appointed.

Commentary: *This section allows the supplies of gas, electricity, telecommunications, etc. to make it a condition of the supply of such services to a bank that the bank liquidator personally guarantees the payment of any charges in respect of any supply after the appointment of the bank liquidator and not before.*

Getting in the bank’s property

170. (1) This section applies in the case of a bank where—

- (a) the bank becomes the subject of a bank insolvency order, or

-
- (b) a provisional bank liquidator is appointed;

and “the office-holder” means the bank liquidator or the provisional bank liquidator, as the case may be.

(2) Where any person has in his possession or control any property, books, papers or records to which the bank appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the property, books, papers or records to the office-holder.

(3) Where the office-holder—

- (a) seizes or disposes of any property which is not property of the bank, and
- (b) at the time of seizure or disposal believes, and has reasonable grounds for believing, that he is entitled (whether in pursuance of an order of the court or otherwise) to seize or dispose of that property,

the next subsection has effect.

(4) In that case the office-holder—

- (a) is not liable to any person in respect of any loss or damage resulting from the seizure or disposal except in so far as that loss or damage is caused by the office-holder’s own negligence, and
- (b) has a lien on the property, or the proceeds of its sale, for such expenses as were incurred in connection with the seizure or disposal.

Commentary: *This section empowers the court to order any person who is in possession of property, books, papers or records to which the bank appears to be entitled to be surrendered to the bank liquidator.*

Subsections (3) and (4) give the bank liquidator immunity from suit in relation to any property seized or disposed by the liquidator in the belief that such property belonged to the bank and the seizure and disposal was in accordance with the order of the court.

Duty to co-operate with office-holder

171. (1) Each of the persons mentioned in the next subsection shall—

- (a) give to the office-holder such information concerning the bank and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time after the effective date reasonably require, and
- (b) attend on the office-holder at such times as the latter may reasonably require.

(2) The persons referred to above are—

- (a) those who are or have at any time been officers of the bank,
- (b) those who have taken part in the formation of the bank at any time within one year before the effective date,
- (c) those who are in the employment of the bank, or have been in its

employment (including employment under a contract for services) within that year, and are in the office-holder's opinion capable of giving information which he requires,

- (d) those who are, or have within that year been, officers of, or in the employment (including employment under a contract for services) of, another company which is, or within that year was, an officer of the bank in question, and
- (e) in the case of a bank subject to bank insolvency by the court, any person who has acted as bank liquidator or bank administrator of the bank.

(3) For the purposes of subsections (1) and (2), "the effective date" is whichever is applicable of the following dates—

- (a) the date on which the provisional bank liquidator was appointed, and
- (b) the date on which the bank entered bank insolvency.

(4) If a person without reasonable excuse fails to comply with any obligation imposed by this section he is guilty of an offence and liable on summary conviction to a fine of \$50,000, and where the default continues he shall be liable to a fine of \$500 for every day of default.

Commentary: *This section imposes an obligation on past and present officers of the bank, persons who have taken part in the formation of the bank, persons, who are or*

have been in the employment of the bank, etc. to give the bank administrator or bank liquidator information concerning the bank on a wide range of matters; e.g. its formation, business, dealings, affairs, property, etc. as may be required by the bank administrator.

Inquiry into bank's dealings, etc.

172. (1) The court may, on the application of the office-holder, summon to appear before it—

- (a) any officer of the bank,
- (b) any person known or suspected to have in his possession any property of the bank or supposed to be indebted to the bank, or
- (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the bank.

(2) The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit an affidavit to the court containing an account of his dealings with the bank or to produce any books, papers or other records in his possession or under his control relating to the bank or the matters mentioned in paragraph (c) of the subsection.

(3) An account submitted to the court under subsection (2) must be contained in—

- (a) a witness statement verified by affidavit
- (b) an affidavit

(4) The following applies in a case where—

-
- (a) a person without reasonable excuse fails to appear before the court when he is summoned to do so under this section, or
 - (b) there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court under this section.

(5) The court may, for the purpose of bringing that person and anything in his possession before the court, cause a warrant to be issued to a police officer or prescribed officer of the court—

- (a) for the arrest of that person, and
- (b) for the seizure of any books, papers, records, money or goods in that person's possession.

(6) The court may authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held, in accordance with the rules, until that person is brought before the court under the warrant or until such other time as the court may order.

Commentary: *This section enables the court (on the application of the bank liquidator or on its own motion) to require any officer of the bank, any person having possession of any property of the bank or any person who the court thinks is capable of giving information, etc. concerning the bank to submit an affidavit to the court containing an account of his dealings with the bank or to produce books, records, etc. to the bank.*

Court's enforcement powers under s. 172

173. (1) If it appears to the court, on consideration of any evidence obtained under section 172 or this section, that any person has in his possession any property of the bank, the court may, on the application of the office-holder, order that person to deliver the whole or any part of the property to the office-holder at such time, in such manner and on such terms as the court thinks fit.

(2) If it appears to the court, on consideration of any evidence so obtained, that any person is indebted to the bank, the court, may, on the application of the office-holder, order that person to pay to the office-holder, at such time and in such manner as the court may direct, the whole or any part of the amount due, whether in full discharge of the debt or otherwise, as the court thinks fit.

(3) The court may, if it thinks fit, order that any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 172 or this section shall be examined in Bermuda, or in a place outside Bermuda.

(4) Any person who appears or is brought before the court under section 172 or this section may be examined on oath, either orally by interrogatories [or by written account verified by affidavit], concerning the bank or the matters mentioned in section 173(1)(c).

Commentary: *Where the court establishes after an enquiry under section 172 that a person has in his possession any property of the bank, the court is empowered under this section to order the person concerned to deliver the property to the bank liquidator.*

Subsection (2) provides that if the court, after an enquiry under section 172, is satisfied that any person is indebted to the bank, it may order him to pay the amount due to the bank liquidator.

Adjustment of prior transactions (administration and liquidation)

Transactions at an undervalue

174. (1) This section applies in the case of a bank where—

- (a) the bank enters bank administration, or
- (b) the bank enters bank insolvency,

and “the office-holder” means the bank administrator or the bank liquidator, as the case may be.

(2) Where the bank has at a relevant time (defined in section 176) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.

(3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the bank had not entered into that transaction.

(4) For the purposes of this section and section 166, a bank enters into a transaction with a person at an undervalue if—

- (a) the bank makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the bank to receive no consideration, or

-
- (b) the bank enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the bank.

(5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—

- (a) that the bank which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
- (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the bank.

(6) For the purpose of this section, anything done by the bank in connection with the exercise of a stabilization power under Part 1 of this Act is not a transaction at an under value.

Commentary: *This section makes provision for transaction that have been entered into by the bank at an under value. Under value is defined by subsection (4) as the making of gifts, or transactions for which the bank receives no consideration or a consideration the value of which is significantly less than the value of the consideration provided by the bank.*

Subsection (5) provides an exception where a bank enters into a transaction in good faith and for the purpose of carrying on the business of the bank and

for its benefit. The court is empowered to restore the position to what it would have been if the bank had not entered into that transaction.

Preferences

175. (1) Where the bank has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.

(2) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the bank had not given that preference.

(3) For the purposes of this section and section 177, a bank gives a preference to a person if—

- (a) that person is one of the bank's creditors or a surety or guarantor for any of the bank's debts or other liabilities, and
- (b) the bank does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the bank going into bank insolvency or bank administration, will be better than the position he would have been in if that thing had not been done.

(4) The court shall not make an order under this section in respect of a preference given to any person unless the bank which gave the preference was influenced in deciding to give it by a desire to

produce in relation to that person the effect mentioned in subsection (3)(b).

(5) A bank which has given a preference to a person connected with the bank (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (4).

(6) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference.

(7) For the purpose of this section, action taken by the bank in connection with the exercise of a stabilization power under Part 1 of this Act does not amount to giving a preference.

Commentary: *Where a bank has given a bank's creditor a preference over the creditors by putting him in a better position, than he would have been in the event of a bank insolvency, the court is empowered under this section to restore the position to what it would have been if the bank had not given that preference.*

"Relevant time" under ss. 174,175

176. (1) Subject to the next subsection, the time at which a bank enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into, or the preference given—

- (a) in the case of a transaction at an undervalue or of a preference which is given to a person who is connected

with the bank (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency (which expression is defined below),

- (b) in the case of a preference which is not such a transaction and is not so given, at a time in the period of 6 months ending with the onset of insolvency.

(2) Where a bank enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (1)(a) or (b), that time is not a relevant time for the purposes of section 174 or 175 unless the bank

- (a) is at that time unable to pay its debts within the meaning of section 95(2);
- (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference;

but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a bank with a person who is connected with the bank.

(3) For the purposes of subsection (1), the onset of insolvency is-

- (a) in a case where section 174 or 175 applies by reason of an administrator of a bank being appointed, the date on which the appointment takes effect;

-
- (b) in a case where section 174 or 175 applies by reason of a bank insolvency the date of entering bank insolvency.

Commentary: *This section makes provision for determining the “relevant time” for the purposes of sections 174 and 175 in relation to the time at which a bank is treated to have entered into a transaction at an under value or a transaction at a preference.*

Orders under ss. 175, 176

177. (1) Without prejudice to the generality of sections 174(3) and 175(2), an order under either of those sections with respect to a transaction or preference entered into or given by a bank may (subject to the next subsection)—

- (a) require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the bank,
- (b) require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred,
- (c) release or discharge (in whole or in part) any security given by the bank,
- (d) require any person to pay, in respect of benefits received by him from the bank, such sums to the officeholder as the court may direct,
- (e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction, or by the

giving of the preference, to be under such new or revived obligations to that person as the court thinks appropriate,

- (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for the security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction or by the giving of the preference, and
- (g) provide for the extent to which any person whose property is vested by the order in the bank, or on whom obligations are imposed by the order, is to be able to prove in the bank insolvency of the bank for debts or other liabilities which arose from, or were released or discharged (in whole or in part) under or by, the transaction or the giving of the preference.

(2) An order under section 174 or 175 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the bank in question entered into the transaction or (as the case may be) the person to whom the preference was given; but such an order—

- (a) shall not prejudice any interest in property which was acquired from a person other than the bank and was acquired in good faith, for value and

without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and

- (b) shall not require a person who received a benefit from the transaction or preference in good faith, for value and without notice of the relevant circumstances to pay a sum to the office-holder, except where that person was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of the bank.

(3) Where a person has acquired an interest in property from a person other than the bank in question, or has received a benefit from the transaction or preference, and at the time of that acquisition or receipt-

- (a) he had notice of the relevant surrounding circumstances and of the relevant proceedings, or
- (b) he was connected with, or was an associate of, either the bank in question or the person with whom that bank entered into the transaction or to whom that bank gave the preference,

then, unless the contrary is shown, it shall be presumed for the purpose of paragraph (a) or (as the case may be) paragraph (b) of subsection (2) that the interest was acquired or the benefit was received otherwise than in good faith.

(4) For the purposes of subsection (3), the relevant surrounding circumstances, are (as the case may require)-

- (a) the fact that the bank in question entered into the transaction at an undervalue; or
- (b) the circumstances which amounted to the giving of the preference by the bank in question;

and subsections (5) to (7) have effect to determine whether, for those purposes, a person has notice of the relevant proceedings.

(5) In a case where section 163 or 164 applies by reason of the bank in question entering bank insolvency or bank administration at any time, a person has notice of the relevant proceedings if he has notice-

- (a) where the bank has entered bank insolvency on the making of a bank insolvency order of the fact that the application on which the bank insolvency order is made has been presented or of the fact that the bank has entered into bank insolvency;
- (b) in any other case, of the fact that the bank has entered into bank insolvency.

(6) The provisions of section 174 or 175 apply without prejudice to the availability of any other remedy even in relation to a transaction or preference which the bank had no power to enter into or give.

Commentary: *This section makes detailed provision on the kind of orders that the court may make under*

sections 174 or 175 with respect to transactions or preference entered into or given by a bank. Under subsection (2), the court is empowered to require any property transferred by the bank to be vested in the bank; to release or discharge any security given by the bank; to require the payment of money to the bank liquidator; to require any surety or guarantor whose security obligations to a person were released or discharged; to be subject to new or revived obligations; to provide for security to be provided for the discharge of any obligation imposed by or under the order; and provide for the extent to which persons are able to prove in the bank insolvency in respect of their property vested in the bank. Subsections (3) to (8) provide for ancillary provisions.

Extortionate credit transactions

178. (1) This section applies as does section 163, and where the bank is, or has been, a party to a transaction for, or involving, the provision of credit to the bank.

(2) The court may, on the application of the office-holder, make an order with respect to the transaction if the transaction is or was extortionate and was entered into in the period of 3 years ending with the day on which the bank entered into bank insolvency.

(3) For the purposes of this section a transaction is extortionate if, having regard to the risk accepted by the person providing the credit—

- (a) the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally

-
- or in certain contingencies) in respect of the provision of the credit, or
- (b) it otherwise grossly contravened ordinary principles of fair dealing;

and it shall be presumed, unless the contrary is proved, that a transaction with respect to which an application is made under this section is or, as the case may be, was extortionate.

(4) An order under this section with respect to any transaction may contain such one or more of the following as the court thinks fit, that is to say—

- (a) provision setting aside the whole or part of any obligation created by the transaction,
- (b) provision otherwise varying the terms of the transaction or varying the terms on which any security for the purposes of the transaction is held,
- (c) provision requiring any person who is or was a party to the transaction to pay to the office-holder any sums paid to that person, by virtue of the transaction, by the bank,
- (d) provision requiring any person to surrender to the office-holder any property held by him as security for the purposes of the transaction,
- (e) provision directing accounts to be taken between any persons.

(5) The powers conferred by this section are exercisable in relation to any transaction concurrently with any powers exercisable in relation to that transaction as a transaction at an undervalue.

Commentary: *This section makes provision for the court on the application of the bank liquidator to set aside any obligation created by an extortionate credit transaction or a transaction at an under value, entered into by the bank within 2 years before bank insolvency.*

Subsection (3) describes “extortionate transactions” as transactions requiring grossly exorbitant payment to be made, or that grossly contravene ordinary principles of fair dealing.

Avoidance of certain floating charges

179. (1) Subject as follows, a floating charge on the bank’s undertaking or property created at a relevant time is invalid except to the extent of the aggregate of—

- (a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the bank at the same time as, or after, the creation of the charge,
- (b) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the bank, and
- (c) the amount of such interest (if any) as is payable on the amount falling within paragraph (a) or (b) in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.

(2) Subject to the next subsection, the time at which a floating charge is created by a bank is a relevant time for the purposes of this section if the charge is created—

- (a) in the case of a charge which is created in favour of a person who is connected with the bank, at a time in the period of 2 years ending with the onset of bank insolvency, or
- (b) in the case of a charge which is created in favour of any other person, at a time in the period of 12 months ending with the onset of bank insolvency.

(3) Where a bank creates a floating charge at a time mentioned in subsection (3)(b) and the person in favour of whom the charge is created is not connected with the bank, that time is not a relevant time for the purposes of this section unless the bank—

- (a) is at that time unable to pay its debts within the meaning of section 95, or
- (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction under which the charge is created.

(4) For the purposes of subsection (3), the onset of bank insolvency is —

- (a) in a case where this section applies by reason of an administrator of a bank being appointed by administration order, the date on which the administration application is made,

-
- (b) in a case where this section applies by reason of a bank entering bank insolvency, the date of the commencement of bank insolvency.

(5) For the purposes of subsection (2)(a) the value of any goods or services supplied by way of consideration for a floating charge is the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the goods or services in the ordinary course of business and on the same terms (apart from the consideration) as those on which they were supplied to the bank.

Commentary: *This section invalidates a floating charge in circumstances where the value of the consideration for the creation of the charge exceeds the value of any money given, or goods and services supplied to the bank at the time of creation of the charge; or exceeds the value of any discharge or reduction in the bank's debt; and the interest thereon.*

Unenforceability of liens on books, etc.

180. (1) This section applies in the case of a bank where—

- (a) the bank enters bank insolvency, or
- (b) a provisional bank liquidator is appointed;

and “the office-holder” means the bank liquidator or the provisional bank liquidator, as the case may be.

(2) Subject as follows, a lien or other right to retain possession of any of the books, papers or other records of the bank is unenforceable to the

extent that its enforcement would deny possession of any books, papers or other records to the office-holder.

(3) This does not apply to a lien on documents which give a title to property and are held as such.

Commentary: *This section prevents a person from a lien, or right to retain possession of the books of the bank, its records and papers where such claims would deny the bank liquidator possession of the books, papers and records.*

Preferential debts in Insolvency

Acting without qualification an offence

181. (1) A person who acts as a bank liquidator at a time when he is not qualified to do so is guilty of an offence and liable on summary conviction to a fine of \$50,000.

(2) This section does not apply to the official receiver.

Commentary: *This section makes it an offence for an unqualified person to act as bank liquidator.*

Persons not qualified to act as insolvency practitioners

182. (1) A person who is not an individual is not qualified to act as a bank liquidator.

(2) A person is not qualified to act as a bank liquidator at any time unless at that time he is authorised so to act by virtue of membership of a professional body recognised under section 183 below, being permitted so to act by or under the rules of that body.

(3) A person is not qualified to act as a bank liquidator in relation to another person at any time unless—

- (a) there is in force at that time security, and
- (b) that security meets the prescribed requirements with respect to his so acting in relation to that other person.

(4) A person is not qualified to act as a bank liquidator at any time if at that time he has been adjudged bankrupt or sequestration of his estate has been awarded and (in either case) he has not been discharged.

Commentary: *This section makes provision establishing the qualifications for a bank liquidator. Subsection (1) requires that person to be an individual; subsection (2) requires that person to be authorized to act as bank liquidator by virtue of being a member of a professional body under whose rules he is permitted to so act. Subsection (3) requires a bank liquidator to post a security that meets the requirements prescribed by the Minister. Subsection (4) provides grounds of disqualification. These are bankruptcy or sequestration of estate of the person concerned.*

Recognised professional bodies

183. (1) The Minister may by order declare a body which appears to him to fall within subsection (2) to be a recognised professional body for the purposes of this section.

(2) A body may be recognised if it regulates the practice of a profession and maintains and enforces rules for securing that such of its members

as are permitted by or under the rules to act as bank liquidators—

- a. are fit and proper persons so to act, and
- b. meet acceptable requirements as to education and practical training and experience.

(3) References to members of a recognised professional body are to persons who, whether members of that body or not, are subject to its rules in the practice of the profession in question and the reference in section 182(2) to membership of a professional body recognised under this section is to be read accordingly.

(4) An order made under subsection (1) in relation to a professional body may be revoked by a further order if it appears to the Minister that the body no longer falls within subsection (2).

(5) An order of the Minister under this section has effect from such date as is specified in the order; and any such order revoking a previous order may make provision whereby members of the body in question continue to be treated as authorised to act as bank liquidators for a specified period after the revocation takes effect.

(6) An order under this section has effect in relation to any provision applicable for the purpose of bank insolvency.

Commentary: *This section makes provision for the Minister to recognize professional bodies for the purpose of regulating insolvency practitioners.*

Subsection (2) provides the criteria for recognition of a body namely that its rules secure that its members

are fit and proper and that they meet acceptable requirements on education, practical training and experience.

Provisions Against Debt Avoidance

Additional general powers

184. (1) A bank liquidator has the following powers.

(2) Power to effect and maintain insurances in respect of the business and property of the bank.

(3) Power to do all such things (including the carrying out of works) as may be necessary for the realisation of the property of the bank.

(4) Power to make any payment which is necessary or incidental to the performance of the bank liquidator's functions.

Commentary: *This section makes provision for the power of the bank liquidator. It empowers the bank liquidator to take out insurance on the business of property of the bank; and to do all things necessary for realizing the property of the bank; and to make such properties as are necessary for his functions.*

Status of bank liquidator

185. A bank liquidator is an officer of the court.

Commentary: *This section provides for the bank liquidator to be an officer of the court.*

Tenure of bank liquidator

Term of appointment

186. A bank liquidator appointed by a bank insolvency order remains in office until vacating

office—

- (a) by resigning under section 187,
- (b) on removal under section 188 or 189,
- (c) on disqualification under section 190,
- (d) on the appointment of a replacement in accordance with section 191,
- (e) in accordance with sections 193 to 195, or
- (f) on death.

Commentary: *This section sets out the various ways in which the office of a bank liquidator must be vacated.*

Resignation

187. (1) A bank liquidator may resign by notice to the court.

(2) Rules under section 320 may restrict a bank liquidator's power to resign.

(3) Resignation shall take effect in accordance with those rules (which shall include provision about release).

Commentary: *This section makes provision for the resignation of a bank liquidator. Provision is made by subsection (2) for rules made under section 320 to restrict the liquidator's power to resign.*

Removal by court

188. (1) A bank liquidator may be removed by order of the court on the application of—

- (a) the liquidation committee, or
- (b) the BMA

(2) A bank liquidator removed by order has release with effect from a time determined by the Minister.

Commentary: *This section makes provision for the removal of a bank liquidator by the court on the application of either the liquidation committee or the BMA.*

Removal by creditors

189. (1) A bank liquidator may be removed by resolution of a meeting of creditors held pursuant to section 139 provided that the following conditions are met.

(2) Condition 1 is that the liquidation committee has passed a full payment resolution.

(3) Condition 2 is that the notice given to creditors of the meeting includes notice of intention to move a resolution removing the bank liquidator.

(4) Condition 3 is that the BMA—

(a) receives notice of the meeting, and

(b) is given an opportunity to make representations to it.

(5) A bank liquidator who is removed under this section has release with effect—

(a) from the time when the court is informed of the removal, or

(b) if the meeting removing the bank liquidator resolves to disapply paragraph (a), from a time determined by the Minister.

Commentary: *This section makes provision for the removal of a bank liquidator by resolution of a meeting of creditors held under section 150. Such a resolution would only have effect if the liquidation committee has passed a full payment resolution; if notice is given to the creditors of intention to secure the bank liquidator; and the BMA is notified and*

given an opportunity to make representations to the meeting.

Disqualification

190. (1) If a bank liquidator ceases to be qualified to act as an insolvency practitioner, the appointment lapses.

(2) A bank liquidator whose appointment lapses under subsection (1) has release with effect from a time determined by the Minister.

Commentary: *This section provides for the appointment of a bank liquidator to lapse if he ceases to be qualified to act as an insolvency practitioner.*

Release

191. A bank liquidator who is released is discharged from all liability in respect of acts or omissions in the bank insolvency and otherwise in relation to conduct as bank liquidator (but without prejudice to the effect of section 161.

Commentary: *This section makes provision discharging a bank liquidator from all liability for acts and omissions in the bank insolvency on his release as bank liquidator.*

Replacement

192. (1) Where a bank liquidator vacates office [the BMA or the Minister as the case maybe?] must as soon as is reasonably practicable appoint a replacement bank liquidator.

(2) But where a bank liquidator is removed by resolution of a meeting of creditors under section 189—

-
- (a) a replacement may be appointed by resolution of the meeting, and
 - (b) failing that, subsection (1) above applies.

Commentary: *This section provides for the BMA to appoint a liquidator to replace a bank liquidator who has vacated his office. Provision is also made for a creditor meeting to replace a bank liquidator that it has removed.*

Termination of process, &c

Bank voluntary arrangement

193. (1) A bank liquidator may make a proposal in accordance with section 194 (company voluntary arrangement).

(2) Before making a proposal the bank liquidator—

- (a) shall present a final report on the bank liquidation to the liquidation committee,
- (b) shall send a copy of the report to—
 - (i) the BMA,
 - (ii) the BDIC,
 - (iii) the Minister, and
 - (iv) the registrar of companies, and
- (c) shall make the report available to members, creditors and contributories on request.

(3) A proposal may be made only with the consent of the liquidation committee.

(4) The liquidation committee may consent only if—

- (a) it has passed a full payment resolution, and

(b) the bank liquidator is satisfied, as a result of arrangements made with the BDIC, that any depositor still eligible for compensation under the scheme will be dealt with in accordance with section 101(2)(a) or (b).

(5) The bank liquidator must be the nominee (see section 196).

(9) On the termination of a bank voluntary arrangement the bank liquidator may apply to the court to lift the suspension of the bank insolvency order.

Commentary: *This section makes provision for the bank to enter into voluntary arrangements under section 194. The bank liquidator may make a proposal for voluntary arrangement but only if he has presented a final report to the liquidation committee and the liquidation committee consents to the proposal. However, the liquidation committee can only give its consent if it has passed a full payment resolution.*

The proposal

Those who may propose an arrangement

194. (1) The directors of a bank may make a proposal under this group of sections (section 194 to 203) to the bank and to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs (from here on referred to, in either case, as a "voluntary arrangement").

(2) A proposal under this group of sections is one which provides for some person ("the nominee") to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of

supervising its implementation; and the nominee must be a person who is qualified to act as an insolvency practitioner or authorised to act as nominee, in relation to the voluntary arrangement.

Commentary: *This section makes provision for a bank to enter into voluntary arrangement – described in subsection (1) as a composition in satisfaction of the bank debts or a scheme of arrangement of its affairs; such a voluntary arrangement must be proposed by the directors of the bank to the company and to its creditors, and must nominate a person to act as trustee or otherwise to supervise the implementation of the arrangement.*

Procedure where nominee is not the bank liquidator

195. (1) This section applies where the nominee under section 1 is not the bank liquidator.

(2) The nominee shall, within 28 days (or such longer period as the court may allow) after he is given notice of the proposal for a voluntary arrangement, submit a report to the court stating—

- (a) whether, in his opinion, the proposed voluntary arrangement has a reasonable prospect of being approved and implemented,
- (b) whether, in his opinion, meetings of the bank and of its creditors should be summoned to consider the proposal, and
- (c) if in his opinion such meetings should be summoned, the date on which, and time and place at which, he proposes the meetings should be held.

(3) For the purposes of enabling the nominee to prepare his report, the person intending to make the proposal shall submit to the nominee—

- a. a document setting out the terms of the proposed voluntary arrangement, and
- b. a statement of the bank's affairs containing—
 - (i) such particulars of its creditors and of its debts and other liabilities and of its assets as may be prescribed, and
 - (ii) such other information as may be prescribed.

(4) The court may—

- (a) on an application made by the person intending to make the proposal, in a case where the nominee has failed to submit the report required by this section or has died, or
- (b) on an application made by that person or the nominee, in a case where it is impracticable or inappropriate for the nominee to continue to act as such,

direct that the nominee be replaced as such by another person qualified to act as an insolvency practitioner, or authorised to act as nominee, in relation to the voluntary arrangement.

Commentary: *This section makes provision for the procedure to be followed by the nominee in relation to voluntary arrangements – in cases where the*

nominee is not the bank liquidator, the procedure set out in this section must be followed.

The nominee is required to submit a report to the court setting out his views on the likelihood of the voluntary arrangement being approved and implemented, whether meetings of the creditor should be summoned and the dates for such meetings.

Subsection (2) requires the nominee to be provided with the terms of the proposed voluntary arrangement; and a statement of the bank's Statement of Affairs.

Subsection (3) provides for the court to direct that the nominee be replaced by a qualified person.

Summoning of meetings

196. (1) Where the nominee under section 194 is not the bank liquidator, and it has been reported to the court that such meetings as are mentioned in section 195(2) should be summoned, the person making the report shall (unless the court otherwise directs) summon those meetings for the time, date and place proposed in the report.

(2) Where the nominee is the bank liquidator, he shall summon meetings of the bank and of its creditors to consider the proposal for such a time, date and place as he thinks fit.

(3) The persons to be summoned to a creditors' meeting under this section are every creditor of the bank of whose claim and address the person summoning the meeting is aware.

Commentary: *This section makes provision for the summoning of meetings of the bank and its creditors to consider the proposal for voluntary arrangement.*

Consideration and implementation of proposal

Decisions of meetings

197. (1) The meetings summoned under section 196 shall decide whether to approve the proposed voluntary arrangement (with or without modifications).

(2) The modifications may include one conferring the functions proposed to be conferred on the nominee on another person qualified to act as an insolvency practitioner or authorised to act as nominee, in relation to the voluntary arrangement.

(3) But they shall not include any modification by virtue of which the proposal ceases to be a proposal such as is mentioned in section 194.

(4) A meeting so summoned shall not approve any proposal or modification which affects the right of a secured creditor of the bank to enforce his security, except with the concurrence of the creditor concerned.

(5) Subject as follows, a meeting so summoned shall not approve any proposal or modification under which—

- (a) any preferential debt of the bank is to be paid otherwise than in priority to such of its debts as are not preferential debts, or
- (b) a preferential creditor of the bank is to be paid an amount in respect of a preferential debt that bears to that debt a smaller proportion than is borne to another preferential debt by the amount that is to be paid in respect of that other debt.

(6) However, the meeting may approve such a proposal or modification with the concurrence of the preferential creditor concerned.

(7) Subject as above, each of the meetings shall be conducted in accordance with the rules.

(8) After the conclusion of either meeting in accordance with the rules, the chairman of the meeting shall report the result of the meeting to the court, and, immediately after reporting to the court, shall give notice of the result of the meeting to such persons as may be prescribed.

(9) References in this section to preferential debts and preferential creditors are to be read in accordance with section 311.

Commentary: *This section makes provision for decisions to be taken by meetings of the bank and its creditors. The meeting is empowered to approve proposals for voluntary arrangements with or without modification.*

Approval of arrangement

198. (1) This section applies to a decision, under section 199, with respect to the approval of a proposed voluntary arrangement.

(2) The decision has effect if, in accordance with the rules—

(a) it has been taken by both meetings summoned under section 196, or

(b) (subject to any order made under subsection (4)) it has been taken by the creditors' meeting summoned under that section.

(3) If the decision taken by the creditors' meeting differs from that taken by the bank's

meeting, a member of the bank may apply to the court.

(4) An application under subsection (3) shall not be made after the end of the period of 28 days beginning with—

- a. the day on which the decision was taken by the creditors' meeting, or
- b. where the decision of the bank meeting was taken on a later day, that day.

(5) The BMA is entitled to be heard on the application.

(6) On an application under subsection (3), the court may—

- (a) order the decision of the bank meeting to have effect instead of the decision of the creditors' meeting, or
- (b) make such other order as it thinks fit.

Commentary: *This section provides for decisions of meetings of the bank and its creditors, approving a voluntary arrangement to have effect, where the decision is taken by both meetings.*

Effect of approval

199. (1) This section applies where a decision approving a voluntary arrangement has effect under section 198.

(2) The voluntary arrangement—

- (a) takes effect as if made by the bank at the creditors' meeting, and
- (b) binds every person who in accordance with the rules—
 - (i) was entitled to vote at that meeting (whether or not he was present or represented at it), or

-
- (ii) would have been so entitled if he had had notice of it, as if he were a party to the voluntary arrangement.
- (3) If—
- (a) when the arrangement ceases to have effect any amount payable under the arrangement to a person bound by virtue of subsection (2)(b)(ii) has not been paid, and
 - (b) the arrangement did not come to an end prematurely,
- the bank shall at that time become liable to pay to that person the amount payable under the arrangement.
- (4) Subject as follows, if the bank is subject to bank insolvency the court may –
- (a) suspend the bank insolvency order; and
 - (b) give such directions with respect to the conduct of the bank insolvency as it thinks appropriate for facilitating the implementation of the voluntary arrangement.
- (5) The court shall not make an order under subsection (3)(a)—
- (a) at any time before the end of the period of 28 days beginning with the first day on which each of the reports required by section 197 has been made to the court, or
 - (b) at any time when an application under the next section or an appeal in respect of such an application is pending, or at any time in the period

within which such an appeal may be brought.

Commentary: *This section provides for voluntary arrangements to take effect as if made by the bank at a creditor's meeting, and binds persons who, under the rules, were entitled to vote at that meeting, or would have been so entitled had they had notice.*

Subsection (3) imposes a liability on the bank to pay creditors who have not been paid under the voluntary arrangement before it ceased to have effect.

Challenge of decisions

200. (1) Subject to this section, an application to the court may be made, by any of the persons specified below, on one or both of the following grounds, namely—

- (a) that a voluntary arrangement which has effect under section 198 unfairly prejudices the interests of a creditor, member or contributory of the bank;
- (b) that there has been some material irregularity at or in relation to either of the meetings.

(2) The persons who may apply under subsection (1) are—

- (a) a person entitled, in accordance with the rules, to vote at either of the meetings;
- (b) a person who would have been entitled, in accordance with the rules, to vote at the creditors' meeting if he had had notice of it;

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- (c) the nominee or any person who has replaced him under section 195(4) or 197(2); and
 - (d) if the bank is subject to bank insolvency.
- (3) An application under this section shall not be made—
- (a) after the end of the period of 28 days beginning with the first day on which each of the reports required by section 197(8) has been made to the court, or
 - (b) in the case of a person who was not given notice of the creditors' meeting, after the end of the period of 28 days beginning with the day on which he became aware that the meeting had taken place, but (subject to that) an application made by a person within subsection (2)(b) on the ground that the voluntary arrangement prejudices his interests may be made after the arrangement has ceased to have effect, unless it came to an end prematurely.
- (4) Where on such an application the court is satisfied as to either of the grounds mentioned in subsection (1) it may do one or both of the following, namely—
- (a) revoke or suspend any decision approving the voluntary arrangement which has effect under section 198 or, in a case falling within subsection (1)(b), any [decision taken by the meeting in question which has effect under that section;

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- (b) give a direction to any person for the summoning of further meetings to consider any revised proposal the person who made the original proposal may make or, in a case falling within subsection (1)(b), a further bank or (as the case may be) creditors' meeting to reconsider the original proposal.

(5) Where at any time after giving a direction under subsection (4)(a) for the summoning of meetings to consider a revised proposal the court is satisfied that the person who made the original proposal does not intend to submit a revised proposal, the court shall revoke the direction and revoke or suspend any decision approving the voluntary arrangement which has effect under section 198.

(6) In a case where the court, on an application under this section with respect to any meeting—

- (a) gives a direction under subsection (4)(b), or
- (b) revokes or suspends an approval under subsection (4)(a) or (5),

the court may give such supplemental directions as it thinks fit and, in particular, directions with respect to things done under the voluntary arrangement since it took effect.

(7) Except in pursuance of the preceding provisions of this section, a decision taken at a meeting summoned under section 197 is not invalidated by any irregularity at or in relation to the meeting.

Commentary: *This section makes provision for the court to provide redress for creditors, members and contributories of a bank who have been prejudiced by a voluntary arrangement. The court is empowered under subsection (4) to revoke or suspend any decision approving the voluntary arrangement, and to give directions for summoning further meetings to consider revised proposals.*

False representations, etc.

201. (1) If, for the purpose of obtaining the approval of the members or creditors of a bank to a proposal for a voluntary arrangement, a person who is an officer of the bank—

- (a) makes any false representation, or
- (b) fraudulently does, or omits to do, anything,

he commits an offence.

(2) Subsection (1) applies even if the proposal is not approved.

(3) A person guilty of an offence under this section is liable—

- (a) upon summary conviction to a fine of \$50,000 or imprisonment for 2 years or both;
- (b) on conviction on indictment to a fine of \$500,000 or imprisonment for 5 years or both.

Commentary: *This section makes provision for offences in relation to making false representation or otherwise does a fraudulent act for the purpose of obtaining approval of members or creditors to proposal for voluntary arrangement.*

Implementation of proposal

202. (1) This section applies where a voluntary arrangement has effect under section 198.

(2) The person who is for the time being carrying out in relation to the voluntary arrangement the functions conferred—

(a) on the nominee by virtue of the approval given at one or both of the meetings summoned under section 185,

(b) by virtue of section 195(4) or 197(2) on a person other than the nominee, shall be known as the supervisor of the voluntary arrangement.

(3) If any of the bank's creditors or any other person is dissatisfied by any act, omission or decision of the supervisor, he may apply to the court; and on the application the court may—

(a) confirm, reverse or modify any act or decision of the supervisor,

(b) give him directions, or

(c) make such other order as it thinks fit.

(4) The supervisor—

(a) may apply to the court for directions in relation to any particular matter arising under the voluntary arrangement, and

(b) is included among the persons who may apply to the court for the winding up of the bank.

(5) The court may, whenever—

(a) it is expedient to appoint a person to carry out the functions of the supervisor, and

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- (b) it is inexpedient, difficult or impracticable for an appointment to be made without the assistance of the court,

make an order appointing a person who is qualified to act as an insolvency practitioner or authorised to act as supervisor, in relation to the voluntary arrangement, either in substitution for the existing supervisor or to fill a vacancy.

(6) The power conferred by subsection (5) is exercisable so as to increase the number of persons exercising the functions of supervisor or, where there is more than one person exercising those functions, so as to replace one or more of those persons.

Commentary: *This section provides for the nominee under sections 195 and 197 to be called the Supervisor in relation to his functions for voluntary arrangements.*

Subsection (3) provides for creditors and other persons dissatisfied with decisions of the supervisor to appeal the decision of the court.

Subsection (4) provides for the supervisor to apply to the court for directions or for the winding up of the bank.

Subsections (5) and (6) make provision for the court to appoint a substitute supervisor to fill a vacancy in the office.

Arrangements coming to an end prematurely

203. For the purposes of this group of sections, a voluntary arrangement the approval of which has taken effect under section 198 comes to an end prematurely if, when it ceases to have effect, it has not been fully implemented in respect of all persons

bound by the arrangement by virtue of section 199(2)(b)(i).

Commentary: *This section makes provision for voluntary arrangements to come to an end prematurely if it ceases to have effect at a time when it has not been fully implemented in respect of the persons bound by these.*

Dissolution

204. (1) A bank liquidator who thinks that the winding up of the bank is for practical purposes complete shall summon a final meeting of the liquidation committee.

(2) The bank liquidator—

- (a) shall present a final report on the bank insolvency to the meeting,
- (b) shall send a copy of the report to—
 - (i) the BMA,
 - (ii) the BDIC,
 - (iii) the Minister, and
 - (iv) the registrar of companies, and
- (c) shall make the report available to members, creditors and contributories on request.

(3) At the meeting the liquidation committee shall—

- (a) consider the report, and
- (b) decide whether to release the bank liquidator.

(4) If the liquidation committee decides to release the bank liquidator, the bank liquidator—

- (a) shall notify the court and the registrar of companies, and
- (b) vacates office, and has release, when the court is notified.

(5) If the liquidation committee decides not to release the bank liquidator, the bank liquidator may apply to the Minister for release; if the application is granted, the bank liquidator—

- (a) vacates office when the application is granted, and
- (b) has release from a time determined by the Minister.

(6) On receipt of a notice under subsection (4)(a) the registrar of companies shall register it.

(7) At the end of the period of 3 months beginning with the day of the registration of the notice, the bank is dissolved (subject to deferral under section 205).

Commentary: *This section makes provision for the dissolution of the bank. If the bank liquidator is satisfied that the winding-up of the bank is complete, he must summon a final meeting of the liquidations committee to present them with a final report on the insolvency. The liquidation committee must then consider the report and decide whether or not to release the liquidator. Once released, the liquidator must notify the court and the registrar of companies and vacate his office. But if the liquidations committee decides not to release the liquidator, then he must apply to the Minister for release under subsection (5). If the application is granted, the release has effect.*

Subsection (7) provides for the bank to be dissolved at the end of 3 months from date of notice of release, then registered by the registrar of companies under subsection 4(a).

Dissolution: supplemental

205. (1) The Minister may by direction defer the

date of dissolution under section 204, on the application of a person who appears to the Minister to be interested.

(2) An appeal to the court lies from any decision of the Minister on an application for a direction under subsection (1).

(3) A person who obtains deferral under subsection (1) shall, within 7 days after the giving of the deferral direction, deliver a copy of the direction to the registrar of companies for registration.

(4) A person who without reasonable excuse fails to comply with subsection (3) is guilty of an offence and liable on summary conviction to a fine of \$1000 and, for continued offence, to a daily default fine of \$500.

(5) The bank liquidator may give the notice summoning the final meeting under section 204 at the same time as giving notice of any final distribution of the bank's property; but, if summoned for an earlier date the meeting shall be adjourned (and, if necessary, further adjourned) until a date on which the bank liquidator is able to report to the meeting that the winding up of the bank is for practical purposes complete.

(6) A bank liquidator must retain sufficient sums to cover the expenses of the final meeting under section 204.

Commentary: *This section makes for the provision in relation to dissolution. Subsection (1) empowers the Minister to defer the date of dissolution on the application of an interested person. Subsection (2) provides for appeals against the decision of the Minister to defer dissolution. Subsection (3) requires*

the person who obtained the deferral to notify the registrar of companies within 7 days. Subsection (4) creates an offence for non-compliance with subsection (3); and subsection (5) provides for the bank liquidator to give simultaneous notices of final meetings of creditors and final distributions.

Other processes

Bank insolvency as alternative order

206. (1) On a petition for a winding up order in respect of a bank the court may, instead, make a bank insolvency order.

(2) A bank insolvency order may be made under subsection (1) only on the application of the BMA.

Voluntary winding-up

207. A resolution for voluntary winding up of a bank under Part XIII Companies Act 1981 shall have no effect without the prior approval of the court.

Commentary: *This section precludes the voluntary winding up of a bank without the approval of the court.*

Dismissal of pending winding-up petition

208. (1) A petition for the winding up of a bank—

- (a) shall be dismissed on the making of a bank insolvency order in respect of the bank, and
- (b) shall be suspended while the bank is in bank insolvency.

(2) Sub-section (1)(b) does not apply to a petition presented under—

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- (a) section [XX] of the Companies Act 1981 (public interest), or
 - (b) section 19 of the Banks and Deposits Companies Act 1999 (petition by BMA).

(3) Where a bank liquidator becomes aware that a petition was presented under a provision referred to in subsection (2) before his appointment, he shall apply to the court for directions under section 244.

Commentary: *This section makes provision for the court to dismiss a petition for winding up of the bank on the making of an insolvency order and its supervision during the currency of bank insolvency.*

Notice to BMA of preliminary steps

209. (1) A petition for a winding up order in respect of a bank may not be determined unless the conditions below are satisfied.

(2) A resolution for voluntary winding up of a bank may not be made unless the conditions below are satisfied.

(3) Condition 1 is that the BMA has been notified—

- (a) by the petitioner for a winding up order, that the petition has been presented, or
- (b) by the bank, that a resolution for voluntary winding up may be made.

(4) Condition 2 is that a copy of the notice complying with Condition 1 has been filed with the court (and made available for public inspection by the court).

(5) Condition 3 is that—

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- (a) the period of 2 weeks, beginning with the day on which the notice is received, has ended, or
 - (b) the BMA has informed the person who gave the notice that it does not intend to apply for a bank insolvency order,
 - (c) or exercise a stabilization powers under part 1.
- (6) Condition 4 is that no application for a bank insolvency order is pending.
- (7) Arranging for the giving of notice in order to satisfy Condition 1 can be a step with a view to minimising the potential loss to a bank's creditors for the purpose of section 287 (wrongful trading).
- (8) Where the BMA receives notice under Condition 1 the BMA shall inform the person who gave the notice, within the period in Condition 3(a), whether it intends to apply for a bank insolvency order or exercise a stabilization power under Part 1 of this Act.

Commentary: *This section makes provision for the BMA to be notified of the presentation of a petition for winding up a bank, or a resolution for voluntary winding up of the bank. Where the BMA notifies the person concerned that it proposes to apply for a bank insolvency order, neither the petition nor the resolution can be proceeded with.*

Application of insolvency law

210. (1) The Minister may by order—
- (a) provide for an enactment about insolvency to apply to bank insolvency (with or without specified modifications);

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- (b) amend, or modify the application of, an enactment about insolvency in consequence of this Part.
 - (2) An order under subsection (1)—
 - (a) shall be made by statutory instrument, and
 - (b) shall be subject to affirmative resolution procedure.

Commentary: *This section empowers the Minister by order to apply provisions on insolvency made under other laws to bank insolvency with or without modification.*

Under subsection (2), the orders are subject to affirmative resolution procedure.

Miscellaneous

Role of BDIC

211. (1) For the purpose of co-operating in the pursuit of Objective 1 in section 101 the BDIC—

- (a) may make or arrange for payments to or in respect of eligible depositors of the bank, and
- (b) may make money available to facilitate the transfer of accounts of eligible depositors of the bank.

(2) The BDIC may include provision about expenditure under this section; and, in particular sums raised in connection with the scheme may be expended under this section.

(3) The BDIC is entitled to participate in proceedings for or in respect of a bank insolvency order.

(4) A bank liquidator must—

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- (a) comply with a request of the BDIC for the provision of information, and
 - (b) provide the BDIC with any other information which the bank liquidator thinks might be useful for the purpose of co-operating in the pursuit of Objective 1.

Commentary: *This section makes provision for role of the BDIC in cooperating in bank insolvency. The BDIC may make arrangements for payments to be made in respect of eligible depositors of the bank or make money available to facilitate transfer of accounts of eligible depositors. The bank liquidator is required to provide information to the BDIC on request or if he thinks information would be useful to the BDIC in cooperating for the purpose of Objective 1 in section 101.*

Transfer of accounts

212. (1) This section applies where a bank liquidator arranges, in pursuit of Objective 1 in section 101, for the transfer of eligible depositors' accounts from the bank to another financial institution.

(2) The arrangements may disapply, or provide that they shall have effect despite, any restriction arising by virtue of contract or legislation or in any other way.

(3) In subsection (2) "restriction" includes—

- (a) any restriction, inability or incapacity affecting what can and cannot be assigned or transferred (whether generally or by a particular person), and

(b) a requirement for consent (by any name).

(4) In making the arrangements mentioned in subsection (1) the bank liquidator must ensure that eligible depositors will be able to remove money from transferred accounts as soon as is reasonably practicable after transfer.

Commentary: *This section seeks to facilitate transfers of eligible depositors accounts from the bank to another bank or deposit to their company. Subsection (2) provides for the arrangement by the bank liquidator to disapply any restriction imposed by contract or legislation on such transfers; or consents required for such transfer. Subsection (4) requires the bank liquidator to ensure that eligible depositors will be able to remove their money from transferred accounts as soon as possible.*

PART 3
Bank Administration
Introduction

Overview

213. (1) This Part provides for a procedure to be known as bank administration.

(2) The main features of bank administration are that—

- (a) it is used where part of the business of a bank is sold to a commercial purchaser in accordance with section 11 or transferred to a bridge bank in accordance with section 12 (and it can also be used in certain cases of multiple transfers under Part 1),
- (b) the court appoints a bank administrator on the application of the relevant authority,
- (c) the bank administrator is able and required to ensure that the non-sold or not transferred part of the bank ("the residual bank") provides services or facilities required to enable the commercial purchaser ("the private sector purchaser") or the transferee ("the bridge bank") to operate effectively.

(3) The Table describes the provisions of this Part.

Sections	Topic
Sections 213 to 219	Introduction
Sections 220 to 304	Process
Sections 305 to 307	Multiple Transfers
Sections 308 to 309	Termination

Commentary:

This section gives an overview of Part 3 – bank administration.

Subsection 2 describes the main features of bank administration. This procedure is used in conjunction with a sale to a commercial purchaser under section 11 or a transfer to a bridge bank under section 12. A bank administrator would be appointed by the Court on the application of either the BMA or the Minister. The bank administrator is required to ensure that the residual bank (that part of the bank that is left behind after a sale or transfer) provides services to and facilities that are required to enable the commercial purchase as the bridge bank to operate effectively.

Interpretation: general

214. (1) In this Part-

“bank administrator” where the context requires, includes a reference to a former bank administrator,

“correspondence” includes correspondence by telephonic or other electronic means,

“creditors’ meeting” has the meaning given by section 235,

“hire-purchase agreement” includes a conditional sale agreement, a chattel leasing agreement and a retention of title agreement,

“market value” means the amount which would be realised on a sale of property in the open market by a willing vendor,

(2) used in this Part and in the Companies Act 1981 have the same meaning as in that Act.

(3) A reference to the relevant authority means-

- (a) the BMA in relation to provisions relating to a private sector purchaser, and
- (b) the Minister in relation to provisions relating to a bridge bank, and the provisions of the Part shall be construed accordingly.

Commentary:

This section provides definitions for terms and expressions used in this Part.

Objectives

215. (1) A bank administrator has two objectives—

- (a) Objective 1: support for commercial purchaser or bridge bank (see section 216), and
- (b) Objective 2: “normal” administration (see section 218).

(2) Objective 1 takes priority over Objective 2 (but a bank administrator is obliged to begin working towards both objectives immediately upon appointment).

Commentary:

This section sets out the objectives of bank administration. There are two objectives. Objective 1 is to provide support for the commercial purchaser and the bridge bank. Objective 2 is normal administration, which rescue the (as provided in section 217) residual bank as a going concern or with a view to achieving a better result for the residual bank’s creditors as a whole. This would be the case if the bank were to wound up.

Subsection 2 provides that objective 1 taken priority

over objective 2.

Objective 1: supporting private sector purchaser or bridge bank

216. (1) Objective 1 is to ensure the supply to the private sector purchaser or bridge bank of such services and facilities as are required to enable it, in the opinion of the relevant authority, to operate effectively.

(2) For the purposes of Objective 1—

- (a) the reference to services and facilities includes a reference to acting as transferor or transferee under a supplemental or reverse property transfer instrument or order, and
- (b) the reference to “supply” includes a reference to supply by persons other than the residual bank.

(3) In the case of bank administration following a private sector purchase the bank administrator must co-operate with any request of the BMA to enter into an agreement for the residual bank to provide services or facilities to the private sector purchaser; and—

- (a) in pursuing Objective 1 the bank administrator must have regard to the terms of that or any other agreement entered into between the residual bank and the private sector purchaser,
- (b) in particular, the bank administrator must avoid action that is likely to prejudice performance by the residual bank of its obligations in accordance with those terms,

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- (c) if in doubt about the effect of those terms the bank administrator may apply to the court for directions under section 244, and
 - (d) the private sector purchaser may refer to the court a dispute about any agreement with the residual bank, by applying for directions under section 244.
- (4) In the case of bank administration following transfer to a bridge bank, the bank administrator must co-operate with any request of the Minister to enter into an agreement for the residual bank to provide services or facilities to the bridge bank; and—
- (a) the bank administrator must avoid action that is likely to prejudice performance by the residual bank of its obligations in accordance with an agreement,
 - (b) the bank administrator must ensure that so far as is reasonably practicable an agreement entered into includes provision for consideration at market rate,
 - (c) paragraph (b) does not prevent the bank administrator from entering into an agreement on any terms that the bank administrator thinks necessary in pursuit of Objective 1, and
 - (d) this subsection does not apply after Objective 1 ceases.
- (5) Where a bank administrator requires the relevant authority's consent or approval to any action in accordance with this Part, the relevant

authority may withhold consent or approval only on the grounds that the action might prejudice the achievement of Objective 1.

Commentary:

This section describes the purpose of objective 1, that is, the supply to the private sector purchaser or the bridge bank of services and facilities to enable the private sector purchaser or bridge bank to operate effectively. Such services and facilities include acting as a transferor or transferee under a supplemental or reverse property transfer instrument or order.

Subsections (3) and (4) require an administrator to cooperate with the BMA (in relation to private sector purchasers) and the Minister (in respect of a bridge bank) in relation to requests made by the BMA or the Minister to enter into agreements for the residual bank to provide services or facilities to the private sector purchaser, or as the case may be, the bridge bank.

Objective 1: duration

217. (1) Objective 1 ceases if the relevant authority notifies the bank administrator that the residual bank is no longer required in connection with the private sector purchaser or bridge bank.

(2) A bank administrator who thinks that Objective 1 is no longer required may apply to the court for directions under section 244 and the court may direct the relevant authority to consider whether to give notice under subsection (1) above.

(3) If immediately upon the making of a bank administration order the relevant authority thinks that the residual bank is not required in connection with the private sector purchaser or

bridge bank, the relevant authority may give a notice under subsection (1).

(4) A notice under subsection (1) is referred to in this Part as an "Objective 1 Achievement Notice".

Commentary:

This section makes provision for the duration of Objective 1. Objective 1 ceases to apply if the bank administrator is notified that the residual bank is no longer required in connection with either the private sector purchaser or the bridge bank.

Subsection (2) provides for the administrator to apply to the Court where it thinks that Objective 1 is no longer required.

Objective 2: "normal" administration

218. (1) Objective 2 is to—

- a. rescue the residual bank as a going concern ("Objective 2(a)"), or
- b. achieve a better result for the residual bank's creditors as a whole than would be likely if the residual bank were wound up without first being in bank administration ("Objective 2(b)").

(2) In pursuing Objective 2 a bank administrator must aim to achieve Objective 2(a) unless of the opinion either—

- (a) that it is not reasonably practicable to achieve it, or
- (b) that Objective 2(b) would achieve a better result for the residual bank's creditors as a whole.

(3) In pursuing Objective 2(b) in bank administration following transfer to a bridge bank,

the bank administrator may not realise any asset unless—

- (a) the asset is on a list of realisable assets agreed between the bank administrator and the relevant authority, or
- (b) the relevant authority has given an Objective 1 Achievement Notice.

Commentary:

This section makes provision for Objective 1. This objective has two strands to it. The first is securing the residual bank as a going concern; the second is achieving a better result for the residual bank's creditors than would be the case on a winding-up without bank administration.

Subsection 2 requires the bank administrator to aim to achieve Objective 2(a) unless it is either not practicable to achieve it or Objective 2 would achieve a better result.

Process

Bank administration order

219. (1) A bank administration order is an order appointing a person as the bank administrator.

(2) A person is eligible for appointment as a bank administrator if qualified to act as an insolvency practitioner.

(3) An appointment may be made only if the person has consented to act.

(4) A bank administrator is an officer of the Court.

(5) A bank administration order takes effect in accordance with its terms; and—

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- (a) the process of a bank administration order having effect may be described as “bank administration” in relation to the bank, and
 - (b) while the order has effect the bank may be described as being “in bank administration”.

Commentary:

This section makes provision for an order of the Court appointing a person to be bank administrators. Subsection 2 requires such person to be qualified to act as an insolvency practitioner and if he consents to acting as bank administrator (subsection 3).

Application

220. (1) An application for a bank administration order may be made to the court by the relevant authority.

(2) An application must nominate a person to be appointed as the bank administrator.

(3) The bank must be given notice of an application, in accordance with rules under section 320.

Commentary:

This section makes provision for applications for bank administration order.

An application to the Court must be made by either the BMA or the Minister, and must nominate a qualified person for appointment.

Grounds for applying

221. (1) The relevant authority may apply for a bank administration order in respect of a bank if the following conditions are met.

(2) Condition 1 is that the relevant authority has made or intends to make a property transfer instrument in respect of the bank in accordance with section 11(2) or a property transfer order in respect of the bank in accordance with section 12(2).

(3) Condition 2 is that the relevant authority is satisfied that the residual bank—

- (a) is unable to pay its debts, or
- (b) is likely to become unable to pay its debts as a result of the property transfer instrument or order which the relevant authority intends to make.

Commentary:

This section makes provision for the grounds for applying for a bank administration order.

There are two grounds for applying – the first is that the BMA or the Minister has made or intends to make a property transfer instrument under section 11(2) or as the case may be, order under section 12(2). The second is that the BMA or as the case may be, the Minister, is satisfied that the residual bank is unable to pay its debts or is likely to become unable to pay its debts as a result of the transfer.

Grounds for making

222. (1) The court may make a bank administration order if satisfied that the conditions in section 221 were met.

(2) On an application for a bank administration order the court may—

- a. grant the application,
- b. adjourn the application (generally or to a specified date), or
- c. dismiss the application.

Commentary:

This section makes provision for the grounds for the making of the Order. The Court is required to be satisfied that the conditions set out in section 221 have been satisfied.

General powers, duties and effect

223. (1) A bank administrator may do anything necessary or expedient for the pursuit of the Objectives in section 215.

(2) The following provisions of this section provide for—

- (a) general powers and duties of bank administrators (by application of provisions about administrators), and
- (b) the general process and effects of bank administration (by application of provisions about administration).

Commentary:

This section makes provision for the general powers and duties of a bank administrator.

Subsection (1) provides that a bank administrator may do anything necessary or expedient for pursuing objectives 1 and 2 in section 215.

Effect of Administration

Dismissal of Pending Winding-Up Petition

224. A petition for the winding up of a bank shall be dismissed on the making of a bank administration order in respect of the bank.

Commentary:

This section makes provision for the effect of a bank administration order. If a petition for the winding up

of a bank had been made, then the Court is required to dismiss the petition on the making of a bank administration order.

Moratorium on insolvency proceedings

225. (1) This section applies to a bank in administration.

(2) No resolution may be passed for the winding up of the bank.

(3) No order may be made for the winding up of the bank.

Commentary:

This section imposes a moratorium for the winding up of any bank that is in administration. No resolution for winding up may be passed, and no order for winding up may be made whilst the bank is in administration.

Moratorium on other legal process

226. (1) This section applies to a bank in administration.

(2) No step may be taken to enforce security over the bank's property except—

(a) with the consent of the bank administrator, or

(b) with the permission of the court.

(3) No step may be taken to repossess goods in the bank's possession under a hire-purchase agreement except—

a. with the consent of the bank administrator, or

b. with the permission of the court.

(4) A landlord may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the bank except—

(a) with the consent of the bank administrator, or

(b) with the permission of the court.

(5) No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the bank or property of the bank except—

(a) with the consent of the bank administrator, or

(b) with the permission of the court.

(6) In the case of bank administration following transfer to a bridge bank, unless the relevant authority has given an Objective 1 Achievement Notice consent of the bank administrator may not be given for the purposes of this section without the approval of the relevant authority.

(7) In the case of bank administration following transfer to a bridge bank, unless the relevant authority has given an Objective 1 Achievement Notice, in considering whether to give permission under subsection (6) to a winding-up the court must have regard to the Objectives in section 215.

(8) In considering whether to give permission for the purposes of this section, the court must have regard to the Objectives in section 215.

(9) Where the court gives permission for a transaction under this section it may impose a condition on or a requirement in connection with the transaction.

(10) In this section “landlord” includes a person to whom rent is payable.

Commentary:

This section places a moratorium on other legal process whilst a bank is in administration. No steps may be taken (a) to enforce a security against a bank; (b) to repossess goods in the bank's possession; and no landlord can forfeit a lease granted to the bank; nor can legal process be instituted or continued against the bank or its property without the consent of the administrator.

Interim Moratorium

227. (1) This section applies where a bank administration application in respect of a bank has been made and the application has not yet been granted or dismissed.

(2) The provisions of sections 225 and 227 shall apply (ignoring any reference to the consent of the administrator).

Commentary:

This section makes provision for an interim moratorium. It provides for the moratorium set out in section 225 and 226 to apply in cases where an application for bank administration has been made but not yet granted (or dismissed).

*Process of Administration***Announcement of bank administrator's appointment**

228. (1) This section applies where a person becomes the bank administrator.

(2) As soon as is reasonably practicable the bank administrator shall—

- a. send a notice of his appointment to the bank, and

b. publish a notice of his appointment in the prescribed manner.

(3) As soon as is reasonably practicable the bank administrator shall—

- (a) obtain a list of the bank's creditors, and
- (b) send a notice of his appointment to each creditor of whose name and address he is aware.

(4) The bank administrator shall send a notice of his appointment to the registrar of companies before the end of the period of 7 days beginning with the date specified in subsection (6).

(5) The bank administrator shall send a notice of his appointment to such persons as may be prescribed before the end of the prescribed period beginning with the date specified in subsection (6).

(6) The date for the purpose of subsections (4) and (5) is in the case of a bank administrator appointed by a bank administration order, the date of the order.

(7) The court may direct that subsection (3)(b) or (5)—

- (a) shall not apply, or
- (b) shall apply with the substitution of a different period.

(8) A notice under this section must—

- (a) contain the prescribed information, and
- (b) be in the prescribed form.

(9) A bank administrator commits an offence if he fails without reasonable excuse to comply with a requirement of this section and shall be liable on summary conviction to a fine of \$5,000.

Commentary:

This section makes provision for bank administrators to inform the relevant bank, the bank's creditors, and the Registrar of Companies of his appointment. He is also required to publish a notice of his appointment.

Statement of bank's affairs

229. (1) As soon as is reasonably practicable after appointment the bank administrator shall by notice in the prescribed form require one or more relevant persons to provide the bank administrator with a statement of the affairs of the bank.

(2) The statement must—

- a. be verified by an affidavit,
- b. be in the prescribed form,
- c. give particulars of the bank's property, debts and liabilities,
- d. give the names and addresses of the bank's creditors,
- e. specify the security held by each creditor,
- f. give the date on which each security was granted, and
- g. contain such other information as may be prescribed.

(3) In sub-section (1) "relevant person" means—

- (a) a person who is or has been an officer of the bank,
- (b) a person who took part in the formation of the bank during the period of one year ending with the date on which the bank enters bank administration,

-
- (c) a person employed by the bank during that period, and
 - (d) a person who is or has been during that period an officer or employee of a bank which is or has been during that year an officer of the bank.
- (4) For the purpose of subsection (3) a reference to employment is a reference to employment through a contract of employment or a contract for services.

Commentary:

This section makes provision for the bank administrator to be furnished with a statement of the affairs of the bank. Such statement must be furnished by officers or former officers of the bank or other persons as mentioned in subsection (3).

Subsection (2) requires such a statement to give particulars of the bank's property, debts and liabilities, the bank's creditors, the securities held by creditors, and the date on which each security was granted; and other information as may be prescribed.

Date of submission of statement of affairs

230. (1) A person required to submit a statement of affairs must do so before the end of the period of 14 days beginning with the day on which he receives notice of the requirement.

- (2) The bank administrator may—
- a. revoke a requirement under section 229(1), or
 - b. extend the period specified in subsection (1) (whether before or after expiry).

(3) If the bank administrator refuses a request to act under sub-section (2) the person whose request is refused may apply to the court.

(4) A person who fails without reasonable excuse to comply with a requirement under this section or section 229 is guilty of an offence, and liable on summary of conviction and a fine of \$10,000.

Commentary:

This section requires statements of affairs to be furnished to the bank administrator before the end of a period of 14 days from notice – which may be extended by the bank administrator.

Administrator's proposals –Pre Objective 1 Achievement Notice

231. (1) This section applies before the giving of an Objective 1 Achievement Notice (at which point section 232 applies).

(2) The bank administrator must as soon as is reasonably practicable after appointment make a statement setting out proposals for achieving the Objectives in section 215.

(3) The statement must say whether the bank administrator proposes to pursue Objective 2(a) or 2(b) in section 218.

(4) The statement must have been agreed with the relevant authority.

(5) But a bank administrator who is unable to agree a statement with the relevant authority may apply to the court for directions under section 245; and the court may make any order, including

dispensing with the need for the relevant authority agreement.

(6) The bank administrator must send the statement to the relevant authority.

(7) The bank administrator may revise the statement (and subsections (4) to (6) apply to a revised statement as to the original).

(8) The statement shall be treated in the same way (subject to this section) as a statement under section 232.

Commentary:

This section makes provisions requiring the bank administrator to make a statement setting out his proposals for achieving the objectives in section 215. The bank administrator is required to state whether he proposes to pursue objective 2(a) or 2(b) in section 218.

Subsection (4) requires such statement to be agreed with the BMA or the Minister, as the case may be.

When the bank administrator is unable to agree a statement with the BMA or the Minister, he must apply to the Court for directions under section 245.

Administrator's proposals- Post Objective 1 Achievement Notice

232. (1) This section shall not apply unless the relevant authority has given an Objective 1 Achievement Notice.

(2) The administrator of a bank shall make a statement setting out proposals for achieving the purpose of bank administration.

(3) Before making proposals under subsection (2) in the case of bank administration following transfer to a bridge bank, the bank administrator must consult the relevant authority

about the possibility of a payment to the residual bank from a scheme established by resolution fund order under section 62(3).

(4) A statement under subsection (2) must, in particular—

- (a) deal with such matters as may be prescribed, and
- (b) where applicable, explain why the bank administrator thinks that Objective 2(a) mentioned in section 218(1) cannot be achieved.

(5) Proposals under this section may include—

- (a) a proposal for a voluntary arrangement under Part 2 of this Act,
- (b) a proposal for a compromise or arrangement to be sanctioned under Part III Companies Act 1981. (arrangements and reconstructions).

(6) The bank administrator shall send a copy of the statement of his proposals—

- (a) to the registrar of companies,
- (b) to every creditor of the bank of whose name and address he is aware, and
- (c) to every member of the bank of whose address he is aware

(7) The bank administrator shall comply with subsection (6)—

- (a) as soon as is reasonably practicable after the relevant authority has given an Objective 1 Achievement Notice, and
- (b) in any event, before the end of the period of 68 days beginning with the

day on which the bank enters administration.

(8) The bank administrator shall be taken to comply with subsection (6)(c) if he publishes in the prescribed manner a notice undertaking to provide a copy of the statement of proposals free of charge to any member of the bank who applies in writing to a specified address.

(9) A bank administrator who fails without reasonable excuse to comply with subsection (7) shall be guilty of an offence and liable on summary of conviction to a fine of \$10,000.

(10) A period specified in this section may be varied in accordance with section 277.

Commentary:

This section makes provisions for the bank administrator to make a statement setting out his proposals for achieving bank administration.

But such a requirement only applies once the BMA or the Minister have given the bank administrator an Objective 1 achievement notice.

Under subsection (4) such a statement must deal with prescribed matters, and where applicable, must explain why Objective 2(a) in section 218(1) cannot be achieved.

The bank administrator is required by subsection (6) to provide a copy of his proposals to the Registrar of Companies, to every creditor of the bank, and to every member of the bank.

Creditors' meeting

233. (1) In this Part "creditors" meeting" means a meeting of creditors of a bank summoned by the

bank administrator—

- a. in the prescribed manner, and
- b. giving the prescribed period of notice to every creditor of the bank of whose name and address he is aware.

(2) A period prescribed under subsection (1)(b) may be varied in accordance with section 277.

(3) A creditors' meeting shall be conducted in accordance with the rules.

Commentary:

This section provides for creditors meetings to be summoned by the bank administrator, and for such meetings to be conducted in a manner prescribed in Rules made under section 320.

Requirement for initial creditors' meeting

234. (1) Each copy of an administrator's statement of proposals sent to a creditor under section 231(6)(b) must be accompanied by an invitation to a creditors' meeting (an "initial creditors' meeting").

(2) The date set for an initial creditors' meeting must be—

- (a) as soon as is reasonably practicable after the giving of an Objective 1 Achievement Notice, and
- (b) in any event, within the period of 70 days beginning with the date on which the bank enters bank administration.

(3) A bank administrator shall present a copy of his statement of proposals to an initial creditors' meeting.

(4) A period specified in this section may be varied in accordance with section 276.

(5) A bank administrator who fails without reasonable excuse to comply with a requirement of

this section shall be guilty of an offence and liable on summary conviction to a fine of \$10,000.

Commentary:

This section makes provision for the requirements for the initial creditor's meeting. It requires the statement of proposals sent to the creditors by the bank administrator to contain an invitation to an initial creditor's meeting.

Disapplication of section 234(1)

235. (1) Section 234(1) shall not apply where the statement of proposals states that the bank administrator thinks—

- (a) that the bank has sufficient property to enable each creditor of the bank to be paid in full, or
- (b) that the bank has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of section 134(2)(a).

(2) But the bank administrator shall summon an initial creditors' meeting if it is requested—

- (a) by creditors of the bank whose debts amount to at least 10% of the total debts of the bank,
- (b) in the prescribed manner, and
- (c) in the prescribed period.

(3) A meeting requested under sub-section (2) must be summoned for a date in the prescribed period.

(4) The period prescribed under sub-section (3) may be varied in accordance with section 276.

Commentary:

This section makes provision for the disapplication of section 234(1) if the bank administrator is satisfied

that the bank has sufficient property to enable every creditor to be paid in full; or the bank has insufficient property to enable a distribution to be made to unsecured creditors.

Business and result of initial creditors' meeting

236. (1) An initial creditors' meeting to which a bank administrator's proposals are presented shall consider them and may—

- a. approve them without modification, or
- b. approve them with modification to which the bank administrator consents.

(2) After the conclusion of an initial creditors' meeting the bank administrator shall as soon as is reasonably practicable report any decision taken to—

- (a) the court,
- (b) the registrar of companies, and
- (c) such other persons as may be prescribed.

(3) A bank administrator who fails without reasonable excuse to comply with sub-section (2) shall be guilty of an offence and liable on summary conviction to a fine of \$10,000.

Commentary:

This section requires the initial creditor's meeting to consider the bank administrator's proposals and to either approve them without modification or approve them with such modification as may be consented to by the administrator.

Revision of administrator's proposals

237. (1) This section applies where—

- a. a bank administrator's proposals have been approved (with or without

-
- modification) at an initial creditors' meeting,
- b. the bank administrator proposes a revision to the proposals, and
 - c. the bank administrator thinks that the proposed revision is substantial.
- (2) The bank administrator shall—
- (a) summon a creditors' meeting,
 - (b) send a statement in the prescribed form of the proposed revision with the notice of the meeting sent to each creditor,
 - (c) send a copy of the statement, within the prescribed period, to each member of the bank of whose address he is aware, and
 - (d) present a copy of the statement to the meeting.
- (3) The bank administrator shall be taken to have complied with subsection (2)(c) if he publishes a notice undertaking to provide a copy of the statement free of charge to any member of the bank who applies in writing to a specified address.
- (4) A notice under subsection (3) must be published—
- (a) in the prescribed manner, and
 - (b) within the prescribed period.
- (5) A creditors' meeting to which a proposed revision is presented shall consider it and may—
- (a) approve it without modification, or
 - (b) approve it with modification to which the bank administrator consents.
- (6) After the conclusion of a creditors' meeting the bank administrator shall as soon as is reasonably practicable report any decision taken to—

-
- (a) the court,
 - (b) the registrar of companies, and
 - (c) such other persons as may be prescribed.

(7) A bank administrator who fails without reasonable excuse to comply with subsection (6) is guilty of an offence and liable on summary conviction to a fine of \$10,000.

Commentary:

This section makes provision for a revision of the bank administrator's proposals.

When the bank administrator proposes substantial revisions to his proposal following an initial creditor's meeting, he is required to summon a creditor's meeting and present a copy of the revised proposals at the meeting. The creditor's meeting must then consider the revised proposals and decide whether to approve them with or without modification.

Failure to obtain approval of administrator's proposals

238. (1) This section applies where a bank administrator reports to the court that—

- a. an initial creditors' meeting has failed to approve the bank administrator's proposals presented to it, or
- b. a creditors' meeting has failed to approve a revision of the bank administrator's proposals presented to it.

(2) The court may—

- (a) provide that the appointment of an administrator shall cease to have effect from a specified time;

-
- (b) adjourn the hearing conditionally or unconditionally;
 - (c) make an interim order;
 - (d) make any other order (including an order making consequential provision) that the court thinks appropriate.
 - (e)

Commentary:

This section makes provision for cases where a creditor's meeting fails to approve a bank administrator's proposals presented to it.

In such case, the administrator must report this to the Court and the Court may provide that the appointment of the administrator shall cease to have effect; or may adjourn the hearing; or may make an interim order or other orders.

Further creditors' meetings

239. (1) The bank administrator shall summon a creditors' meeting if—

- a. it is requested in the prescribed manner by creditors of the bank whose debts amount to at least 10% of the total debts of the bank, or
- b. he is directed by the court to summon a creditors' meeting.

(2) The bank administrator may comply with a request under subsection (1)(a) only if satisfied that it will not prejudice pursuit of Objective 1 in section 216.

(3) A bank administrator who fails without reasonable excuse to summon a creditors' meeting as required by this section shall be guilty of an offence and liable on summary conviction to a fine of \$10,000.

Commentary:

This section makes provision for further meetings of creditors. Such meetings must be summoned by the administrator if he is so requested by creditors whose debts amount to at least 10% of the total debts of the bank; or he is so directed by the Court. But a bank administrator need only comply with a request by the creditors of at least 10% of the debt if satisfied that it will not prejudice the pursuit of Objective 1 in section 216.

Creditors' committee

240. (1) Subject to subsections (2) and (3) a creditors' meeting may establish a creditors' committee.

(2) A creditors' meeting may not establish a creditors' committee in reliance on subsection (1) until the relevant authority has given an Objective 1 Achievement Notice.

(3) Until that time the relevant authority shall have the functions of the creditors' committee.

(4) A creditors' committee shall carry out functions conferred on it by or under this Act.

(5) A creditors' committee may require the bank administrator—

- (a) to attend on the committee at any reasonable time of which he is given at least seven days' notice, and
- (b) to provide the committee with information about the exercise of his functions.

Commentary:

This section makes provision for the establishment of a creditor's committee by the creditors meeting. But it can only do so where the BMA or the Minister, as

the case may be, has given an Objective 1 Achievement Notice.

Correspondence instead of creditors' meeting

241. (1) Anything which is required or permitted by or under this Part to be done at a creditors' meeting may be done by correspondence between the bank administrator and creditors—

- a. in accordance with the rules, and
- b. subject to any prescribed condition.

(2) A reference in this Part to anything done at a creditors' meeting includes a reference to anything done in the course of correspondence in reliance on subsection (1).

(3) A requirement to hold a creditor's meeting is satisfied by conducting correspondence in accordance with this section.

Commentary:

This section provides for an alternative to creditors meetings. Anything that may be done at creditors' meetings may be done by correspondence between the bank administrator and the creditors.

But such correspondence maybe in accordance with any Rules that may be made under section 320 and subject to prescribed conditions.

Functions of Administrator

General powers

242. (1) The bank administrator may do anything necessary or expedient for the management of the affairs, business and property of the bank.

(2) A provision of this Part which expressly permits the administrator to do a specified thing is without prejudice to the generality of subsection (1).

(3) A person who deals with the bank administrator in good faith and for value need not inquire whether the bank administrator is acting within his powers.

(4) A bank administrator may not rely on subsection (1) for the purpose of recovering property transferred by property transfer instrument.

Commentary:

This section makes provision for the general powers of the bank administrator. Subsection (1) empowers the bank administrator to do anything necessary or expedient for the management of the affairs, business and property of the bank.

Specified powers of a bank administrator

243. (1) The bank administrator has the powers specified in subsections (4) to (26).

(2) The exercise of those powers is subject to section 215(2) and subsection (3).

(3) In the case of bank administration following transfer to a bridge bank until the relevant authority has given Objective 1 Achievement Notice, power under subsections (5), (6), (14), (17), (18), (19), (20), (21), and (24) may be exercised only with the consent of the relevant authority.

(4) Power to take possession of, collect and get in the property of the bank and, for that purpose, to take such proceedings as may seem to him expedient.

(5) Power to sell or otherwise dispose of the property of the bank by public auction or private contract.

(6) Power to raise or borrow money and grant security therefor over the property of the bank.

(7) Power to appoint a barrister and attorney or accountant or other professionally qualified person to assist him in the performance of his functions.

(8) Power to bring or defend any action or other legal proceedings in the name and on behalf of the bank.

(9) Power to refer to arbitration any question affecting the bank.

(10) Power to effect and maintain insurances in respect of the business and property of the bank.

(11) Power to use the bank's seal.

(12) Power to do all acts and to execute in the name and on behalf of the bank any deed, receipt or other document.

(13) Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the bank.

(14) Power to appoint any agent to do any business which he is unable to do himself or which can more conveniently be done by an agent and power to employ and dismiss employees.

(15) Power to do all such things (including the carrying out of works) as may be necessary for the realisation of the property of the bank.

(16) Power to make any payment which is necessary or incidental to the performance of his functions.

(17) Power to carry on the business of the bank.

(18) Power to establish subsidiaries of the bank.

(19) Power to transfer to subsidiaries of the bank the whole or any part of the business and property of the bank.

(20) Power to grant or accept a surrender of a lease or tenancy of any of the property of the bank,

and to take a lease or tenancy of any property required or convenient for the business of the bank.

(21) Power to make any arrangement or compromise on behalf of the bank.

(22) Power to call up any uncalled capital of the bank.

(23) Power to rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person indebted to the bank and to receive dividends, and to accede to trust deeds for the creditors of any such person.

(24) Power to present or defend a petition for the winding up of the bank.

(25) Power to change the situation of the bank's registered office.

(26) Power to do all other things incidental to the exercise of the foregoing powers.

Commentary:

This section provides specified powers of a bank administrator. But such specified powers are subject to the obligation under section 215(2) that a bank administrator is required to begin working towards both Objective 1 and Objective 2 – albeit that Objective 1 (normal administration) takes priority over Objective 2.

Further, subsection (2) requires certain powers to be exercised only with the consent of the BMA, or as the case may be, the Minister.

Additional specified powers of bank administrator

244. (1) The bank administrator—

-
- a. may remove a director of the bank, and
 - b. may appoint a director of the bank (whether or not to fill a vacancy).

(2) The bank administrator may call a meeting of members or creditors of the bank.

Commentary:

This section makes provision for additional specified powers of the bank administrator. A bank administrator may remove a director of the bank and may appoint another director or an additional director. A bank administrator may also call a meeting of members or creditors of the bank.

Application to court for directions

245. (1) The bank administrator may apply to the court for directions in connection with his functions.

(2) Before the relevant authority has given an Objective 1 Achievement Notice, the bank administrator may apply for directions if unsure whether a proposed action would prejudice the pursuit of Objective 1; and before making an application in reliance on this section the bank administrator must give notice to the relevant authority, which shall be entitled to participate in the proceedings.

(3) In making directions the court must have regard to the Objectives in section 215.

Commentary:

This section makes provision for the bank administrator to apply to the Court for directions in connection with his functions.

Exercise of management powers

246. (1) A bank in bank administration or an

officer of a bank in bank administration may not exercise a management power without the consent of the bank administrator.

- (2) For the purpose of subsection (1)—
- a. “management power” means a power which could be exercised so as to interfere with the exercise of the bank administrator’s powers,
 - b. it is immaterial whether the power is conferred by an enactment or an instrument, and
 - c. consent may be general or specific.

Commentary:

This section makes provision for prohibiting a bank or an officer of the bank from exercising management powers without the consent of the bank administrator.

Distribution

247. (1) Subject to subsection (3) the bank administrator may make a distribution to a creditor of the bank.

(2) Section 131 (preferential debts) applies in relation to a distribution under this section as it applies in relation to a bank insolvency.

(3) In the case of bank administration following transfer to a bridge bank until the relevant authority has given an Objective 1 Achievement Notice a bank administrator may make a distribution only with the relevant authority’s consent.

Commentary:

This section makes provision for the bank administrator to make distribution to creditors. But in cases where the bank administrator has been

appointed following transfer to a bridge bank, the bank administrator may make a distribution only with the consent of the Minister where no Objective 1 Achievement Notice has been given.

Further, under subsection (2), the bank administrator is required to ensure that the preferential debts are paid in priority to all other debts (applying section 133).

Distribution in other cases

248. The bank administrator may make a payment otherwise than in accordance with sections 243(16) and 247 if he thinks it likely to assist achievement of the objectives of bank administration in section 215.

Commentary:

This section makes provision for distribution to be made otherwise than as provided in section 247 and 243(16) if he thinks it is likely to assist achievement of objectives in section 215.

Bank administrator: general duties

249. The bank administrator shall on his appointment take custody or control of all the property to which he thinks the bank is entitled.

Commentary:

This section requires bank administrators to take custody and control of all property to which the bank is entitled.

Bank administrator: management of affairs

250. (1) Subject to subsections (2) and (3), the bank administrator shall manage the bank's affairs, business and property in accordance with—

- a. any proposals approved under section 236,

-
- b. any revision of those proposals which is made by him and which he does not consider substantial, and
 - (c) any revision of those proposals approved under section 237.

(2) Before the approval of proposals under section 236 a bank administrator shall manage the bank's affairs, business and property in accordance with principles agreed between the bank administrator and the relevant authority.

(3) If the court gives directions to the bank administrator in connection with any aspect of his management of the bank's affairs, business or property, the bank administrator shall comply with the directions.

(4) The court may give directions under subsection (3) only if—

- (a) no proposals have been approved under section 236,
- (b) the directions are consistent with any proposals or revision approved under section 236 or 237,
- (c) the court thinks the directions are required in order to reflect a change in circumstances since the approval of proposals or a revision under section 236 or 237, or
- (d) the court thinks the directions are desirable because of a misunderstanding about proposals or a revision approved under section 236 or 237.

Commentary:

This section requires the bank administrator to manage its affairs in accordance with proposals

approved by an initial creditor's meeting under section 236 or any revision of those proposals.

Administrator as agent of bank

251. In exercising his functions under this Part the bank administrator acts as its agent.

Commentary:

This section clarifies the position of the administrator when exercising functions and provides that in such cases he acts as the agent of the bank.

Charged property: floating charge

252. (1) Subject to subsection (3), the bank administrator may dispose of or take action relating to property which is subject to a floating charge as if it were not subject to the charge.

(2) Where property is disposed of in reliance on subsection (1) the holder of the floating charge shall have the same priority in respect of acquired property as he had in respect of the property disposed of.

(3) The bank administrator may take action only if satisfied that it will not prejudice pursuit of Objective 1 in section 215.

(4) In sub-section (2) "acquired property" means property of the bank which directly or indirectly represents the property disposed of.

Commentary:

This section makes provision for a bank administrator to dispose of or take action in relation to property which is subject to a floating charge as if it were not subject to such charge.

Charged property: non-floating charge

253. (1) The court may by order enable the bank administrator to dispose of property which is subject

to a security (other than a floating charge) as if it were not subject to the security.

(2) An order under subsection (1) may be made only—

- a. on the application of the bank administrator, and
- b. where the court thinks that disposal of the property would be likely to promote the objectives of bank administration in section 215 in respect of the bank.
- c. If the court is satisfied that it will not prejudice pursuit of Objective 1 in section 215.

(3) An order under this section is subject to the condition that there be applied towards discharging the sums secured by the security—

- (a) the net proceeds of disposal of the property, and
- (b) any additional money required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the property at market value.

(4) If an order under this section relates to more than one security, application of money under subsection (3) shall be in the order of the priorities of the securities.

(5) A bank administrator who makes a successful application for an order under this section shall send a copy of the order to the registrar of companies before the end of the period of 14 days starting with the date of the order.

(6) A bank administrator who without reasonable cause fails to comply with subsection (5)

shall be guilty of an offence and liable on summary conviction to a fine of \$5,000.

Commentary:

This section makes provision for empowering the Court to make orders establishing the bank administrator to dispose property subject to a security as if it were not subject to such a security.

Subsection (3) imposes a requirement on all such orders that the net proceeds of the disposal of the property be applied towards discharging the sum secured by the security.

Hire-purchase property

254. (1) The court may by order enable the bank administrator to dispose of goods which are in the possession of the bank under a hire-purchase agreement as if all the rights of the owner under the agreement were vested in the bank.

(2) An order under subsection (1) may be made only—

- a. on the application of the bank administrator, and
- b. where the court thinks that disposal of the goods would be likely to promote the purpose of administration in respect of the bank.
- c. In the case of administration following transfer to a bridge bank, until the BMA has given an Objective 1 Achievement Notice an application may be made only with the relevant authority's consent.

(3) An order under this section is subject to the condition that there be applied towards discharging the sums payable under the hire-purchase agreement—

- (a) the net proceeds of disposal of the goods, and
- (b) any additional money required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the goods at market value.

(4) A bank administrator who makes a successful application for an order under this section shall send a copy of the order to the registrar of companies before the end of the period of 14 days starting with the date of the order.

(5) A bank administrator who without reasonable cause fails to comply with sub-section (4), commits an offence and is liable on summary conviction to a fine of \$5,000.

Commentary:

This section makes provision empowering the Court to make orders enabling the bank administrator to dispose of goods in the possession of the bank which are the subject of a hire-purchase agreement.

Subsection (3) imposes a requirement on all such orders that the net proceeds of disposal be applied towards discharging the sums payable under the hire-purchase agreement.

Protection for secured or preferential creditor

255. (1) A bank administrator's statement of proposals under section 231 may not include any

action which—

- a. affects the right of a secured creditor of the bank to enforce his security,
- b. would result in a preferential debt of the bank being paid otherwise than in priority to its non-preferential debts, or
- c. would result in one preferential creditor of the bank being paid a smaller proportion of his debt than another.

(2) Subsection (1) does not apply to—

- (a) action to which the relevant creditor consents,
- (b) a proposal for a voluntary arrangement under sections 194 to 203 (although this subsection is without prejudice to section 196),
- (c) a proposal for a compromise or arrangement to be sanctioned under Part VII the Companies Act 1981 (arrangements and reconstructions),

(3) The reference to a statement of proposals in subsection (1) includes—

- (a) a reference to a statement as revised or modified,
- (b) a reference to the principles specified in section 250(2).

(4) Subsection (1) (a) shall not apply until the relevant authority has given an Objective 1 Achievement Notice.

Commentary:

This section makes provision protecting secured and preferential creditors. It precludes the administrator's statement of proposals under section

231 from including provisions preventing a secured creditor of a bank from securing this security; or that would result in a preferential debt being paid otherwise than in priority to non-preferential debts or would result in a preferential creditor of the bank being paid a smaller portion of this debt than another.

Challenge to bank administrator's conduct of bank

256. (1) A creditor or member of a bank in administration may apply to the court claiming that—

- a. the bank administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or
- b. the bank administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors).

(2) A creditor or member of a bank in administration may apply to the court claiming that the bank administrator is not performing his functions as quickly or as efficiently as is reasonably practicable.

(3) The court may—

- (a) grant relief;
- (b) dismiss the application;
- (c) adjourn the hearing conditionally or unconditionally;
- (d) make an interim order;

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- (e) make any other order it thinks appropriate.
- (4) In particular, an order under this section may—
- (a) regulate the bank administrator's exercise of his functions;
 - (c) require the bank administrator to do or not do a specified thing;
 - (d) require a creditors' meeting to be held for a specified purpose;
 - (e) provide for the appointment of a bank administrator to cease to have effect;
 - (f) make consequential provision.
- (5) An order may be made on a claim under sub-section (1) whether or not the action complained of—
- (a) is within the bank administrator's powers under this Part;
 - (b) was taken in reliance on an order under section 253 or 254.
- (6) An order may not be made under this section if it would impede or prevent the implementation of—
- (a) a voluntary arrangement approved under this Part ,
 - (b) a compromise or arrangement sanctioned under Part VII of the Companies Act 1981(arrangements and reconstructions),
 - (c) proposals or a revision approved under section 236 or 237 more than 28 days before the day on which the application for the order under this section is made.
- (7) The relevant authority may make an application to the court, on any grounds, including

grounds of insufficient pursuit of Objective 1 in section 215 (in addition to applications that may anyway be made under this section).

(8) Until the relevant authority has given an Objective 1 Achievement Notice an order may be made on the application of a creditor only if the court is satisfied that it would not prejudice pursuit of Objective 1 in section 215.

Commentary:

This section makes provision for creditors or members of a bank in administration to apply to the Court to challenge conduct by the bank administrator where it is alleged that he has acted unfairly, or proposes to act in a way which would harm the interests of the application creditor or member, or where the administrator is not performing his functions as quickly or as efficiently as is reasonably practicable.

Misfeasance

257. (1) The court may examine the conduct of a person who—

- a. is or purports to be the bank administrator, or
- b. has been or has purported to be the bank administrator.

(2) An examination under this section may be held only on the application of—

- (a) the official receiver,
- (c) the bank administrator of the bank,
- (d) the liquidator of the bank,
- (e) a creditor of the bank,
- (f) a contributory of the bank, or
- (g) the relevant authority.

(3) An application under sub-section (2) must allege that the bank administrator—

- (a) has misapplied or retained money or other property of the bank,
- (b) has become accountable for money or other property of the bank,
- (c) has breached a fiduciary or other duty in relation to the bank,
- (d) has been guilty of misfeasance.

(4) On an examination under this section into a person's conduct the court may order him—

- (a) to repay, restore or account for money or property;
- (b) to pay interest;
- (c) to contribute a sum to the bank's property by way of compensation for breach of duty or misfeasance.

(5) In subsection (3) "bank administrator" includes a person who purports or has purported to be a bank's administrator.

(6) An application under subsection (2) may be made in respect of an bank administrator who has been discharged under section 268 only with the permission of the court.

Commentary:

This section makes provision enabling the Court to examine the conduct of a person who purports to be a bank administrator.

An application to the Court for such an examination must allege that the bank administrator has misapplied or retained money or other property of the bank; or has become accountable for money or other property of the bank; or has breached a fiduciary duty in relation to the bank.

Court ending administration on application of bank administrator

258. (1) On the application of the bank administrator the court may provide for the appointment of the bank administrator to cease to have effect from a specified time.

(2) The bank administrator shall make an application under this section if the bank administrator thinks that the purpose of bank administration has been sufficiently achieved in relation to the bank.

(3) On an application under this section the court may—

- (a) adjourn the hearing conditionally or unconditionally;
- (c) dismiss the application;
- (d) make an interim order;
- (e) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for).

Commentary:

This section makes provision for the bank administrator to apply to the Court for his appointment to cease to have effect.

Moving from administration to dissolution

259. (1) If the bank administrator thinks that the bank has no property which might permit a distribution to its creditors, he shall send a notice to that effect to the registrar of companies.

(2) The court may on the application of the bank administrator disapply subsection (1) in respect of the bank.

(3) On receipt of a notice under subsection (1) the registrar shall register it.

(4) On the registration of a notice in respect of a bank under subsection (1) the appointment of bank administrator of a bank shall cease to have effect.

(5) If a bank administrator sends a notice under subsection (1) he shall as soon as is reasonably practicable—

(a) file a copy of the notice with the court, and

(b) send a copy of the notice to each creditor of whose name and address he is aware.

(6) At the end of the period of three months beginning with the date of registration of a notice in respect of a bank under subsection (1) the bank is deemed to be dissolved.

(7) On an application in respect of a bank by the bank administrator or another interested person the court may—

(a) extend the period specified in subsection (6),

(b) suspend that period, or

(c) disapply subsection (6).

(8) Where an order is made under subsection (7) in respect of a bank the bank administrator shall as soon as is reasonably practicable notify the registrar of companies.

(9) A bank administrator who fails without reasonable excuse to comply with subsection (5) is guilty of an offence and liable on summary conviction to a fine of \$5,000.

Commentary:

This section makes provision for the bank administrator to dissolve the bank. If the bank administrator is of the view that the bank has no

property which might permit a distribution to its creditors, he must send a notice to that effect to the registrar of companies, who must register the notice. On such registration, the appointment of the administrator ceases to have effect. Subsection (6) provides that at the end of a period of 3 months from the date of registration of a notice, the bank is deemed dissolved.

Discharge of bank administration order where bank administration ends

260. (1) This section applies where the court makes an order under this Part providing for the appointment of a bank administrator to cease to have effect.

(2) The court shall discharge the bank administration order.

Commentary:

This section makes provision for the Court to discharge the bank administration order when the Court makes an order under this Part providing for the appointment of a the bank administrator to cease to have effect.

Notice to Registrar of Companies where bank administration ends

261. (1) This section applies where the court makes an order under this Part providing for the appointment of a bank administrator to cease to have effect.

(2) The bank administrator shall send a copy of the order to the registrar of companies within the period of 14 days beginning with the date of the order.

(3) A bank administrator who fails without reasonable cause to comply with sub-section (2) is

guilty of an offence and liable on summary conviction to a fine of \$5,000.

Commentary:

This section requires a bank administrator to notify the registrar of companies of any order made by the Court for his appointment to cease to have effect.

Replacing Administrator

Resignation of bank administrator

262. (1) A bank administrator may resign only in prescribed circumstances.

(2) A bank administrator may resign only by notice in writing-

- (a) to the court, copied to the relevant authority, or
- (b) in the case of a bank administrator appointed by the creditors' committee under section 266 to the creditors' committee.

Commentary:

This section makes provision for the resignation of a bank administrator. The bank administrator is required to file a notice of resignation to the Court or, as the case may be, the creditors' committee.

Removal of bank administrator from office

263. (1) The court may by order remove a bank administrator from office.

(2) But until the relevant authority has given an Objective 1 Achievement Notice, an application for an order may be made only with the relevant authority's consent.

Commentary:

This section makes provision for the Court to remove a bank administrator from office.

Bank Administrator ceasing to be qualified

264. (1) The bank administrator shall vacate office if he ceases to be qualified to act as an insolvency practitioner in relation to the bank.

(2) Where a bank administrator vacates office by virtue of subsection (1) he shall give notice to the relevant authority.

(3) A bank administrator who fails without reasonable cause to comply with sub-section(2) is guilty of an offense and liable on summary conviction to a fine of \$5,000.

Commentary:

This section makes provision for the bank administrator to vacate his office, if he ceases to be qualified to act as an insolvency practitioner.

Supplying vacancy in office of bank administrator

265. (1) Section 266 applies where a bank administrator—

- a. dies,
- b. resigns,
- c. is removed from office under section 263, or
- d. vacates office under section 264.

Commentary:

This section makes provision for the appointment of a bank administrator to replace an administrator who has died, resigned, removed from office, or ceased to be qualified.

Replacing bank administrator

266. (1) Subject to subsection (2) where the bank administrator was appointed by a bank

administration order, the court may replace the bank administrator on an application under this subsection made by a creditors' committee of the bank.

(2) Until the relevant authority has given an Objective 1 Achievement Notice the Authority may make an application under subsection (1).

(3) Thereafter, either the relevant authority or a creditors' committee may apply.

Commentary:

This section makes provision for the replacement of a bank administrator by the Court on the application of the Minister or the BMA, or the Creditor's Committee.

Substitution of bank administrator: competing floating charge-holder

267. (1) This section applies to a bank administrator but only after an Objective 1 Achievement Notice has been given.

(2) The holder of a prior qualifying floating charge in respect of the bank's property may apply to the court for the bank administrator to be replaced by a bank administrator nominated by the holder of the prior floating charge.

Commentary:

This section makes provision for the holder of a prior qualifying floating charge in respect of the bank's property to apply to the Court for the replacement of a bank administrator. But such application can only be made after an Objective 1 Achievement Notice has been given.

Vacation of office: discharge from liability

268. (1) Where a person ceases to be the bank

administrator (whether because he vacates office by reason of resignation, death or otherwise, because he is removed from office or because his appointment ceases to have effect) he is discharged from liability in respect of any action of his as bank administrator.

(2) The discharge provided by subsection (1) takes effect—

- a. where the person ceases to be bank administrator before an Objective 1 Achievement Notice has been given, at a time determined by the relevant authority, and
- b. otherwise, at a time determined by resolution of the creditors' committee.

(3) Discharge—

- (a) applies to liability accrued before the discharge takes effect, and
- (b) does not prevent the exercise of the court's powers under section 257.

Commentary:

This section makes provision for a person who ceases to be bank administrator to be discharged from liability in respect of any action of the bank administrator.

Vacation of office: charges and liabilities

269. (1) This section applies where a person ceases to be the bank administrator (whether because he vacates office by reason of resignation, death or otherwise, because he is removed from office or because his appointment ceases to have effect).

(2) In this section—

“the former administrator” means the person referred to in subsection (1), and “cessation” means the time when he ceases to be the bank’s administrator.

(3) The former bank administrator’s remuneration and expenses shall be—

- (a) charged on and payable out of property of which he had custody or control immediately before cessation, and
- (b) payable in priority to any security to which section 251 applies.

(4) A sum payable in respect of a debt or liability arising out of a contract entered into by the former bank administrator or a predecessor before cessation shall be—

- (a) charged on and payable out of property of which the former administrator had custody or control immediately before cessation, and
- (b) payable in priority to any charge arising under subsection (3).

(5) Subsection (4) shall apply to a liability arising under a contract of employment which was adopted by the former bank administrator or a predecessor before cessation; and for that purpose—

- (a) action taken within the period of 14 days after an administrator’s appointment shall not be taken to amount or contribute to the adoption of a contract,
- (b) no account shall be taken of a liability which arises, or in so far as it arises, by reference to anything which is done or which occurs before the

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- adoption of the contract of employment, and
- (c) no account shall be taken of a liability to make a payment other than wages or salary.
- (6) In subsection (5)(c) "wages or salary" includes—
- (a) a sum payable in respect of a period of holiday (for which purpose the sum shall be treated as relating to the period by reference to which the entitlement to holiday accrued),
- (b) a sum payable in respect of a period of absence through illness or other good cause,
- (c) a sum payable in lieu of holiday,
- (d) in respect of a period, a sum which would be treated as earnings for that period for the purposes of an enactment about social security, and
- (e) a contribution to an occupational pension scheme.
- (7) In the application of subsection (3), payments may be made only-
- (a) in accordance with directions of the relevant authority
- (b) if the relevant authority satisfied that they will not prejudice Objective 1 in section 215.

Commentary:

This section makes provision in respect of the former bank administrator's remuneration and expenses. Subsection (3) provides that such remunerations and expenses shall be charged and is payable out of property of which the administrator had custody and control immediately before he vacated office and is

payable in priority to a security which is a floating charge to which section 252 applies.

General

Joint and concurrent bank administrators

270. (1) In this Part—

- (a) a reference to the appointment of a bank administrator includes a reference to the appointment of a number of persons to act jointly or concurrently as the bank administrator, and
- (b) a reference to the appointment of a person as bank administrator includes a reference to the appointment of a person as one of a number of persons to act jointly or concurrently as the bank administrator.

(2) The appointment of a number of persons to act as bank administrator must specify—

- (a) which functions (if any) are to be exercised by the persons appointed acting jointly, and
- (b) which functions (if any) are to be exercised by any or all of the persons appointed.

Commentary:

This section makes provision for references to the appointment of a bank administrator to include a reference to the appointment of a number of persons to act jointly or concurrently as bank administrators. Subsection (2) requires the appointment of a number of persons to act as bank administrator to specify the functions to be exercised jointly and the function to be exercised by any or all administrators.

Joint bank administrator

271. (1) This section applies where two or more persons are appointed to act jointly as the bank administrator.

(2) A reference to the bank administrator of the bank is a reference to those persons acting jointly.

(3) But a reference to the bank administrator in sections 262 to 269 of this Part is a reference to any or all of the persons appointed to act jointly.

(4) Where an offence of omission is committed by the bank administrator, each of the persons appointed to act jointly—

(a) commits the offence, and

(b) may be proceeded against and punished individually.

(5) Where persons are appointed to act jointly in respect of only some of the functions of the bank administrator, this section applies only in relation to those functions.

Commentary:

This section makes further provisions for joint bank administrators where two or more persons are appointed as joint administrators.

References to a bank administrator in this Part are to be interpreted as a reference to those persons acting jointly, except for references to bank administrator in sections 262 to 269. In those sections, a reference to bank administrator is to be interpreted a reference to any or all of the joint bank administrators.

Concurrent bank administrator

272. (1) This section applies where two or more

persons are appointed to act concurrently as the bank administrator.

(2) A reference to the bank administrator in this Part is a reference to any of the persons appointed (or any combination of them).

Commentary:

This section provides that when bank administrators have been appointed to act concurrently, then references in this Part to bank administrators is a reference to them acting jointly.

Acting bank administrator (joint and concurrent)

273. (1) Where a bank is in bank administration, a person may be appointed to act as bank administrator jointly or concurrently with the person or persons acting as the bank administrator.

(2) An appointment under sub-section (1) must be made by the court on the application of the person or persons acting as the bank administrator.

(3) An appointment under subsection (1) may be made only with the consent of the person or persons acting as the bank administrator.

(4) But until an Objective 1 Achievement Notice has been given, an application under subsection (1) may be made only by the relevant authority.

Commentary:

This section makes provision for bank administrators to be appointed by the Court to act jointly or concurrently with other bank administrators. Subsection 3 requires such appointments to be made with the consent of the person concerned.

Presumption of Validity

274. An act of the bank administrator is valid in

spite of a defect in his appointment or qualification.

Commentary:

This section makes provision for the validity of acts of bank administrators notwithstanding defects in their appointment.

Extension of time limit

275. (1) Where a provision of this Part provides that a period may be varied in accordance with this section the period may be varied—

- (a) by the court, and
- (b) on the application of the bank administrator.

(2) A time period may be extended under this section—

- (a) more than once, and
- (b) after expiry.

(3) Until an Objective 1 Achievement Notice has been given, an application under this section may be made only by the relevant authority.

(4) In considering an application under this section, the court may have regard to Objective 1 in section 215.

Commentary:

This section makes provision for extension of time. Subsection (2) allows for timelines under the Act to be extended more than once and after their expiry. The Court is required to take into account Objective 1 in section 215.

Variation of specified periods

276. (1) A period specified in section 231 (7), 233 (1) (b) or 234 (2) may be varied in respect of a bank by the bank administrator with consent of the

relevant authority.

(2) The power to extend under sub-section (1)—

- (a) may be exercised in respect of a period only once,
- (b) may not be used to extend a period by more than 28 days,
- (c) may not be used to extend a period which has been extended by the court, and
- (d) may not be used to extend a period after expiry.

Commentary:

This section makes provision for the time period specified in sections 231(7), 233(1)(b) and 234(2) to be varied by a bank administrator but with the consent of the BMA or as the case may be, the Minister. Subsection (2) imposes limitations on the power to vary.

Reference to “period”

277. Where a period is extended under section 275 or 276, a reference to the period shall be taken as a reference to the period as extended.

Commentary:

This section makes provision for the expression “period” in this Part to be defined as a reference to the period as extended.

Amendment of provision about time

278. (1) The Minister may by order amend a provision of this Part which—

- (a) requires anything to be done within a specified period of time,

-
- (b) prevents anything from being done after a specified time, or
 - (c) requires a specified minimum period of notice to be given.
- (2) An order under this section—
- (a) must be made by statutory instrument, and
 - (b) shall be subject to negative resolution procedure.

Commentary:

This section makes provision empowering the Minister to amend any provision of this Part relating to period of time. The Minister is empowered to make such amendments by Orders subject to the Statutory Instruments Act.

Appointment of bank administrator

Appointment and powers of provisional bank administrator

279. (1) Subject to the provisions of this section, the court may, at any time after the making of an application for a bank administration order, appoint a bank administrator provisionally.

(2) The appointment of a provisional bank administrator may be made at any time before the making of a bank administration order.

(3) Only a person who is qualified to act as an insolvency practitioner and who consents to act may be appointed provisional bank administrator.

(4) The provisional bank administrator shall carry out such functions as the court may confer on him.

(5) The court may only confer on a provisional bank administrator functions in connection with the pursuance of Objective 1 and

section 216(2)(a) shall not apply before a bank administration order is made.

(6) A provisional bank administrator may not pursue Objective 2.

(7) The appointment of a provisional bank administrator lapses on the appointment of a bank administrator.

(8) Section 129 applies to a provisional bank administrator.

(9) When a bank administrator is provisionally appointed by the court, his powers may be limited by the order appointing him.

Commentary:

This section makes provision for the manner of the appointment of, and the powers of a provisional bank administrator.

The provisional bank administrator may have such functions as the Court may confer on him. But the Court may only confer on him functions in connection with the pursuance of Objective 1. A provisional bank administrator is not permitted to pursue Objective 2 in section 216.

Discretion in managing and distributing assets

280. (1) In the case of bank administration following transfer to a bridge bank, until the relevant authority has given an Objective 1 Achievement Notice distribution may be made only-

- (a) with the relevant authority's consent, or
- (b) out of assets which have been designated as realisable by agreement between the bank administrator and the relevant authority.

Commentary:

This section makes provision for the distribution of assets. In relation to bank administration following transfer to a bridge bank, and in the absence of an Objective 1 Achievement Notice, distribution may be made with the consent of the Minister and out of assets which have been designated as reliable by the Minister and the bank administrator.

Share of assets for unsecured creditors

281. (1) This section applies where a floating charge relates to property of a bank which is in bank administration.

(2) Subject to subsection (5) the bank administrator—

- (a) shall make a prescribed part of the bank's net property available for the satisfaction of unsecured debts, and
- (b) shall not distribute that part to the proprietor of a floating charge except in so far as it exceeds the amount required for the satisfaction of unsecured debts.

(3) Subsection (2) shall not apply to a bank if—

- (a) the bank's net property is less than the prescribed minimum, and
- (b) the bank administrator thinks that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits.

(4) Subsection (2) shall also not apply to a bank if or in so far as it is disapplied by—

- (a) a voluntary arrangement in respect of the bank, or

-
- (b) a compromise or arrangement agreed under Part VII of the Companies Act 1981 (arrangements and reconstructions).
- (5) Subsection (2) shall also not apply to a bank if—
- (a) the bank administrator applies to the court for an order under this subsection on the ground that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits, and
- (b) the court orders that subsection (2) shall not apply.
- (6) In subsections (2) and (3) a bank's net property is the amount of its property which would, but for this section, be available for satisfaction of claims of holders of debentures secured by, or holders of, any floating charge created by the bank.
- (7) An order under subsection (2) prescribing part of a bank's net property may, in particular, provide for its calculation—
- (a) as a percentage of the bank's net property, or
- (b) as an aggregate of different percentages of different parts of the bank's net property.
- (8) An order under this section—
- (a) must be made by statutory instrument, and
- (b) shall be subject to negative resolution procedure.
- (9) In the case of bank administration following transfer to a bridge bank until the relevant authority has given an Objective 1

Achievement Notice distribution may be made in reliance on this section only-

- (a) with the relevant authority's consent, or
- (b) out of assets which have been designated as realisable by agreement between the bank administrator and the relevant authority.

(10) In this section—

“floating charge” means a charge which is a floating charge on its creation and which is created after the first order under subsection (2)(a) comes into force, and “prescribed” means prescribed by order by the Minister.

(11) An order under this section may include transitional or incidental provision.

Commentary:

This section makes provision for setting aside a prescribed part of the bank's net property to make it available for the satisfaction of unsecured debts and in cases where a floating charge relates to the property of the bank. In such cases, the prescribed part shall not be available for distribution to the proprietor of the floating charge. Subsection (5) creates certain exception to this.

Power to disclaim onerous property

282. (1) Subject as follows, the bank administrator may, by the giving of the prescribed notice, disclaim any onerous property and may do so notwithstanding that he has taken possession of it, endeavoured to sell it, or otherwise exercised rights of ownership in relation to it.

(2) In the case of bank administration following transfer to a bridge bank, until the relevant

authority has given an Objective 1 Achievement Notice, notice of disclaimer may be given only with the relevant authority's consent.

(3) The following is onerous property for the purposes of this section—

- (a) any unprofitable contract, and
- (b) any other property of the bank which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act.

(5) A disclaimer under this section—

- (a) operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the bank in or in respect of the property disclaimed; but
- (b) does not, except so far as is necessary for the purpose of releasing the bank from any liability, affect the rights or liabilities of any other person.

(6) A notice of disclaimer shall not be given under this section in respect of any property if—

- (a) a person interested in the property has applied in writing to the bank administrator or one of his predecessors as administrator requiring the bank administrator or that predecessor to decide whether he will disclaim or not, and
- (b) the period of 28 days beginning with the day on which that application was made, or such longer period as the court may allow, has expired without a notice of disclaimer having been

given under this section in respect of that property.

(7) Any person sustaining loss or damage in consequence of the operation of a disclaimer under this section is deemed a creditor of the bank to the extent of the loss or damage and accordingly may prove for the loss or damage in the bank insolvency.

Commentary:

This section makes provision for the bank administrator to disclaim any onerous property. But in relation to administrator following transfer to a bridge bank no notice of disclaimer may be given until the Minister has given an Objective 1 Achievement Notice.

Onerous property is defined in subsection (2) as property that is an unprofitable contract or property that is unsaleable or may give rise to a liability to pay money or performs an onerous task.

Disclaimer of leaseholds

283. (1) The disclaimer under section 282 of any property of a leasehold nature does not take effect unless a copy of the disclaimer has been served (so far as the bank administrator is aware of their addresses) on every person claiming under the bank as underlessee or mortgagee and either—

- (a) no application under section 285 below is made with respect to that property before the end of the period of 14 days beginning with the day on which the last notice served under this subsection was served; or

(b) where such an application has been made, the court directs that the disclaimer shall take effect.

(2) Where the court gives a direction under subsection (1)(b) it may also, instead of or in addition to any order it makes under section 285, make such orders with respect to fixtures, tenant's improvements and other matters arising out of the lease as it thinks fit.

Commentary:

This section makes provision respecting disclosures to leasehold property. A disclaimer would not take effect unless a copy of the disclaimer is served on every person claiming under the bank as underlessee or mortgagee and either no application is made to the Court under section 285 or an application has been made to the Court and the Court directs that the disclaimer takes effect.

Land subject to rentcharge

284. (1) The following applies where, in consequence of the disclaimer under section 282 of any land subject to a rentcharge, that land vests by operation of law in the Crown or any other person (referred to in the next subsection as "the proprietor").

(2) The proprietor and the successors in title of the proprietor are not subject to any personal liability in respect of any sums becoming due under the rentcharge except sums becoming due after the proprietor, or some person claiming under or through the proprietor, has taken possession or control of the land or has entered into occupation of it.

Commentary:

This section makes provision in relation to disclaimed land (under section 282) that vests in the Crown or other person. In such event, neither the Crown nor other persons shall be subject to any personal liability in respect of any sums becoming due under the rentcharge – except sums due after the Crown or other person has taken possession or control of this land.

Powers of court (general)

285. (1) This section and the next apply where the bank administrator has disclaimed property under section 282.

(2) An application under this section may be made to the court by—

- (a) any person who claims an interest in the disclaimed property, or
- (b) any person who is under any liability in respect of the disclaimed property, not being a liability discharged by the disclaimer.

(3) Subject as follows, the court may on the application make an order, on such terms as it thinks fit, for the vesting of the disclaimed property in, or for its delivery to—

- (a) a person entitled to it or a trustee for such a person, or
- (b) a person subject to such a liability as is mentioned in subsection (2)(b) or a trustee for such a person.

(4) The court shall not make an order under subsection (3)(b) except where it appears to the court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer.

(5) The effect of any order under this section shall be taken into account in assessing for the purpose of section 282(7) the extent of any loss or damage sustained by any person in consequence of the disclaimer.

(6) An order under this section vesting property in any person need not be completed by conveyance, assignment or transfer.

Commentary:

This section makes provision for powers of the Court in respect of property disclaimed under section 282.

The Court on the application of a person who has an interest in the disclaimed property or a person under a liability in respect of the disclaimed property, may vest the disclaimed property in the person entitled to it, or a person subject to a liability.

Powers of court (leaseholds)

286. (1) The court shall not make an order under section 285 vesting property of a leasehold nature in any person claiming under the bank as underlessee or mortgagee except on terms making that person—

- (a) subject to the same liabilities and obligations as the bank was subject to under the lease at the commencement of the bank administration, or
- (b) if the court thinks fit, subject to the same liabilities and obligations as that person would be subject to if the lease had been assigned to him at the commencement of the bank administration.

(2) For the purposes of an order under section 285 relating to only part of any property comprised in a lease, the requirements of subsection (1) apply as if the lease comprised only the property to which the order relates.

(3) Where subsection (1) applies and no person claiming under the bank as underlessee or mortgagee is willing to accept an order under section 285 on the terms required by virtue of that subsection, the court may, by order under that section, vest the bank's estate or interest in the property in any person who is liable (whether personally or in a representative capacity, and whether alone or jointly with the bank) to perform the lessee's covenants in the lease.

(4) The court may vest that estate and interest in such a person freed and discharged from all estates, encumbrances and interests created by the bank.

(5) Where subsection (1) applies and a person claiming under the bank as underlessee or mortgagee declines to accept an order under section 285, that person is excluded from all interest in the property.

Commentary:

This section makes provision for the powers of the Court under section 285 in relation to the vesting of property of a leasehold. In such case the Court shall not make the order except on terms making the person subject to the same liabilities and obligations as the bank was subject to.

Notification that bank is in bank administration

287. (1) When a bank has entered bank administration —

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- (a) every invoice, order for goods or services, business letter or order form (whether in hard copy, electronic or any other form) issued by or on behalf of the bank, or an administrator of the bank, and
 - (b) all the bank's websites, must contain a statement that the bank is in bank administration.

(2) If default is made in complying with this section, the bank and any of the following persons who knowingly and willfully authorises or permits the default, namely, any officer of the bank, and any administrator of the bank, is guilty of an offence and liable on summary conviction to a fine of \$5,000.

Commentary:

This section makes provision for notification that a bank is in bank administration. It requires all invoices, business letters, etc. and the bank's website to contain a statement that the bank is in bank administration.

Fraudulent trading

288. (1) If in the course of the bank administration it appears that any business of the bank has been carried on with intent to defraud creditors of the bank or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2) The court, on the application of the bank administrator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be

liable to make such contributions (if any) to the bank's assets as the court thinks proper.

Commentary:

This section makes provision for the Courts to make persons carrying on fraudulent trading liable to make contributions to the bank's assets.

Wrongful trading

289. (1) Subject to subsection (3), if in the course of the bank administration it appears that subsection (2) applies in relation to a person who is or has been a director of the bank, the court, on the application of the bank administrator, may declare that that person is to be liable to make such contribution (if any) to the bank's assets as the court thinks proper.

(2) This subsection applies in relation to a person if—

- (a) the bank has entered bank administration,
- (b) at some time before the commencement of the bank administration, that person knew or ought to have concluded that there was no reasonable prospect that the bank would avoid entering into bank administration, and
- (c) that person was a director of the bank at that time;

but the court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) above was before [insert the date of commencement].

(3) The court shall not make a declaration under this section with respect to any person if it is

satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the bank's creditors as (assuming him to have known that there was no reasonable prospect that the bank would avoid going into bank administration) he ought to have taken.

(4) For the purposes of subsections (2) and (3), the facts which a director of a bank ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both—

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the bank, and
- (b) the general knowledge, skill and experience that that director has.

(5) The reference in subsection (4) to the functions carried out in relation to a bank by a director of the bank includes any functions which he does not carry out but which have been entrusted to him.

(6) This section is without prejudice to section 287.

Commentary:

This section makes provision for the Court to declare directors to be liable to make contributions to the bank's assets if, before a bank enters bank administration, such person knew or ought to have concluded that there was no reasonable prospect that the bank would avoid entering bank administration. But the Court is not empowered to

make such a declaration if satisfied that that person took every step with a view to minimising the potential loss to the bank's creditors as he ought to have taken.

Proceedings under ss. 288, 289

290. (1) On the hearing of an application under section 288 or 289, the bank administrator may himself give evidence or call witnesses.

(2) Where under either section the court makes a declaration, it may give such further directions as it thinks proper for giving effect to the declaration; and in particular, the court may—

- (c) provide for the liability of any person under the declaration to be a charge on any debt or obligation due from the bank to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the bank held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf, and
- (d) from time to time make such further order as may be necessary for enforcing any charge imposed under this subsection.

(3) For the purposes of subsection (2), "assignee"—

- (c) includes a person to whom or in whose favour, by the directions of the person made liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but

(d) does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(4) Where the court makes a declaration under either section in relation to a person who is a creditor of the bank, it may direct that the whole or any part of any debt owed by the bank to that person and any interest thereon shall rank in priority after all other debts owed by the bank and after any interest on those debts.

(5) Sections 288 and 289 have effect notwithstanding that the person concerned may be criminally liable in respect of matters on the ground of which the declaration under the section is to be made.

Commentary: *This section makes provision in relation to proceedings before the court under sections 288 and 289. It provides for the bank liquidator to give evidence or call witnesses. It provides for the court to give directions to give effect to the declaration.*

Management by administrators

Supplies of gas, water, electricity, etc.

291. (1) This section applies in the case of a bank where—

- (a) the bank enters into bank administration, or
- (b) a provisional bank administrator is appointed;

and “the office-holder” means the administrator, or the provisional bank administrator, as the case may be.

(2) If a request is made by or with the concurrence of the office-holder for the giving, after the effective date, of any of the supplies mentioned in the next subsection, the supplier—

(a) may make it a condition of the giving of the supply that the office-holder personally guarantees the payment of any charges in respect of the supply, but

(b) shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the bank before the effective date are paid.

(3) The supplies referred to in subsection (2) are—

(a) a supply of gas by a gas supplier,

(c) a supply of electricity by an electricity supplier,

(d) a supply of water by a water service provider, or,

(e) a supply of communications services by a provider of a public communications service.

(4) “The effective date” for the purposes of this section is whichever is applicable of the following dates—

(a) the date on which the bank entered bank administration, or

(b) the date on which the provisional bank administrator was appointed.

(5) The following applies to expressions used in subsection (3)—
“communications services” do not include electronic communications services to the extent that they are used to broadcast or otherwise transmit programme services.

Commentary: *This section allows the supplies of gas, electricity, telecommunications, etc. to make it a condition of the supply of such services to a bank that the bank liquidator personally guarantees the payment of any charges in respect of any supply after the appointment of the bank liquidator and not before.*

Getting in the bank's property

292. (1) This section applies in the case of a bank where—

- (a) the bank enters bank administration, or
- (b) a provisional bank liquidator is appointed;

and “the office-holder” means the bank administrator, or the provisional bank administrator, as the case may be.

(2) Where any person has in his possession or control any property, books, papers or records to which the bank appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the property, books, papers or records to the office-holder.

(3) Where the office-holder—

- (a) seizes or disposes of any property which is not property of the bank, and

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- (b) at the time of seizure or disposal believes, and has reasonable grounds for believing, that he is entitled (whether in pursuance of an order of the court or otherwise) to seize or dispose of that property, the next subsection has effect.
 - (4) In that case the office-holder—
 - (a) is not liable to any person in respect of any loss or damage resulting from the seizure or disposal except in so far as that loss or damage is caused by the office-holder's own negligence, and
 - (b) has a lien on the property, or the proceeds of its sale, for such expenses as were incurred in connection with the seizure or disposal.

Commentary: *This section empowers the court to order any person who is in possession of property, books, papers or records to which the bank appears to be entitled to be surrendered to the bank administrator.*

Subsections (3) and (4) give the bank liquidator immunity from suit in relation to any property seized or disposed by the liquidator in the belief that such property belonged to the bank and the seizure and disposal was in accordance with the order of the court.

Duty to co-operate with office-holder

293. (1) Each of the persons mentioned in the next subsection shall—

- (a) give to the office-holder such information concerning the bank and

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- its promotion, formation, business, dealings, affairs or property as the office-holder may at any time after the effective date reasonably require, and
- (b) attend on the office-holder at such times as the latter may reasonably require.
- (2) The persons referred to above are—
- (a) those who are or have at any time been officers of the bank,
 - (b) those who have taken part in the formation of the bank at any time within one year before the effective date,
 - (c) those who are in the employment of the bank, or have been in its employment (including employment under a contract for services) within that year, and are in the office-holder's opinion capable of giving information which he requires,
 - (d) those who are, or have within that year been, officers of, or in the employment (including employment under a contract for services) of, another bank which is, or within that year was, an officer of the bank in question, and
 - (e) in the case of a bank subject to imposition of bank administration by order of the court, any person who has acted as bank administrator, or bank liquidator of the bank.

(3) For the purposes of subsections (2) and (3), “the effective date” is whichever is applicable of the following dates—

- (a) the date on which the bank entered bank administration,
- (b) the date on which the provisional bank liquidator was appointed.

(4) A person who without reasonable excuse fails to comply with any obligation imposed by this section, is guilty of an offence and liable on summary conviction to a fine of \$25,000.

Commentary: *This section imposes an obligation on past and present officers of the bank, persons who have taken part in the formation of the bank, persons, who are or have been in the employment of the bank, etc. to give the bank administrator or bank liquidator information concerning the bank on a wide range of matters; e.g. its formation, business, dealings, affairs, property, etc. as may be required by the bank administrator.*

Inquiry into bank’s dealings, etc.

294. (1) The court may, on the application of the office-holder, summon to appear before it—

- (a) any officer of the bank,
- (b) any person known or suspected to have in his possession any property of the bank or supposed to be indebted to the bank, or
- (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the bank.

(2) The court may require any such person as is mentioned in subsection (1)(a) to (c) to submit to the court an account of his dealings with the bank or to produce any books, papers or other records in his possession or under his control relating to the bank or the matters mentioned in paragraph (c) of the subsection.

(3) An account submitted to the court under subsection (3) must be contained in a witness statement verified by affidavit.

(4) The following applies in a case where—

- (a) a person without reasonable excuse fails to appear before the court when he is summoned to do so under this section, or
- (b) there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court under this section.

(5) The court may, for the purpose of bringing that person and anything in his possession before the court, cause a warrant to be issued to a police officer [or prescribed officer of the court]—

- (a) for the arrest of that person, and
- (b) for the seizure of any books, papers, records, money or goods in that person's possession.

(6) The court may authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held, in accordance with the rules, until that person is brought before the court under the warrant or until such other time as the court may order.

Commentary: *This section enables the court (on the application of the bank liquidator or on its own motion) to require any officer of the bank, any person having possession of any property of the bank or any person who the court thinks is capable of giving information, etc. concerning the bank to submit an affidavit to the court containing an account of his dealings with the bank or to produce books, records, etc. to the bank.*

Court's enforcement powers under s 294

295. (1) If it appears to the court, on consideration of any evidence obtained under section 294 or this section, that any person has in his possession any property of the bank, the court may, on the application of the office-holder, order that person to deliver the whole or any part of the property to the office-holder at such time, in such manner and on such terms as the court thinks fit.

(2) If it appears to the court, on consideration of any evidence so obtained, that any person is indebted to the bank, the court may, on the application of the office-holder, order that person to pay to the office-holder, at such time and in such manner as the court may direct, the whole or any part of the amount due, whether in full discharge of the debt or otherwise, as the court thinks fit.

(3) The court may, if it thinks fit, order that any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 294 or this section shall be examined in Bermuda where he may for the time being be, [or in a place outside Bermuda.]

(4) Any person who appears or is brought before the court under section 294 or this section may be examined on oath, either orally or by

interrogatories, concerning the bank or the matters mentioned in section 294(1)(c).

Commentary: *Where the court establishes after an enquiry under section 294 or this section that a person has in his possession any property of the bank, the court is empowered under this section to order the person concerned to deliver the property to the bank liquidator.*

Subsection (2) provides that if the court, after such enquiry, is satisfied that any person is indebted to the bank, it may order him to pay the amount due to the bank liquidator.

Adjustment of prior transactions

Transactions at an undervalue

296. (1) Where the bank has at a relevant time (defined in section 298) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.

(2) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the bank had not entered into that transaction.

(3) For the purposes of this section and section 299, a bank enters into a transaction with a person at an undervalue if—

- (a) the bank makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the bank to receive no consideration, or
- (b) the bank enters into a transaction with that person for a consideration the value of which, in money or

money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the bank.

(4) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—

- (a) that the bank which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
- (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the bank.

Commentary: *This section makes provision for transaction that have been entered into by the bank at an under value. Under value is defined by subsection (4) as the making of gifts, or transactions for which the bank receives no consideration or a consideration the value of which is significantly less than the value of the consideration provided by the bank.*

Subsection (5) provides an exception where a bank enters into a transaction in good faith and for the purpose of carrying on the business of the bank and for its benefit. The court is empowered to restore the position to what it would have been if the bank had not entered into that transaction.

Preferences

297. (1) Where the bank has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.

(2) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the bank had not given that preference.

(3) For the purposes of this section and section 299, a bank gives a preference to a person if—

- (a) that person is one of the bank's creditors or a surety or guarantor for any of the bank's debts or other liabilities, and
- (b) the bank does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the bank entering bank administration, will be better than the position he would have been in if that thing had not been done.

(4) The court shall not make an order under this section in respect of a preference given to any person unless the bank which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3)(b).

(5) A bank which has given a preference to a person connected with the bank (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (4).

(6) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference.

Commentary: *Where a bank has given a bank's creditor a preference over the creditors by putting him in a better position, than he would have been in the event of a bank insolvency, the court is empowered under this section to restore the position to what it would have been if the bank had not given that preference.*

"Relevant time" under ss 296, 297

298. (1) Subject to the next subsection, the time at which a bank enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into, or the preference given—

- (a) in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the bank (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of bank administration (which expression is defined below),
- (b) in the case of a preference which is not such a transaction and is not so given, at a time in the period of 6 months ending with the onset of bank administration.

(2) Where a bank enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (1)(a) or (b), that time is not a relevant time for the purposes of section 296 or 297 unless the bank—

- (a) is at that time unable to pay its debts within the meaning of section 95(2), or

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- (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference;

but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a bank with a person who is connected with the bank.

(3) For the purposes of subsection (1), the onset of bank administration is—

- (a) in a case where section 296 or 297 applies by reason of an administrator of a bank being appointed by administration order, the date on which the administration application is made,
- (b) in a case where section 296 or 297 applies by reason of an administrator of a bank being appointed otherwise than as mentioned in paragraph (a), the date on which the appointment takes effect,
- (c) in a case where section 296 or 297 applies by reason of a bank entering bank insolvency following conversion of administration into bank insolvency at the time when the appointment of an administrator ceases to have effect, the date on which the bank entered administration (or, if relevant, the date on which the application for the administration order was made or

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- a copy of the notice of intention to appoint was filed), and
- (d) in a case where section 296 or 297 applies by reason of a bank entering bank administration at any other time, the date of the commencement of the bank administration.

Commentary: *This section makes provision for determining the "relevant time" for the purposes of sections 296 and 297 in relation to the time at which a bank is treated to have entered into a transaction at an under value or a transaction at a preference.*

Orders under ss 296, 297

299. (1) Subject to subsection (4) and without prejudice to the generality of sections 296 and 297, an order under either of those sections with respect to a transaction or preference entered into or given by a bank may (subject to the next subsection)—

- (a) require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the bank,
- (b) require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred,
- (c) release or discharge (in whole or in part) any security given by the bank,
- (d) require any person to pay, in respect of benefits received by him from the bank, such sums to the office-holder as the court may direct,
- (e) provide for any surety or guarantor whose obligations to any person were

released or discharged (in whole or in part) under the transaction, or by the giving of the preference, to be under such new or revived obligations to that person as the court thinks appropriate,

- (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for
- (g) the security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction or by the giving of the preference, and provide for the extent to which any person whose property is vested by the order in the bank, or on whom obligations are imposed by the order, is to be able to prove in the bank insolvency for debts or other liabilities which arose from, or were released or discharged (in whole or in part) under or by, the transaction or the giving of the preference.

(2) An order under section 296 or 297, may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the bank in question entered into the transaction or (as the case may be) the person to whom the preference was given; but such an order—

- (a) shall not prejudice any interest in property which was acquired from a person other than the bank and was acquired in good faith and for value,

or prejudice any interest deriving from such an interest, and

- (b) shall not require a person who received a benefit from the transaction or preference in good faith and for value to pay a sum to the office-holder, except where that person was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of the bank.

(3) Where a person has acquired an interest in property from a person other than the bank in question, or has received a benefit from the transaction or preference, and at the time of that acquisition or receipt he was connected with, or was an associate of, either the bank in question or the person with whom that bank entered into the transaction or to whom that bank gave the preference, then, unless the contrary is shown, it shall be presumed for the purposes of paragraph (a) or (as the case may be) paragraph (b) of subsection (2) that the interest was acquired or the benefit was received otherwise than in good faith.

(4) In considering making an order under this section the Court must have regard to Objective 1 of section 215.

Commentary: *This section makes detailed provision on the kind of orders that the court may make under sections 174 or 175 with respect to transactions or preference entered into or given by a bank. Under subsection (2), the court is empowered to require any property transferred by the bank to be vested in the bank; to release or discharge any security given*

by the bank; to require the payment of money to the bank liquidator; to require any surety or guarantor whose security obligations to a person were released or discharged; to be subject to new or revived obligations; to provide for security to be provided for the discharge of any obligation imposed by or under the order; and provide for the extent to which persons are able to prove in the bank insolvency in respect of their property vested in the bank. Subsections (3) to (8) provide for ancillary provisions.

Extortionate credit transactions

300. (1) This section applies as does section 282, and where the bank is, or has been, a party to a transaction for, or involving, the provision of credit to the bank.

(2) The court may, on the application of the office-holder, make an order with respect to the transaction if the transaction is or was extortionate and was entered into in the period of 3 years ending with the day on which the bank entered bank administration.

(3) For the purposes of this section a transaction is extortionate if, having regard to the risk accepted by the person providing the credit—

(a) the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit, or

(b) it otherwise grossly contravened ordinary principles of fair dealing;

and it shall be presumed, unless the contrary is proved, that a transaction with

respect to which an application is made under this section is or, as the case may be, was extortionate.

(4) An order under this section with respect to any transaction may contain such one or more of the following as the court thinks fit, that is to say—

- (a) provision setting aside the whole or part of any obligation created by the transaction,
- (b) provision otherwise varying the terms of the transaction or varying the terms on which any security for the purposes of the transaction is held,
- (c) provision requiring any person who is or was a party to the transaction to pay to the office-holder any sums paid to that person, by virtue of the transaction, by the bank,
- (d) provision requiring any person to surrender to the office-holder any property held by him as security for the purposes of the transaction,
- (e) provision directing accounts to be taken between any persons.

(5) The powers conferred by this section are exercisable in relation to any transaction concurrently with any powers exercisable in relation to that transaction as a transaction at an undervalue.

Commentary: *This section makes provision for the court on the application of the bank administrator to set aside any obligation created by an extortionate credit transaction or a transaction at an under value, entered into by the bank within 2 years before bank insolvency.*

Subsection (3) describes “extortionate transactions” as transactions requiring grossly exorbitant payment to be made, or that grossly contravene ordinary principles of fair dealing.

Avoidance of certain floating charges

301. (1) Subject as follows, a floating charge on the bank’s undertaking or property created at a relevant time is invalid except to the extent of the aggregate of—

- (a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the bank at the same time as, or after, the creation of the charge,
- (b) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after the creation of the charge, of any debt of the bank, and
- (c) the amount of such interest (if any) as is payable on the amount falling within paragraph (a) or (b) in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.

(2) Subject to the next subsection, the time at which a floating charge is created by a bank is a relevant time for the purposes of this section if the charge is created—

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- (a) in the case of a charge which is created in favour of a person who is connected with the bank, at a time in the period of 2 years ending with the onset of bank administration,
 - (b) in the case of a charge which is created in favour of any other person, at a time in the period of 12 months ending with the onset of bank administration,
 - (c) in either case, at a time between the making of a bank administration application in respect of the bank and the making of an administration order on that application.

(3) Where a bank creates a floating charge at a time mentioned in subsection (2)(b) and the person in favour of whom the charge is created is not connected with the bank, that time is not a relevant time for the purposes of this section unless the bank—

- (a) is at that time unable to pay its debts within the meaning of section 95(3), or
- (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction under which the charge is created.

(4) For the purposes of subsection (2), the onset of bank administration is—

- (a) in a case where this section applies by reason of an administrator of a bank being appointed by administration order, the date on which the administration application is made,

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- (b) in a case where this section applies by reason of a bank entering bank administration, the date of the commencement of the bank administration.

(5) For the purposes of subsection (1)(a) the value of any goods or services supplied by way of consideration for a floating charge is the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the goods or services in the ordinary course of business and on the same terms (apart from the consideration) as those on which they were supplied to the bank.

Commentary: *This section invalidates a floating charge in circumstances where the value of the consideration for the creation of the charge exceeds the value of any money given, or goods and services supplied to the bank at the time of creation of the charge; or exceeds the value of any discharge or reduction in the bank's debt; and the interest thereon.*

Unenforceability of liens on books, etc.

302. (1) This section applies in the case of a bank where—

- (a) the bank enters administration, or
- (b) a provisional bank administrator is appointed;

and “the office-holder” means the bank administrator, or the provisional bank administrator, as the case may be.

(2) Subject as follows, a lien or other right to retain possession of any of the books, papers or other records of the bank is unenforceable to the

extent that its enforcement would deny possession of any books, papers or other records to the office-holder.

(3) This does not apply to a lien on documents which give a title to property and are held as such.

Commentary: *This section prevents a person from a lien, or right to retain possession of the books of the bank, its records and papers where such claims would deny the bank administrator possession of the books, papers and records.*

Acting without qualification an offence

303. A person who acts as bank administrator in relation to a bank at a time when he is not qualified to do so is guilty of an offence and liable on summary conviction to a fine of \$50,000.

Commentary: *This section makes it an offence for an unqualified person to act as bank administrator.*

Persons not qualified to act as bank administrator

304. (1) A person who is not an individual is not qualified to act a bank administrator.

(2) A person is not qualified to act as a bank administrator at any time unless at that time he is authorised so to act by virtue of membership of a professional body recognized under section 305 below, being permitted so to act by or under the rules of that body.

(3) A person is not qualified to act as a bank administrator in relation to another person at any time unless—

-
- (a) there is in force at that time security for the proper performance of his functions, and
 - (b) that security meets the prescribed requirements with respect to his so acting in relation to that other person.
- (4) A person is not qualified to act as a bank administrator at any time if at that time he has been adjudged bankrupt or sequestration of his estate has been awarded and (in either case) he has not been discharged.

Commentary: *This section makes provision establishing the qualifications for a bank liquidator. Subsection (1) requires that person to be an individual; subsection (2) requires that person to be authorized to act as bank liquidator by virtue of being a member of a professional body under whose rules he is permitted to so act. Subsection (3) requires a bank liquidator to post a security that meets the requirements prescribed by the Minister. Subsection (4) provides grounds of disqualification. These are bankruptcy or sequestration of estate of the person concerned.*

Recognised professional bodies

305. (1) The Minister may by order declare a body which appears to him to fall within subsection (2) below to be a recognised professional body for the purposes of this section.

(2) A body may be recognised if it regulates the practice of a profession and maintains and enforces rules for securing that such of its members as are permitted by or under the rules to act as bank administrators—

-
- (a) are fit and proper persons so to act, and
 - (b) meet acceptable requirements as to education and practical training and experience.

(3) References to members of a recognised professional body are to persons who, whether members of that body or not, are subject to its rules in the practice of the profession in question and the reference in section 304(2) above to membership of a professional body recognised under this section is to be read accordingly.

(4) An order made under subsection (1) in relation to a professional body may be revoked by a further order if it appears to the Minister that the body no longer falls within subsection (2).

(5) An order of the Minister under this section has effect from such date as is specified in the order; and any such order revoking a previous order may make provision whereby members of the body in question continue to be treated as authorised to act as bank administrators for a specified period after the revocation takes effect.

(6) An order made under this section has effect in relation to any provision applied for the purposes of bank administration.

Commentary: *This section makes provision for the Minister to recognize professional bodies for the purpose of regulating insolvency practitioners.*

Subsection (2) provides the criteria for recognition of a body that maintains rules to ensure that its members are fit and proper and that they meet acceptable requirements on education, practical training and experience.

Sharing information

306. (1) This section applies to bank administration following transfer to a bridge bank.

(2) Within the period of 5 days beginning with the day on which the bank administrator is appointed, the relevant authority must give the bank administrator information about the financial positions of the residual bank and the bridge bank.

(3) While the residual bank is in bank administration the bridge bank must give the bank administrator on request information about the financial position of the bridge bank that the bank administrator requires for the purposes of pursuing Objective 1 in section 215.

(4) Until the relevant authority has given an Objective 1 Achievement Notice, the bank administrator must—

- (a) give the relevant authority information on request,
- (b) allow the relevant authority access to records on request,
- (c) give the bridge bank information on request,
- (d) allow the bridge bank access to records on request,
- (e) keep the relevant authority informed about, and allow the relevant authority to participate in, any discussions between the bank administrator and another person which relate to, or are likely to affect, pursuit of Objective 1 in section 215, and
- (f) keep the bridge bank informed about, and allow the bridge bank to

participate in, any discussions between the bank administrator and another person which relate to, or are likely to affect, pursuit of Objective 1 in section 215.

(5) The Minister shall by regulations prescribe—

- (a) the classes of information that must be provided under subsections (2) to (4), and
 - (b) the classes of record to which access must be allowed under subsection (4).
- (6) Regulations under subsection (5)—
- (a) shall be made by statutory instrument, and
 - (b) shall be subject to negative resolution procedure.

Commentary:

This section makes provision for the sharing of information in relation to bank administration following transfer to a bridge bank.

The Minister is required to share financial information about the position of the residual bank with the bank administrator. A bridge bank is also required to share information about its financial position with the bank administrator on request for the purposes of achieving Objective 1 in section 203.

Further, the bank administrator is required, until the Minister has given an Objective 1 Achievement Notice to share information with both the Minister and the bridge bank on request and allow either of them access to records.

Subsection 5 makes provision for Regulations prescribing classes of information that may be

shared and classes of records to which access must be allowed.

Multiple transfers

General application of this Part

307. (1) This section applies where more than one property transfer instrument is made in respect of a bank.

(2) For that purpose “property transfer instrument” includes—

- (a) supplemental instruments and orders under section 42,
- (b) onward property transfer orders under section 43, and
- (c) property transfer orders under section 45.

(3) This Part applies to the bank with any modifications specified by the Minister in regulations.

(4) The regulations—

- (a) shall be made by statutory instrument, and

shall be subject to affirmative resolution procedure.

Commentary:

This section makes provision for the Minister to make regulations modifying the provisions of this Part to any bank when more than one property transfer instrument has been made in respect of the bank.

Bridge bank to private purchaser

308. (1) This section applies where the relevant authority gives a bank administrator—

- (a) an Objective 1 Achievement Notice in respect of a bridge bank, and

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- (b) notice that Objective 1 is still required to be pursued in respect of a commercial purchaser who has acquired all or part of the business of the bridge bank.

(2) An Objective 1 Achievement Notice accompanied by a notice under subsection (1)(b) is referred to in this Part as an Objective 1 Interim Achievement Notice.

(3) Where an Objective 1 Interim Achievement Notice is given, Objective 1 continues to apply—

- (a) in accordance with section 216(3), and
- (b) with the commercial purchaser being treated as the “private sector purchaser”.

(4) An Objective 1 Interim Achievement Notice in respect of the bridge bank—

- (a) has effect as between the bank administrator and the bridge bank, but
- (b) has no other effect for the purposes of provisions of this Part which refer to the giving of an Objective 1 Achievement Notice.

(5) When the relevant authority gives the bank administrator an Objective 1 Achievement Notice in respect of the commercial purchaser, section 217 and other provisions of this Part which refer to the giving of an Objective 1 Achievement Notice shall have effect.

Commentary:

This section makes provision for an Objective 1 Interim Achievement in respect of bridge banks.

Subsection (3) provides that where an Objective 1 Interim Achievement Notice is given, Objective 1 continues to apply in accordance with section 216(3) and with the commercial purchaser treated as the private sector purchaser.

Property transfer from bridge bank

309. (1) This section applies where the relevant authority —

- (a) transfers all or part of the business of a bank ("the original bank") to a bridge bank ("the original bridge bank") by making a property transfer order in accordance with section 12(2), and
- (b) later makes or proposes to make an onward property transfer order under section 42(2) from the bridge bank to a transferee ("the onward transferee").

(2) If the onward transferee is a company which is wholly owned by the Crown—

- (a) the onward transferee is treated as a bridge bank for the purposes of this Part, and
- (b) the original bridge bank is treated as a residual bank for the purposes of this Part.

(3) In any other case, the relevant authority may determine that the original bridge bank is to be treated as a residual bank for the purposes of this Part.

(4) Where the original bridge bank is put into bank administration in reliance on subsection (2)(b), Objective 1 shall apply in accordance with section 216(4) in relation to both—

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- (a) services provided by the original bank to the original bridge bank, and
 - (b) services provided by the original bridge bank to the onward transferee.
- (5) Where the original bridge bank is put into bank administration in reliance on a determination under subsection (3), Objective 1 shall apply in accordance with—
- (a) section 217(3) in relation to services provided by the original bridge bank to the onward transferee, and
 - (b) section 216(4) in relation to services provided by the original bank to the original bridge bank.
- (6) But the Minister may determine—
- (a) that subsection (5) does not apply, and
 - (b) that section 308 shall apply as if the Minister had given—
 - (i) an Objective 1 Interim Achievement Notice in respect of the original bridge bank, and
 - (ii) a notice under section 308(1)(b) in respect of the onward transferee.

Commentary:

This section makes provision in relation to an onward property transfer from the original bridge bank to another.

If that other person is a company wholly owned by the Crown, then that company would be treated as a bridge bank for the purposes of this Part, and the original bridge bank is treated as a residual bank. In any other case, the Minister may determine that the original bridge bank is to be treated as a residual bank for the purposes of this Part.

Property transfer from temporary public ownership

310. (1) This section applies where the relevant authority—

- (a) makes a share transfer order, in respect of securities issued by a bank (or a bank's holding company), in accordance with section 13(2), and
- (b) later makes a property transfer order from the bank (or from another bank which is or was in the same group as the bank) under section 45(2).

(2) This Part applies to the transferor under the property transfer order as to the transferor under a property transfer instrument.

(3) For that purpose this Part applies with any modifications specified by the Minister in regulations; and the regulations—

- (a) shall be made by statutory instrument, and
- (b) shall be subject to affirmative resolution procedure.

Commentary:

This section makes provision for the transfer of property from temporary public ownership to commercial purchasers.

The provision of this Part would apply to such transfers as they apply to the original transfer of property into public ownership under section 13(2).

Subsection (3) provides that this Part so applies with such modification as the Minister may make in regulations.

Termination

Successful rescue

311. (1) This section applies if—

- (a) the relevant authority has given an Objective 1 Achievement Notice, and
- (b) the bank administrator has pursued Objective 2(a) in section 218 and believes that it has been achieved.

(2) The bank administrator shall make an application under section 258 (court ending administration on achievement of objectives).

(3) A bank administrator who makes an application in accordance with subsection (2) must send a copy to the relevant authority.

(4) A person who fails without reasonable excess to comply with subsection (3) is guilty of an offence and liable on summary conviction to a fine of \$10,000.

Commentary:

This section makes provision for the termination of bank administration where the objective has been achieved.

In those circumstances, the bank administrator must make an application to the Court under section 259 for the appointment of the bank administrator to cease.

Winding-up or voluntary arrangement

312. (1) This section applies if—

- (a) the relevant authority has given an Objective 1 Achievement Notice, and
- (b) the bank administrator pursues Objective 2(b) in section 218.

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- (2) The bank administrator may—
- (a) give a notice under section 259 (no more assets for distribution), or
 - (b) make a proposal in accordance with section 193 (bank voluntary arrangement).
- (3) Sections 194 to 203 shall apply to a proposal made by a bank administrator, with the following modifications.
- (4) In section 196 (summoning of meetings) subsection (2) (and not (1)) applies.
- (5) The action that may be taken by the court under section 199(4) (effect of approval) includes suspension of the bank administration order.
- (6) On the termination of a bank voluntary arrangement the bank administrator may apply to the court to lift the suspension of the bank administration order.
- (7) The bank administrator may not act under subsection (2) above unless satisfied that the bank has received any funds it is likely to receive from any scheme under a resolution fund order under section 62(3).

Commentary:

This section makes provision in cases where the BMA or the Minister as the case may be, notifies the bank administrator that the residual bank is no longer required in connection with the private sector purchaser or bridge bank (Objective 1 Achievement Notice) and the bank administrator has sought to achieve a better result for the residual bank's creditors (Objective 2(a)).

In such a case the bank administrator may give notice under section 246 that the bank has no

property for distribution to creditors or make a proposal for voluntary arrangements under section 193 as audited by subsection (3) to (6).

Part 4

MISCELLANEOUS

Preferential debts in insolvency

Categories of preferential debts

313. (1) A reference in this Act to the preferential debts of a bank is to the debts listed in Schedule 2 to this Act (Categories of preferential debts); and references to preferential creditors are to be read accordingly.

(2) In that Schedule “the debtor” means the bank concerned.

Commentary: *This section gives effect to Schedule [2] that sets out the categories of preferential debts.*

“The relevant date”

314. (1) This section explains references in Schedule 2 to the relevant date (being the date which determines the existence and amount of a preferential debt).

(2) For the purposes of section 197 (meetings to consider bank voluntary arrangement), the relevant date in relation to a bank which is not entering bank insolvency is the date on which the voluntary arrangement takes effect.

(3) In relation to a bank which has entered bank insolvency, the following applies—

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- (a) if the bank insolvency is by imposition of bank insolvency by order of the court, and the bank insolvency order was made immediately upon the discharge of a bank administration order, the relevant date is the date on which the bank entered bank administration;
 - (b) if the case does not fall within paragraph (a) and the bank—
 - (i) has entered bank insolvency by imposition of bank insolvency by order of the court, and
 - (ii) had not entered bank insolvency voluntarily before the date of the making of the bank insolvency order,the relevant date is the date of the appointment (or first appointment) of a provisional bank liquidator or,
 - (c) if no such appointment has been made, the date of the making of a bank insolvency order;
- (4) If the case does not fall within paragraph (a), (b) or (c), the relevant date is the date of the passing of the resolution for the bank to enter bank insolvency.
- (5) In relation to a bank which is in administration (and to which no other provision of this section applies) the relevant date is the date on which the bank enters administration.

Commentary: *This section makes provision for determining references to relevant date for the purpose of determining the existence and the amount of a preferential date for the purposes of Schedule [2]. In the case of bank insolvency, it is the date of the appointment of a provisional bank liquidator or the date of the making of a bank insolvency order. In the case of bank insolvency following bank administration, it is the date on which the bank entered bank administration.*

Transactions defrauding creditors

315. (1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

- (a) he makes a gift to the other otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
- (b) he enters into a transaction with the other in consideration of marriage ; or
- (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2) Where a person has entered into such a transaction, the court may, if satisfied under subsection (3), make such order as it thinks fit for—

- (a) restoring the position to what it would have been if the transaction had not been entered into, and
- (b) protecting the interests of persons who are victims of the transaction.

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—

- (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
- (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

(4) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as “the debtor”.

(5) In this section and the following two sections, anything done by the bank in connection with the exercise of a stabilization power under Part 1 of this Act is not a transaction at or under value for the purposes of this section.

Commentary: *This section empowers the court where satisfied that a transaction was entered into at a undervalue for the purpose of defrauding creditor by putting assets beyond their reach and by otherwise prejudicing their interests in relation to claims they are making or may make. A transaction is entered into at an undervalue of a gift is made to another or the transaction is otherwise entered into for no consideration, or where the consideration is marriage or where the value of the consideration received by the persons entering into the transaction (in money or money's worth) is significantly less*

than the value of the consideration provided by himself.

Persons who may apply for an order under section 315

316. (1) An application for an order under section 315 shall not be made in relation to a transaction except-

- (a) in a case where the debtor is a bank which has entered bank insolvency, by the bank liquidator or (with the leave of the court) by a victim of the transaction; or
- (b) in a case where a victim of the transaction is bound by a voluntary arrangement approved under Part 2 of this Act, by the supervisor of the voluntary arrangement or by any person who (whether or not so bound) is such a victim.

(2) An application made under any of the paragraphs of subsection (1) is to be treated as made on behalf of every victim of the transaction.

Commentary: *This section restricts the persons who may apply to the court for an order under section 316(2) to the bank liquidator or, with the leave of the court, to a victim of the transaction – but only in cases where the debtor is a bank that has entered bank insolvency.*

Provision which may be made by order under s. 315

317. (1) Without prejudice to the generality of

section 315, an order made under that section with respect to a transaction may (subject as follows)—

- (a) require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made;
- (b) require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of the money so transferred;
- (c) release or discharge (in whole or in part) any security given by the debtor;
- (d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;
- (e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the court thinks appropriate;
- (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction.

(2) An order under section 315 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction; but such an order—

- (a) shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and
- (b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

(3) For the purposes of this section the relevant circumstances in relation to a transaction are the circumstances by virtue of which an order under section 315 may be made in respect of the transaction.

(4) In this section “security” means any mortgage, charge, lien or other security.

Commentary: *This section makes further provision with respect to the orders that can be made by the court under section 315. The court is empowered to vest property the subject of a transaction at an undervalue in any person; to release or discharge security given by the debtor; to require persons to make payments to others; to revive the obligations of surety's and guarantor's that were released or*

discharged under the transaction; and to provide for security to be given for the discharge of obligations imposed by the order.

Subsection (2) provides protection for persons who acquired an interest in property in good faith, for value and without notice.

Summary proceedings

318. (1) Notwithstanding anything in section 452 of the Criminal Code Act 1907, an information relating to such an offence which is triable summarily by a Magistrates' Court may be so tried if it is laid at any time within 3 years after the commission of the offence and within 12 months after the date on which evidence sufficient in the opinion of the Director of Public Prosecutions or the Minister (as the case may be) to justify the proceedings comes to his knowledge.

(2) For purposes of this section, a certificate of the Director of Public Prosecutions, or the Minister (as the case may be) as to the date on which such evidence as is referred to above came to his knowledge is conclusive evidence.

Commentary: *This section disapplies section 452 of the Criminal Code Act 1907 that limits the time during which proceedings for summary offences must be commenced. Section 452 of that Act limits the period to six months after the offence is committed or within 3 months of the facts coming to the knowledge of the Director of Public Prosecutions. Subsection (1) seeks to enlarge that time by providing that summary offences under this act may be tried by the Magistrates Court if proceedings are commenced within three years after the commission of the offence.*

Offences by bodies corporate

319. (1) This section applies to offences under this Act other than those excepted by subsection (4).

(2) Where a body corporate is guilty of an offence to which this section applies and the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity he, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly.

(3) Where the affairs of a body corporate are managed by its members, subsection (2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(4) The offences excepted from this section are those under [sections 146, 155, 156, 145, 146, 147, and 148 and those under paragraphs 15(2), 16(3)(a), 17(3)(a), 18(3)(a), 21(1) and 22(1)(a) of Schedule A1].

Commentary: This section makes provision for criminal sanctions to apply to directors, managers, etc. of bodies corporate that are found guilty of offences under this Act if the offences are proved to have been committed with their consent or connivance. In such cases the officers would be equally guilty and liable to be prosecuted.

Subsection (4) excludes certain offences under the Act from the application of these provisions.

Admissibility in evidence of statements of affairs, etc.

320. (1) In any proceedings (whether or not under this Act)—

- (a) a statement of affairs prepared for the purposes of any provision of Part 2 or 3;
- (b) a statement made in pursuance of a requirement imposed by or under Part 2 or 3; and
- (c) any other statement prepared for the purpose of a provision of Part 2 or 3,

may be used in evidence against any person making or concurring in making the statement.

(2) However, in criminal proceedings in which any such person is charged with an offence to which this subsection applies—

- (a) no evidence relating to the statement may be adduced, and
- (b) no question relating to it may be asked,

by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.

(3) Subsection (2) applies to any offence other than—

- (a) an offence under section [111(7), 150(2), 157(1)(a) or (d) or (2), 159, 173(5),] ;
- (b) an offence which is—

-
- (i) created by rules made under this Act, and
 - (ii) designated for the purposes of this subsection by such rules or by regulations made by the Minister;
 - (c) an offence which is—
 - (i) created by regulations made by or under this Act, and
 - (ii) designated for the purposes of this subsection by such regulations;
 - (iii) an offence under section [XX] of the Criminal Code Act 19?? (false statements made on oath or made otherwise than on oath).

(4) Regulations under subsection (3)(b)(ii) shall be made by statutory instrument and shall be subject to negative resolution procedure.

Commentary: *This section permits statements made by persons in pursuance of requirements under this Act to be used civil or administrative proceedings against them. Subsection (2) however prohibits the use of such statements in criminal proceedings.*

Rules

321. (1) Rules may be made by the Minister, and in the case of rules that affect court procedure, with the concurrence of the Chief Justice, for the purpose of giving effect to this Part.

(2) Without prejudice to the generality of subsection (1), or to any provision of this Act by virtue of which rules under this section may be made

with respect to any matter, rules under this section may contain—

- (a) any such provision as is specified in [Schedule ? to this Act], and
- (b) such incidental, supplemental and transitional provisions as may appear to the Chief Justice or, as the case may be, the Minister necessary or expedient.

(3) For the purposes of subsection (2), a reference in Schedule 3 to this Act to doing anything under or for the purposes of a provision of this Act includes a reference to doing anything under or for the purposes of Part 2 or 3.

(4) In Schedule 3 to this Act “liquidator” includes a provisional liquidator or bank liquidator.

(5) Rules under this section shall be made by statutory instrument subject to negative resolution procedure.

(6) Nothing in this section prejudices any power to make rules of court.

Commentary: *This section makes provision for the Minister to make rules for the purposes of this Act. Rules made also contain matters as are specified in Schedule 3.*

Credit unions

322. (1) The Minister may by order provide for this Act to apply to credit unions (within the meaning of section 2 of the Credit Unions Act 2010) as it applies to banks, subject to modifications set out in the order.

(2) An order may—

- (a) amend the Credit Unions Act 2010,

-
- (b) or any other enactment which relates, or in so far as it relates, to credit unions;
 - (c) amend an enactment amended by this Part;
 - (d) replicate, with or without modifications, any provision of this Part;
 - (e) apply a provision made under or by virtue of this Part, with or without modifications, to this Part as it applies to credit unions.
- (3) An order—
- (a) shall be made by statutory instrument, and
 - (b) shall be subject to negative resolution procedure.
- (4) Provision made under or by virtue of this Part may make special provision in relation to the application of this Part to credit unions.

Fees, orders

Fees

323. (1) There shall be paid in respect of proceedings under Parts 2 and 3 of this Act, such fees as the Minister may by order direct.

(2) The Minister may by order direct by whom and in what manner the fees are to be collected and accounted for.

(3) The Chief Justice may, with the sanction of the Minister, by order provide for sums to be deposited, by such persons, in such manner and in such circumstances as may be specified in the order, by way of security for fees payable by virtue of this section.

(4) An order under this section may contain such incidental, supplemental and transitional provisions as may appear to the Chief Justice or Minister (as the case may be) the necessary or expedient.

(5) An order under this section shall be made by statutory instrument and, shall be subject to negative resolution procedure.

(6) Fees payable by virtue of this section shall be paid into the Consolidated Fund

(7) Nothing in this section prejudices any power to make rules of court.

Commentary: *This section makes provision for the payment of fees in relation to insolvency proceedings and bank administration proceedings. Provision is also made for the Chief Justice to order that sums be deposited by way of security for fees payable by virtue of this section. The Minister is empowered to levy the fees by order.*

Consequential provision

324. (1) The Minister may by order make provision in consequence of this Act.

(2) An order may, in particular, amend or modify the effect of an enactment (including a fiscal enactment) passed before the commencement of this Act.

(3) An order—

- (a) shall be made by statutory instrument, and
- (b) shall be subject to affirmative resolution procedure.

Commentary

This section makes provision for the Minister to

amend or modify the effect of an enactment passed before the commencement of this Act. Such amendments will be made by Order subject to affirmative resolution procedure.

Interpretation:general

325. (1) In this Act—

“BMA” means the Bermuda Monetary Authority established by the Bermuda Monetary Authority Act 1969;

“bank” means a bank or deposit company licensed under the Bank and Deposit Companies Act 1999 but does not include a credit union within the meaning of section 2 of the Credit Unions Act 2010;

“BDIC” means the Bermuda Deposit Insurance Corporation established by section 4 of the Deposit Insurance Act 2011;

“compensation order” means a compensation scheme order, a compensation proceeds order or a third party compensation order under this Act;

“court” means the Supreme Court;

“Crown” means the Crown in right of Bermuda;

“director”, has the meaning given in section 2 of the Companies Act 1981; “eligible depositors” means depositors who are eligible for compensation under the Deposit Insurance Act 2011;

“financial assistance”, has the meaning given in section 3;

“holding company” has the meaning given in section 86(2) of the Companies Act 1981;

“indemnity” includes any undertaking or other arrangement entered into for the purpose of indemnifying any person or for any similar purpose;

“liabilities” includes obligations;

“Minister” means the Minister of Finance;

“modifications” includes omissions, additions and alterations, and “modify” has a corresponding meaning;

“pension [plan] [scheme]” has the meaning given under section 2 of the National Pension Scheme (Occupational Pensions) Act 1998;

“prescribed” means prescribed by regulations made under this Act;

“relevant guarantee arrangements”, in relation to any bank, means any guarantee arrangements for protecting some or all of the holders of investments, depositors or other creditors of the bank;

“relevant authorities” means the Minister and the BMA;

“residual bank” means a bank all or part of whose business has been transferred in accordance with section 11(2)(b) or 12(2),

“securities”, has the meaning given in section 14;

["specified", in relation to any order or regulations under this Act, means specified in the order or regulations;]

["specified purposes" include the purposes of any specified statutory provision;]

"subsidiary company" has the meaning given by section 86 of the Companies Act 1981;

"wholly-owned subsidiary" has the meaning given by section 113(2) of the Companies Act 1981.

(2) In this Act any reference to anything transferred by or under a particular order under section 13 includes a reference to anything transferred by or under any other order under that section.

(3) For the purposes of this Act any company that was a bank licensed under the Banks and Deposits Companies Act 1999 immediately before the making of the first order under section 13 in relation to the company is to be regarded as continuing to be a licensed bank, whether or not it would be one apart from this subsection.

(4) For the purposes of this Act any reference (however expressed) to a company which is—

(a) a holding company of a bank; or

(b) a subsidiary company of a bank,

includes, in relation to any time after the making of the first instrument or order respectively under section 11 or 12 in relation to the bank ("the relevant time"), a reference to a company which was a holding company or subsidiary company of the

bank immediately before the making of that order but is not one at the relevant time.

(5) For the purposes of this Act a company is to be regarded as wholly owned by the Crown at any time if at that time—

- (a) it is a company of which no person other than the Crown is a member, or
- (b) it is a wholly-owned subsidiary of a company within paragraph (a).

(6) A reference in this Act to a thing in writing includes a reference to a thing in electronic form.

(7) A reference in this Act to action includes a reference to inaction.

(8) A reference in this Act to inability to pay debts—

- (a) a bank that is in default on an obligation to pay a sum due and payable under an agreement, is to be treated as unable to pay its debts, and
- (b) section 96(3) of this Act also applies; and

for the purposes of paragraph (a) “agreement” means an agreement the making or performance of which constitutes or is part of a regulated activity carried on by the bank.

Commentary: *This section defines the various terms used in the Bill.*

Regulations

326. (1) The Minister may make regulations prescribing anything that may be prescribed under

this Act.

(2) Regulations under this section shall be made by statutory instrument and shall be subject to negative resolution procedure.

SCHEDULE 1
Powers of Bank Liquidator in a Bank Insolvency
(Section 115)

Part I
Powers Exercisable with Sanction in Bank Insolvency

1. Power to pay any class of creditors in full.
2. Power to make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the bank, or whereby the bank may be rendered liable.
3. Power to bring legal proceedings under section [160, 161, 171, 175, 178, 296, or 297 or 315].

Part II
Powers Exercisable Without Sanction of the Court

4. Power to bring or defend any action or other legal proceeding in the name and on behalf of the bank and includes power to submit matters to arbitration.

Part III
Powers Exercisable Without Sanction in any Bank Insolvency

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5. Power to sell any of the bank's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.
 6. Power to compromise, on such terms as may be agreed—
 - (a) all calls and liabilities to calls, all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the bank and a contributory or alleged contributory or other debtor or person apprehending liability to the bank, and
 - (b) subject to paragraph 2 in Part 1 of this Schedule, all questions in any way relating to or affecting the assets or the bank insolvency and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it.
 7. Power to do all acts and execute, in the name and on behalf of the bank, all deeds, receipts and other documents and for that purpose to use, when necessary, the bank's seal.
 8. Power to prove, rank and claim in the bank insolvency of any contributory for any balance against his estate, and to receive dividends in the bank insolvency in respect of that balance, as a

separate debt due from the bank or insolvent, and rateably with the other separate creditors.

9. Power to draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the bank, with the same effect with respect to the bank's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the bank in the course of its business.
10. Power to raise on the security of the assets of the bank any money requisite.
11. Power to take out in his official name letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot conveniently be done in the name of the bank.

In all such cases the money due is deemed, for the purpose of enabling the bank liquidator to take out the letters of administration or recover the money, to be due to the bank liquidator himself.

12. Power to appoint an agent to do any business which the bank liquidator is unable to do himself.
13. Power to do all such other things as may be necessary for bank insolvency's affairs and distributing its assets.

SCHEDULE 2
The Categories of Preferential Debts
[section 299]

Category 1: Taxes

1. All taxes owing to the Government and rates owing to a municipality at the relevant date.

Category 2: Remuneration, etc., of employees

2. So much of any amount which—

- (a) is owed by the debtor to a person who is or has been an employee of the debtor, and
- (b) is payable by way of remuneration in respect of the whole or any part of the period of 5 months next before the relevant date,

as does not exceed so much as may be prescribed by order made by the Minister.

3. An amount owed by way of accrued holiday remuneration, in respect of any period of employment before the relevant date, to a person whose employment by the debtor has been terminated, whether before, on or after that date.

4. So much of any sum owed in respect of money advanced for the purpose as has been applied for the payment of a debt which, if it had not been paid, would have been a debt falling within paragraph 2 or 3.

Category 3: Contributions to occupational pension schemes, etc.

5. Any sum which is owed by the debtor and is a sum to which [Schedule 1 to the National Pension Scheme (Occupational Pensions) Act 1998] applies (contributions to occupational pension schemes).

Category 4: Deposit insurance scheme

6. Any sum which is owed by the debtor to a depositor in respect of insured deposits under the Scheme established under the BDIC to an amount not exceeding the insured amount under the Scheme.

Interpretation

7. For the purposes of paragraphs 2 to 4, a sum is payable by the debtor to a person by way of remuneration in respect of any period if it is paid as wages or salary (whether payable for time or for piece work or earned wholly or partly by way of commission) in respect of services rendered to the debtor in that period.

Orders

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8. An order under paragraph 2 -
- (a) may contain such transitional provisions as may appear to the Minister necessary or expedient;
 - (b) shall be made by statutory instrument subject to negative resolution procedure.

Schedule 3
Provisions Capable of Inclusion in Bank
Insolvency Rules
(Section 307)
Courts

1. Provision for supplementing, in relation to bank insolvency, any provision made by or under Parts 2 and 3 of this Act
2. (1) Provision for regulating the practice and procedure of the court exercising jurisdiction for the purposes of Parts 2 and 3 this Act or so far as relating to, and to matters connected with or arising out of, the bank insolvency, being any provision that could be made by rules of court.
(2) Rules made by virtue of this paragraph about the consequence of failure to comply with practice or procedure may, in particular, include provision about the termination of bank administration.

Notices, etc.

3. Provision requiring notice of any proceedings in connection with or arising out of the insolvency of a bank to be given or published in the manner prescribed by the rules.
4. Provision with respect to the form, manner of serving, contents and proof of any petition,

application, order, notice, statement or other document required to be presented, made, given, published or prepared by or under this Act or rules relating to, or to matters connected with or arising out of, the insolvency of banks.

5. Provision specifying the persons to whom any notice is to be given.

Registration of voluntary arrangements

6. Provision for the registration of voluntary arrangements approved under Part 2 [and 3] of this Act, including provision for the keeping and inspection of a register.

Provisional liquidator

7. Provision as to the manner in which a provisional bank liquidator appointed under this Act is to carry out his functions.

Conduct of insolvency

8. Provision with respect to the certification of any person as, and as to the proof that a person is, the liquidator, or administrator of a bank.

9. The following provision with respect to meetings of a bank's creditors, contributories or members—

- (a) provision as to the manner of summoning a meeting (including provision as to how any power to require a meeting is to be exercised, provision as to the manner of determining the value of any debt or contribution for the purposes of any such power and provision making the exercise of any such power subject to

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- the deposit of a sum sufficient to cover the expenses likely to be incurred in summoning and holding a meeting);
- (b) provision specifying the time and place at which a meeting may be held and the period of notice required for a meeting;
 - (c) provision as to the procedure to be followed at a meeting (including the manner in which decisions may be reached by a meeting and the manner in which the value of any vote at a meeting is to be determined);
 - (d) provision for requiring a person who is or has been an officer of the bank to attend a meeting;
 - (e) provision creating, in the prescribed circumstances, a presumption that a meeting has been duly summoned and held;
 - (f) provision as to the manner of proving the decisions of a meeting.

10. (1) Provision as to the functions, membership and proceedings of liquidation committee's established under section 112 of this Act.

(2) The following provision with respect to the establishment of a liquidation committee under section 112 that is to say-

- (a) provision for resolving differences between a meeting of the bank's creditors and a meeting of its contributories or members;
- (b) provision authorising the establishment of the liquidation

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- committee without a meeting of contributories in a case where a bank is being wound up on grounds including its inability to pay its debts; and
- (c) provision modifying the requirements of this Act with respect to the establishment of the liquidation committee in a case where a bank insolvency order has been made immediately upon the discharge of an administration order.
11. Provision as to the manner in which any requirement that may be imposed on a person under any of Parts 2 and 3 of this Act by the bank liquidator, or bank administrator or a special manager appointed under section 135 is to be so imposed.
12. Provision as to the debts that may be proved in a bank insolvency, as to the manner and conditions of proving a debt and as to the manner and expenses of establishing the value of any debt or security.
13. Provision with respect to the manner of the distribution of the property of a bank that is in bank insolvency, including provision with respect to unclaimed funds and dividends.

Bank Administration

14. Provision which—
- (a) applies in relation to bank administration, with or without

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- modifications, a provision of Parts 2 and 3 of this Act, or
- (b) serves a purpose in relation to bank administration similar to a purpose that may be served by the rules in relation to bank insolvency by virtue of a provision of this Schedule.

Financial provisions

15. Provision as to the amount, or manner of determining the amount, payable to the bank liquidator, or bank administrator or a special manager appointed under section 135, by way of remuneration for the carrying out of functions in connection with or arising out of the bank insolvency.
16. Provision with respect to the manner in which moneys received by the bank liquidator of a bank in the course of carrying out his functions as such are to be invested or otherwise handled and with respect to the payment of interest on sums which, in pursuance of rules made by virtue of this paragraph, have been paid into the Insolvency Services Account.
17. Provision enabling the Minister to set the rate of interest paid on sums which have been paid into the [Insolvency Services Account].
18. Provision as to the fees, costs, charges and other expenses that may be treated as the expenses of a bank insolvency.
19. Provision as to the fees, costs, charges and other expenses that may be treated as properly incurred by the bank administrator of a bank.

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20. Provision as to the fees, costs, charges and other expenses that may be incurred for any of the purposes of Part 2 and 3 of this Act or in the administration of any voluntary arrangement approved under Part 2.

Information and records

21. Provision requiring registrars and other officers of court having in relation to, or to matters connected with or arising out of, the insolvency or winding-up of a bank -
- (a) to keep books and other records with respect to the exercise of that jurisdiction, and
 - (b) to make returns to the Minister of the business of those courts.
22. Provision requiring a creditor, member or contributory, or such a committee as is mentioned in paragraph 10 above, to be supplied (on payment in prescribed cases of the prescribed fee) with such information and with copies of such documents as may be prescribed.
23. Provision as to the manner in which proceedings under sections 165 and 166 are to be conducted, as to the circumstances in which records of such examinations or proceedings are to be made available to prescribed persons and as to the costs of such examinations and proceedings.
24. Provision imposing requirements with respect to—
- (a) the preparation and keeping by the liquidator or bank administrator of a bank, of prescribed books, accounts and other records;

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- (b) the production of those books, accounts and records for inspection by prescribed persons;
 - (c) the auditing of accounts kept by the bank liquidator or bank administrator of a bank.
25. Provision as to the manner in which the bank liquidator of a bank is to act in relation to the books, papers and other records of the bank, including provision authorising their disposal.

General

26. [Provision conferring power on the Minister to make regulations with respect to so much of any matter that may be provided for in the rules as relates to the carrying out of the functions of the liquidator, or administrator of a bank.]
27. Provision conferring a discretion on the court.
28. Provision conferring power on the court to make orders for the purpose of securing compliance with obligations imposed by or under section [315].
29. Provision making non-compliance with any of the rules a criminal offence.
30. Provision making different provision for different cases or descriptions of cases, including different provisions for different areas.