



BERMUDA

BANKING (SPECIAL RESOLUTION REGIME) ACT 2016

2016 : 1

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BANKING (SPECIAL RESOLUTION REGIME) ACT 2016

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:

DIVISION 1 SPECIAL RESOLUTION REGIME

Part 1 Preliminary

Citation

1 This Act may be cited as the Banking (Special Resolution Regime) Act 2016.

Interpretation: general

2 (1) In this Act—

“bank” means a bank or deposit company licensed under the Banks 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 under section 4 of the Deposit Insurance Act 2011;

“BMA” means the Bermuda Monetary Authority established under the Bermuda Monetary Authority Act 1969;

“compensation order” means a compensation scheme order, a compensation proceeds order or a third party compensation order under this Act;

“the 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 4;

“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;

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“Minister” means the Minister of Finance;

“modifications” includes omissions, additions and alterations, and “modify” has a corresponding meaning;

“pension plan” 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 authority” means the Minister or 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;

“stabilisation option” means any of the stabilisation powers set out under sections 11 and 12;

“stabilisation powers” means the powers of the relevant authorities set out under sections 11, 12 and 13;

“subsidiary company” has the meaning given by section 86(1) 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 Deposit 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) For the purposes of this Act, a reference to 'unable to pay debts' shall mean—
- (a) in reference to a bank: a bank shall be deemed unable to pay its debts where it is in default of an obligation to pay a sum due and payable under an agreement;
 - (b) in reference to a company: a company shall be deemed unable to pay its debts—
 - (i) if a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding \$500 then due has served on the company, by leaving it at the company's registered office, a written demand (in the prescribed form) requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
 - (ii) if the execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
 - (iii) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due;
 - (iv) if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.
- (9) For the purposes of subsection (8)(a), "agreement" means an agreement the making or performance of which constitutes or is part of a regulated activity carried on by the bank.

Part 2

Special Resolution Framework

Special resolution regime application

- 3 (1) The special resolution regime for banks in this Act 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 in Division 3); and
 - (c) the bank administration procedure (provided in Division 4).

- to—
- (3) The “stabilisation options” under subsection (2)(a) refer to a transfer of banking assets to—
 - (a) a private sector purchaser under section 11;
 - (b) a bridge bank under section 12; or
 - (c) temporary public ownership under section 13.
 - (4) The operation of the special resolution regime shall be administered by—
 - (a) the Minister; and
 - (b) the BMA.

Financial assistance

- 4 (1) In this Act, subject to subsection (2), “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.
- (3) An order made under this section is subject to the negative resolution procedure.

Special resolution objectives

- 5 (1) The relevant authorities shall have regard to the special resolution objectives, under subsection (2), in using, or considering the use of—
- (a) the stabilisation powers;
 - (b) the bank insolvency procedure; or
 - (c) the bank administration procedure.
- (2) The special resolution objectives consist of the following objectives—
- (a) objective 1 is to protect and enhance the stability of the financial systems of Bermuda;
 - (b) objective 2 is to protect and enhance public confidence in the stability of the banking system of Bermuda;
 - (c) objective 3 is to protect depositors;
 - (d) objective 4 is to protect public funds; and
 - (e) objective 5 is to avoid interfering with property rights in contravention of section 13 of the Constitution of Bermuda.
- (3) In subsection (2)(a), the reference to the stability of the financial systems of Bermuda includes, in particular, a reference to the continuity of banking services.
- (4) The objectives listed under subsection (2) shall be applied and balanced as appropriate in each case, and the order in which the objectives are listed is not significant .

Code of practice and procedure

- 6 (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 Division;
 - (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 (Specific conditions: private sector purchaser and bridge bank) is satisfied;
 - (g) sections 64 (Transfer to temporary public ownership) and 67 (Independent valuer); and
 - (h) compensation as provided under Part 5 of Division 2.
- (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.
- (5) Before issuing the Code of Practice, the Minister must consult—
- (a) the BMA; and
 - (b) the BDIC.
- (6) As soon as is reasonably practicable after issuing the Code of Practice, the Minister shall furnish the BMA with a copy.
- (7) The Minister shall lay a copy of the Code of Practice before the Legislature.
- (8) The Minister may revise and re-issue the Code of Practice.
- (9) Subsections (1), (2) and (3) apply to re-issue as to the first issue.

(10) The Statutory Instruments Act 1977 shall not apply to codes of practice made under this section.

Part 3

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 conditions under this section are met.

(2) Condition 1 refers to a bank that 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 refers to a situation where, 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 consider Conditions 1 and 2 as having been 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 grounds for applying for and making a bank insolvency order are set out in sections 98 and 99.

(8) The grounds for applying for and making a bank administration order are set out in sections 204 and 205.

Specific conditions: private sector purchaser and bridge bank

8 (1) Subject to subsection (4), the BMA may exercise a stabilisation power in respect of a bank in accordance with section 11(2)(b) (property transfer instruments) and the Minister may exercise a stabilisation power in respect of a bank in accordance with section 12(2) (property transfer orders), only if satisfied that Condition A is met.

(2) Condition A refers to a situation where the exercise of the powers under sections 11(2)(b) and 12(2)(a) is deemed necessary, having regard to the public interest in—

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

(3) Condition B refers to where—

- (a) the Minister has recommended to the BMA to exercise the stabilisation powers under sections 11(2) on the grounds that it is necessary to protect the public interest; and
 - (b) in the BMA's opinion, exercise of the stabilisation powers is an appropriate way to provide that protection.
- (4) Before determining whether Condition A is met and, if so, how to react—
- (a) the BMA in respect of the exercise of the power under section 11(2)(b) must consult the Minister; and
 - (b) the Minister must, in respect of the exercise of the power under section 12(2), consult the BMA.
- (5) 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 systems 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.
- (6) The conditions in this section 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) (share transfer orders) only if satisfied that either Condition C or Condition D is met.
- (2) Condition C 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 D 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 under this section, the Minister must consult the BMA.
- (5) The conditions in this section are in addition to the conditions in section 7.

Banking Liaison Panel

- 10 (1) The Minister shall appoint 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 Division 2, Division 3, Division 4 or Division 5 (excluding the stabilisation

powers and orders made under section 74(1) relating to the compensation scheme, the resolution fund and third party compensation);

- (b) the code of practice and procedure under section 6; and
 - (c) anything else referred to the panel by the Minister.
- (3) The panel shall consist of—
- (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;
 - (f) one or more persons who in the Minister's opinion have expertise in insolvency law and practice; and
 - (g) one or more persons holding such qualifications as the Minister, in consultation with the BMA, may deem appropriate.

DIVISION 2

STABILISATION POWERS

Part 1

Stabilisation Options

Private sector purchaser

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

- (2) For that purpose the BMA may make—
- (a) one or more share transfer instruments;
 - (b) one or more property transfer instruments.

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 Division) 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); and
 - (b) is not a bridge bank for the purposes of—
 - (i) section 30(1);
 - (ii) section 43(1).

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.
- (3) The Code of Practice shall set out adequate provision for the management of a bank placed under temporary public ownership under this section.

Part 2

Transfer of Securities

Interpretation of "securities"

- 14 In this Division, "securities" includes anything falling within any of the following classes—
- (a) Class 1: shares and stock;
 - (b) Class 2: debentures, including—
 - (i) debenture stock;
 - (ii) loan stock;
 - (iii) bonds;
 - (iv) certificates of deposit; and
 - (v) any other instrument creating or acknowledging a debt; and
 - (c) Class 3: warrants or other instruments that entitle the holder to acquire anything in Class 1 or 2.

Share transfer instrument

- 15 (1) A share transfer instrument is an instrument made under section 11(2)(a) by the BMA for purposes of the first stabilisation option relating to a private sector purchase, and such instrument—
- (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 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.

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.

Effect of a transfer instrument or order

- 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 and 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.

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.

Conversion and de-listing

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.

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 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 Minister.

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

(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.

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; or
- (b) whether the transferred shares are registered.

(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.

Default event provision

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 agreement;
- (e) a sum referred to in the agreement becomes payable or ceases to be payable;
- (f) delivery of anything referred to in the agreement becomes due or ceases to be due;
- (g) a right to claim a payment or delivery in the agreement 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 a transfer is made by the instrument or order.

Incidental provisions

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

(2) For purposes of 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.

Procedure: instruments

24 (1) The BMA shall, as soon as is reasonably practicable after making a share transfer instrument in respect of a bank, 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) in the Gazette and other publications 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.

Procedure: orders

25 (1) A share transfer order—

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

(2) The Minister shall, as soon as is reasonably practicable after making a share transfer order in respect of a bank, 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) The Minister shall, as soon as is reasonably practicable after making a share transfer order, publish a copy—

- (a) on the Ministry's internet website; and
- (b) in the Gazette or other publications to maximise the likelihood of the order coming to the attention of persons likely to be affected.

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 Division).
- (5) Before making a supplemental share transfer instrument, the BMA must consult the Minister.
- (6) The possibility of the BMA making a supplemental share transfer instrument under subsection (2) is without prejudice to the possibility of the making of a new instrument in accordance with section 11(2) (without reference being made to subsection (2) above).

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 Division).
 - (5) Before making a supplemental share transfer order, the Minister must consult the BMA.
 - (6) The possibility of the Minister making a supplemental share transfer order under subsection (2) is without prejudice to the possibility of making of a new order in accordance with section 13(2) (without reference to subsection (2) above).

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 Division).
- (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.

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 64 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 Division).

(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.

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 Division).

(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.

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 64 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 Division).

(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.

Part 3
Transfer of Property

Transfer date

32 In sections 18, 35 and 36—

“transfer date” means the date or time on or at which a share or property transfer instrument or order (or the relevant part of it) takes effect.

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.

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.

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;
- (d) rights and liabilities under the law of a country or territory outside Bermuda; and
- (e) rights and liabilities under any statutory provision.

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

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).

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 confers rights or imposes 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.

Termination rights for property transfer

38 The provisions of section 22 shall apply, with the necessary modifications, to property transfers under sections 33 to 37.

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 or order).
- (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.

Enforceability of obligations under section 39

40 An obligation imposed by section 39 is enforceable as if created by contract between the transferor and transferee.

Incidental provision

- 41 (1) A property transfer instrument or order may include incidental, consequential or transitional provision.
- (2) For purposes of 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.

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 orders.

(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 Division).

(5) Before making a supplemental property transfer—

- (a) instrument, the BMA must consult the Minister; and
- (b) order, the Minister must consult the BMA.

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

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 64 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 Division).

(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.

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 Division).

(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.

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; or
 - (b) as a property transfer instrument for all other purposes (including for the purposes of the application of powers under this Division).
- (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.

Temporary public ownership: reverse property transfer

46 (1) This section applies where the Minister has made a property transfer order in accordance with section 13(2) 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 under section 25; or
 - (b) as a property transfer instrument for all other purposes (including for the purposes of the application of a power under this Division).

(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.

Restriction of partial transfers

47 In this Division “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.

Procedure

48 (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 6.

(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 the BMA or Ministry internet website, as the case may be; 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.

Creation of liabilities

49 (1) The provision that may be made by a property transfer instrument or order as provided in 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).

Part 4

Restriction of Partial Property Transfers

Interpretation: Part 4

50 (1) In this Part—

“continuity powers” means the powers conferred by section 77(2) and includes continuity powers as referred to in sections 78(2), 80(2), 81(2) and 90(2)(f);

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

“eligible depositor” means any person who at any material time is an eligible depositor under the Deposit Insurance Act 2011;

“excluded rights” means rights—

- (a) which relate to a retail deposit made with a bank;
- (b) which relate to a retail liability owed to a bank;
- (c) which relate to a contract which was entered into by or on behalf of a bank 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 bank 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 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 Minister and the BMA;
- (b) in relation to Case 3 (as specified in section 51(4)), 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 depositor; or
- (b) the deposit is held in an account of a particular class or brand provided by a particular bank which either—
 - (i) is mainly used by eligible depositors; or
 - (ii) has been mainly marketed by the bank to eligible depositors;

“retail liability” means a liability which is owed to a bank by an eligible depositor;

“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 bodies corporate and not 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.

Application of Part 4

- 51 (1) This Part applies in the cases set out in subsections (2), (3) and (4).
- (2) Case 1 refers to 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 refers to 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 refers to where—
- (a) the Minister has made a share transfer order in accordance with section 13(2); and
 - (b) a property transfer order has been made by the Minister under section 45 or 46 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 the group of sections, a property transfer instrument or order which purports to transfer all of the property, rights and liabilities of a bank 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.

Set-off and netting

52 (1) A partial property transfer to which this Part applies may provide for the transfer of the protected rights and liabilities between a particular person and a bank under a particular set-off arrangement, netting arrangement as defined in section 48 or title transfer financial collateral arrangement as defined in section 50.

(2) A partial property transfer to which this Part applies may not include provision under the continuity powers which terminates or modifies the protected rights or liabilities between the particular person and the bank.

(3) For the purposes of subsections (1) and (2), rights and liabilities between the particular person and the bank are protected if they are rights and liabilities which either the particular person or the bank is entitled to set-off or net under a set-off arrangement, netting arrangement or title transfer financial collateral arrangement which the particular person has entered into with the bank 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 the particular person and the bank 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 the particular person or the bank to set-off or net rights and liabilities also permits the particular person or the bank to set-off or net rights and liabilities with another person; or
- (b) the right of the particular person or the bank 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 the particular person or by the bank.

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 Part 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 Part 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 Part applies may not transfer the liability unless the benefit of the security is also transferred.

(5) A partial property transfer to which this Part 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 bank in contravention of a rule or directive prohibiting such arrangements, which is made by the BMA under the Banks and Deposit Companies Act 1999 or otherwise than in accordance with the licence of the bank.

(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 subsection (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.

Capital market arrangements

54 (1) Subject to subsection (3), a partial property transfer to which this Part applies may provide for the transfer of the property, rights and liabilities which are or form part of a capital market arrangement to which the bank is a party.

(2) Subject to subsection (3), a partial property transfer to which this Part 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 bank 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 bank 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 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.

- (5) For the purposes of this section, an arrangement is a capital market arrangement if—
- (a) it 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;
 - (b) it involves a grant of security to—
 - (i) a party to the arrangement who issues a capital market investment;
 - (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;
 - (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;
 - (d) at least one party guarantees the performance of obligations of another party;
 - (e) at least one party provides security in respect of the performance of obligations of another party; or
 - (f) the arrangement involves an investment in options, futures and contracts for differences.

Financial markets

55 A property transfer order to which this Part 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 the operation of or rendering unenforceable—

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

Trusts

56 A partial property transfer to which this Part 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 bank to the transferee—

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

Additional restrictions on reverse transfers

57 (1) This section applies to a partial property transfer to which this Part 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 bank; 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 where the transfer is not being effected by a property transfer order;
- (c) a transfer of a claim for damages or an award of damages against the bank 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, the reference to insolvency includes a reference to—

- (a) liquidation;
- (b) bank insolvency;
- (c) bank administration;
- (d) a composition with creditors; and
- (e) a scheme of arrangement.

Termination rights

58 A partial property transfer to which this Part applies may not make provision for sections 38(6) and (7) 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.

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 Part 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.

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.

Contravention of other provisions of this group of sections

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

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

(3) The person referred to in subsection (1) may give notice to the relevant authority of the alleged contravention of the 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 Part 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 Part 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 Part has been contravened in the manner specified in the notice given under subsection (3), take the steps specified in subsection (7).

(6) The steps referred to in subsection (5)(a) 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 referred to in subsection (5)(b) are to give reasons to the person who has given a notice under subsection (3) as to why the relevant authority considers that no provision of this Part 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 the person who has given the notice 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 the 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 that property or those rights or liabilities.

Part 5

Compensation and Disputes

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 72 for compensation to be paid to persons other than transferors.

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.

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.

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.

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 makes a property transfer order under section 45; or
 - (h) the Minister makes a reverse property transfer order under section 46.
- (2) Where a transfer order has been made under subsection (1), the Minister may make—
- (a) a compensation scheme order;
 - (b) 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 the replacement as to the first appointment).

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 the 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 subject to the negative resolution procedure.

(9) Subsection (8) does not apply if the order is contained in a statutory instrument that contains an order to which section 63 applies.

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 67(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 made under this section shall be subject to the negative resolution procedure.

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

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 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.

Resolution fund

71 (1) The Minister may make a resolution fund order, which 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 such 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 such 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 6.

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).

Third party compensation: mandatory provision

- 73 (1) In this section and sections 76 and 77—
- (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;
 - (ii) satisfies conditions specified by the regulations;
 - (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.

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

(3) 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.

- (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 a specified effect;
 - (c) make provision which is to be treated as forming part of a third party compensation order—
 - (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 nonoccurrence 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 instalment.

(7) Regulations made under this section shall be subject to the affirmative resolution procedure.

Sources of compensation and procedure

- 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 referred in subsection (1) may provide for compensation or other payments to be made by—

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

(3) An order referred to in subsection (1) shall be subject to the affirmative resolution procedure.

Disputes

75 (1) This section applies to—

- (a) share transfer orders;
- (b) share transfer instruments; and
- (c) property transfer instruments.

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

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

- (a) jurisdiction on the Supreme Court;
- (b) jurisdiction on a specified tribunal; or
- (c) discretion on a specified person.

(4) Where jurisdiction is conferred on a tribunal or discretion is conferred on a specified person, provision must be made for appeals to the Supreme Court against the decisions of the specified tribunal or person.

(5) An appeal lies to the Court of Appeal from a decision of the Supreme Court with leave of the Court of Appeal.

Part 6

Incidental Functions

General continuity obligation: property transfers

76 (1) In this section and section 77—

“group company” in relation to a company that is a residual bank means any company which is, or was immediately before the transfer—

- (a) a parent company or subsidiary company of that company; or
- (b) a subsidiary company of any parent company of that company;

“the transferred business” means the part of the bank’s business that has been transferred;

“transferee” means a private sector 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) may, 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.

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 rights and impose obligations on a group company and a transferee, which shall have effect as if created by contract between them;
- (e) confer rights and impose 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 BMA or the Minister 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—
 - (i) by the BMA in the case of a property transfer instrument only with the consent of the Minister; or
 - (ii) by 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.

Continuity obligations: onward property transfers

78 (1) In this section—

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

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

“onward transferee” refers to the person to whom the onward transfer is made.

(2) The Minister 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) Subsection (2) may be applied 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 of paragraphs (a) to (d).
- (4) 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.
- (5) 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.
- (6) 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.

General continuity obligation: share transfers

- 79 (1) In this section and section 80—
- “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);
- “the continuity authority” means—
- (a) the BMA, where ownership was transferred in accordance with section 11(2)(a); and
 - (b) the Minister, where ownership was transferred in accordance with section 13(2);
- “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);
- “group company” has the meaning given in section 76;
- (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 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.

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

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 rights and impose 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).

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 Minister 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) Subsection (2) may be applied to impose obligations on—
 - (a) the bank;
 - (b) anything which is or was a group company (within the meaning of section 76) 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 of paragraphs (a) to (c).
- (4) 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.
- (5) 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.
- (6) Sections 79(3) to (7) and 80(3) and (4) apply to an obligation as applied under subsection (2) with any necessary modification.

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) shall be subject to the 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, means the BMA or the Minister as the case may be.

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.

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 accordance with 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.

Power to change law

85 (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 310); or
- (c) to any combination of paragraphs (a) and (b).

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

(7) An order shall be subject to the affirmative resolution procedure.

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

- (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;
- (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).

International obligation notice: general

86 (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).

Public funds: general

87 (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) shall be subject to the negative resolution procedure.

Temporary public ownership: report

88 (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.

Part 7

Holding Companies

Temporary public ownership

89 (1) The Minister may take the holding company of a bank into temporary public ownership, in accordance with section 13(2), if the conditions under this section are met.

(2) Condition 1 is that the BMA is 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 C or D 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.

Supplemental

90 (1) In the following provisions, references to banks include references to holding companies—

- (a) section 6(3)(b);
- (b) section 9(1);
- (c) section 16(1); and
- (d) section 85(5)(a).

(2) Where the Minister takes a bank's holding company into temporary public ownership as provided in section 89—

- (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 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)(b) 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 73 apply in relation to orders treated as property transfer instruments by virtue of section 46(5)(b) (including those sections as applied by virtue of subsection (2) above), the reference in section 47 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) A reference to two banks being in the same group is a reference to there being group undertakings in respect of each other.

Contribution to costs of special resolution regime

91 (1) The Minister may require the BDIC to make payments (to the Minister or the BMA) in respect of expenses incurred (by the Minister or the BMA) in connection with the exercise of the power.

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(2) Subsection (1) is subject to section 92 (limit on amount of special resolution regime payments).

(3) In subsection (1), “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.

(4) Any payment made by the BDIC under subsection (1) is to be treated for the purposes of this Part as an expense under the compensation scheme.

(5) In this section and section 92, “specified rate” means a rate specified by the Minister.

(6) Different rates may be specified under different provisions or for different periods.

(7) A rate may be specified by reference to a rate set (from time to time) by any person.

(8) 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).

Limit on amount of special resolution regime payments

92 (1) The total amount of special resolution regime payments required to be made in respect of a bank may not exceed notional net expenditure (see subsection (3)), minus actual net expenditure (see subsection (4)).

(2) A “special resolution regime payment” is—

- (a) a payment under section 91(1); or
- (b) a payment required to be made by the BDIC by virtue of section 74(2) (sources of compensation).

(3) Notional net expenditure is 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 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 the total amount of expenses (other than resolution regime payments) actually incurred by the BDIC in respect of the bank, minus 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 BDIC do not include any levy received (or likely to have been received) by it.

DIVISION 3
BANK INSOLVENCY

Part 1
Preliminary

Overview and interpretation

93 (1) The main features of bank insolvency under this Division 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.

(2) In this Division—

“bank liquidator” means a person appointed by the court as a bank liquidator of a bank which is subject to bank insolvency pursuant to a bank insolvency order made under section 95;

“contributory” means any person liable to contribute to the assets of a bank in the event of the bank being made subject to bank insolvency under a bank insolvency order made under section 95;

“insolvency practitioner” means a person who is member of, and who is accorded the right to practise as a bank liquidator by, a professional body for bank liquidators recognised by the Minister by order made under paragraph 3 of Schedule 1.

Application of “associate” and “company”

94 (1) For the purposes of this Division, 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; or
- (b) a relative of—
 - (i) the individual;
 - (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 the husband or wife or a relative of 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 who is acting in the capacity of a 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—
 - (i) the same person has control of both companies;
 - (ii) a person has control of one company and persons who are his associates control the other company; or
 - (iii) a person has control of one company and he and persons who are his associates have control of the other company;
- (b) if a group of two or more persons has control of each company, and the group 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 Division—

- (a) 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

- (b) a reference to a husband or wife includes a former husband or wife and a reputed husband or wife.

(9) For the purposes of this Division, any director or other officer of a company is to be treated as employed by that company.

(10) For the purpose of this Division, 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 any body 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 has effect with any necessary modifications.

Part 2

Bank Insolvency Order and Appointment of Bank Liquidator

Bank liquidator

Bank insolvency order

95 (1) A bank insolvency order is an order appointing a person as the bank liquidator of a bank for purposes of this Division.

(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) Schedule 1 has effect with respect to the tenure of the bank liquidator.

(5) 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”.

Status of bank liquidator

96 A bank liquidator is an officer of the court.

Application for bank insolvency order

- 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.

Grounds for applying

- 98 (1) In this section—
- (a) Ground A applies with respect to either of the following options—
 - (i) that a bank is unable, or likely to become unable, to pay its debts (as defined in section 2(8)); or
 - (ii) that a bank has had, or will have, its licence revoked under section 18 of the Banks and Deposit Companies Act 1999.
 - (b) Ground B is that the winding up of a bank would be in the public interest;
 - (c) Ground C is that the winding up of a bank would be fair.
- (2) The BMA may apply for a bank insolvency order only if—
- (a) it is satisfied that—
 - (i) Conditions 1 and 2 in section 7 are met;
 - (ii) the bank has eligible depositors;
 - (iii) Ground A or C applies; and
 - (b) the Minister has been consulted with respect to Ground A in relation to the the option set out in subsection (1)(a)(i).
- (3) The Minister may apply for a bank insolvency order only if—
- (a) he is satisfied that the bank has eligible depositors;
 - (b) he is satisfied that Grounds B and C apply; and
 - (c) the BMA has been consulted.
- (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 110 of the Companies Act 1981;
 - (b) any information obtained or report made under sections 41 or 42 of the Banks and Deposit Companies Act 1999.

Grounds for making a bank insolvency order

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(1) 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;
- (b) that Grounds B and C of section 98(1) apply; and
- (c) that the sources of information on the basis of which the Minister is satisfied to apply for a bank insolvency order under section 98(3) are found by the court to be satisfactory.

(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.

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 in accordance with Condition 1 under section 101 of a petition for a winding up order; and
- (b) the BMA applies for a bank insolvency order contrary to Condition 3 in section 101,

the bank insolvency order is treated as having taken effect when the person referred to in section 101(8) presents the petition to the court.

(3) In any other case, the bank insolvency order is treated as having taken effect when the application for the order is made to the court by the BMA or the Minister.

(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.

Petition for winding up order or resolution for winding up

101 (1) A petition for a winding up order in respect of a bank may not be determined by the court unless Conditions 1 to 4 under this section are satisfied.

(2) A resolution for voluntary winding up of a bank may not be made unless Conditions 1 to 4 under this section are satisfied

(3) Condition 1 is that the BMA has been notified—

- (a) by the petitioner for a winding up order, that the petition is to be presented to the court; or
- (b) by the bank, that a resolution for voluntary winding up order 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 by the court for public inspection).

(5) Condition 3 is that the BMA has informed the person who gave the notice that it does not intend to apply for a bank insolvency order or to exercise stabilisation powers under Division 2.

(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 277 (wrongful trading).

(8) Where the BMA receives notice under Condition 1, the BMA shall inform the person who gave the notice, within 28 days, beginning with the day after the BMA receives the notice, whether it intends to apply for a bank insolvency order or exercise a stabilisation power under Division 2 of this Act.

Consequences of bank insolvency order

102 (1) On the making of a bank insolvency order, a copy of the order must immediately be forwarded by the bank liquidator (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 under section 103, no action or proceeding shall be proceeded 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.

Appointment of provisional bank liquidator

Appointment and powers of provisional bank liquidator

103 (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 as provided in section 97, 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 as a 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 pursuant to the application made under section 97(2).

(6) The provisional bank liquidator shall carry out 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.

(8) A provisional bank liquidator may be removed from office as provided in paragraph 6 of Schedule 1.

Appointment to office of two or more persons

104 (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.

Validity of bank liquidator's acts

105 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.

Objectives of bank liquidation

Objectives

106 (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, in accordance with section 107; or
- (b) receives payment from (or on behalf of) the BDIC as provided in section 108.

(3) Objective 2 is, subject to subsection (5), to wind up the affairs of the bank in accordance with the bank insolvency order 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).

(5) The bank liquidator must carry out the requirements of Objective 2 in accordance with the provisions of this Part as directed by, and act subject to the powers of, the court in this Part and in the Rules of the Supreme Court made for the purposes of this Part.

Transfer of accounts of depositors

107 (1) This section applies where a bank liquidator arranges, in pursuit of Objective 1 in section 106(2)(a), 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.

Role of the BDIC

108 (1) For the purpose of co-operating in the pursuit of Objective 1 in section 106, 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 a provision that payment of any expenditures arising out of and in connection with the administration of any arrangement or transfer made under this section may be made out of the Deposit Insurance Fund provided for under the Deposit Insurance Act 2011.

(3) The BDIC is entitled to participate in proceedings for or in respect of a bank insolvency order.

(4) A bank liquidator must—

- (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.

Liquidation committee

Liquidation committee

109 (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 106; and
 - (b) must notify the liquidation committee when in the bank liquidator’s opinion Objective 1 in section 106 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 106 has been achieved entirely or so far as is reasonably practicable (a “full payment resolution”); or
 - (b) apply to the court under section 133(4).
- (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 to replace the members nominated by the BMA and the Minister;
 - (c) the BDIC may resign from the liquidation committee (in which case 3 or 5 new members may be elected under paragraph (b)); and
 - (d) 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 the provisions of this section, regulations under section 313 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.

Liquidation committee procedure

- 110 (1) A meeting of the liquidation committee may be summoned—

- (a) by any of the members; or
- (b) by the bank liquidator.

(2) The liquidation committee, whether consisting of the initial members or their nominated replacements, has a meeting that 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 109(5), the bank liquidator must apply to the court—

- (a) for an order under subsection (4); or
- (b) for directions under or by virtue of section 133(2).

(6) A nominating body under section 109(2) may replace its nominee at any time.

(7) After the removal of the nominated members under section 109(6)(b), the BMA—

- (a) shall receive notice of and 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 109(6)(d)—

- (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 109 and has not been re-formed under subsection (8)—

- (a) a reference in this Part to the liquidation committee is of no effect;
- (b) for section 183(2) to (4), substitute requirements for the liquidation committee for the bank liquidator, before making a proposal—
 - (i) to produce a final report;
 - (ii) to send copies of the report in accordance with section 183(2)(b);
 - (iii) to make the report available in accordance with section 183(2)(c); and
 - (iv) to be satisfied as specified in section 183(4)(b);

- (c) Condition 2 in section 204(3) does not apply; and
- (d) for section 194(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 of the report in accordance with section 194(2)(b);
 - (iii) make the report available in accordance with section 194 (2)(c); and
 - (iv) notify the court and the Registrar of Companies of the intention to vacate office and to apply for release.

Liquidation committee Objective 1 recommendations

111 (1) As soon as is reasonably practicable, a liquidation committee must recommend the bank liquidator to pursue—

- (a) in section 106(2): Objective 1(a);
- (b) in section 106(2): Objective 1(b); or
- (c) Objective 1(a) for one specified class of case and Objective 1(b) for another.

(2) In making a recommendation, the liquidation committee must consider—

- (a) the desirability of achieving Objective 1 in section 106(2) as quickly as possible; and
- (b) Objective 2 in section 106(3).

(3) If the liquidation committee thinks that the bank liquidator is failing to comply with its recommendation, it must apply to the court for directions under section 133(4).

(4) Where the liquidation committee has not made a recommendation, the bank liquidator may apply to the court under section 110(3) and the court may, in particular, make a direction in lieu of a recommendation if the liquidation committee fails to make one within a period set by the court.

Functions and powers of bank liquidator

General functions of bank liquidator in bank insolvency in winding up

112 The functions of the bank liquidator of a bank which is subject to bank insolvency, subject to Objective 1 in section 106, are to ensure that the assets of the bank are collected, realised and distributed to the bank's creditors and, if there is a surplus, to the persons entitled to it.

General powers, duties and effect

113 (1) Subject to sections 96 and 114, the bank liquidator may do anything necessary or expedient in pursuit of the Objectives in section 106.

(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.

- (3) A bank liquidator has the following powers—
- (a) to effect and maintain insurances in respect of the business and property of the bank;
 - (b) to do all such things (including the carrying out of works) as may be necessary for the realisation of the property of the bank; and
 - (c) to make any payment which is necessary or incidental to the performance of the bank liquidator's functions.

Delegation of powers to bank liquidator

114 (1) Provision may be made in the Rules by the Minister under section 309 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 bank 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, subject to the court's control.

(2) 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 special leave of the court or sanction of the liquidation committee.

Powers of bank liquidator exercisable with sanction

115 (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 2 to this Act (payment of debts; compromise of claims, etc.; institution and defence of proceedings); and
- (b) with or without the sanction of the court, exercise any of the general powers specified in Part III of Schedule 2.

(2) Where the bank liquidator, in exercise of the powers conferred on him under this Part—

- (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 110(3)).

(5) In exercising or considering whether to exercise a power under Schedule 2, the bank liquidator shall have regard to Objective 1 in section 106.

(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.

Official Receiver and special manager

Official Receiver

116 The Official Receiver appointed under section 3 of the Companies Act 1981 has the powers and is to discharge the duties, for purposes of this Act, conferred on him under the Companies Act 1981 where the need arises.

Power to appoint special manager

117 (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 have 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.

Part 3

Bank Property, Contributories and Creditors

Bank property

Vesting of bank property in bank liquidator

118 (1) When a bank is subject to a bank insolvency order, 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.

Custody of bank's property

119 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.

Avoidance of property dispositions, etc.

120 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.

Avoidance of attachments, etc.

121 Where a bank is subject to the imposition of a bank insolvency order, 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.

Bank's statement of affairs

122 (1) Where the court has made a bank insolvency order or appointed a provisional bank liquidator, the bank liquidator may by notice require some or all of the persons mentioned in subsection (3) 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 bank's 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) in the case of the persons referred to in subsection (1), by—

(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 subsection (5), 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 subsections (1) and (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—

"contributory" has the meaning assigned to the term in section 159 of the Companies Act 1981;

"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 cause 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 for a continuing offence, to a daily default fine of \$500.

Power to stay bank insolvency

123 (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 immediately 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.

Contributories

Settlement of list of contributories and application of assets

124 (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 of the bank 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 settling the list, the court shall distinguish persons who are contributories in their own right and persons who are contributories in a representative capacity or are liable for the debts of others.

Debts due from contributory to bank

125 (1) The court may, at any time after making a bank insolvency order, make an order with respect to any contributory for the time being on the lists of contributories to pay, in a manner directed by the order, any money due from him (or from the estate of the person whom 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 reimbursed to him by way of set-off against any subsequent call.

Power to make calls

126 (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.

Order on contributory to be conclusive evidence

127 (1) An order made by the court with respect to 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.

Adjustment of rights of contributories

128 The court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled to it.

Power to arrest absconding contributory

129 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 for him and them to be kept safely, subject to the Police and Criminal Evidence Act 2006 and rules made under section 309, until such time as the court may order.

Creditors

Power to exclude creditors not proving in time

130 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.

Inspection of books by creditors, etc.

131 (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 106.

Meetings to ascertain wishes of creditors or contributories

132 (1) Subject to Objective 1 in section 106, 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.

Meetings of creditors and contributories on distribution of assets

133 (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 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, 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 (4), unless the liquidation committee has passed a full payment resolution (except as provided in section 110 or 111).

Payment of general expenses of bank insolvency

134 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.

Enforcement of bank liquidator's duty to make returns, etc.

135 (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 may exercise the powers in subsections (2) and (3).

(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 bank liquidator.

Imposition of penalties on bank liquidator

136 Nothing in section 135 prejudices the operation of any enactment imposing penalties on a bank liquidator in respect of any such default as is mentioned in that section.

Part 4

Bank Debts

Preferential debts

Preferential debts (general provision)

137 (1) In a bank insolvency, for purposes of Objective 2 under section 106(3), 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 are to debts listed in Schedule 3 to this Act, and references to preferential condition are to be used accordingly.

Preferential charge on goods distrained

138 (1) This section applies where a bank is subject to bank insolvency by order of the court and is without prejudice to section 121 (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 bank 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.

Expenses of bank insolvency relating to creditor payments

139 (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 140(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) Regulations may restrict the application of subsection (1), in such circumstances as may be prescribed, to expenses authorised 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.

Share of assets for unsecured creditors in bank insolvency

140 (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 bank 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 voluntary arrangement in respect of the bank.

(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 shall be subject to the negative resolution procedure.

(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;

“prescribed” means prescribed by order by the Minister.

(10) An order under this section may include transitional or incidental provision.

Disclaimer

Power to disclaim onerous property

141 (1) This and the next two sections apply to a bank that is being made the subject of a bank 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, endeavoured 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;
- (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 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.

(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.

Disclaimer of leaseholds

142 (1) The disclaimer under section 143 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 144 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 144, make such orders with respect to fixtures, tenant's improvements and other matters arising out of the lease as it thinks fit.

Land subject to rent charge

143 (1) The following applies where, in consequence of the disclaimer under section 142 of any land subject to a rent charge, that land vests by operation of law in the Crown or any other person (referred to in subsection (2) 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 rent charge 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.

Powers of court - disclaimed property

144 (1) This section and the next apply where the bank liquidator has disclaimed property under section 141.

- (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 141 (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.

Powers of court - leasehold property

145 (1) The court shall not make an order under section 144 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 144 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 144 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 144, that person is excluded from all interest in the property.

Effect of execution or attachment

146 (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 or by the appointment of a receiver.

Duties of officers charged with execution of writs and other processes

147 (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 Minister may by regulations increase or decrease the sum of money specified in subsection (3).

Supplementary matters

Rescission of contracts by the court

148 (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.

Notification that bank is in bank insolvency

149 (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 wilfully authorises or permits the default, namely, any officer of the bank or any bank liquidator, is guilty of an offence and is liable on summary conviction to a fine of \$10,000.

Interest on debts

150 (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.

Documents exempt from stamp duty

151 (1) In the case of a bank insolvency by order of the court, the following provisions have 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.

Bank's books to be evidence

152 Where a bank is subject to a bank insolvency order under this Division, 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.

Information as to pending bank insolvency

153 (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.

Resolutions passed at adjourned meetings

154 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.

Part 5

Fraud and Misconduct

Judicial notice and affidavits

Judicial notice of court documents

155 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

- (b) of the official seal or stamp of the 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.

Affidavits, etc. in Bermuda and overseas

156 (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.

Fraudulent actions and misconducts

Fraud, etc. in anticipation of bank insolvency

157 (1) When a bank is made the subject of a bank insolvency under this Division, 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;
- (b) fraudulently removed any part of the bank's property to the value of \$500 or more;
- (c) concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the bank's property or affairs;
- (d) made any false entry in any book or paper affecting or relating to the bank's property or affairs;
- (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 the two cases under that subsection) 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 the two cases under that subsection) 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 5 years imprisonment or both.

(6) The Minister may by order subject to the negative resolution procedure increase or reduce the money sums specified in paragraphs (a) and (b) of subsection (1).

Transactions in fraud of creditors

158 (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 5 years imprisonment or both.

Misconduct in course of bank insolvency

159 (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);
 - (b) does not deliver up to the bank 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;
 - (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;
 - (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 5 years imprisonment or both.

Falsification of bank's books

160 (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 5 years imprisonment or both.

Material omissions from statement relating to bank's affairs

161 (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 5 years imprisonment or both.

False representations to creditors

162 (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 5 years imprisonment or both.

Summary remedy against delinquent directors, bank liquidators, etc.

163 (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 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.

Fraudulent trading

164 (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, subsection (2) 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 referred to in subsection (1) are to be liable to make such contribution (if any) to the bank's assets as the court thinks proper.

Wrongful trading

165 (1) Subject to subsection (3), 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 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 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 164.

Proceedings under ss. 164, 165

166 (1) On the hearing of an application under section 164 or 165, 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;
- (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 164 and 165 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.

Restriction on re-use of bank names

167 (1) This section applies to a person where a bank has entered into bank insolvency under this Division 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 the bank went into 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 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 bank entered bank insolvency—

- (a) be a director of any other bank that is known by a prohibited name;
- (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 an offence and liable on summary conviction to a fine of \$10,000 or imprisonment for 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.

Personal liability for debts, following contravention of s. 167

168 (1) A person is personally responsible for all the relevant debts of a bank if at any time—

- (a) in contravention of section 167, 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 167.

(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 were 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 subsection (1), such debts and other liabilities of the bank as were 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 167 is presumed, unless the contrary is shown, to have been willing at any time thereafter to act on any instructions given by that person.

Investigation and prosecution of malpractice

Prosecution of delinquent officers and members of bank

169 (1) If it appears to the court in the course of the 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 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, appoint inspectors to 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.

Obligations arising under s. 169

170 (1) For the purpose of an investigation by the Minister in consequence of a report made to him under section 169(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 169(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 169(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 169, 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 (5), 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.

Management by bank administrators, bank liquidators, etc.

Supplies of gas, water, electricity, etc.

171 (1) This section applies in the case of a bank where—

- (a) the bank is being made the subject of a bank insolvency order under this Division; or
- (b) a provisional bank liquidator is appointed.

(2) In this section and sections 172 to 175, a reference to "the bank liquidator" includes the provisional bank liquidator.

(3) If a request is made by or with the concurrence of the bank liquidator for the giving, after the effective date, of any of the supplies mentioned in subsection (4), the supplier—

- (a) may make it a condition of the giving of the supply that the bank liquidator personally guarantee the payment of any charges in respect of the supply;
- (b) shall, however, 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 be paid.

(4) The supplies referred to in subsection (3) 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; or
- (d) a supply of communications services by a provider of a public electronic communications service.

(5) "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 is appointed.

Effect of seizure of property believed to be bank property

172 (1) This section applies in the case of a bank where the bank becomes the subject of a bank insolvency order or a provisional bank liquidator is appointed.

(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 bank liquidator.

(3) Where the bank liquidator—

- (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 bank liquidator—

- (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 bank liquidator'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.

Duty to co-operate with bank liquidator

173 (1) Each of the persons mentioned in the next subsection shall—

- (a) give to the bank liquidator such information concerning the bank and its promotion, formation, business, dealings, affairs or property as the bank liquidator may at any time after the effective date reasonably require; and
- (b) attend on the bank liquidator at such times as the latter may reasonably require.

(2) The persons referred to in subsection (1) 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 bank liquidator'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 under this Division, 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 cause 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.

Inquiry into bank's dealings, etc.

174 (1) The court may, on the application of the bank liquidator, 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 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 that subsection.

(3) An account submitted to the court under subsection (2) must be contained in—

- (a) a witness statement verified by affidavit; and
- (b) an affidavit.

(4) Subsections (5) and (6) apply in a case where—

- (a) a person without reasonable cause 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 made under section 309, until that person is brought before the court under the warrant or until such other time as the court may order.

Court's enforcement powers under s. 174

175 (1) If it appears to the court, on consideration of any evidence obtained under section 174 or this section, that any person has in his possession any property of the bank, the court may, on the application of the bank liquidator, order that person to deliver the whole or any part of the property to the bank liquidator 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 bank liquidator, order that person to pay to the bank liquidator, 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 174 or this section be examined in Bermuda, or in a place outside Bermuda.

(4) Any person who appears or is brought before the court under section 174 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 174(1)(c).

Adjustment of prior transactions (bank administration and bank liquidation)

Transactions at an undervalue

176 (1) This section applies in the case of a bank where—

- (a) the bank enters bank administration; or
- (b) the bank enters bank insolvency.

(2) In this section and sections 177 to 180, "the office-holder" means the bank administrator or the bank liquidator, as the case may be.

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(3) Where the bank has at a relevant time (defined in section 178) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.

(4) 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.

(5) For the purposes of this section and section 179, 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.

(6) 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.

(7) For the purpose of this section, anything done by the bank in connection with the exercise of a stabilisation power under Division 2 of this Act is not a transaction at an undervalue.

Preferences

177 (1) Where the bank has at a relevant time (defined in section 178) 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 179, 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 stabilisation power under Division 2 of this Act does not amount to giving a preference.

"Relevant time" under ss. 176,177

178 (1) Subject to subsection (2), 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;
- (b) in the case of a preference which is not a transaction under paragraph (a) 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 176 or 177 unless the bank—

- (a) is at that time unable to pay its debts within the meaning of section 2(8);
- (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 176 or 177 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 176 or 177 applies by reason of a bank insolvency, the date of entering bank insolvency.

Orders under ss. 176, 177

179 (1) Without prejudice to the generality of sections 176(4) and 177(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 subsection (2)—

- (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 vested in the bank 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 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 176 or 177 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) and (6) have effect to determine whether, for those purposes, a person has notice of the relevant proceedings.

(5) In a case where section 167 or 168 applies by reason of the bank in question entering bank insolvency or bank administration (the relevant proceedings) 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 176 or 177 apply without prejudice to the availability of any other remedy given in relation to a transaction or preference which the bank had no power to enter into or give.

Extortionate credit transactions

180 (1) This section and section 176 apply to the circumstances 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 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.

Avoidance of certain floating charges

181 (1) Subject to the provisions of this section, 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 subsection (3), 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 (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 2(8); 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 (1), 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 a bank administration order under section 202, 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 bank insolvency order under this Division.
- (5) For the purposes of subsection (1)(b), 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.

Unenforceability of liens on books, etc.

- 182 (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.
- (2) In this section, a reference to “the bank liquidator” includes the provisional bank liquidator.
- (3) 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 bank liquidator.
- (4) This does not apply to a lien on documents which give a title to property and are held as such.

Part 6

Procedure for Voluntary Arrangements and other Processes

Voluntary arrangements

Bank voluntary arrangement

- 183 (1) A bank liquidator may make a proposal in accordance with section 184 (proposal for 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 106(2)(a) or (b).
- (5) For purposes of this section, the bank liquidator must be the nominee.
- (6) 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.

The proposal

Proposal for voluntary arrangement

184 (1) The directors of a bank may make a proposal under this group of sections (section 184 to 193) to the bank and to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs (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 by the court to act as nominee, in relation to the voluntary arrangement.

Procedure where nominee is not the bank liquidator

185 (1) This section applies where the nominee under section 186(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 by the court to act as nominee, in relation to the voluntary arrangement.

Summoning of meetings

186 (1) Where the nominee under section 184 is not the bank liquidator, and it has been reported to the court that such meetings as are mentioned in section 185(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.

Consideration and implementation of proposal

Decisions of meetings

187 (1) The meetings summoned under section 186 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 by the court to act as nominee, in relation to the voluntary arrangement.

(3) The modifications made under subsection (1) shall not include any modification by virtue of which the proposal ceases to be a proposal such as is mentioned in section 193.

(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) 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 as may be provided in the regulations made under section 313.

(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 301.

Approval of arrangement

188 (1) This section applies to a decision 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 186; or
- (b) subject to any order made under subsection (6), it has been taken by the creditors' meeting summoned under section 186.

(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.

Effect of approval

189 (1) This section applies where a decision under section 188 approving a voluntary arrangement has effect.

- (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 to subsection (5), 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 (4)(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 187 has been made to the court; or
 - (b) at any time when an application under the section 190 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.

Challenge of decisions

190 (1) Subject to this section, an application to the court may be made, by any of the persons specified in subsection (2), on one or both of the following grounds, namely—

- (a) that a voluntary arrangement which has effect under section 188 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, as may be prescribed in section 313, to vote at either of the meetings;
 - (b) a person who would have been entitled, as may be prescribed in section 313, to vote at the creditors' meeting if he had had notice of it; and
 - (c) the nominee or any person who has replaced him under section 185(4) or 187(2).
- (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 187(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 188 or, in a case falling within subsection (1)(b), any decision taken by the meeting in question which has effect under that section;
 - (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)(b) 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 188.
- (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 under section 187 taken at a meeting summoned under section 186 is not invalidated by any irregularity at or in relation to the meeting.

False representations, etc.

191 (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) on 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 5 years imprisonment or both.

Implementation of proposal

192 (1) This section applies where a voluntary arrangement has effect under section 188.

(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 186;
- (b) by virtue of section 185(4) or 187(2) on a person other than the nominee,

shall be known as the supervisor of the voluntary arrangement ("the supervisor").

(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
- (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.

Arrangement coming to an end prematurely

193 For the purposes of this group of sections, a voluntary arrangement the approval of which has taken effect under section 188 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 189(2)(b).

Dissolution

194 (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;

(b) has release from a time determined by the Minister; and

(c) shall notify the court and the Registrar of Companies.

(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 195).

Dissolution: supplemental

195 (1) The Minister may by direction defer the date of dissolution under section 194, 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 cause fails to comply with subsection (3) is guilty of an offence and liable on summary conviction to a fine of \$1,000 and, for a continued offence, to a daily default fine of \$500.

(5) The bank liquidator may give the notice summoning the final meeting under section 194 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 194.

Other processes

Bank insolvency as alternative order

196 (1) On a petition for a winding up order in respect of a bank the court may, instead, make a bank insolvency order in terms of section 99.

(2) A bank insolvency order may be made under subsection (1) only on the application of the BMA.

Voluntary winding up

197 A resolution for voluntary winding up of a bank under Part XIII of the Companies Act 1981 shall have no effect without the prior approval of the court.

Dismissal of pending winding up petition

198 A petition for the winding up of a bank shall be dismissed by the court on the making of a bank insolvency order in respect of the bank.

Application of other statutory provision on insolvency

- 199 (1) The Minister may by order—
- (a) provide for any statutory provision on insolvency to apply to bank insolvency under this Division (with or without specified modifications);
 - (b) amend, or modify the application of, a statutory provision on insolvency in consequence of this Division.
- (2) An order under subsection (1) shall be subject to the affirmative resolution procedure.

DIVISION 4

BANK ADMINISTRATION

Part 1

Preliminary

Overview

- 200 (1) This Division 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 private sector 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 Division 2);
 - (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 non-transferred part of the bank (“the residual bank”) provides services or facilities required to enable the private sector purchaser (“the private sector purchaser”) or the transferee (“the bridge bank”) to operate effectively.
- (3) This Division provides for—
- (a) general powers and duties of bank administrators (by application of provisions about bank administrators); and
 - (b) the general process and effects of bank administration (by application of provisions about bank administration).

Interpretation

- 201 (1) In this Division—
- “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 222;

“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) Terms used in this Division 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.

Part 2

Bank Administration Order and Appointment of Bank Administrator

Appointment of bank administrator

Bank administration order

202 (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 administration order takes effect in accordance with its terms, and—

- (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”.

Application

203 (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 309.

Grounds for applying

204 (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.

Grounds for making

205 (1) The court may make a bank administration order if satisfied that the conditions in section 204 have been 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 specific date; or

(c) dismiss the application.

Status of bank administrator

206 A bank administrator is an officer of the court.

Powers and duties of bank administrator

207 A bank administrator may, for the pursuit of the Objectives in section 209, exercise the powers and perform the functions set out in Part 3 of this Division.

Appointment and powers of provisional bank administrator

208 (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 210(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 135 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.

Objectives of bank administration

Objectives

209 (1) A bank administrator has two objectives—

- (a) Objective 1: support for a private sector purchaser or bridge bank; and
- (b) Objective 2: pursue a “normal” administration.

(2) Objective 1 takes priority over Objective 2 (but a bank administrator is obliged to begin working towards both objectives immediately upon appointment).

Objective 1: supporting private sector purchaser or bridge bank

210 (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;
- (c) if in doubt about the effect of those terms, the bank administrator may apply to the court for directions under section 234; 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 234.

(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 considers 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 Division, the relevant authority may withhold consent or approval only on the grounds that the action might prejudice the achievement of Objective 1.

Objective 1: duration

211 (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 234 and the court may direct the relevant authority to consider whether to give notice under subsection (1).

(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 Division as an "Objective 1 Achievement Notice".

Objective 2: "normal" administration

212 (1) Objective 2 is to—

- (a) rescue the residual bank as a going concern (referred to as "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 (referred to as "Objective 2(b)").

(2) In pursuing Objective 2, a bank administrator must aim to achieve Objective 2(a) unless he is 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.

Part 3

Process of Bank Administration

Effect of bank administration

Dismissal of pending winding-up petition

213 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 under this Division.

Moratorium on insolvency proceedings

- 214 (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.

Moratorium on other legal proceedings

- 215 (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 the court must have regard to the Objectives in section 209.

(8) In considering whether to give permission for the purposes of this section, the court must have regard to the Objectives in section 209.

(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.

Interim moratorium

216 (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 214 and 215 shall apply (however, no account is to be taken of reference to the consent of the bank administrator).

Effect of bank administrator appointment

Announcement of bank administrator's appointment

217 (1) This section applies where a person is appointed as 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 cause to comply with a requirement of this section and shall be liable on summary conviction to a fine of \$5,000.

Statement of bank's affairs

218 (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 subsection (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 the period referred to in paragraph (b); and
- (d) a person who is or has been during the period referred to in paragraph (b) 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.

Date of submission of statement of affairs

219 (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 218(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 subsection (2), the person whose request is refused may apply to the court.

(4) A person who fails without reasonable cause to comply with a requirement under this section or section 218 is guilty of an offence, and liable on summary conviction to a fine of \$10,000.

Bank administrator’s proposals — Pre-Objective 1 Achievement Notice

220 (1) This section applies before the giving of an Objective 1 Achievement Notice (at which point section 221 applies).

(2) The bank administrator must as soon as is reasonably practicable after appointment make a written statement setting out proposals for achieving the objectives in section 209.

(3) The statement must say whether the bank administrator proposes to pursue Objective 2(a) or 2(b) in section 212

(4) The statement must have been agreed with the relevant authority.

(5) A bank administrator who is unable to agree a statement with the relevant authority may apply to the court for directions under section 234, and the court may make any order, including dispensing with the need for the agreement with the relevant authority.

(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 221.

Bank administrator’s proposals — Post-Objective 1 Achievement Notice

221 (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 an “Objective 2 (a)” under section 212(1)(a) cannot be achieved.

(5) Proposals under this section may include—

(a) a proposal for a voluntary arrangement under Division 3 of this Act;

(b) a proposal for a compromise or arrangement to be sanctioned under Part VII Companies Act 1981 (arrangements and reconstructions).

(6) The bank administrator shall send a copy of the statement of his proposals to—

- (a) the Registrar of Companies;
 - (b) every creditor of the bank of whose name and address he is aware; and
 - (c) 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 28 days beginning with the day on which the bank enters bank 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 cause 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 265.

Creditors meetings

Creditors' meeting

- 222 (1) In this Division "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 265.
- (3) A creditors' meeting shall be conducted in accordance with the rules.

Requirement for initial creditors' meeting

- 223 (1) Each copy of a bank administrator's statement of proposals sent to a creditor under section 221(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 at an initial creditors' meeting.

(4) A period specified in this section may be varied in accordance with section 265.

(5) A bank administrator who fails without reasonable cause 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.

Disapplication of section 231(1)(a)

224 (1) Section 231(1)(a) 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 140(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 subsection (2) must be summoned for a date in the prescribed period.

(4) The period prescribed under subsection (3) may be varied in accordance with section 265.

Business and result of initial creditors' meeting

225 (1) An initial creditors' meeting at 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 cause to comply with sub-section (2) shall be guilty of an offence and liable on summary conviction to a fine of \$10,000.

Procedure for revision of bank administrator's proposals

Revision of bank administrator's proposals

- 226 (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 at 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 at 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 cause to comply with subsection (6) is guilty of an offence and liable on summary conviction to a fine of \$10,000.

Failure to obtain approval of bank administrator's proposals

- 227 (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 a bank 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.

Further creditors' meetings

- 228 (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 210.
- (3) A bank administrator who fails without reasonable cause 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.

Creditors' committee

- 229 (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.

Correspondence instead of creditors' meeting

230 (1) Anything which is required or permitted by or under this Division 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 Division 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.

Part 4

Powers of Bank Administrator

General and specified powers

General powers

231 (1) The bank administrator may do anything necessary or expedient for the—

- (a) pursuit of Objectives in section 209; and
- (b) management of the affairs, business and property of the bank.

(2) A provision of this Division which expressly permits the bank 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.

Specified powers of bank administrator

232 (1) The bank administrator has the powers specified in subsections (4) to (26).

(2) The exercise of those powers is subject to section 209(2).

(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.

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(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.

Additional specified powers of bank administrator

233 (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.

Exercise of powers and functions

Application to court for directions

234 (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 209.

Exercise of management powers

235 (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.

Distribution

236 (1) Subject to subsection (3), the bank administrator may make a distribution to a creditor of the bank.

(2) Section 137 (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.

Distribution in other cases

237 The bank administrator may make a payment otherwise than in accordance with sections 232(16) and 236 if he thinks it likely to assist achievement of the objectives of bank administration in section 215.

Bank administrator: general functions

238 The bank administrator shall on his appointment take custody or control of all the property to which he thinks the bank is entitled.

Bank administrator: management of affairs

239 (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 225;
- (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 226.

(2) Before the approval of proposals under section 225, 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 225;
 - (b) the directions are consistent with any proposals or revision approved under section 225 or 226;
 - (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 225 or 226; or
 - (d) the court thinks the directions are desirable because of a misunderstanding about proposals or a revision approved under section 225 or 226.

Bank administrator as agent of bank

240 In exercising his functions under this Division the bank administrator acts as the bank's agent.

Charged property: floating charge

241 (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 under subsection (1) only if satisfied that it will not prejudice pursuit of Objective 1 in section 209.

(4) In subsection (2), “acquired property” means property of the bank which directly or indirectly represents the property disposed of.

Exercise of powers in relation to specified property

Charged property: non-floating charge

242 (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;
- (b) where the court thinks that disposal of the property would be likely to promote the objectives of bank administration in section 209 in respect of the bank; and
- (c) if the court is satisfied that it will not prejudice pursuit of Objective 1 in section 209.

(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 fails without reasonable cause to comply with subsection (5) shall be guilty of an offence and liable on summary conviction to a fine of \$5,000.

Hire-purchase property

243 (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;
- (b) where the court thinks that disposal of the goods would be likely to promote the purpose of administration in respect of the bank; and
- (c) in the case of a bank administration following transfer to a bridge bank where the relevant authority has given an Objective 1 Achievement Notice, on application 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 fails without reasonable cause to comply with sub-section (4), commits an offence and is liable on summary conviction to a fine of \$5,000.

Protection for secured or preferential creditor

244 (1) A bank administrator's statement of proposals under section 220 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 184 to 193 (although this subsection is without prejudice to section 186);
- (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 239(2).

(4) Subsection (1)(a) shall not apply until the relevant authority has given an Objective 1 Achievement Notice.

Challenge to bank administrator's actions

Challenge to bank administrator's conduct of bank

245 (1) A creditor or member of a bank in bank administration may apply to the court claiming that—

- (a) the bank administrator is acting or has acted so unfairly as to harm the interests of the applicant (whether alone or in common with some or all other creditors or members); 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 creditors or members).
- (2) A creditor or member of a bank in bank 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;
 - (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;
 - (b) require the bank administrator to do or not to do a specified thing;
 - (c) require a creditors’ meeting to be held for a specified purpose;
 - (d) provide for the appointment of a bank administrator to cease to have effect;
 - (e) make consequential provision.
- (5) An order may be made on a claim under subsection (1) whether or not the action complained of—
- (a) is within the bank administrator’s powers under this Division;
 - (b) was taken in reliance on an order under section 242 or 243.
- (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 Division;
 - (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 225 or 226 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 209 (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 209.

Misfeasance

- 246 (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;
 - (b) the bank administrator of the bank;
 - (c) the bank liquidator of the bank;
 - (d) a creditor of the bank;
 - (e) a contributory of the bank; or
 - (f) the relevant authority.
- (3) An application under subsection (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 a bank administrator who has been discharged under section 257 only with the permission of the court.

Ending of bank administration and dissolution of bank

Court ending bank administration on application of bank administrator

247 (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;
- (b) dismiss the application;
- (c) make an interim order;
- (d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for).

Moving from bank administration to dissolution

248 (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 a bank administrator 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 by order—

- (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 cause to comply with subsection (5) is guilty of an offence and liable on summary conviction to a fine of \$5,000.

Discharge of bank administration order where bank administration ends

249 (1) This section applies where the court makes an order under this Division providing for the appointment of a bank administrator to cease to have effect.

(2) The court shall discharge the bank administration order.

Notice to Registrar of Companies where bank administration ends

250 (1) This section applies where the court makes an order under this Division 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.

Part 5

Resignation and Removal

Requirements for resignation and removal

Resignation of bank administrator

251 (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 255, to the creditors' committee.

Removal of bank administrator from office

252 (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.

Bank administrator ceasing to be qualified

253 (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 and to the Registrar of Companies.

(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.

Supplying vacancy in office of bank administrator

254 Section 255 applies where a bank administrator—

- (a) dies;
- (b) resigns;
- (c) is removed from office under section 252; or
- (d) vacates office under section 253.

Replacement and substitution of bank administrator

Replacing bank administrator

255 (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 relevant authority may make an application under subsection (1).

(3) Thereafter, either the relevant authority or a creditors' committee may apply.

Substitution of bank administrator: competing floating charge-holder

256 (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.

Vacation of office: discharge from liability

257 (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 246.

Vacation of office: charges and liabilities

258 (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—

“cessation” means the time when he ceases to be the bank's administrator;

“the former bank administrator” means the person referred to in subsection (1).

- (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 244 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 bank 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 a bank 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 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 is satisfied that they will not prejudice Objective 1 in section 209.

General

Joint and concurrent bank administrators

- 259 (1) In sections 260 to 262—
- (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.

Joint bank administrator

- 260 (1) This section applies where two or more persons are appointed to act jointly as the bank administrator.
- (2) Subject to subsection (3), reference to the bank administrator of the bank is a reference to those persons acting jointly.
- (3) Reference to the bank administrator in sections 251 to 258 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.

Concurrent bank administrator

- 261 (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 Division is a reference to any of the persons appointed (or any combination of them).

Bank administrators (joint and concurrent)

262 (1) Subject to subsection (4), 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 subsection (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) Until an Objective 1 Achievement Notice has been given, an appointment under subsection (1) may be made only by the relevant authority.

Presumption of validity

263 An act of the bank administrator is valid in spite of a defect in his appointment or qualification.

Extension of time limit

264 (1) Where a provision of this Division provides that a period may be varied in accordance with this section, the period may be varied by the court 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 209.

Variation of specified periods

265 (1) A period specified in section 221(7), 222(1)(b) or 223(2) may be varied in respect of a bank by the bank administrator with the consent of the relevant authority.

(2) The power to extend under subsection (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.

Reference to “period”

266 Where a period is extended under section 264 or 265, a reference to the period shall be taken as a reference to the period as extended.

Amendment of provision about time

- 267 (1) The Minister may by order amend a provision of this Division 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 shall be subject to the negative resolution procedure.

Part 6

Management of Bank Assets

Managing and distributing assets

Discretion in managing and distributing assets

268 In the case of bank administration following transfer to a bridge bank, until the relevant authority has given an Objective 1 Achievement Notice, distribution of the bank’s assets 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.

Share of assets for unsecured creditors in bank administration

269 (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 voluntary arrangement in respect of the bank.

(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 shall be subject to the 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.

Power to disclaim onerous property

270 (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.

(4) A disclaimer under this section 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.

(5) Notwithstanding subsection (4), a disclaimer under this section does not operate, except so far as is necessary for the purpose of releasing the bank from any liability, so as to 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 bank 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.

Disclaimer of leaseholds

271 (1) The disclaimer under section 270 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 273 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 273, make such orders with respect to fixtures, tenant's improvements and other matters arising out of the lease as it thinks fit.

Land subject to rentcharge

272 (1) The following applies where, in consequence of the disclaimer under section 270 of any land subject to a rentcharge, that land vests by operation of law in the Crown or any other person (referred to in subsection (2) 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.

Powers of court where property is disclaimed

Powers of court (general)

273 (1) This section and the next apply where the bank administrator has disclaimed property under section 270.

(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 to this section, the court may on the application made under subsection (2) 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 270(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.

Powers of court (leaseholds)

274 (1) The court shall not make an order under section 273 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 273 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 273 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 273, that person is excluded from all interest in the property.

Notification of bank administration and fraudulent actions

Notification that bank is in bank administration

275 (1) When a bank has entered bank administration—

- (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.

Fraudulent trading

276 (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, subsection (2) 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 contribution (if any) to the bank's assets as the court thinks proper.

Wrongful trading

277 (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 the commencement of this Division.

(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 276.

Proceedings under ss. 276, 277

278 (1) On the hearing of an application under section 276 or 277, the bank administrator may himself give evidence or call witnesses.

(2) Where under either section 276 or 277 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;
- (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 276 or 277 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 176 and 177 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.

Management by bank administrator

Supplies of gas, water, electricity, etc.

279 (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.

(2) For purposes of this section and in sections 280 to 288, “bank administrator” includes the provisional bank administrator.

(3) If a request is made by or with the concurrence of the bank administrator for the giving, after the effective date, of any of the supplies mentioned in subsection (4), the supplier—

- (a) may make it a condition of the giving of the supply that the bank administrator personally guarantees the payment of any charges in respect of the supply;
- (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.

(4) The supplies referred to in subsection (3) 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; or
- (d) a supply of communications services by a provider of a public communications service.

(5) “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.

(6) The following applies to expressions used in subsection (4)—

“communications services” do not include electronic communications services to the extent that they are used to broadcast or otherwise transmit programme services.

Getting in the bank's property

280 (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.

(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 bank administrator.

(3) Where the bank administrator—

- (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, subsection (4) has effect.

(4) In that case, the bank administrator—

- (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 bank administrator'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.

Duty to co-operate with bank administrator

281 (1) Each of the persons mentioned in the next subsection shall—

- (a) give to the bank administrator such information concerning the bank and its promotion, formation, business, dealings, affairs or property as the bank administrator may at any time after the effective date reasonably require; and
- (b) attend on the bank administrator at such times as the latter may reasonably require.

(2) The persons referred to in subsection (1) 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 bank administrator'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 (1) and (2), “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 cause 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.

Inquiry into bank’s dealings, etc.

282 (1) The court may, on the application of the bank administrator, 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 subsection (1).

(3) An account submitted to the court under subsection (2) must be contained in a witness statement verified by affidavit.

(4) Subsections (5) and (6) apply in a case where—

- (a) a person without reasonable cause 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—

- (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 of the Supreme

Court, until that person is brought before the court under the warrant or until such other time as the court may order.

Court's enforcement powers under s 282

283 (1) If it appears to the court, on consideration of any evidence obtained under section 282 or this section, that any person has in his possession any property of the bank, the court may, on the application of the bank administrator, order that person to deliver the whole or any part of the property to the bank administrator 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 bank administrator, order that person to pay to the bank administrator, 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 282 or this section 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 282 or this section may be examined on oath, either orally or by interrogatories, concerning the bank or the matters mentioned in section 282(1)(c).

Part 7

Bank Transactions

Adjustment of prior transactions

Transactions at an undervalue

284 (1) Where the bank has at a relevant time (defined in section 286) entered into a transaction with any person at an undervalue, the bank administrator may apply to the court for an order under this section.

(2) Subject to the provisions of this section, the court shall, on such an application by the bank administrator, make such order as it thinks fit for restoring the position to what it would have been if the bank had not entered into the transaction at an undervalue.

(3) For the purposes of this section and section 287, 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.

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(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.

Preferences

285 (1) Where the bank has at a relevant time (defined in section 286) given a preference to any person, the bank administrator may apply to the court for an order under this section.

(2) Subject to the provisions of this section, 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 a preference to any person.

(3) For the purposes of this section and section 287, 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.

"Relevant time" under ss 284, 285

286 (1) Subject to subsection (2), 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 in subsection (3));

- (b) in the case of a preference which is not a transaction at an undervalue 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 284 or 285 unless the bank—

- (a) is at that time unable to pay its debts within the meaning of section 2(8); or
- (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 284 or 285 applies by reason of an administrator of a bank being appointed by bank administration order, the date on which the bank administration application is made;
- (b) in a case where section 284 or 285 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 284 or 285 applies by reason of a bank entering bank insolvency following conversion of bank administration into bank insolvency at the time when the appointment of a bank administrator ceases to have effect, the date on which the bank entered bank administration (or, if relevant, the date on which the application for the bank administration order was made or a copy of the notice of intention to appoint was filed); and
- (d) in a case where section 284 or 285 applies by reason of a bank entering bank administration at any other time, the date of the commencement of the bank administration.

Orders under ss 284, 285

287 (1) Subject to subsections (2) and (4) and without prejudice to the generality of sections 284 and 285, an order of the court under either of those sections with respect to a transaction or preference entered into or given by a bank may—

- (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 vested in the bank 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 bank administrator 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; or
- (g) provide 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 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 284 or 285 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 bank administrator, 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 209.

Extortionate credit transactions

288 (1) This section applies, as in the case of section 284, to transactions at an undervalue, 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 bank administrator, 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 the transaction 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) the transaction 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 bank administrator any sums paid to that person, by virtue of the transaction, by the bank;
- (d) provision requiring any person to surrender to the bank administrator 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.

Avoidance of certain floating charges

289 (1) Subject to the provisions of this section, 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 subsection (3), 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 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 a bank 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 2(8); or
- (b) becomes unable to pay its debts within the meaning of section 2(8) 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 bank administration order, the date on which the bank administration application is made;
- (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.

Unenforceability of liens on books, etc.

290 (1) This section applies in the case of a bank where—

- (a) the bank enters bank administration; or
- (b) a provisional bank administrator is appointed.

(2) For purposes of this section, “bank administrator” includes the provisional bank administrator.

(3) Subject to subsection (4), 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 bank administrator.

(4) This section does not apply to a lien on documents which give a title to property and are held as such.

Acting without qualification an offence

291 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.

Persons not qualified to act as bank administrator

292 (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 a member of a professional body recognised under section 293.

(3) A person is not qualified to act as a bank administrator in relation to bank 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 bank.

(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.

Recognised professional bodies

293 (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 members—

- (a) are fit and proper persons so to act; and
- (b) meet acceptable requirements as to education and practical training and experience.

(3) A person is not qualified to act as a bank administrator unless—

- (a) he has at least ten years' experience managing insolvencies or administrations; or
- (b) he is a member of a professional body recognised by the Minister and subject to rules which permit him to act as a bank administrator.

(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.

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

Sharing information

294 (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 209.

(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 209; 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 209.

(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) shall be subject to the negative resolution procedure.

Multiple transfers

General application of this Division

295 (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 Division applies to the bank with any modifications specified by the Minister in regulations.

(4) The regulations made under this section shall be subject to the affirmative resolution procedure.

Bridge bank to private sector purchaser

296 (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

(b) notice that Objective 1 is still required to be pursued in respect of a private sector 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 Division 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 210(3); and

(b) with the private sector 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;

(b) has no other effect for the purposes of provisions of this Division 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 private sector purchaser, section 211 and other provisions of this Division which refer to the giving of an Objective 1 Achievement Notice shall have effect.

Property transfer from bridge bank

297 (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 43(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 Division; and

(b) the original bridge bank is treated as a residual bank for the purposes of this Division.

(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 Division.

(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 210(4) in relation to both—

- (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 211(3) in relation to services provided by the original bridge bank to the onward transferee; and
- (b) section 210(4) in relation to services provided by the original bank to the original bridge bank.

(6) Notwithstanding subsection (5), the Minister may determine—

- (a) that subsection (5) does not apply; and
- (b) that section 296 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 296(1)(b) in respect of the onward transferee.

Property transfer from temporary public ownership

298 (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 Division applies to the transferor under the property transfer order as to the transferor under a property transfer instrument.

(3) For that purpose, this Division applies with any modifications specified by the Minister in regulations, and the regulations shall be subject to the affirmative resolution procedure.

Termination

Successful rescue

299 (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 212 and believes that it has been achieved.

(2) The bank administrator shall make an application under section 247 (court ending bank 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 cause to comply with subsection (3) is guilty of an offence and liable on summary conviction to a fine of \$10,000.

Winding up or voluntary arrangement

300 (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 212.

(2) The bank administrator may—

- (a) give a notice under section 248 (no more assets for distribution); or
- (b) make a proposal in accordance with section 183 (bank voluntary arrangement).

(3) Sections 184 to 193 shall apply to a proposal made by a bank administrator, with modifications as provided in the following subsections.

(4) In section 186 (summoning of meetings), subsection (2) (and not (1)) applies.

(5) The action that may be taken by the court under section 189(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) 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).

DIVISION 5
MISCELLANEOUS

Part 1

Preferential Debts and Criminal Procedure

Preferential debts in insolvency

Categories of preferential debts

301 (1) A reference in this Act to the preferential debts of a bank is to the debts listed in Schedule 3 to this Act (Categories of preferential debts); and references to preferential creditors are to be read accordingly.

(2) In Schedule 3 “the debtor” means the bank concerned.

The relevant date

302 (1) References in Schedule 3 to the relevant date are references to the date which determines the existence and amount of a preferential debt.

(2) For the purposes of section 187 (referring to 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—

- (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 under paragraph (b), the relevant date is the date of the making of a bank insolvency order.

(4) If the case does not fall within paragraph (a), (b) or (c) of subsection (3), 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 bank administration (and to which no other provision of this section applies,) the relevant date is the date on which the bank enters bank administration.

Transactions defrauding creditors

303 (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 person or otherwise enters into a transaction with such person on terms that provide for him to receive no consideration;
- (b) he enters into a transaction with the other person in consideration of marriage; or
- (c) he enters into a transaction with the other 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 himself.

(2) Where a person has entered into a transaction under subsection (1), 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 a transaction under subsection (1), 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 in this Division to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it, and in sections 304 and 305 the person entering into the transaction is referred to as “the debtor”.

(5) In this section and sections 304 and 305, anything done by the bank in connection with the exercise of a stabilisation power under Division 2 of this Act is not a transaction at an under value for the purposes of this section.

Persons who may apply for an order under s. 303

304 (1) An application for an order under section 303 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 Division 3 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.

Provision which may be made by order under s. 303

305 (1) Without prejudice to the generality of section 303, an order made under that section with respect to a transaction may, subject to the other provisions of this section—

- (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 303 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 303 may be made in respect of the transaction.
- (4) In this section “security” means any mortgage, charge, lien or other security.

Criminal procedure

Summary proceedings

306 (1) Notwithstanding anything in section 80 of the Criminal Jurisdiction and Procedure Act 2015, information relating to an offence under this Act 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 in subsection (1) came to his knowledge is conclusive evidence.

Offences by bodies corporate

307 (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 150, 151, 153, 159 and 160.

Admissibility in evidence of statements of affairs, etc.

308 (1) In any proceedings (whether or not under this Act)—

- (a) a statement of affairs prepared for the purposes of any provision of Division 3 or 4;
- (b) a statement made in pursuance of a requirement imposed by or under Division 3 or 4; and
- (c) any other statement prepared for the purpose of a provision of Division 3 or 4,

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 sections 122, 153, 159, 161, 162, 173;
- (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 122 of the Criminal Code Act 1907 (false statements tendered in evidence).

(4) Regulations under subsection (3)(b)(ii) shall be subject to the negative resolution procedure.

Part 2

Rules and Regulations

Rules and application of Act to credit unions

Rules

309 (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 Act.

(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 4 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 4 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 Divisions 2 and 3.

(4) In Schedule 4 to this Act, “liquidator” includes a provisional bank liquidator or bank liquidator.

(5) Rules made under this section shall be subject to the negative resolution procedure.

(6) Nothing in this section prejudices any power to make rules of court.

Credit unions

310 (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) amend any other enactment which relates, or in so far as it relates, to credit unions;
- (c) amend an enactment amended by this Division;
- (d) replicate, with or without modifications, any provision of this Division;
- (e) apply a provision made under or by virtue of this Division, with or without modifications, to this Division as it applies to credit unions.

(3) Provision made under or by virtue of this Division may make special provision in relation to the application of this Division to credit unions.

Fees and regulations

Fees

311 (1) There shall be paid in respect of proceedings under Divisions 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) necessary or expedient.

(5) An order under this section shall be subject to the 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.

Consequential provision

312 (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 shall be subject to the affirmative resolution procedure.

Regulations

313 (1) The Minister may make regulations prescribing anything that may be prescribed under this Act.

(2) Regulations under this section shall be subject to the negative resolution procedure.

Consequential Amendments

314 Schedule 5, which amends the Companies Act 1981 and Banks and Deposit Companies Act 1999, has effect.

Commencement

315 This Act 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.

SCHEDULE 1

(Section 95)

QUALIFICATIONS OF AND GROUNDS FOR REMOVAL OF BANK LIQUIDATOR

PART I

Qualifications of provisional bank liquidator and bank liquidator

1 (1) Only a person who is qualified to act as an insolvency practitioner may be appointed as a provisional bank liquidator or as a bank liquidator.

(2) An appointment under subparagraph (1) may be made only if the person has consented to act.

Persons not qualified to act as bank liquidators

2 (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 a member of a professional body recognised under paragraph 3 of this Schedule.

(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.

(5) A person is not qualified to act unless—

(a) he has at least ten years' experience carrying out insolvencies; or

(b) he is a member of a professional body which authorises him by virtue of his being a member of the professional body to act as an insolvency professional.

Recognised professional bodies

3 (1) The Minister may by order declare a body which appears to him to fall within subparagraph (2) to be a recognised professional body for the purposes of this Act.

(2) A body may be recognised if it regulates the practice of a profession and maintains and enforces rules for securing that its members—

(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 paragraph 2(2) to membership of a professional body recognised under this paragraph is to be read accordingly.

(4) An order made under subparagraph (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 subparagraph (2).

(5) An order of the Minister under this Schedule 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 paragraph has effect in relation to any provision applicable for the purpose of bank insolvency.

(7) An order made under subparagraph (1) is subject to the negative resolution procedure.

PART II

REMOVAL OF BANK LIQUIDATOR

Term of appointment

4 (1) The appointment of a provisional bank liquidator terminates as provided in paragraph 6.

(2) A bank liquidator appointed by a bank insolvency order remains in office until vacating office—

- (a) by resigning under paragraph 5;
- (b) on removal under paragraphs 7 and 8;
- (c) on disqualification under paragraph 9;
- (d) on the appointment of a replacement in accordance with paragraph 10;
- (e) in accordance with sections 193 to 195; or
- (f) on death.

Resignation

5 (1) A bank liquidator may resign by notice to the court.

(2) Rules under section 309 may restrict a bank liquidator's power to resign.

(3) Resignation shall take effect in accordance with rules under section 309 (which shall include provision about release).

Removal of provisional bank liquidator

6 (1) This paragraph applies with respect to the removal from office and vacation of office of the provisional bank liquidator.

(2) Subject to subparagraph (3), 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.

Removal by court

7 (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.

Removal by creditors

8 (1) A bank liquidator may be removed by resolution of a meeting of creditors held pursuant to section 132, 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 paragraph 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.

Disqualification

9 (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 subparagraph (1) has release with effect from a time determined by the Minister.

Replacement

10 (1) Where a bank liquidator vacates office, the court must as soon as is reasonably practicable appoint a replacement bank liquidator.

(2) Where a bank liquidator is removed by resolution of a meeting of creditors under paragraph 8—

- (a) a replacement may be appointed by resolution of the meeting; and
- (b) failing that, subparagraph (1) above applies.

Acting without qualification an offence

11 (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 paragraph does not apply to the official receiver.

Release

12 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 his conduct as bank liquidator (but without prejudice to the effect of section 163).

SCHEDULE 2

(Section 115)

POWERS OF BANK LIQUIDATOR IN A BANK INSOLVENCY

PART I

Powers Exercisable with Sanction of the Court in Bank Insolvency

- 1 Power to pay any class of creditor 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 164, 165, 174, 176, 177, 180, 284, 285 or 303.

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 of the Court in any Bank Insolvency

- 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 I 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.

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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.

12 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.

13 Power to appoint an agent to do any business which the bank liquidator is unable to do himself.

14 Power to do all such other things as may be necessary for the bank insolvency's affairs and distributing its assets.

SCHEDULE 3

(Section 137)

CATEGORIES OF PREFERENTIAL DEBTS

Application of Employment Act 2000

1 The provisions of this Schedule are without prejudice to the Employment Act 2000.

Category 1: 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 2: Taxes

5 All taxes owing to the Government and rates owing to a municipality at the relevant date.

Category 3: Contributions to occupational pension schemes, etc.

6 Any sum which is owed by the debtor and is a sum to which the First Schedule to the National Pension Scheme (Occupational Pensions) Act 1998 applies (Contributions).

Category 4: Deposit insurance scheme

7 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

8 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

- 9 An order under paragraph 2—
- (a) may contain such transitional provisions as may appear to the Minister necessary or expedient;
 - (b) is subject to the negative resolution procedure.

SCHEDULE 4

(Section 309)

PROVISIONS CAPABLE OF INCLUSION IN BANK INSOLVENCY RULES

Courts

1 Provision for supplementing, in relation to bank insolvency, any provision made by or under Divisions 2 and 3 of this Act.

2 (1) Provision for regulating the practice and procedure of the court exercising jurisdiction for the purposes of Divisions 2 and 3 of 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 Divisions 3 and 4 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.

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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 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 109 of this Act.

(2) The following provision with respect to the establishment of a liquidation committee under section 109, 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 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 provision of Divisions 2 and 3 of this Act by the bank liquidator, or bank administrator or a special manager appointed under section 117 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.

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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 modifications, a provision of Divisions 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 117, by way of remuneration for the carrying out of functions in connection with or arising out of the bank insolvency.

16 Provision as to the fees, costs, charges and other expenses that may be treated as the expenses of a bank insolvency.

17 Provision as to the fees, costs, charges and other expenses that may be treated as properly incurred by the bank administrator of a bank.

18 Provision as to the fees, costs, charges and other expenses that may be incurred for any of the purposes of Divisions 3 and 4 of this Act or in the administration of any voluntary arrangement approved under Division 3.

Information and records

19 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.

20 Provision requiring a creditor, member or contributory, or such committee as is mentioned in paragraph 10 to be supplied (on payment of a prescribed fee in prescribed cases) with such information and with copies of such documents as may be prescribed.

21 Provision as to the manner in which proceedings under sections 169 and 170 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.

- 22 Provision imposing requirements with respect to—
- (a) the preparation and keeping by the bank liquidator or bank administrator of a bank, of prescribed books, accounts and other records;
 - (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.
- 23 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

- 24 Provision conferring power on the Minister to make rules 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.
- 25 Provision conferring discretion on the court.
- 26 Provision conferring power on the court to make orders for the purpose of securing compliance with obligations imposed by or under section 303.
- 27 Provision making non-compliance with any of the rules of a criminal offence.
- 28 Provision making different provision for different cases or descriptions of cases, including different provisions for different areas.

SCHEDULE 5

(Section 314)

CONSEQUENTIAL AMENDMENTS

Amends Companies Act 1981

1 The Companies Act 1981 is amended—

- (a) in section 163(1), by deleting the word “An” and substituting the words “Subject to section 163A, an”;
- (b) by inserting after section 163 the following new section—

“Application for winding up of banks

163A Where a winding up of a company is with respect to a bank, the petition for the winding up order shall comply with the following provisions of the Banking (Special Resolution Regime) Act 2016—

- (a) the conditions set out in section 101; and
- (b) applicable orders made under section 199.”;
- (c) in section 202(1), by deleting the word “Where” and substituting the words “Subject to section 202A, where”;
- (d) by inserting after section 202 the following new section—

“Resolution to wind up bank voluntarily

202A Where a company being wound up voluntarily is a bank, the making of a resolution for the voluntary winding up shall be subject to the following provisions of the Banking (Special Resolution Regime) Act 2016—

- (a) the conditions set out in section 101; and
- (b) applicable orders made under section 199.”.

Amends Banks and Deposit Companies Act 1999

2 The Banks and Deposit Companies Act 1999 is amended by repealing section 19 and substituting the following—

“Application by Authority for bank insolvency order

19 (1) On an application for a bank insolvency order made by the Authority by virtue of this section, the court may make a bank insolvency order for an institution in respect of which a licence is revoked, if the court is of the opinion that it is just and equitable that the institution be placed under bank insolvency proceedings.

(2) The provisions of Division 3 of the Banking (Special Resolution Regime) Act 2016 shall apply with respect to the bank insolvency proceedings of an institution under this section.

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(3) In this section, “bank insolvency order” has the meaning given in section 95(1) of the Banking (Special Resolution Regime) Act 2016.”.

[Assent Date: 27 February 2016]

[Operative dates: Sections 1 and 10 in force on 19 December 2016.]