IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 233 OF 2002

IN THE MATTER OF THE BANKS AND TRUST COMPANIES LAW (2001 REVISION)

AND

IN THE MATTER OF THE GRAND COURT RULES (ORDER 55)

AND

IN THE MATTER OF AN APPEAL FROM HIS EXCELLENCY THE GOVERNOR IN EXECUTIVE COUNCIL

BETWEEN:

FEDERAL BANK OF THE MIDDLE EAST LTD

Appellant

- and -

HIS EXCELLENCY THE GOVERNOR IN EXECUTIVE COUNCIL

Respondent

GRAND COURT CAYMAN ISLANDS

ORIGINATING NOTICE OF MOTION TO THE GRAND COURT PURSUANT TO THE BANKS AND TRUST COMPANIES LAW (2001 REVISION)

CLERK OF COURT APR 04 2002

TAKE NOTICE that the Grand Court of the Cayman Islands at The Law Courts, George Town, Grand Cayman will be moved upon the expiration of 21 days from the

service of upon you of this notice, or as soon thereafter as counsel can be heard, by counsel for the above-named Federal Bank of the Middle East Ltd by way of an appeal from the imposition by the Governor in Council of directives and restrictions issued on 14th March 2002 purportedly pursuant to section 14(1)(b)(ii) and (vi) of the Banks and Trust Companies Law (2001 Revision) ("The Law").

AND for an Order:

1. That the said directives and restrictions be set aside;

2. That the Respondent do pay the costs of and incidental to this appeal;

3. For any such further or other Order as this Honourable Court shall think fit;

4. Alternatively, that the Court may make such further or other Orders under section 21(6), or otherwise, of the Law as may be appropriate including any order as to the costs of this appeal.

AND FURTHER TAKE NOTICE that the general grounds of this appeal are:

1. That the decision was contrary to law

1.1 Before the Respondent could invoke any of the discretionary powers under Section 14(1)(ii) and (vi) of the Law, as the Respondent purported to do, the Respondent had to form, and of necessity express, a bona fide opinion,

complying with the requirements of public law reasonableness and rationality, that at least one of the statutory criteria set out under sub-section (1) (a), or (b), or (c) or (d) or (e), or (f) or (g) of section 14 applied.

1.2 In the document of 14th March 2002 by which the Respondent's "Directives and Restrictions" were communicated to the Appellant no such opinion was expressed. None of the pre-requisite "opinions" necessary before any of the discretionary powers under subsection (1)(i) to (vi) of section 14 became exercisable was apparently formed. Further, or alternatively, if the Respondent simply adopted a recommendation by the Cayman Islands Monetary Authority ("CIMA"), that did not constitute the reaching of a section 14(1)(a) to (g) "opinion" for the purposes of the Law, nor the valid exercise of discretionary powers by the Respondent, and/or it unlawfully fettered the Respondent's discretion.

1.3 Further, the rules of natural justice, and fairness, applied to the process by which the Respondent decided whether to form a section 14(1)(a) to (g) opinion, if so whether, consequentially, to invoke any power under section 14(1)(ii) and/or (vi), and if so what steps should be directed. The Appellant will contend that in all of the circumstances the Respondent was required to comply with the said rules so as (a) to accord the Appellant a fair hearing (b) to provide reasons for any decision adverse to the Appellant, and (c) to reach an opinion which was bona fide and reached after consideration of relevant

raised by CIMA (see further the ground of appeal below headed "That the directives were excessive or not required in the public interest").

1.6 As to (b):

(i) No reasons were provided for the decision. Instead the Respondent merely set out the directives, and the restrictions.

(ii) Although the Law does not expressly require a decision to be reasoned, the nature of a decision under section 14, and its importance, are such that reasons are plainly required either for the decision to be fairly reached or to satisfy the requirements of *Wednesbury* reasonableness and rationality. Sufficient reasons were required which were proper, adequate and intelligible, and which demonstrated that the Respondent had considered and rationally dealt with the substantial points which had been raised by the Appellant in correspondence and in discussion with CIMA, or could have raised, if given adequate notice by the Respondent. The Respondent gave no reasons.

1.7 As to (c):

(i) During 2001 and 2002, and prior to the decision of 14th March, the Appellant had taken measures to meet concerns raised by CIMA which are summarised in extensive correspondence and documents provided by the Appellant to CIMA. The Respondent was bound to, but did not, consider such measures, and the Appellant's responsible

approach towards CIMA and its other regulator, the Central Bank of Cyprus. Neither did the Respondent consider the views of the Central Bank of Cyprus ("CBoC") (the local regulator supervising 100% of the banking business carried on by the Appellant), that Directives were not required, as expressed by letter to CIMA dated 28 February 2002, before invoking any powers under section 14(1) of the Law.

(ii) Without prejudice to the generality, the Appellant will in particular refer to the measures taken and identified, and to other matters raised by the Appellant, particularly in letters dated 21/09/01, 26/09/01, 4/10/01, 1/11/01, 11/12/01, 13/12/01, 21/12/01 (the last three from Messrs Hunter and Hunter, the Appellant's attorneys), 4/01/02 and 11/01/02. The Appellant will also refer to and rely upon what was said by the Appellant's representatives at the meeting in London between representatives of the Appellant and CIMA on 8th February 2002, and the Appellant's letters which followed including the letter exhibiting proposed undertakings of 8th February 2002, and the letter from the Governor of the CBoC of 28th February 2002 referred to above.

(iii) CIMA was aware throughout that the Appellants intended to relocate to another regulatory jurisdiction. Licence applications are already at an advanced stage in two other countries, a fact of which CIMA had been advised before the imposition of the Directives. The Appellants expect to leave the Cayman regulatory jurisdiction within a matter of months, or at least could have expected to do so but for the Directives.

The Directives were unreasonable and unnecessary, given the Appellants' impending departure from the jurisdiction, and are now potentially prejudicial to those very relocation efforts.

2. That the Respondent acted ultra vires

2.1 Under Section 14(1)(ii) and (vi), the Respondent's powers, if (which is denied) any could be invoked, were a power to impose conditions (14(1)(ii)) and to require such action by the licensee as the Respondent considered necessary (14(1)(vi)).

2.2 Certain of the directives and restrictions, as particularised below, were, in whole or part, ultra vires the authority of the Respondent under the Law, in that they imposed penalties upon, or purported to require the taking of steps by, persons outside the jurisdiction of the Law, and/or did not fall within the powers available under Section 14(1)(ii) or (vi) properly defined, and/or improperly fettered the future exercise of discretion. In particular, but without prejudice to the generality, the Appellant will say that the following directives were ultra vires; Directives 1, 3, 4, 5, 6, 10, and 12.

3. That the Directives were excessive or not required in the public interest.

3.1 In respect of each of the said directives and restrictions, the Respondent was wrong to issue the same, in that he could not reasonably have formed the opinion, upon proper consideration of the facts, that the Appellant is or was

carrying on business in a manner falling within any of the paragraphs (a) to (g) inclusive in subsection 14(1), such as to require the issuance of the said directives and restrictions. Further, or alternatively, such an opinion should not now be held.

3.2 If and to the extent that the Respondent did arrive at such an opinion, he misdirected himself as to matters of fact or law in doing so and/or failed properly to take into account relevant matters of fact or law, or drew inappropriate or incorrect inferences from such facts and matters as he did consider.

3.3 Further, even if the Respondent held a justifiable, relevant, statutory opinion (which is not admitted), the directives and restrictions were in all the circumstances individually and cumulatively unnecessary in the public interest, and disproportionately damaging to the Appellant and its customers when weighed against any possible advantage to be gained from them, no such advantage being admitted. The directives and restrictions were a disproportionate response to any concerns held by the Respondent. Insofar as it was necessary for the Appellant to satisfy the aims of the said directives, such aims could have been achieved by other means which were offered to, but refused by, the Respondent.

3.4 That, in respect of the particular directives and restrictions the subject of this appeal, and without prejudice to the generality of the foregoing (and upon adopting the numbering in the Respondent's notice of 14th March 2002):

(1) The directive is a penalty on the related party or parties concerned who are outwith the jurisdiction of the Law. It was in any event unnecessary. Further, one result of this directive will be that shareholders will be forced to deposit their funds with other banks: such a result is not in the interests of the Appellant nor its depositors.

(2) The Appellant having already confirmed, in correspondence and by board resolution of June 2001, that the directive represents its established practice, the directive is in all respects excessive and unnecessary.

(3) The directive requires the bringing about of a state of affairs which is outside the control of the Appellant. Further, the time allowed is arbitrary and unreasonable. The Appellant can be required to market the land, but cannot control whether it will actually be sold by a particular date. Further, it imposes restrictions which are unreasonable and unjustified.

(4) The directive purports to require the taking of steps by a third party which is not susceptible to the jurisdiction of the law. In all other

respects, the directive serves a purpose which has already been substantially and sufficiently achieved in a manner approved by the Appellant's Auditors. In the premises, the directive is based on an incorrect assumption, is internally inconsistent, unnecessary and harmful.

(5) The directive is unnecessary and has no justification by reference to the protection of the public interest or the interests of depositors or creditors. Further, the directive expressly recognises that "no further provisions would be required at this time" but goes on to impose requirements upon shareholders of the Appellant. Further the directive assumes a future hypothetical situation but without reference to the facts which might otherwise prevail should such a hypothesis occur. Further, the directive does not consider alternative treatments in the event of the default envisaged and wrongly makes a connection between such a default and an increase of capital of a like amount.

(6) As to 6(i): this directive is ultra vires in that it wrongly imposes directives on "Principals". The extra sum of capital required from such "principals" of US$5 million is unjustified, and an assertion that further capital "may or may not be required" is meaningless in regulatory terms. Further, and without prejudice to the foregoing, the Appellant offered, at the meeting of 8th February 2002, to procure an injection of further capital in the sum requested and in a manner which should

have been acceptable to CIMA. As to 6(ii) if a plan was required, it could have been asked for by CIMA under its supervisory powers. Further, the dates provided are arbitrary and inappropriate.

(7) The directive is unnecessary and cannot be justified by reference to the protection of the public interest or the interests of depositors or creditors. On the contrary, at current rates of interest, the directive risks condemning the Appellants to not securing the best returns on investments and deposits, or to unprofitability and to long-term erosion of capital. The distinction in the treatment of funds derived from new depositors and those held on existing deposits is artificial and has no meaning.

(8) This directive was unnecessary. A related party loan was repaid in June 2001 (that is, before any directives were imposed by the Respondent). There have been no such loans since then and the Appellant's policy, as stated to CIMA, is not to make such loans.

(9) This directive was unjustified. The Appellant did not have a history of cash dividend declaration, nor was the Appellant going to embark on voting cash dividends. Indeed the accounts for 31/12/00 and those for 31/12/01 show that the Appellant has no distributable reserves or profits.

(10) The directive, although imposed on 14th March 2002, required the Appellant to provide monthly reports including one by 31st July 2001. It purports to be retrospective. It was in any event unnecessary. The Appellant has been co-operative in the provision to CIMA of reasonably required reports.

(11) The directive already represented the practice of the Appellant, and was unnecessary.

(12) The first part of the directive merely repeats the existing requirement under the Law and is otiose. The second part contains a declaration as to a future fettering of the respondent's discretion which is not a directive permitted under section 14(1)(ii) or (vi), and further, it entails a fettering of future discretion conferred by section 10(2) of the Law. It was in any event unnecessary. The accounts for the year in question have been delivered.

(13) The directive, that the Appellant maintain a 15% risk/asset ratio, already represents the practice of the Appellant. Indeed both the monthly reports made to CIMA and the audited accounts of the Appellant reveal that the risk asset ratio is and has been much higher than 15%. The imposition of a directive to the same effect is unnecessary and excessive.

4. **That in the premises, the directives and restrictions appealed against are irrational and unfair and/or not required in the public interest.**

TIMOTHY DUTTON QC

DATED the 4th day of April 2002

To: The Secretary to Executive Council
2nd Floor, Government Administration Building
Elgin Avenue
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Messrs Hunter & Hunter
Attorneys-at-Law for the Appellant

This Originating Notice of Motion was issued by Messrs Hunter & Hunter of The Huntlaw Building, 75 Fort Street P.O Box 190, George Town, Grand Cayman (Ref: AJM/AJB/08986.001), Attorneys-at-Law for the Appellant, whose registered and principal office is situated at Butterfield House, Fort Street, PO Box 705 GT, Georgetown, Grand Cayman, Cayman Islands.