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In The Matter of the Suspension and Liquidation of Utah Savings and Loan Association, a Utah Corporation, W. Smoot Brimhall, Commissioner of Financial Institutions of the State of Utah : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Suspension and Liquidation of Utah Savings and Loan Association, a Utah corporation, W. Smoot Brimhall, Commissioner of Financial Institutions of the State of Utah,

Appellant.

No. 11172

APPELLANT'S BRIEF

Appeal from an Order of the District Court of Utah County
Honorable Joseph E. Nelson, Judge

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STATEMENT OF KIND OF CASE

This is an appeal from an Order of the District Court of Utah County directing that certain funds deposited with Utah Savings & Loan Association, which had been received and held separately in trust for the depositors thereof under authority of Section 7-7-43, U.C.A. 1953, be treated the same as other deposits and assets of the Association in connection with dividends or other distribution of assets to be authorized by the Court and that the same not be treated separately as trust funds.

DISPOSITION IN LOWER COURT

The matter was presented to the lower Court on a Petition of the Appellant herein for authority to disburse said funds as trust funds to the depositors thereof, and the Court made its Order directing that such not be done.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Order of the Court and for directions of this Court as to the proper disposition of said funds.

STATEMENT OF FACTS

On December 5, 1966, W. Smoot Brimhall, the Commissioner of Financial Institutions of the State of Utah, (then designated as the Bank Commissioner) took over the affairs and assets of Utah Savings & Loan Association, a Utah corporation, engaged in the savings and loan business, with its principal place of business in Provo, Utah County, State of Utah (hereinafter sometimes called the Association), and the District Court of Utah County, by an Order dated December 16th, 1966, approved the Commissioner's action and assumed jurisdiction of this proceeding as provided by law.

Some time prior to July 1, 1966, the appellant, W. Smoot Brimhall, became concerned about the capital

condition of the Association. (R. 32) On or about July 6, 1966, Appellant learned, through the news media, of the closing of the Idaho Savings & Loan Association, an uninsured savings and loan association in Idaho. He further ,at that time, learned that there was an unusually heavy demand for withdrawal of savings on Utah Savings and Loan Association, which he felt was attributable partly to the closing of the Idaho institution. (R. 32) On the same date, namely, July 6, 1966, the Board of Directors of Utah Savings and Loan Association placed that Association on a limited withdrawal program. (R. 33)

On July 7 ,1966, the Appellant made a determination that there was reason for serious doubt that investing savers would be able to get a full return on their savings that they had in the Association, and further made a determination that there was a danger that those who were withdrawing funds might get a disproportionate share of their savings over those shareholders who were not withdrawing funds. (R. 33)

Accordingly, on the evening of July 7, 1966, Appellant met with the Board of Directors of Utah Savings and Loan Association, and gave the management verbal orders that they should segregate any new funds received from that time on and hold them under supervision of the Banking Department. That verbal Order was confirmed by writing on Juy 8, 1966 with a letter from the Appellant to the Board of Directors of the Association, which letter read as follows:

"Gentlemen:

By authority vested in me, by Section 7-7-43, Utah Code Annotated, 1953, you are hereby ordered to hold all funds received as dues or other payments on investment shares received after the opening of business July 7, 1966. These funds are to be held separately from all other funds of your association and are to be deposited or invested under the supervision of this department. You may invest these funds in any investment outlet authorized by Section 7-5-11, Utah Code Annotated, 1953 as amended. This confirms my verbal order given in your office on July 7, 1966. Very truly yours." (R. 34-35)

All such funds received by the Association as dues or other payments on investment shares after the opening of business on July 7, 1966 were in fact segregated and kept in a separate special account opened in the Walker Bank and Trust Company, and they have always since been separated, segregated, and separately identifiable. (R. 35, 35 and 41) The procedure followed in keeping said funds separate was to make a daily accounting of it, although the money would actually be put into the special account only every three or four days. The daily accounting was kept at the Association,and from these daily accountings they would make a disbursement over to the special account. (R. 39, 40 and 41)

The Appellant, in connection with his letter of direction to the Association, intended that the funds be held in trust for those savers who delivered them to the Association following the opening of business on

July 7, 1966, and had he not believed that they would be so separately held in trust, he would have taken over the Association under the power granted to him by the statutes rather than to let the Association continue to operate and accept funds from the depositors. (R. 35 and 36)

Subsequent to the setting up of the said special account in which were deposited the funds received after July 7, 1966, the procedure was to permit withdrawal of such funds by the persons deposting them in full. (R. 43, 44, and 45) No interest was paid or credited upon any of the deposits made subsequent to July 7, 1966 and which became a part of the special trust account. (R. 46)

At the time of the Court's Order, there remained in said special account approximately $544,000.00. (R. 36)

ARGUMENT I

THE COURT ERRED IN CONCLUDING THAT THE FUNDS ARE NOT TRUST FUNDS AND THAT THEY SHOULD BE TREATED THE SAME AS OTHER DUES AND DEPOSITS AND ASSETS OF THE ASSOCIATION.

(a) *Sec. 7-2-15 U.C.A. does not prevent the treatment of the funds as trust funds under Sec. 7-7-43.*

The Court in its conclusions of law stated that Section 7-7-43, Utah Code Annotated, 1953, creates no

superior equity or preference to funds held in trust where the savings and loan association is liquidated and further concluded that Section 7-2-15 of the Code requires that no preference or priority shall be given to any claim against a savings and loan association "except such as are ordinarily incurred in supervising and liquidating the affairs of such institutions and *except such as are otherwise provided by law.*"

As indicated in the Statement of Facts, the funds involved were accumulated at the direction of the Appellant Commissioner under authority of the provisions of Section 7-7-43, which Section read as follows:

> "Whenever, upon investigation and determination by the bank commissioner, any building and loan company under his supervision is, in his opinion, in such condition that persons investing money therein will not receive the full return of their investment with agreed earnings, or so that nonwithdrawing shareholders are in danger of not receiving a proportionate interest in the assets equally with active withdrawing shareholders, the bank commissioner may, pending reduction of liabilities or reorganization of such building and loan company require that withdrawal payments cease and *he may cause all new money received as dues or other payments on investment shares by such company to be separately held or deposited or invested in trust under his supervision and preserved for the protection of persons making such new investments,* and also, pending such reduction of liabilities or reorganization he may exercise such authority and jurisdiction and institute such regulations

and control as he may deem necessary to prevent losses or inequalities to investors; and if necessary in his opinion and reasonable discretion, he may enter into possession and conserve the company and its assets pending such reduction of liabilities or reorganization and for such time as he deems reasonable to allow such company to reduce its liabilities or reorganize." (emphasis added)

It will be noted that Section 7-2-15 is a part of the chapter on suspension and liquidation of institutions under the jurisdiction of the Commissioner and Section 7-7-43 is a section under the chapter devoted expressly to building and loan corporations. Section 7-2-15 was enacted in 1927, whereas Section 7-7-43, was enacted thereafter in 1935. We submit that if there is any conflict between the two, that the one later enacted should take preference. We further submit that the two statutes are not inconsistent, however, by reason of the proviso in 7-2-15 that such preferences should not be given, "except such as are otherwise provided by law". Surely, the procedures authorized in Section 7-7-43 does provide for the setting up of the trust funds and the handling of the same preferentially, so that these clearly are "otherwise provided by law".

It does not appear that any case has been decided directly interpreting the provisions of Section 7-7-43, as above quoted by the Utah Courts nor so far as we can find by the court of any jurisdiction. It appears, however, that the statute itself is clear enough as to its purposes and intent so that no conclusion properly can

be drawn other than that such funds so held in trust are the sole property of the persons who remitted the same, and are not to be commingled with, or become a part of the assets of the association, whether while said association continued to endeavor to extricate itself from its difficulties, or after assumption of the assets thereof by the Bank Commissioner, under his statutory authority. Were it otherwise, there would be no purpose in holding these funds separate and apart.

The statute states that such funds shall be "separately held or deposited or invested in trust . . . and preserved for the protection of persons making such new investments". We can conceive of no clearer language to indicate the responsibilities as relate to such monies, the purposes of so holding the same, and the ownership thereto, upon failure of the association to have adjusted its liabilities and circumstances within a reasonable time and prior to taking over of the assets of the association by the Bank Commissioner.

Clearly, under the statute, these are trust funds. The uniform and simple definition of a trust is:

> "The legal relationship between one person having an equitable ownership in property and another person owning the legal title to such property, the equitable ownership of the former entitling him to the performance of certain powers by the latter, which performance can be compelled in a court of equity."
>
> 54 Am. Jur., Trusts, Section 4.

The statute clearly contemplates that the association receiving such funds, after directions by the Commissioner, shall, as to such funds, be trustee; that as to such funds the persons remitting the funds shall be cestui que trusts; that the funds themselves shall be trust funds held for the said cestu que trusts and specifically as the statute states "preserved for the protection of the persons making such new investments".

The Commissioner having concluded that a reasonable time had elapsed and having taken possession of the properties and assets of the association as contemplated by Section 7-7-44, and Title 7, Chapter 2, Utah Code Annotated, 1953, the purpose of the trust has ceased. The cestui que trust would be entitled, by an action in a Court of equity, to a return to them of the trust funds; and hence, it would appear to be the obligation of the Commissioner to make a return of said funds to the owners thereof for whom they were held under the statute, without the necessity for any suit or demand, as rapidly as possible so as to avoid any further loss of interest or use of said funds by the owners thereof.

In the absence of some specific interpretation of our statute, it is helpful to consider the rule as relates to ownership and the rights to have returned intact deposits made in a bank, which at the time of such deposit, was insolvent to the knowledge of the officers or directors thereof. The general rule with regard to that matter is that acceptance of general deposits by

a bank which is insolvent, to the knowledge of its officers, constitutes a fraud as will entitle the unsuspecting depositor to rescind and recover back the money, or give him a preferential claim, or create a trust ex maleficio. This rule and numerous supporting cases are set forth in annotations in 25 A.L.R., Page 128, and a superseding annotation on Page 1078, 81 A.L.R.

We do recognize that there are cases as relates to building and loan associations which hold, in the absence of statute, that where people had become members of an association and made deposits in their savings accounts as the result of fraudulent representations as to the solvency of the corporation, that such deposits were not entitled to priority and were not held in trust. The reason of such ruling is that the controlling principal of savings and loan associations is mutuality. Furthermore, as stated in an annotation at 100 A.L.R., page 573, the solvency of a building and loan association is sui generis. Such insolvency consists of such condition as reducing the available and collectible assets below the level of the stock already paid in and makes it impossible for the association to pay back to its stockholders the amount of their contributions. It does not consist of the inability to pay its outside debts, but merely the inability to satisfy the demands of its own members. Thus, the members of a defunct building and loan asociation are generally its chief, if not its only creditors.

It may well have been that this unusual circumstance as relates to the position of building and loan

associations and their relationship to their shareholders, and the trend of some decided cases as relates to such deposits, was the controllng reason for the enactment by our Legislature of Section 7-7-43, so as to protect the funds of shareholders who might tender the same during an interim period when it was known to all concerned (except perhaps the persons tendering the funds) that immediately upon receipt of the same into the general assets of the association the depositor would automatically lose a substantial part thereof because of the financial instability of the association.

Even in the absence of specific statutory direction as relates to the return of these funds, in view of the very clear and express statutory direction that the same shall be held separately in trust and specifically that the purpose of the trust is to preserve those funds for the protection of the persons making such new investments, all of the elements are present which would sustain an action by the cestiu que trusts for a preferential claim as relates to such funds. See ***Harry E. Jones, Inc., vs. Kemp,*** (C.C.A. Cal.) 74 F. 2d, 623.

(b) *The funds did not lose their character as trust funds by commingling with other funds.*

One of the further conclusions of law of the Court which it arrived at in support of its Decree and Order was that in no event could the special fund maintained at Walker Bank and Trust Company be deemed to have created a special trust fund entitling the depositors to preferential treatment with regard thereto,

because the funds were commingled with other funds belonging to the Association. This is definitely an erroneous conclusion of law. The doctrine of commingling of assets, so as to result in a loss of the character of the assets or a deprivation of the rights of the owners therein, results only where there cannot be an identification, either in kind or amount. As stated in 1 Am. Jur. 2d, page 275, Accession and Confusion, Section 3:

> "The doctrine of confusion of goods only applies where the quantity and value of the property of each owner cannot be determined. In general, it may be said that if the goods of several persons are intermingled and can be easily distinguished and separated or if they are of the same nature and value, although not capable of actual separation by identifying each particular, and if the portion of each owner is known and a division can be made of equal proportionate value, then each may claim his own, or his aliquot part, as the case may be . . . "

Section 21 under Accession and Confusion in the same volume states:

> "Obviously, there can be no commingling by the mixing of dollars when the number owned by each claimant is known, and consequently in such case there can be no forfeiture of the separate estate of one party under the commingling doctrine."

SUMMARY

Every element necessary to the establishment of a trust fund for the special use and benefit of the persons making the deposits during the period involved were present. The procedure was set up in accordance with specific statutory authority; the Appellant Commissioner intended that the monies be separately kept and held in trust and preserved for the persons making such deposits; the deposits would not have been permitted to be received except with the understanding that they be so kept and held in trust; the said deposits were in fact separately identified and separately held in an account separate and apart from the regular account of the Association; no interest was paid or accumulated on said deposits as was done in connection with other deposits; in making payments out on withdrawal request, the full amount of said deposits was paid out, without interest; and in all manner the funds were treated in accordance with the statutory intention, namely, to keep and preserve them separately for the benefit of the persons who deposited the same.

CONCLUSION

We submit that the funds involved were and are trust funds belonging specially and separately to the depositors thereof; that the depositors thereof are entitled to their return in full, without interest; and that this Court should reverse the Order of the Court below and should direct the Appellant Commissioner to forthwith disburse and return said funds to the persons from whom said deposits and funds were received.

Respectfully submitted,

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