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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 Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE SUS-
PENSION AND LIQUIDATION OF
UTAH SAVINGS AND LOAN AS-
SOCIATION, a Utah Corporation,

Case No.
11172

Respondents.

RESPONDENTS' BRIEF

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

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CHRISTENSEN

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Respondents.

RESPONDENTS' BRIEF

STATEMENT OF KIND OF CASE

This case is an appeal from an Order directing that the Appellant include certain funds deposited with Utah Savings & Loan Association with the other assets of the Association and to treat said funds the same as other deposits and assets of the Association in connection with dividends or other distributions of assets.

DISPOSITION BELOW

The Petitioner appeals from an Order issued in respondent's favor.

RELIEF SOUGHT ON APPEAL

Respondent prays for affirmance of the Order below:

STATEMENT OF FACTS

Appellant's statement of facts is substantially correct except as to the following observations:

Although the appellant had ordered that all deposits subsequent to July 7, 1966 be segregated pursuant to his authority under Section 7-7-43, *Utah Code Annotated*, 1953, and subsequent deposits were allegedly segregated, in reality they were not credited to separate trust accounts. Instead, the entries reflecting deposits were made on the old ledgers of prior depositors, without indication of the proposed trust. Said funds were co-mingled with other funds belonging to the association and withdrawn upon request and without regard to the appellant's letter.

Even though the appellant claims to have come to the conclusion that it was likely that persons investing new funds in the association would not receive the full return of their investments and that non-withdrawing depositors were in danger of not sharing proportionately with the withdrawing members, appellant did not exercise his full authority under Section 7-7-43, *Utah Code Annotated*, 1953, by requiring that withdrawal payments cease to protect the non-withdrawing members.

ARGUMENT

POINT I.

SECTION 7-7-43 DOES NOT PROVIDE FOR THE CREATION OF SUPERIOR EQUITY OR PREFERENCE TO FUNDS HELD IN TRUST WHERE THE SAVINGS AND LOAN ASSOCIATION IS LIQUIDATED UNDER THE PROVISIONS OF CHAPTER 2, TITLE 7, UTAH CODE ANNOTATED.

The appellant relies upon Section 7-7-43, *Utah Code Annotated*, 1953, as authority for his appeal seeking reversal of the Order of the Court. A careful reading of the statutory provision indicates that the Bank Commissioner may, pending reduction of liabilities or reorganization, cause such funds to be placed in trust, but the statute does not authorize the return of the fund if such reduction of liabilities or reorganization is not affected as in our case. Section 7-7-44, *Utah Code Annotated*, 1953, states:

“If any such building and loan company shall not adjust its liabilities or reorganize within such reasonable time as the bank commissioner shall direct, he shall proceed to liquidate the said company as provided by said Title 7, Chapter 2 of Utah Code Annotated, 1953.”

In other words, when a reorganization or reduction cannot be effected, Chapter 2 of Title 7 governs, and the commissioner must liquidate the company under the provisions of Chapter 2.

Section 7-2-15, *Utah Code Annotated*, 1953, reads as follows:

“No preferences or priorities shall be given to any claim except such as are ordinarily incurred in supervising and liquidating the affairs of such institution and except such as are otherwise provided by law. Claims based on checks, drafts, authorizations to correspondents to charge accounts, or other instruments issued by any bank or trust company in exchange for or in settlement of any bills, notes, checks, orders, drafts, bonds, warrants, coupons or other evidences of indebtedness, including any such obligations drawn upon such issuing bank or trust company, received by it for collections and remittance or payment and not for deposit shall upon the liquidation of such issuing bank or trust company be entitled to payment in full in preference to and before any payment shall be made upon the claims of depositors and other general creditors of such bank or trust company (emphasis supplied).”

This section indicates the position of our legislature as to preferences or priorities of claims when a bank or building and loan corporation is being liquidated. The only preferences permitted are those costs which are incurred in the administration of the liquidation, those based upon checks, drafts, and the like, and finally those otherwise provided by law. It should be noted that nowhere in Section 7-7-43 is such a preference or priority indicated. In fact, a careful reading of Section 7-7-43 with Section 7-7-44 clearly indicates that the Bank Commissioner has authority to control the trust

funds only during reduction in liabilities or reorganization and that authority cannot be extended to the liquidation of the company.

In construing Section 7-2-15, our Supreme Court has stated:

“The clear import of these sections (7-2-15 and 16) is to fix equality in the treatment of claims and in the declaration of dividends thereon.” *United States Fidelity Guaranty Co. v. Malia*, 87 Utah 426, 49 P2d 954 (1935).”

This is closely aligned to the general principle which underlies the existence of all savings and loan associations.

“The controlling principle of savings and loan associations being that of mutuality among its shareholders, all must fare alike, in that all burdens shall be borne equally, unless one class of shareholders has a superior equity.” (*Rummons, et al v. Home Savings and Loan Association*, 47 P2d 845, 100 A.L.R., 570, (Wash. 1935).

When one compares the *Rummons* case with our present case it readily can be seen that the fund herein should be distributed in accordance with the court order. In *Rummons* the depositors were induced by fraud to invest in the corporation after it had become insolvent. Even under such flagrant circumstances the Washington Court could find no “superior equity” in those depositors, who had made such later investments. In our case there is no fraud, and the statutes in question create no superior equity in the depositors who invested after July 7, 1966.

Appellant cites authority stating the general rule that deposits made in a bank which was insolvent to the knowledge of the officers or directors thereof at the time of the deposit, constitutes a fraud, thereby entitling the unsuspecting depositor to rescind and recover back the money, or give him a preferential claim, or create a trust *ex maleficio*. The appellant appropriately would have the Court consider this rule in interpreting our statute. However, the appellant fails to show the true relationship between the general rule and our statute. The general rule is based upon the bank's actual and hopeless insolvency at the time it received the deposit, and that the managing officers had actual knowledge of the insolvency. (*See* annotation, 81 A.L.R., p. 1078, where the observation is made as follows:

“The insolvency must be of such a hopeless character that it was manifestly impossible for the banker to reasonably expect to continue in business, or meet their obligations When the bank is having a run on it, but the officers were fully expecting to meet the emergency, there is no fraud and no trust is created”.

[*Id.* at 1081)].

Therefore, if the Legislature in enacting Section 7-7-43 intended, as claimed by appellant, to protect shareholders of a building and loan association as depositors in banks are protected under the common law rule it is clear that our statute should be interpreted to allow a trust under Section 7-2-15 only where there has been an actual fraud by the association officers or directors. To hold otherwise would be to work a harsh and unjust

preference in favor of the select depositors and against those remaining, whereas both groups should be protected by the appellant.

CONCLUSION

It is respectfully submitted that the appellant exceeded his authority in petitioning the court for authority to distribute the funds in question. It is clear that under Section 7-7-43, 7-7-44, and 7-2-15, *Utah Code Annotated*, 1953, the appellant may not treat this fund and its depositors in a preferential manner. Such was the decision by the court below after careful consideration of the issue. It is also a decision which respondent respectfully requests this court to affirm.

Respectfully submitted,

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