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## Hansard

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# Amendments to Law (Resolution of Dunfermline Building Society) Order 2009

MAY

6

2009

Volume 710: debated on Wednesday 6 May 2009

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Motion to Approve

8.38pm

Moved By

**Lord Myners** >

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That the order laid before the House on 30 March be approved.

*Relevant Documents: 12th Report from the Joint Committee on Statutory Instruments and 14th Report from the Merits Committee*

**The Financial Services Secretary to the Treasury** >

(Lord Myners)

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My Lords, I beg to move that the House do approve the third draft order standing in my name. In speaking to this order, I am mindful of the concerns raised by Members of this House regarding Section 75 during the passage of the Banking Bill, including the welcome contributions made to the debate by the Constitution Committee and the Delegated Powers Committee, among others. I am grateful for the opportunity to demonstrate how we have stuck to both the spirit and the letter of the agreements that we made through the process of developing and passing the Banking Act in the exercise of this power. In keeping with the assurances that we gave this House through the passage of the Act, the powers exercised in the order before the House today were necessary to ensure the execution of the Dunfermline Building Society transaction. Their scope is reasonable.

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Members of the other place asked whether it would not have been better to put powers that may be replicated in every resolution into the Bill rather than repeating their use in orders relating to each subsequent resolution. As noble Lords will, I am sure, be aware, it is not uncommon for consequential changes, in the broader sense of the term, to be made by way of an order when a new regime is introduced into a complicated field of law. The Treasury will certainly consider whether it is appropriate for such provision to be made. In this instance, a number of the changes that we have proposed in the order are specific to the Dunfermline Building Society situation.

On the order, Section 75 was included in the Banking Act 2009 so that provisions of primary and secondary legislation and common law could be amended to facilitate the resolution of a failing firm in accordance with special resolution objectives such as promoting financial stability, protecting depositors and ensuring the efficient use of public funds. In this case, these amendments to existing legislation include: making effective the transfer to Nationwide of shares in a subsidiary of the Dunfermline Building Society; and, in Part 3, making provision about the Dunfermline bridge bank—for example, exempting the institution from the Freedom of Information Act, and conferring qualified immunity from litigation on its directors. As such, the substance of the order is largely technical.

Reflecting the new responsibilities assigned to the Bank of England under the Banking Act, the order supports the property transfer instrument made by the Bank, which transferred the Dunfermline Building Society's member business to the Nationwide Building Society, and the social housing portfolio to a bridge bank owned by the Bank of England. The rump Dunfermline Building Society was then placed into building society special administration following an application to court and by court order.

Article 3 of the order supports the transfer of shares in Dunfermline Building Society nominees—a transfer that was effected by the property transfer instrument—by modifying certain provisions of companies' legislation in consequence of the nature of the transfer. It ensures that the transfer to Nationwide of this subsidiary was effective from day one.

Article 4 of the order makes provision in relation to employees. Most employees would transfer to Nationwide automatically by the operation of the Transfer of Undertakings (Protection of Employment) Regulations, otherwise known as TUPE. This provision ensures that all employees of the Dunfermline Building Society are transferred to Nationwide irrespective of whether they would fall within the scope of TUPE. Accordingly, they enjoy the protections of this legislation.

Article 5 makes it clear that liabilities in respect of the Dunfermline Building Society pension scheme are not assumed by Nationwide, in accordance with the terms of the transaction.

The position of the members of the Dunfermline Building Society's pensions scheme was raised in Questions in the other place yesterday. My colleague, the Economic Secretary to the Treasury, will write to Members of the other place to put this on to the record. All Dunfermline Building Society employees were transferred to Nationwide on 30 March 2009. The Dunfermline Building Society's defined benefit pension scheme was not transferred to Nationwide. However, the 160 employees who were members of the defined benefit pension scheme will be offered membership of the Nationwide group personal pension arrangements. No new benefits will accrue under the Dunfermline Building Society's defined benefit scheme.

As the Dunfermline Building Society is now in special administration, the pension scheme is a creditor in the administration and is expected to make a significant recovery from the winding-up of the estate. These recoveries will be used to meet liabilities to pension holders. However, special administration is classed as an insolvency event for the purposes of Chapter 3 of the Pensions Act 2004. Therefore, the Pension Protection Fund will assess whether the assets of the scheme are less than the protected liabilities of the scheme. In the event of a shortfall of assets, the Pension Protection Fund would assume responsibility for the scheme.

I have already mentioned the provisions made in Part 3 in relation to the Dunfermline bridge bank, which have been a feature of previous banking resolutions under the Banking (Special Provisions) Act. Articles 9 and 10 again make the technical provision about the FSA's rule-making powers that has been made in previous resolutions.

Article 11 makes provision for the treatment in insolvency of the claims that the Treasury will acquire against the Dunfermline Building Society in the special administration in consequence of the Treasury entering into the funding arrangement with Nationwide. It provides that the Treasury's claims shall have the same priority in insolvency as the claims they replace. That is, the claims which replace those of the shareholding depositors will rank behind ordinary unsecured creditors, reflecting the present position of shareholding depositors in insolvency proceedings in respect of building societies.

During the passage of the Bill, Members of this House raised their concerns about the potential for Section 75 orders to be made with retrospective effect. Once again, the powers we have taken in this case demonstrate how we intended to use the powers as framed in the Act and as set out in the detailed code of practice. In this case, the order was made at 9.45 am on 30 March, but had effect from 8 am, so that it came into force at the same time as the property transfer instrument that executed the transaction. That was necessary, as the order needed to reflect the provision of the property transfer instrument and the transfer needed to take place prior to the opening of the Dunfermline's branches on Monday morning. I understand that took place at 8 am, which speaks highly of the work ethic in the Dunfermline Building Society, if nothing else. I hope that noble Lords will agree that this was an appropriate use of the Banking Act in quite extraordinary circumstances. I commend the order to the House.

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🕒 8.45pm

**Lord Goodlad** >

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My Lords, in his opening remarks, the Minister referred to the report of your Lordships' Select Committee on the Constitution on what is now the Banking Act, particularly on its Section 75. At the time of the debates that were held then, nobody quite had in mind the circumstances that have arisen in the case of the Dunfermline Building Society. The Minister has, with his usual assiduity and expertise, kindly engaged me in correspondence since the report was published; that will form the basis of our supplementary report, to be issued shortly. The only question arising tonight is: would he confirm that he believes the actions of the Government in respect of the Dunfermline Building Society to be consistent with the undertakings given by him, and by the Chancellor of the Exchequer and others, about the use of retrospective powers?

**Baroness Noakes** >

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My Lords, the Minister will be pleased that I do not have quite as much to say on this order as on the previous two that we debated, but he will also be aware that I asked for this order to be debated separately from them, specifically because of it being made under the Section 75 powers that were the subject of much attention during the passage of the 2009 Banking Bill, not only in your Lordships' House but in the other place. Indeed, while Clause 75 was amended during the passage of the Bill, many remained uncomfortable at the end with the powers in that clause. During that passage, we constantly pressed the Minister for examples of why the retrospective element was necessary, in particular in Clause 75; we never had a satisfactory answer.

When I saw this order, my reaction was twofold. First, if the Treasury could come up with over six pages of usage of the Section 75 power only two months after the passing of the Act, why during the passage of the Bill could it not have articulated more clearly what the power was there for?

Did the Treasury not know then how it was going to use the power, or did it withhold from Parliament its intention on how to use it? Neither possibility would reflect well on the Treasury or on the Government.

The Minister has referred to my honourable friend Mr Mark Hoban pressing the Minister in another place on why the Banking Act was not used for many of the issues that are dealt with in this order. With respect, those questions were not answered, either then or today. The exemption from the Freedom of Information Act, or the issue about shadow directors, for example, have not suddenly popped up in the case of the Dunfermline Building Society. They were identified when Northern Rock was nationalised and when Bradford & Bingley was processed, but it seems that no satisfactory answer has been given on why they were not dealt with in what became the Act. Now that we are getting quite used to nationalising things, why do we have to use Section 75 all the time to change the law for things that appear to be routine? The Minister said that this shows why we needed the retrospective element of Section 75. However, as I see it, the only degree of retrospection is between 9.45 am and 8 am on 30 March. I am puzzled why the Government, first, did not articulate why they needed the power of retrospection when they took Section 75 of the Act and, secondly, why that was necessary for one hour and 45 minutes. When the orders were made under the Banking (Special Provisions) Act 2008, which has no power of retrospection—that is, in respect of Northern Rock and Bradford & Bingley—they did not have a problem about one hour and 45 minutes needing a special power for retrospection. Therefore, I am mystified as to why that is necessary.

Will the Minister confirm the precise retrospective effect of the order, as that is not made clear either in the order or in the Explanatory Notes? Having taken the power to retrospectively take the law, I feel that it is incumbent on the Treasury when it uses the power which contains that element of retrospection—and when it solemnly recites in the order that it is both necessary and desirable to have retrospective effect and that the Treasury has had regard to the fact that it is in the public interest to avoid retrospective legislation, which is in Section 75—to go beyond those recitations and say what degree of retrospection has been taken and why it has been taken. Perhaps it is really only one hour and 45 minutes, in which case the matter can be dealt with straightforwardly. I hope that the Minister will agree that it is right, if such orders come forward in future, that the retrospective element and the reason for that element of retrospection should be clearly identified.

I raise one issue of substance in relation to the order. It concerns the pension aspects, which are dealt with at paragraph 5. The Minister has partly explained this issue, which was also raised by my honourable friend in another place yesterday. Why were the powers in Section 71 of the Banking Act not used in relation to the property transfer instrument? When we considered the Bill, we were led to believe that the widely drawn Section 71 was there to deal with all consequential pension matters. That power is specifically for dealing with consequential pension matters. We were also assured during our consideration of the Bill that there was no intention to use the power in Section 71 to affect the accrued rights of members. We now find that Section 75 has been used to deal with the pension issue, but it achieves a result that strands those members within the defined benefit scheme. It may be that employees will move over to a group pension plan, but their defined benefit scheme and any liability in there which is not funded has been stranded.

Related to that, will the Minister explain why the staff and, indeed, any deferred pensioners of the Dunfermline Building Society have been treated more harshly than those of Northern Rock and Bradford & Bingley? The effect of what the Government have done is that if there is a shortfall the scheme will end up in the Pension Protection Fund; and the consequences of that are that pensioners will get less than they would otherwise have got. That has not happened with either Northern Rock or Bradford & Bingley, as I understand it, where pensioners and employees with pension rights were protected. The Minister claimed credit for protecting the

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retail depositors. Is it now the Government's intention that depositors will be protected to a greater extent than employees in relation to their pension rights? A definitive statement from the Government on that would be helpful.

Lastly, the order refers to the property transfer instrument which the Bank of England issued in respect of the Dunfermline Building Society. A footnote to the order refers to this being published on the Bank's website, but, as the Minister will recall, in response to amendments that I tabled, the Government tabled amendments at the Report stage of the Banking Bill so that the Treasury also has to lay a copy of the property transfer instrument before Parliament. When was that done? I searched the Parliament website but could find no relevant reference. I hope that the Minister can tell me that it has been done and when it was done, so perhaps I can locate it within the parliamentary system. Will the Minister also agree that when dealing with orders coming before Parliament it would be helpful to give a parliamentary reference, rather than one on an external website, since we now have the procedure in the Act to ensure that these instruments are laid before Parliament?

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### Lord Newby >

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My Lords, we spent a long time during the passage of the Banking Bill discussing Section 75. It was argued by a number of noble Lords on the Conservative Benches that we should not have it at all and that the Government should just do things and then be sued if the people to whom they had done them had any objection to them. It was argued that we have Section 75 because one cannot predict everything in advance and we needed a catch-all provision. It seems to me that this order demonstrates why we need Section 75 and it has been used in exactly the way that the Government set out during the Bill's passage. I suspect, as the noble Baroness says, that some of the Bill's provisions would be replicated pretty much verbatim if a subsequent building society or bank went through the same procedure, but the fact that we now have them here in no way reduces the usefulness of having them here and I am happy to support the Government.

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### Lord Myners >

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My Lords, I thank all noble Lords who have participated in this debate for their useful and at times challenging contributions. The noble Lord, Lord Goodlad, asked a broad but important question: do we in Government believe that the use of Section 75 powers here is in accordance with the explanations that we gave when seeking those powers? As noble Lords know, I come new to these issues. When Henry VIII powers were first mentioned in my presence, I could tell from people's body language that I needed to take them seriously. When they were explained to me I realised why that was the case. I recognised that they are not powers that any Government should seek unless they really believe that they are necessary and that they should always use them with great care. That applies in this case and I take some comfort from the noble Lord, Lord Newby, in that respect.

The noble Baroness raised a number of questions, including about pensions. I noted what was said in the other place by the honourable Member for Fareham, whose work I study with great interest and whose contribution to debate in the other place on matters in connection with finance and banking is of a high order. She asked why Section 75 and not Section 71 was used to deal with pensions. Section 71 was used to make the provision in paragraph 9 of the banks' property transfer instrument. The order makes further changes to legislation in consequence of the arrangements made with Nationwide, which do not affect accrued rights. In respect of pensions, the noble Baroness made some observations about an apparently different treatment between the approach adopted at the Dunfermline Building Society and that in respect of Northern Rock. I believe that the answer here is the different standing of the pension fund of a bank compared with a building society. Because of the nature of the capital structure of the building society and the depositors being members of the society ranking behind senior creditors, and the pension fund constituting a senior creditor, the situation of members of the

defined benefit pension scheme of the Dunfermline is rather good. They have a significant claim ahead of others on the assets of the Dunfermline Building Society, which should give them considerable comfort in contemplating their retirement.

**Lord Kirkhill** >

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My Lords, on a point of clarification, I did not quite understand why those members of the pension scheme might have a preference ahead of others. Can the Minister briefly develop that point for me?

**Lord Myners** >

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My Lords, the answer relates to the nature of the deposit account holders of a building society, the shareholders also effectively being unsecured depositors and subordinate to the preferred creditors and the pension fund in respect of having a deficit, counting as a preferred or senior creditor in that respect.

**Baroness Noakes** >

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My Lords, is this the only case to date—including Northern Rock, Bradford & Bingley and, now, the Dunfermline—where a pension fund liability is effectively being left to go into the Pension Protection Fund if there is not enough money? I understand that this is the only one that has been “stranded”—the word I used when I spoke. The Minister has not quite answered that point. He has said that they have preference, but that is not the point. The point is what happens to the deficit in the pension fund, if there is one.

**Lord Myners** >

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My Lords, I am endeavouring to suggest to your Lordships—and I will correct this if I am myself misdirected—that there is considerable security in the situation of the defined benefit pension scheme of the Dunfermline in terms of its members’ access to additional funding in respect of any deficit. Put simply, there is little likelihood of this defined benefit pension scheme having to have recourse to the Pension Protection Fund. So, while the term “left stranded” might describe how they are left geographically, they are stranded in quite a pleasant place compared to members of a scheme in a failing company.

The noble Baroness asked where the retrospective effect was, and specifically referred to the 8 am to 9.45 am. I assure the noble Baroness that there was no suggestion of people being dilatory. I was quite closely involved with the transaction. It was announced on a Monday morning. Negotiations with the Nationwide, the outcome of an auction process, took place throughout the night. I was there myself late on the Sunday evening and again early on the Monday morning, although I must confess that, unlike officials, I did not work throughout the night. The delay of an hour and 45 minutes was just a matter of sequencing.

The noble Baroness also repeated the points that have been made by the honourable Member for Fareham in the other place on FOI and shadow directors. This will tend to be a feature of such instruments and orders should we seek them in the future, but we should not approach them lightly. On each and every occasion, we should ask ourselves whether an exemption from freedom of information, or protection against the possible suggestion that somebody is acting as a shadow director, is something that we should look at freshly in the light of each circumstance. We have come to understand from resolution processes, under the special Act and now under the 2009 Act, that they may appear to be similar but when you get into the detail of them, each and every one is very different and, therefore, needs to be judged on the specifics.

I am sure that, again, I have failed to answer every question asked. If so, I apologise and shall seek to rectify that by writing or giving way.

**Baroness Noakes** >

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My Lords, I asked about the property transfer instrument.

**Lord Myners** >

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My Lords, I shall write to the noble Baroness on that.

Motion agreed.