Report by the Comptroller and Auditor General

Trustee Savings Banks: Rights of Ownership

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Comptroller and Auditor General

National Audit Office
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Report

1. In July 1986, the House of Lords unanimously dismissed appeals by Trustee Savings Bank (TSB) depositors in Scotland and England and Wales claiming rights to ownership of the TSBs' assets. Their Lordships held that depositors had no interest in the assets of the banks other than the right to receive back their deposits together with any interest contractually agreed. In the detailed speeches in which their Lordships set out their agreed reasons, Lord Templeman noted:

(a) that prior to the passing of the Trustee Savings Banks Act 1985 statutory trustee savings banks and their assets had "belonged to the State";

(b) that the TSB Central Board was "an institution of the State";

(c) that the 1985 Act had "privatised" the banks; and

(d) that in passing the 1985 Act Parliament had decided "to present their surplus assets amounting, it is said, to £800 million to the successor companies established in accordance with the Act."

2. The House of Lords judgment confirmed the Government's view, stated in the White Paper (Cmnd 9415) of December 1984 just prior to the passage of the 1985 Act, that the TSBs did not belong to their depositors. But the judgment appeared prima facie to raise doubts about the Government's view, also stated in the White Paper that the ownership of the TSBs had never been established and that they did not belong to the Government. A basic purpose of the 1985 Act was to remove the uncertainty of ownership and establish the position clearly for the future. As the public flotation of the TSBs in September 1986 will, when fully paid, realise some £1,275 million I thought it right that, on behalf of Parliament, the National Audit Office (NAO) should examine the issues raised on ownership and whether there had been any surrender of rights of income due and payable to the Exchequer. The NAO also reviewed the consideration given by the Treasury and others to the question of ownership, both before and after the House of Lords judgment, and whether Parliament had been properly informed on this issue when passing the 1985 Act. This report sets out the NAO's findings, based on an examination of the relevant Treasury papers.

Statutory background

3. TSBs were founded voluntarily by local groups out of their own resources. At an early stage the Government adopted a supervisory role over the banks and a protective role for their investors under successive Acts of Parliament from 1817 onwards. These statutes provided a framework within which the trustees could operate through lending the TSBs' money to the National Debt Commissioners, at interest and with certainty of repayment without loss.

4. In 1973, the Page Committee, in considering the future role and development of national savings, reported that considerable doubt existed as to the extent of the trustees' liabilities to depositors in TSBs and of the Government's responsibilities (Cmnd 5273). The Committee recommended that the TSBs should be clearly established as mutual organisations owned by their depositors and able to provide a fully competitive personal banking service. The Committee also recommended that the TSBs' existing reserves should be supplemented by Government money.

Trustee Savings Banks Act 1976

5. In July 1974, the Government announced that it accepted that the TSBs should be allowed to develop along the lines that the Page Committee recommended. But it was decided the TSBs should build up sufficient reserves themselves without Government funds, and no declaration was made of mutuality. The subsequent Trustee Savings Banks Act 1976 removed many of the restrictions on the activities of the TSBs and enabled them to make radical changes to their structure and services so as to compete on a more equal footing with the major clearing banks. The TSB Central Board was established in 1976 to enable the TSBs to improve central coordination and to assume progressively some of the supervisory powers exercised by the Treasury. The Government made it clear that the Central Board was not an instrument of government.

6. Although the 1976 Act did not clearly establish ownership of the TSBs, Section 23 of the Act did provide for transfer to the Central Board of existing surplus moneys from closed TSBs and for any future such surpluses to be passed to the Central Board. And Schedule 1 of the Act specifically provided that:

> "The Central Board shall not be regarded as the servant or agent of the Crown or as enjoying any status, privilege or amenity of the Crown and the property of the Central Board shall not be regarded as property of, or as property held on behalf of, the Crown."

7. These provisions were substantially repeated in the Trustee Savings Banks Act 1981 which consolidated with amendments the earlier legislation. The position in 1981 remained, however, that none of the legislation specifically covered the question of ownership of the TSBs' assets. The legislation did not provide any arrangements for the dissolution of the Central Board which would have been the ultimate recipients of assets from TSBs which closed.

A new structure

8. A major concern when the restructuring of the TSBs was being considered was the need to establish firm ownership and accountability. Legal advice obtained by the Treasury supported the view that the TSBs did not belong to the Government, or to the Central Board or the trustees, or to the employees or depositors; but equally it did not positively clarify who did own the TSBs. In considering alternative ways in which the financial structure of the TSBs might be reorganised neither the Treasury nor the Central Board favoured the introduction of mutual ownership because this would not provide the degree of clear legal ownership and proper accountability to shareholders judged to be essential. Another important consideration was the desirability of ready access to further capital in the long as well as the short term. It was agreed that the best solution would be to form a public limited company, the TSB Group plc, as a holding company governed by the Companies Acts and subject to the Bank of England's authority under the Banking Act 1979.

9. During the discussions with the Central Board, the Treasury resisted proposals that the Government might accelerate repayment of certain TSB moneys invested with the National Debt Commissioners, in exchange for a possible share in the proceeds of flotation or an equity share in the new organisation. So far as benefiting from the flotation without a quid pro quo was concerned, and notwithstanding the role played by the Treasury over a century in watching over the TSBs, the Treasury considered that insistence on any allocation of cash or shares would be inappropriate. The taxpayer had never contributed towards the TSBs' assets and the Treasury considered it wrong in principle that any part of the assets should be expropriated or otherwise diverted to the Exchequer.

10. The White Paper (Cmnd 9415), issued in December 1984, announced the Government's intention to put before Parliament a Bill to enable the TSBs to complete their transition to fully-fledged private sector status and to remove long-standing restrictions on their freedom of action. Because of its historical relationship with the TSBs, governed by successive public Acts, the Government considered it should promote the necessary Bill itself rather than rely upon the private legislation usually adopted to change the status of banks.

11. The Treasury and the Central Board envisaged that flotation of the TSB Group would raise a substantial sum, depending on market conditions, and that as well as using the substantial new capital to support the growth of the existing businesses, the Group would expand the existing range of TSB services. The figure of £1 billion was suggested in Parliament but the Treasury declined to speculate, noting that it was a matter for the TSBs. Nevertheless it was clear that the TSBs could not for some time use all the new capital which the flotation would raise, and both the Treasury and the Central Board recognised the inherent possibility of a "windfall" increase in the capital of the TSB Group plc, beyond its immediate needs. The dilemma was emphasised by the possibility of a "bonanza" to the initial shareholders in the new Group, with any action taken to restrict the bonanza likely to increase the extent of the windfall. However, it was felt by the Treasury that the Central Board's public objective of securing more than 1 million shareholders suggested that the benefits of any bonanza would be widely-spread. Also the TSBs had proposed, as set out in a letter from the Chairman of the Central Board which was published in the White Paper, the establishment of charitable foundations which would be endowed with shares and covenanted income by the new Group. The Government's conclusion was that the Bill incorporated the minimum provisions necessary to enable the TSBs to complete the re-organisation appropriate to their wider operations, and that both the "windfall" and "bonanza" aspects were sufficiently catered for and were primarily matters for the Central Board under the flotation arrangements.

12. The view that the Government did not own the TSBs was not disputed during the Bill's passage through Parliament. Indeed the main thrust of debate supported the view that the Government should not seek to reserve to itself any part of the proceeds of flotation. During the debate on the Second Reading of the Bill (14 January 1985), the Economic Secretary to the Treasury confirmed that it had never been the intention to take the resources of the TSBs into the Government's hands. Instead all proceeds from the sale of shares would go towards strengthening the capital resources of the TSB Group plc for future development.

Trustee Savings Banks Act 1985

13. The Trustee Savings Banks Act 1985 subsequently enacted the framework for restructuring the TSBs and transferring them into private

ownership. Provision was made for the transfer of the assets, liabilities and obligations of the existing TSBs and Central Board to the new TSB Group plc on a vesting day to be appointed by the Treasury by statutory instrument after consulting the Central Board.

14. Progress towards vesting was delayed by legal actions in Scotland, and in England and Wales, by TSB depositors claiming ownership of the assets of the TSBs. These claims were eventually disposed of by the unanimous judgment of the House of Lords on 3 July 1986 referred to in paragraph 1 above. The Treasury kept in touch with the Central Board, as the 1985 Act obliged it to do, and considered whether it was right to announce vesting day before issue of the detailed speeches of their Lordships, a date for which was not available. The Treasury concluded on legal advice that there was no obstacle to early vesting. They also felt it important to take account of the Central Board's views and of the possible timings for the TSB flotation in the context of planned public sector asset sales. On 14 July 1986, the Chancellor of the Exchequer informed Parliament that after consultation with the Central Board, the Treasury had set 21 July 1986 as vesting day. On vesting day the assets, liabilities and obligations of the existing TSBs legally passed to the Companies Act companies set up by the TSB Group plc, although the Central Board owned the shares in TSB Group plc until the flotation.

Consideration of detailed House of Lords judgment

15. The publication of the detailed House of Lords speeches on 31 July 1986 stating that the TSBs and their assets "belong to the State" prompted widespread public concern as to whether Parliament had been misled on the question of ownership of the TSBs when passing the 1985 Act and whether the Government had mistakenly waived existing rights to ownership of the TSBs, either before or after the Trustee Savings Banks Act 1985 was passed. In response to the concerns expressed and in the light of suggestions that the share flotation should be halted, the Government drew attention to what it saw as the important legal distinction between the Crown or the Government on the one hand and the State on the other and rejected the view that the House of Lords judgment had undermined the position as set out in the 1984 White Paper and the restructuring arrangements approved by Parliament in the 1985 Act.

16. In a letter which he released to the press and dated 14 August 1986, the Solicitor General reviewed the question of possible Government ownership and the import of the House of Lords judgment. He fully supported the Government view that it did not own the TSB assets prior to the 1985 Act, and made it clear that he regarded the contrary views expressed as being unsustainable. He also set out how this view was fully reconcilable with the House of Lords judgment. A copy of the letter containing the Solicitor General's detailed views is at the Appendix.

Conclusions

17. NAO examination has confirmed that legal advice obtained by the Treasury prior to the publication of the White Paper in December 1984 consistently highlighted the lack of clarity over the ownership of the TSBs. The view expressed in the White Paper that the TSBs did not belong to the Government accorded with the legal advice obtained, even though attention at the time was in practice concentrated on the possible ownership claims of TSBs' depositors rather than on any concept that the TSBs' assets "belonged to the State". Given the legal distinction drawn between "the Government" and "the State", NAO examination disclosed no reason for believing that Parliament was misled on the question of ownership when it was asked to approve the 1985 Act.

18. In drawing up the White Paper it was open to the Government to consider, in the light of the uncertainty over ownership and its long-standing supervisory role over the TSBs, whether Parliamentary approval should be sought to enable the Crown to assume some measure of ownership in TSBs' assets. However, the taxpayer had never contributed towards these assets, and throughout the discussions it was by common consent — not least within Parliament — considered wrong in principle that any proceeds of sale should be diverted to the Exchequer. The Government accordingly proposed and Parliament agreed that the banks should be allowed to retain in full their existing reserves and any fresh capital subscribed by new shareholders (including depositors). On this issue also the NAO found no evidence that Parliament was misled.

19. More generally, however, the question arises whether Parliament might have viewed matters differently had information been available as to whether the TSBs clearly needed to retain the full proceeds of the sale of shares to finance their reasonable forward needs. This matter does not appear to have been as fully considered as the sums at stake would seem to justify. It was touched upon in general terms in discussions within the Treasury in the months leading up to the flotation; but it was not apparently pursued in detail given the Government's overall concern to ensure that the TSBs were in a position to compete effectively, prudently and on an equal footing with other banking groups in the private sector. It is a matter of conjecture whether the provision of such information to Parliament — if it had raised doubts on the TSBs' reasonable need for all the additional funds likely to be derived from the flotation — would have led Parliament to take a different view on the question of allocating some part of the flotation proceeds to the Exchequer. In the Treasury's view there is some reason to suppose, from the conclusions which Parliament reached on the making of covenants and the vesting of TSB Group plc shares free of consideration in charitable foundations (paragraph 11 above), that Parliament agreed that, in so far as "surplus" resources were a question, this was a matter fundamentally for the TSBs.

20. As regards the action taken in the light of the House of Lords judgment, it was clear from the NAO examination that the legal position, and the possible impact on the timing of the flotation, were carefully and promptly considered by the Treasury. As already noted, the Government's clear legal advice, as publicly disclosed in the Solicitor General's letter, was that the judgment did not affect the question of possible Government ownership, which remained as previously assumed. The legal implications of the judgment are not, of course, matters on which I am competent to state a view. As regards the decision to move immediately to vesting without waiting for the full House of Lords judgment, this too was taken on specific legal advice as well as for what were seen as strong operational reasons. There seemed no reason for the Treasury to believe that the full judgment was likely to contain views which would adversely affect or undermine such action.

21. Overall, it is a matter for conjecture whether, and if so how, the House of Lords judgment, had it been known at the time, might have influenced Parliament when its approval was being sought to the proposals in the 1985 legislation. On the evidence available, however, I am satisfied from the NAO's examination that all reasonable efforts were made to establish the facts affecting the complex and long-standing relationships as between successive Governments and the TSBs and to disclose the position fully to Parliament, both at the outset and as matters developed.

Appendix

Letter from Solicitor General

The Rt Hon John Morris QC MP
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14 August 1986

Dear John,

Thank you for your letter to Michael Havers, which with the text of your press statement arrived here on 11 August. In Michael's absence abroad I am replying.

You ask whether the Attorney General agrees with the view, expressed by the Treasury that the Law Lords have not said that the Government owned the TSBs, and that it is not the effect of their judgment that the Government did own them. For my part I do agree with that view and I shall explain why.

My views on the issues discussed in your press statement can, I think, be reduced to a series of propositions.

(1) Section 15(1) of the Trustee Savings Banks Act 1981, which as you know consolidated the 1976 Act, provided that all property of whatever description belonging to a TSB should be vested in its custodian trustees. Parliament further provided in section 32 of the 1981 Act that when a TSB finally closed the trustees were to pay over to the Central Board any surplus moneys. The Central Board was able to distribute such moneys among other TSBs. Paragraph 18 of Schedule 2 of the 1981 Act provided that the Central Board was not to be regarded as a servant or agent of the Crown and that its property was not to be regarded as property of, or property held on behalf of, the Crown. In view of those provisions it would have been quite unjustifiable for the Government to have claimed that the assets of the TSBs belonged to the Government while the banks were a going concern, or that the surplus assets of any closed TSB belonged to the Government.

(2) It is commonplace to draw a distinction between the Crown or the Government on the one hand and the State on the other. "The Crown" is used to describe a body which has legal personality, and the ability to hold and dispose of property; "the State" on the other hand is used to refer to a broader concept, which lacks legal personality and to which assets may be said to belong in the different and more general sense that they are ultimately at the disposition of Parliament.

(3) The Central Board was created by statute. As Lord Keith pointed out in his judgment, on the closure of the last TSB it would have been necessary for Parliament to have legislated for the winding up of the Central Board and the disposal of its assets. In fact the 1985 Act provides for the abolition of both the TSBs and the Central Board and the disposal of their assets. The assets of the TSBs can therefore aptly be described, in the language of Lord Templeman, as having belonged to the State.

(4) It does not follow from the fact that the TSB surplus assets can be so described that they should accrue to the Exchequer. The taxpayer has never contributed to them, and there was indeed a body of depositors who felt so strongly that the surplus assets were their property that they took their claim to the House of Lords. On the abolition of the TSBs and the Central Board there would be no legal personality entitled to their assets and Parliament was entirely free to dispose of them as it thought fit.

I hope it is clear from these propositions why I am in agreement with the legal views expressed by Ian Stewart in his letter of 9 August to Mr Ross and Dr Vincent and why I consider unsustainable your assertion that some basic premise of the Bill has been undermined. I should add that I have been greatly disturbed by suggestions in the press that officials have criticised the Law Lords' understanding of the issue. I find it difficult to believe that any such criticism took place: it would of course have been most improper.

In your press statement you refer to the Judge's direction to the jury in the Ponting case. This seems to me wholly irrelevant to the question of how one should understand the reference to "the State" in the relevant passage in Lord Templeman's judgment. A direction in the case of a prosecution under S.2 of the Official Secrets Act can have no possible bearing on the ownership of TSB assets in the context of very different legislation.

Finally there is, as you know, a long established convention that precludes me from responding to your question about any previous involvement of the Law Officers in this matter.

Signed: *Patrick Mayhew*
(Solicitor-General)