[J-34A-2023 and J-34B-2023] [MO: Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

RICK SIGER, IN HIS CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT	:	No. 12 MAP 2023
	:	Appeal from the Order of the Commonwealth Court Order dated January 31, 2023, at No. 336 MD 2020.
v.	:	
	:	ARGUED: May 24, 2023
CITY OF CHESTER	:	
APPEAL OF: CITY OF CHESTER, MAYOR THADDEUS KIRKLAND AND CITY COUNCIL OF THE CITY OF CHESTER	:	
RICK SIGER, IN HIS CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT	:	No. 15 MAP 2023
	:	Appeal from the Order of the Commonwealth Court Order dated February 14, 2023, at No. 336 MD 2020.
v.	:	
	:	ARGUED: May 24, 2023
CITY OF CHESTER	:	
APPEAL OF: CITY OF CHESTER, MAYOR THADDEUS KIRKLAND AND CITY COUNCIL OF THE CITY OF CHESTER	:	

CONCURRING OPINION AND OPINION IN SUPPORT OF AFFIRMANCE WITH MODIFICATION

JUSTICE BROBSON **DECIDED: January 29, 2024**

As this case makes clear, the Municipalities Financial Recovery Act (Act 47)[1] is a unique and complicated legislative creation, and its infrequent invocation has given this Court little chance to consider its mandates. The Opinion and Opinion in Support of Affirmance (Opinion and OISA) aptly recognizes its significant nature, particularly as it relates to the dire financial circumstances of the City of Chester (the City). And, in parsing the provisions of Chapter 7 of Act 47 (Chapter 7),[2] the Opinion and OISA correctly rejects the bulk of the City's challenges to the modified recovery plan (the Plan) proposed by Michael T. Doweary (the Receiver).[3,4] Nonetheless, I depart from the Opinion and OISA's ultimate conclusion to confirm the Plan in full because, in my view, the Plan defies a critical aspect of the Receiver's statutory authority: Chapter 7 does not permit the Receiver to act independently to implement the Plan. Rather, barring few exceptions, the Receiver is only empowered to *develop a recovery plan* and *require, direct, or order the City and its officials to implement it*. Because I believe the Plan in many ways vests the Receiver with autonomous and unlawful authority to implement the Plan himself and the

[1] Act of July 10, 1987, P.L. 246, *as amended*, 53 P.S. § 11701.101.

[2] 53 P.S. §§ 11701.701-712.

[3] As the Opinion and OISA notes, the Receiver revised the Plan on December 9, 2022, as a compromise with a City official regarding the language of some of the initiatives. This Opinion refers to the December 9, 2022 version of the Plan.

[4] On this point, I join parts I through III of the Opinion and OISA. As to the Opinion and OISA's discussion section, I agree with the Opinion and OISA that: (1) Act 47 supersedes the City's Home Rule Charter; (2) the Plan should not be construed to alter the City's form of government; (3) the City's officials cannot interfere with the Receiver's enforcement of the Plan; (4) the Plan suspends the City's officials' administrative duties because those duties conflict with the goals of the Plan; (5) the Receiver can direct the City's officials to remove items from the legislative agenda; (6) the Receiver's authority under Act 47 does not violate separation of powers principles; (7) the City's solicitor's obligation is permissible; and (8) the weight of the evidence supports the remedies. *See* Opinion and OISA at 32-55. For that reason, I also join parts IV A and IV B(ii)-(v), (vii)-(viii).

City challenges that authority as violative of Chapter 7, I would modify the language of the Plan to limit the Receiver's independent authority and confirm the Plan as modified.

Under Chapter 7, when the Commonwealth Court confirms a recovery plan, that confirmation automatically imposes upon "*the elected and appointed officials* of the distressed municipality or an authority a *mandatory duty to undertake the acts set forth in the recovery plan*." 53 P.S. § 11701.704(a)(1) (emphasis added). Critically, confirmation also has the effect of "*suspending the authority of the elected and appointed officials* of the distressed municipality or an authority to exercise power on behalf of the distressed municipality or authority pursuant to law, *charter*, ordinance, rule or regulation to the extent *that the power would interfere with the powers granted to the receiver or the goals of the recovery plan*." 53 P.S. § 11701.704(a)(2) (emphasis added). The powers and duties of a receiver are set forth in Section 706 of Chapter 7, which provides, in relevant part:

> (a) Powers and duties.--Notwithstanding any other provision of law, the receiver shall have the following powers and duties:
>
> (1) To *require the distressed municipality* or authority to take actions necessary to implement the recovery plan under [S]ection 703.1.
>
> (2) To modify the recovery plan as necessary to achieve financial stability of the distressed municipality and authorities in accordance with [S]ection 703.
>
> (3) To *require the distressed municipality* or authority to negotiate intergovernmental cooperation agreements between the distressed municipality and other political subdivisions in order to eliminate and avoid deficits, maintain sound budgetary practices and avoid interruption of municipal services.
>
> (4) To submit quarterly reports to the governing body and, if applicable, the chief executive officer of the distressed municipality and to the department. The reports shall be posted on a publicly accessible Internet website maintained by the distressed municipality.
>
> (5) To *require the distressed municipality* or authority to cause the sale, lease, conveyance, assignment or other use or disposition of the distressed municipality's or authority's assets in accordance with [S]ection 707.2.
>
> (6) *To approve, disapprove, modify, reject, terminate or renegotiate contracts and agreements with the distressed municipality or authority*,

except to the extent prohibited by the Constitutions of the United States and Pennsylvania.

(7) To *direct the distressed municipality* or authority *to take any other action to implement the recovery plan*.

(8) To attend executive sessions of the governing body of the distressed municipality or authority and make reports to the public on implementation of the recovery plan.

(9) To file a municipal debt adjustment action under the Bankruptcy Code (11 U.S.C. § 101 et seq.) and to act on the municipality's behalf in the proceeding. The power under this paragraph shall only be exercised upon the written authorization of the secretary. The filing of a municipal debt adjustment action under this paragraph and any plan of the receiver accepted by the Federal court shall be considered a modification of the recovery plan, except that the modification shall not be subject to judicial review under section 709.3. A recovery plan submitted to and approved by the Federal court under a Federal municipal debt adjustment action may include Federal remedies not otherwise available under this chapter.

(10) To meet and consult with the advisory committee under [S]ection 711.4.

(11) To employ financial or legal experts deemed necessary to develop and implement the recovery plan. Notwithstanding any law to the contrary, the employment of such experts shall not be subject to contractual competitive bidding procedures.

(12) To make a recommendation to the secretary that the municipality be disincorporated in accordance with Chapter 4.

53 P.S. § 11701.706 (emphasis added). Section 708 of Chapter 7 pertains to elected and appointed officials and provides:

(a) Orders.--The receiver may issue an order to an elected or appointed official of the distressed municipality or an authority to:

(1) implement any provision of the recovery plan; and

(2) refrain from taking any action that would interfere with the powers granted to the receiver or the goals of the recovery plan.

(b) Enforcement.--An order issued under subsection (a) shall be enforceable under [S]ection 709.

53 P.S. § 11701.708. In the event municipal officials refuse to implement a recovery plan, Section 709(a) of Chapter 7 provides for enforcement through judicial action, as follows:

Action by receiver.--The receiver may petition Commonwealth Court to issue a writ of mandamus upon any elected or appointed official of the distressed municipality or authority to secure compliance with an order issued under [S]ection 708. The court shall grant or deny the relief within 14 days of the filing of the petition. The court shall grant the relief

> requested if it determines that the order was issued in compliance with . . . [C]hapter [7].

53 P.S. § 11701.709(a). Appointed and elected municipal officials similarly are authorized to "petition [the] Commonwealth Court to enjoin any action of the receiver that is contrary to . . . [C]hapter [7]." 53 P.S. § 11701.709(b).

Thus, the effect of confirmation of a recovery plan imposes a duty upon the *officials of the distressed municipality* to implement a recovery plan, and it suspends their authority to the extent it conflicts with that plan. By contrast, a receiver is empowered to *require*, *direct*, and *order* the municipalities—which can only act through their elected and appointed officials—to take actions to implement the recovery plan. "Just like a private corporation, any governmental agency or political subdivision, and indeed the Commonwealth itself, can only act or carry out its duties through real people—its agents, servants or employees." *Moon Area Sch. Dist. v. Garzony*, 560 A.2d 1361, 1366 (Pa. 1989). Apart from limited independent authority concerning reports, contracts and agreements, and municipal debt adjustment actions, Chapter 7 does not authorize a receiver to undertake the individual aspects of the recovery plan independently. That task is left to the municipality through its officials. To the extent the municipal officials refuse to enforce the recovery plan or comply with a receiver's requirements, directives, or orders, a receiver's *only* recourse is to secure a writ of mandamus from the Commonwealth Court. If the officials still refuse to comply, the Commonwealth Court can hold the municipal officials in contempt of court order.

As the Opinion and OISA explains, the City's officials refused to comply with many of the Receiver's requirements, directives, and orders to implement the initiatives in the initial recovery plans that the Commonwealth Court approved. This led the Receiver to include modifications in the Plan, as described below, that in several ways grant the Receiver independent authority. Specifically, the ability to audit initiative provides, in part,

that "[t]he Receiver shall *have the ability to conduct* or to have conducted operational, financial or forensic audits or studies of any part of the City." (Plan at 31 (emphasis added).) The residency requirement initiative provides:

> The City has struggled to find qualified individuals to fill key roles within City government. Section 11.9-903(c) of the City's Charter provides that, "[w]here special skills are required, Council may at its discretion, employ qualified non[]residents of the City in such cases where there are no qualified City residents available for the particular position involved." *This initiative substitutes "the Receiver" for "Council."*

(*Id*. at 42 (emphasis added).) And the employee investigations initiative provides, in part:

> As has been demonstrated repeatedly, City elected officials have failed to conduct internal investigations into personnel matters, including those that involve the expenditure of City funds.
>
> *The Receiver shall have the power to conduct investigations into City and Authority personnel matters and to review and approve any such investigation conducted by the City or Authority*.[5]

(*Id.* at 43 (emphasis added).) The Plan further confers upon the Receiver the sole ability to: (1) initiate or approve any hiring on behalf of the City as to both personnel and contractors; (2) determine the auditing firm that will perform City audits; (3) direct how the City spends the American Rescue Plan Act funds or any other federal or Commonwealth funds; and (4) "determine the members of a selection committee for a City or Authority request for proposals or any other procurement where a selection committee is convened." (*Id*. at 41, 44-46, 48.) Finally, while Chapter 7 authorizes the Receiver to "approve, disapprove, modify, reject, terminate or renegotiate contracts and agreements," the Plan goes a step farther and gives the Receiver the power to "*sign* contracts and agreements on behalf of the City." (*Id*. at 47-48 (emphasis added).)

The Receiver seems to acknowledge that parts of the Plan transcend the authority vested in him by Chapter 7, but he justifies those infractions as being a consequence of

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[5] An ethics initiative similarly empowers the Receiver to initiate and conduct investigations. (Plan at 51.)

necessity. For example, as to administrative duties and professional management, the Plan provides:

> The Receiver includes this section because he does not have any other choice. He has tried to work with City elected officials to improve operations and implement basic city functions. He went to [c]ourt earlier this year in a mandamus action, but . . . City officials ignored [the Commonwealth Court's order] from that proceeding . . . .
>
> At the end of the day, the Receiver (or the [Commonwealth] Court) can mandate any initiative, policy or procedure that it wants, but if the individuals responsible for implementing it are incapable of doing so or refuse to do so and face no repercussions, then nothing will ever change and the Receiver will not be able to ensure the provision of vital and necessary services.

(*Id.* at 11.)

The essence of the City's legal argument is that the Plan provides the Receiver with authority that exceeds Chapter 7. While I understand the Receiver's apparent exasperation at the City's officials' attempts to forestall the recovery initiatives, that does not empower the Receiver to implement the Plan independently. There is no "nuclear option" in Chapter 7. The authority vested in a receiver under Chapter 7 is not a trivial aspect of the law. To the contrary, at the outset of Act 47, the General Assembly set forth one of its critical purposes:

> [To e]nact procedures and provide powers and guidelines to ensure fiscal integrity of municipalities *while leaving principal responsibility for conducting the governmental affairs of a municipality, including choosing the priorities for and manner of expenditures based on available revenues, to the charge of its elected officials*, consistent with the public policy set forth in this [S]ection.

53 P.S. § 11701.102(b)(1)(ii) (emphasis added).

Contrast the more limited authority of a Chapter 7 receiver with that of a rehabilitator under Article V of the Insurance Department Act of 1921.[6] There, among the

[6] Act of May 17, 1921, P.L. 789, *as amended*, added by the Act of Dec. 14, 1977, P.L. 280, 40 P.S. §§ 221.1-.63.

powers the General Assembly provides the rehabilitator of an insurance company, a statutory receiver of sorts, are "the powers of the directors, officers and managers, whose authority shall be suspended." 40 P.S. § 221.16(b). The rehabilitator also is authorized to "take such action as he deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer." *Id.* This "step-into-the-shoes" authority is absent in Chapter 7. The General Assembly, therefore, made a meaningful choice to limit a receiver's authority under Chapter 7 to developing a recovery plan and forcing the municipality through its officials to implement it. It did not, however, give a receiver the authority to displace a municipality and its officials and implement the recovery plan himself.

Further, as recognized by Justice Dougherty in his Dissenting Opinion and Opinion in Support of Vacation and Remand (Dissenting Opinion and OISVR), "[a]n action or factor is arbitrary if it is not cabined by law or principle." Dissenting Opinion and OISVR at 2 (quoting *Commonwealth v. Boczkowski*, 846 A.2d 75, 102 (Pa. 2004)). As such, the Commonwealth Court's deferential standard of review does not require this Court to turn a blind eye to violations of Chapter 7 in the Plan. *See* 53 P.S. § 11701.703(e) ("The [Commonwealth Court] shall confirm the modification within 60 days of receipt of notification of the modification unless it finds clear and convincing evidence that the recovery plan as modified is arbitrary, capricious or wholly inadequate to alleviate the fiscal emergency in the distressed municipality."). Indeed, it was clearly within the Commonwealth Court's authority to determine whether the Plan violates any provision of Act 47. Now that this Court has accepted King's Bench jurisdiction, we may do the same.

This is not to say that the Receiver lacks the authority to accomplish the initiatives set forth in the Plan; as explained above, I agree with the Opinion and OISA's rationale that the Plan's initiatives are generally permissible under Chapter 7. I merely take issue

with the *manner* the Receiver employs to achieve the Plan's goals. The unambiguous will of the General Assembly cannot bend to the supposed necessity, or convenience, in a particular instance. I emphasize, however, that if the City's officials continue in their obstinance, the Receiver should again seek mandamus to compel compliance, and the Commonwealth Court should not hesitate to enforce the Plan and hold noncompliant City officials in contempt. Mandamus is the only enforcement mechanism the General Assembly provided in Chapter 7, and, in my view, it should be used to the fullest in circumstances like the present to give effect to Act 47.

I acknowledge the Opinion and OISA disagrees with my position based, in part, on the varying language in Section 706 and Section 708 of Chapter 7 relative to a receiver's statutory authority—*i.e.*, a receiver requiring and directing a "municipality" in Section 706 but ordering "an elected or appointed official of the . . . municipality" in Section 708. The Opinion and OISA's attempt to distinguish between the municipality and its officials for purposes of construing the statutory authority of a receiver under Section 706 is flawed in that it cannot withstand statutory construction scrutiny. Specifically, Section 706(a) provides that the receiver shall have the powers and duties set forth within that subsection, including the power to "*require the distressed municipality* . . . to take actions necessary to implement the recovery plan;" "*require the distressed municipality* . . . to negotiate intergovernmental cooperation agreements;" "*require the distressed municipality* . . . to cause the sale, lease, conveyance, assignment or other use or disposition of the distressed municipality's assets;" and "*direct the distressed municipality* . . . to take any other action to implement the plan." 53 P.S. § 11701.706(a)(1), (3), (5), (7). In the absence of the above italicized words, I would agree that a receiver would have the statutory authority to "take actions necessary to implement the recovery plan;" "negotiate intergovernmental cooperation agreements;" "cause the sale, lease,

conveyance, assignment or other use or disposition of the distressed municipality's assets;" and "take any other action to implement the plan." We cannot, however, simply ignore the italicized words and, as the Opinion and OISA appears to do, read them out of the statute. *Dep't of Transp. v. Taylor*, 841 A.2d 108, 111-12 (Pa. 2004) ("As a general rule courts do not have the power to ignore clear and unambiguous statutory language in pursuit of a statute's alleged or perceived purpose."). The Opinion and OISA's focus on the difference between a municipality and its officials does not address how the Opinion and OISA is able to reach its result and give effect to the words italicized above. Whether *requiring* and *directing* a "municipality" under Section 706 or *ordering* "an elected or appointed official" under Section 708, a receiver is still limited in authority to requiring, directing, and ordering *another person or entity to implement a recovery plan*. Nothing in these provisions empowers a receiver to act as a municipality or as a municipal official—*i.e.*, to implement a recovery plan himself.

A more reasonable reading of the language in Sections 706, 708, and 709 of Chapter 7 is that Section 706 sets forth the general powers of a receiver relative to a municipality and a recovery plan. Section 706, therefore, speaks in broad terms concerning the financial stability of a municipality while setting forth the general rules for how a receiver and a municipality are meant to work together to accomplish the goals of Chapter 7. Sections 708 and 709, by contrast, concern the *enforcement* of a recovery plan for circumstances where, like the present, municipal officials refuse to adhere to a receiver's requirements and directives. Thus, Section 708(a) provides that a receiver may *order* an "elected or appointed official" to "implement any provision of the recovery plan" and "refrain from taking any action" that would obstruct a receiver or the plan. 53 P.S. § 11701.708(a). In Section 708(b), titled "Enforcement," the General Assembly clarified that such an order "is enforceable under [S]ection 709." 53 P.S. § 11701.708(b).

As such, in situations where officials continue to drag their feet and strain a municipality's financial recovery, Section 709 provides that a "receiver may petition [the] Commonwealth Court to issue a writ of mandamus upon any elected or appointed official of the distressed municipality or authority to secure compliance with an order issued under [S]ection 708." 53 P.S. § 11701.709.

It is the well-settled law of this Commonwealth that, "[w]here a remedy is provided by an act of assembly, the directions of the legislation must be strictly pursued and such remedy is exclusive." *Lurie v. Republican Alliance*, 192 A.2d 367, 369 (Pa. 1963). I see no reason why this axiom does not apply here. Where a municipality, which, again, can only act through its municipal officials, fails or refuses to implement a court-approved recovery plan, the exclusive remedy available to the receiver is to issue an order to comply (Section 708) and, if necessary, seek relief from the Commonwealth Court via mandamus (Section 709). Adopting the Opinion and OISA's contrary view that the receiver can bypass the municipality and its officials and implement the plan independently essentially renders Section 708 and 709 superfluous, contrary to our rules of statutory construction. *See Freundt v. Dep't of Transp.*, 883 A.2d 503, 506 (Pa. 2005) ("[I]ndividual statutory provisions must be construed with reference to the entire statute of which they are a part, and the entire statute is presumed to be certain and effective, not superfluous and without import.").

Finally, I disagree with the Opinion and OISA that we should not address the initiatives in the Plan that violate Chapter 7. This entire case concerns the Receiver's statutory authority, and the City's primary grievance is that the modifications in the Plan vest the Receiver with excessive and unlawful authority. The City's brief is rife with references to what it characterizes as the "sledgehammer" approach of the modifications, asserting that the modifications are unlawful and the Receiver must resort to mandamus

rather than seek more authority from the courts—*i.e.*, the exact concern of this minority opinion. (*See, e.g.*, City's Br. at 42.) Thus, to ignore violations of Chapter 7 in the Plan relative to the Receiver's authority would not only disregard the crux of the City's argument, but it would also overlook that we granted King's Bench for the express purpose of delineating a receiver's authority under Chapter 7. I cannot agree with that outcome. Additionally, as the Opinion and OISA also notes, this Court has not had an opportunity to address Chapter 7 before this case, thereby making it critical that we set a precedent that properly interprets the law for future receiverships, if any.

Accordingly, for the reasons set forth above, I concur in the Opinion and OISA's legal analysis but respectfully dissent from its ultimate conclusion to confirm the Plan in full. Rather, I would modify the Plan to eliminate any independent authority vested in the Receiver to implement independently the Plan's substance and confirm the Plan as modified.