

IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO. 516 of 2011

**BRITISH CARIBBEAN BANK INTERNATIONAL CLAIMANT
LIMITED**

AND

CENTRAL BANK OF BELIZE DEFENDANT

Hearings

2013

28th January

9th April

Mr. Eamon H. Courtenay SC and Ms. Pricilla J. Banner for the claimant
Mr. Denys Barrow SC and Mrs. Liesje Barrow-Chung for the defendant.

LEGALL J.

JUDGMENT

1. The claimant is the largest offshore bank incorporated in Belize with registered offices at 60 Market Square, Belize City. The defendant is a statutory body established under the Central Bank of Belize Act, Chapter 262. The claimant, by an application to the defendant dated 15th November, 2007, requested permission from the defendant to

increase loans or credit facilities from US\$20,000,000 to US\$23,000,000 to Caribbean Holdings Inc. a registered company (CHI). This application was approved by the defendant, acting under section 21.02(2) of the International Banking Act Chapter 267 (the IBA) on 5th December, 2007 on certain terms and conditions, including the following:

“The Central Bank’s Board of Directors has approved BBIL’s request to grant a temporary increase of \$3,000,000 in outstanding credit facilities from \$20,000,000 to \$23,000,000 to Caribbean Holdings Inc. for a period of 12 months expiring at the end of November 2008, subject to the following terms and conditions:

1. Total credit facilities shall at no time exceed the approved limit of \$23,000,000 during the twelve month period ended November 2008, after which the facilities must revert to within the \$20,000,000 limit; non-compliance will result in a penalty fee of \$5,000 being levied for each day that the facilities exceed their approved limit:
2. A new application will be required at least six weeks prior to the date on which the bank wishes to implement the following changes: grant facilities in excess of the approved limit, vary the terms and conditions of the credit, or vary the collateral arrangements.” **(the Approval)**

Due to the accumulation of interest and other fees this loan amounted to US\$30 million as at August 2011.

2. CHI was expected to repay the loan and interest from the sale of villas on a 265 acres of land on the private island of Caye Chapel in Belize, which island and villas (the assets) were held as security or collateral by the claimant for the loan to CHI. There were spectacular failures over about three years, on the part of CHI, to repay the loan and interest. The claimant had in November 2009 applied to CBB to be permitted to collect interest only on the loan during the year 2009. It turned out that CHI was not able to even pay the interest. The loan became a “bad debt” or a “non performing loan,” and in accordance with IBA Circular No. 1 of 1999 issued by CBB, which classified loans as “substandard, doubtful and loss,” the loan, according to the defendant, should have been classified as a loss.
3. The claimant decided to take action to deal with the failures to repay the loan. In a first move in this direction, the claimant acquired in March 2010, with the agreement of CHI, six of the villas; and as a second move, in March 2011, the claimant acquired, again with the agreement of CHI, the remaining assets held as collateral for the loan in settlement of CHI indebtedness to the claimant. In effect, the claimant acquired by agreement of CHI, the island of Caye Chapel and the villas, which the claimant already had as security or collateral for the said loan. Instead of showing on the claimant’s balance sheet or accounts the loan as a non performing one, the acquisition of the assets was described therein as an investment held for sale.
4. The defendant felt that the acquisition of the assets by the claimant was in breach of clause 2 of the Approval, on the basis that the

claimant made changes in respect of the loan and collateral without making a new application in accordance with the Approval. In addition, the defendant felt that the acquisition of the assets should have been shown in the claimant's accounts or balance sheet as a loan rather than an investment held for sale. The defendant therefore sent an e-mail dated 20th May, 2011 to the claimant stating that "After further consideration, the Central Bank of Belize . . . has decided that you should reverse the entry and report the investment as a loan, since reporting it as an investment is contrary to BCBIL's memorandum of association item 26." I believe the second investment in the above quote is meant to mean investment held for sale and that "item 26" is really meant to mean paragraph 26 of the memorandum of association of the claimant. The said e-mail concluded by reminding the claimant that paragraph 26 of the memorandum "was inserted upon the request of Central Bank to prevent the movement of loans to investments," and that the claimant must reverse the entry immediately and report the investment as a loan for which it was originally booked. The e-mail also requested that copies of the reversal of the transaction must be submitted to the Central Bank by May 25th, 2011 and a copy of the contract to purchase the collateral of CHI by the same date.

5. The claimant's reply to the e-mail, on the said 20th May, 2011, requested "that at the minimum we should be given an opportunity to discuss this matter with the Central Bank," and the claimant listed in the e-mail, items it wanted to discuss in relation to the acquisition of the assets. A meeting was held on 1st June, 2011 with representatives of the claimant and representatives of the defendant in which the

acquisition of the assets was discussed, and where the claimant made its case that the acquisition was not in contravention of the IBA or the claimant's memorandum of association. The defendant, on the other hand, maintained that the acquisition was contrary to the memorandum. At the end of the meeting, a commitment was given by the claimant to submit to the defendant disclosure of how it intended to treat the acquisition of the assets from an accounting perspective. The defendant, not having heard from the claimant in that regard, wrote a letter to the claimant dated 21st June, 2011 as follows:

“We have reviewed your verbal request to have the transfer of the Caribbean Holdings Incorporated loan of US\$24.0 million remain as an investment held for resale by British Caribbean Bank International Limited (BCBIL) and must now reconfirm our original position that there is nothing in BCBIL's Memorandum of Association that permits it to undertake such a transaction. Consequently, the Central Bank requires that the entry be reversed as of the transaction date of 31 March 2011.

As discussed in our meeting of 1 June 2011, it was agreed that you would consult with the Central Bank on the treatment of this matter before the BCBIL's audited financial statements for 31 March 2011 were finalized. Therefore, the loan must be reported in the audited financial statements, for 31st March, 2011 as originally booked otherwise it would be not only a violation of your articles but a misrepresentation to the public if it were reported as an investment held for resale.

BCBIL must submit copies of the reversing entries to the Central Bank by 24 June 2011.”

6. Armed with a legal opinion in a letter dated 23rd June, 2011 from learned senior counsel Mr. W.H. Courtenay who wrote that: “While we readily concede that the language of paragraph 26 does not expressly comprehend the acquisition of real property for investment purposes, the acquisition of real and other property . . . as an investment for resale falls squarely within the scope of the investment activities permitted by” clause 3(4) of the memorandum, “and is not ultra vires the Company’s objects.” Clause 3(4) states that one of the objects of the claimant is “To invest money in such manner as may from time to time be thought proper.” The claimant replied in a letter dated 24th June, 2011 to the defendant’s letter of 21st June, 2011, that it is “abundantly clear that BCBIL’s Memorandum of Association does permit BCBIL to undertake the transaction.” The defendant having received the above response from the claimant issued “a revision of the terms and conditions of the licence of BCBIL to eliminate any doubt as to the intention to restrict BCBIL from the further unauthorized acquisition of assets”: see paragraph 25 of affidavit of Glenford Ysaguirre. The revision of the licence added a new condition thereto – Condition 15 – to the existing licence. The new Condition 15 states that “BCBIL shall not purchase, acquire or lease real estate except as may be necessary for the purpose of conducting its banking business or housing its staff or providing amenities for its staff having regard to any reasonable requirements

for future cooperation of its banking business or staff.” The licence with the new condition 15 is given as item 1 in the appendix to this judgment.

7. On the 28th June, 2011 the claimant was invited by the defendant, for further consultation on the acquisition of the assets and Condition 15. At that meeting, it is stated in the minutes prepared by Adrian Arana, an employee of the defendant that “Mr. Guiseppi agreed that the conversion of the loan to an investment held for sale should not have been done.” The Governor of the CBB also swore to this effect. But Mr. Tillett, a credit manager of the claimant, who was not at the meeting swore that “Mr. Guiseppi informed me that he made no such comment.” Mr. Guiseppi, in his first affidavit at paragraph 18 states what occurred at the meeting of 28th June, 2011 as follows:

“In the meeting, the Central Bank raised concerns, inter alia, that BCBIL’s intention was to acquire the Assets from the outset, and the treatment of the asset as an investment held for re-sale meant there was less pressure on BCBIL to see that if it were treated as a loan. The Central Bank indicated that it was prepared to allow BCBIL until 19 July 2011 to sell the Assets, failing which, it would issue a circular with regards to accounting treatment in such scenarios.”

8. About two weeks after this meeting, on 15th July, 2011, the defendant issued a circular No. 5 of 2011(the Circular) under section 45(1) of the IBA. Section 45(1) states:

“45. (1) The Central Bank may, from time to time, with the approval of the Minister, issue such orders, directives, circulars or make such regulations prescribing all matters and things required or authorized by this Act to be prescribed or provided for, or which are necessary or convenient for the carrying out of, or the giving full effect to the provision of this Act.”

The Circular states, among other things, as follows:

Summary

“This circular is to restrict the acquisition of assets for sale, by a bank, from a borrower in exchange for the settlement of the borrowers indebtedness, and to implement treatment where any such transaction has already taken place.

Restriction

Banks licenced under the IBA are henceforth prohibited from acquiring an asset for sale from a borrower in exchange for the settlement of the borrower’s indebtedness.”

The whole circular is given as item 2 in the appendix to this judgment.

9. The claimant, no doubt dissatisfied with the action of the defendant in issuing the revision or Condition 15 and the Circular, filed a fixed date claim form dated 10th August, 2011 asking specifically for a

declaration and an order be issued that the above revision or Condition 15 and the Circular were unlawful, void and of no effect, and an injunction restraining the defendant from acting upon or enforcing the Circular or revision. The reliefs claimed in the claim form are for declarations and orders that:

“(a) the revision issued by the defendant on 27 June 2011 to the Terms and Conditions of the claimant’s International Banking Licence by the addition of Condition 15 (**Condition 15**) is unlawful, void and no effect for the following reasons:

- (i) The defendant has erred in law (a) in its interpretation of the claimant’s memorandum of association; and (b) in holding that it has issued any earlier order;
- (ii) The defendant’s decision to impose Condition 15 is ultra vires the International Banking Act (**IBA**) as the defendant has misconstrued its powers under section 8 of the IBA in imposing the particular condition in question;
- (iii) The defendant has failed to have regard to material considerations and/or has had regard to immaterial considerations in imposing Condition 15;
- (iv) The defendant’s decision to impose Condition 15 was in all the circumstances disproportionate and/or was perverse/*Wednesbury* unreasonable; and

- (v) The defendant has breached the claimant's legitimate expectation that it was content with transactions of the type restricted by Condition 15 and would not seek to prevent them.
- (b) The decision to issue Circular No. 5 of 2011, "*Requirements for Assets Acquired for Sale*" on 15 July 2011 (**the Circular**) is unlawful, void and of no effect for the following reasons:
 - (i) The defendant's decision to impose the Circular was *ultra vires*, since the matters prescribed in the Circular are neither (a) required or authorized by the IBA to be prescribed or provided for by the provisions of the IBA or (b) necessary or convenient for the carrying out of, or the giving full effect to the provisions of the IBA;
 - (ii) The defendant failed to consult either the claimant or the rest of the international banking industry in respect of this Circular;
 - (iii) The defendant breached a legitimate expectation that it would not object to such transactions; and
 - (iv) The defendant's decision to issue the Circular was in all the circumstances disproportionate, perverse and/or *Wednesbury* unreasonable.
- (c) The defendant be restrained, whether by itself, its servants or agents or howsoever, from acting upon, in consequence of or seeking to enforce the Circular or Condition 15.
- (d) Such other relief as the court deems just and equitable.
- (e) Costs."

10. The claimant abandoned the legitimate expectation grounds above. But the claimant contends that the Circular is contrary to section 45(1) of the IBA and also violates the intention of the section, which is that the discretion contained therein has to be exercised reasonably, in good faith and in accordance with natural justice. The claimant's point is that Parliament in enacting section 45(1) of the IBA could never be taken to have intended to give to a statutory body a power to act in bad faith, unreasonably, in breach of natural justice or a power to abuse its powers. This point was considered by Byles J who expounded the principle in a celebrated passage in *Cooper v. Wandsworth Board of Works 1863 14CB 180*, approved in *Ridge v. Baldwin 1964 AC 40*, and *Durayappak v. Fernando 1967 2 AC 337*, when he said that "although there are no positive words in a statute, requiring that a party shall be heard, yet the justice of the common law will supply the omission of the legislature": see also Laws LJ in *R v. C Khatum v. Lindon Borough of New Harm 2004 EWCA CV 55*.

The Revision

11. The allegation is that the revision of the claimant's licence is unlawful and of no effect because it was issued due to a misinterpretation by the defendant of Clause 26 of the claimant's memorandum of association, which the claimant states permitted it to acquire the assets as an investment for sale. Moreover, states the claimant, clause 3(4) of the said memorandum permits the said acquisition as an investment for sale. Clause 3(4) of the memorandum is given above. Clause 26 states as follows:

“To purchase, take on lease, or in exchange, or otherwise acquire, hold, undertake or direct the management of work, develop the resources of, and turn to account any estates, lands, buildings, tenements, and other real property and property of every description, whether of freehold, leasehold, or other tenure, and wheresoever situate, and any interests therein, rights and powers conferred by, or incident to, the ownership of any such property for the purpose of conducting its banking business or housing its staff or providing amenities for its staff having regard to any reasonable requirements for future expansion of its banking business or staff.”

The claimant states that another reason for the Revision of the licence was because the claimant had ignored the defendant’s “order” stated in a letter of 21st June 2011 which is given above at paragraph 5.

12. Neri Matus of the CBB had sent an e-mail dated 20th May, 2011 to the claimant that “the CBB had decided that you should revise the entry and report the investment as a loan since reporting it as an investment is contrary to BCBIL Memorandum of Association Item 26. ... This specific item was inserted upon the request of Central Bank to prevent the movement of loan to investments. Therefore you are required to reverse the entry immediately and report the investment as a loan for which it was originally booked.” In addition the Governor of CBB in a letter dated 27th June, 2011 states:

“By powers vested in the Central Bank of Belize (the Central Bank) by virtue of Section 8(2) of the International Banking Act (IBA), the Central Bank hereby informs of a revision of the Terms and Conditions of Licence of British Caribbean Bank International Limited (BCBIL) by the addition of condition No. 15 as per the attached. All other terms and conditions remain the same.

The need to revise BCBIL’s Terms and Conditions of Licence has arisen as a result of BCBIL’s decision to acquire the property of Caribbean Holdings Inc., a distressed and delinquent customer, as an investment held for sale in violation of clause 26 of BCBIL’s Memorandum of Association. Clause 26 was included in the Memorandum of Association at the request of the Central Bank as a precondition to the granting of a licence to prevent this very type of transaction. However, given BCBIL’s failure to abide by its own Memorandum of Association, and its decision to likewise ignore the Central Bank’s order, we are obliged to incorporate this restriction in the terms and conditions of BCBIL’s licence for the avoidance of doubt.”

These terms and conditions come into immediate effect.”

13. Based on the above, the claimant’s submission is that the revision of the licence occurred because of CBB’s interpretation of Clause 26 of the claimant’s memorandum of association, which was made in error; and also because the acquisition of the assets or the transaction was allowable under Clause 3(4) of the memorandum. There is no doubt in

my mind that the above evidence shows that the CBB felt that the transaction was contrary to Clause 26 of the claimant's memorandum of association which, as we saw above, the claimant, through its legal advisor conceded; but advised that the transaction was permitted under other clauses of the memorandum. The question, as I see it, is not whether CBB considered that the transaction was contrary to Clause 26 of the memorandum, though that is relevant, but whether CBB had any statutory authority to issue the Revision. The question, in my view, is not CBB's interpretation of the memorandum, but whether CBB acted in accordance with the legislation under which the licence was revised. It is abundantly clear from the letter dated 27th June, 2011 above revising the licence that the licence was revised in exercise of the powers vested in the Central Bank of Belize under section 8(2) of the IBA. Section 8(2) of the IBA states:

“8. (1) The Central Bank may grant a licence under this Act upon the payment of the prescribed fee and subject to such terms and conditions as it may specify; or it may refuse to grant a licence.

(2) Where a licence is granted subject to the condition that the terms and conditions thereof may be varied subsequent to its issue, the Central Bank may at any time revoke any of the original terms and conditions or impose additional terms and conditions.”

14. Since the original licence had stated that its terms and conditions may be varied, it is also clear that the CBB under section 8(2) is authorized

to revise or vary terms of the claimant's licence. Due to the clear authorization by section 8(2) above to CBB to revise or vary a licence, I am not persuaded that under section 8(2) CBB had no authority to revise the licence, and that the revision is unlawful, even though CBB considered clause 26 of the memorandum. Moreover, clause 3(4) of the memorandum giving the claimant power "to invest money... proper" assuming that authorizes the transaction, which on the facts, I have serious doubts, ought not, in my view, to prevent the defendant from exercising the clear power under section 8(2) above to issue the Revision. Clause 3(4) cannot take precedent over the statutory provision.

15. The revision of the licence by the insertion of new Condition 15 is, according to the claimant, also disproportionate and unreasonable and therefore unlawful and void. Condition 15 states that: "BCBIL shall not purchase, acquire or lease real estate, except as may be necessary for the purpose of conducting its banking business or housing its staff or providing amenities for its staff, having regard to any reasonable requirements for future cooperation of its banking business or staff." It is said that the above condition "prevents the claimant from acquiring real estate even in the event of defaults on debt due to the claimant which is secured upon real estate." The claimant states that the "restriction is not contained in the IBA," and that section 24(4) of the Banks and financial Institutions Act provides that a bank may acquire real estate, inter alia, "in the event of any debt due to a bank which is in default or in danger of default and which is secured by any real or other property": Section 24(4) is as follows:

“24(4). No bank shall purchase, acquire or lease real estate except as may be necessary for the purpose of conducting its banking business or housing its staff or providing amenities for its staff, having regard to any reasonable requirements for future expansion of its banking business or staff; but in the event of any debt due to a bank which is in default or in danger of default and which is secured by any real or other property, the bank may acquire such property which shall, however, be resold or disposed of at the earliest suitable moment.”

Condition 15, according to the claimant, prevents the claimant from acquiring real estate, even though CBB had said that it sought to restrict the activity, thereby showing inconsistency. Condition 15, according to the claimant, is therefore disproportionate and unreasonable.

16. Condition 15 repeats, almost verbatim, the first half of the sentence contained in section 24(4) above. Condition 15 could not alter, and does not specifically purport to alter, the second part of the sentence in section 24(4) which permits a bank, such as the claimant, in the event of a debt in default secured by real property, to “acquire such property which shall however be resold or disposed of at the earliest suitable moment.” Condition 15 says, as also stated in the first part of section 24(4), that “BCBIL should not purchase or acquire real estate, except as may be necessary for the purpose of conducting its banking business.” So the claimant may acquire under the Condition real estate for the purpose of its business. For the above reasons I do not

agree with the submission that Condition 15 “prevents the claimant from acquiring real estate” and that “it is out right ban on any acquisition of any real estate...” when the condition is carefully considered. I do not see a legal basis for the court to hold Condition 15 of the revised licence as unlawful, unreasonable, disproportionate when the condition is worded in the exact words of the first part of section 34(4) above and when the Condition allows purchase of real estate as may be necessary for the claimant’s business.

The Circular

17. The legal attack on the Circular is that it was issued contrary to the powers given to the CBB under section 45(1) of IBA. I repeat the section for convenience:

“45. (1) The Central Bank may, from time to time, with the approval of the Minister, issue such orders, directives, circulars or make such regulations prescribing all matters and things required or authorized by this Act to be prescribed or provided for, or which are necessary or convenient for the carrying out of, or the giving full effect to the provisions of this Act.”

18. The claimant says that, according to the section, the circular had to prescribe either things required or authorized by the IBA to be prescribed or provided for; or things or matters that are necessary or convenient for the carrying out of the provision of the IBA; but the

circular does not meet the requirements of the section. The material parts of the circular are as follows:

“This circular is to restrict the acquisition of assets for sale, by a bank, from a borrower in exchange for the settlement of the borrower’s indebtedness, and to implement treatment where any such transaction has already taken place.

A. RESTRICTION

Banks licensed under the IBA are henceforth prohibited from acquiring an asset for sale from a borrower in exchange for the settlement of the borrower’s indebtedness.

B. REQUIREMENTS

Where any such asset was acquired prior to the date of the issuance of this circular, the following treatment is prescribed:

1. An asset held for sale shall be classified as a fully impaired asset within 30 days of this circular.
2. An impaired asset of this classification will require 100% provisions which shall be made and recognized as a charge to income in the period in which the impairment is identified.
3. The proceeds from the subsequent sale of an impaired asset of this nature shall be recorded as income in the financial period during which the sale occurs.
4. The sale of any such asset shall not be financed partially or wholly by the bank without the prior written approval of the Central Bank of Belize.”

19. The task of the court is to decide whether or not the circular was issued in accordance with the dictates of section 45(1). The claimant

says that the “use of the circular to specify a particular accounting issue targeted against one individual entity and a particular transaction of the entity is without section 45 of the IBA.” In my view, it is not accurate to submit that the use of the circular was to specify a particular accounting issue targeted against one individual entity, without specifically referring to the fact that the circular on its face imposes a restriction and prohibition on “Banks licensed under the IBA.” The evidence shows that: “This Circular as issued is also applicable to all banks licensed under the IBA and not only BCBIL as your letter would suggest. For the record, none of the other licensees have registered any objections to the contents of the circular”: see letter from CBB dated 5th August, 2011. The claimant’s point that the memorandum of the other banks contain restrictions on real estate dealings, is considered below at paragraph 28.

20. The question is whether the circular prescribes matters or things which are necessary or convenient for the carrying out of or the giving full effect to the provision of the IBA. An answer to this question would entail an examination of the IBA to determine its intention and purpose. The IBA prohibits the carrying on of offshore banking business without a licence, and provides criminal penalties for persons who do so without a licence: section 4; only an eligible company can be issued a licence, and the Act defines an eligible company, which includes a company whose memorandum and articles are acceptable to CBB: section 5; an application is required to be made to CBB for a licence, and the CBB may require particulars of the applicant, including its financial standing, detailed business and financial plan

and information of a financial or other nature as CBB may require including its statement from its banking supervisory authority: section 6(2)(3); CBB may cause an investigation of the applicant for the licence concerning its financial standing; the adequacy of its capital, its earning prospects and viability, its source of funds for capitalization; the adequacy of its liquidity and accounting methods: section 7(1)(2); the Act provides for conditions in licences, including prohibiting a licensee from acquiring any material portion of the assets of another licensee “or any other institution without prior consent of CBB”: section 11(1)(g); the Act provides for transactions that are prohibited: Part (iv); provides grounds on which a licence may be revoked including if the CBB is of the opinion that the licensee is carrying on its business in a manner detrimental to the public interest or to the interest of depositors, creditors and other customers: section 27(i); and the Act requires the licensee to keep proper accounting records and audits which are to be sent to CBB, failing which a sanction can be imposed: Part (vi).

21. The above provisions show that the intention and purposes of the IBA are to provide that an offshore bank, to be licensed, has adequate financial standing, capital, liquidity and accounting methods; and prohibiting a licensee from acquiring assets from another institution without the consent of CBB; and to prevent a licensee from carrying on business in a manner detrimental to the public, depositors, creditors, and customers.

22. The evidence shows that the transaction would be a misrepresentation to the public if it was reported in the accounts of the claimant as an investment held for sale, and that it presents a misleading picture of the status of this investment: See letter of 21st June, 2011 and minutes of meeting dated 28th June, 2011. There is also the evidence that: “with no prospect of an immediate sale in sight (of the assets) this transaction will place a tremendous drag on the solvency, liquidity and financial performance of BCBIL,” and that “this investment carries a high liquidity risk in addition to risk of loss in the event of a forced sale.” There is evidence also that “the mere acquisition of the property could not have rendered any improvement to BCBIL’s financial well being given that the property was already securing the loan and legally was already under its control by virtue of its being a registered mortgage security. The balance sheet for 31 March 2011 is reflecting a much improved asset inventory and financial position due to a mere book entry although the transaction did not improve BCBIL’s solvency or liquidity. The fact that this asset may not be easily converted to cash to meet current liabilities and expenses is not reflected anywhere in the financial statements or other prudential reports. BCBIL continued to report a classified portfolio of 13.5% as at 31 March 2011, whereas if the Caye Chapel loan was handled in the conventional manner the true NPL of 38.5% would have had to be reported. This is patently misleading given that the financial status of the bank was not changed or improved in real substance.” See CBB letter dated 5th August, 2011.

23. There is also evidence that Mr. Guiseppi, the chairman of the claimant, agreed that the conversion of the loan to an investment held for sale should not have been done, though this has been denied. The effect of all of the above evidence, according to the defendant, is that the transaction can seriously affect the solvency of BCBIL and in turn affect the depositors, creditors and customers; and further the transaction as recorded in the accounts of BCBIL is misleading to the public
24. On the other hand, the claimant urges that the claimant does not have to reclassify the acquisition of the assets, which is an investment held for sale, as a non-performing loan, and therefore the non-performing loan ratio is not 38.5%, as CBB deposed, which is a basis for CBB's position that the claimant would be regarded as on the verge of insolvency. It is, the claimant says, an error to say that such a ratio exists. There is also evidence from the claimant that "The 100% provision required by the CBB in the Circular is thus contrary to US GAPP (and equivalent provisions under International Accounting Standards). The claimant says that if BCBIL was forced to account for the Caye Chapel property in accordance with the circular, inevitably BCBIL's independent auditors would need to qualify the audit opinion accordingly." To the allegation, that the transaction can seriously affect the solvency of BCBIL and that its accounting treatment of the transaction is misleading to the public, the claimant says that BCBIL has acted in accordance with accounting principles and: "The accounting treatment of the villas and of the Caye Chapel property acquired as a whole as being held for sale (and therefore by

definition not illiquid) and the value attributed to them is an accounting question which has been reviewed by BCBIL independent auditors in accordance with US GAPP.” In a nutshell, the claimant says that the transaction would not affect the solvency of the BCBIL. Its treatment in the books is in accordance with GAPP accounting principles and not misleading to the public. The requirements of the circular are therefore unreasonable and in breach of accepted accounting principles.

25. The problem that the court faces is that no witness was called to testify and be cross-examined on the criteria to determine solvency of a bank. No expert witness was called to testify and be cross-examined on USGAPP accounting principles or accounting principles in general in relation to the treatment of the transaction as a matter of accounting. In my view calling such witness would have been of assistance to the court in deciding whether the claimant acted in accordance with USGAPP accounting principles, and which would have also been relevant on whether the claimant acted reasonably in its accounting treatment of the acquisition of the assets. It has to be remembered that the burden is on the claimant to prove the claim on a balance of probabilities; and I am not satisfied, on the evidence, that the claimant has proven its case on the question of solvency, and that the treatment of the transaction in its books is in accordance with US GAPP accounting principles or accounting principles in general.
26. The claimant further alleges, as I understand the submission, that if a 100% accounting entry is made for the acquisition of the assets valued

at US\$30 million in the accounts of the claimant, as paragraph 2 of Part B of the Circular requires, it would reduce the claimant's capital from about US\$42 million to US\$12 million, and this would have serious consequences for the claimant, including the size of loans that the claimant bank could advance, and would have an impact on the profitability of the claimant. It must be remembered that the acquisition of the assets was done contrary to the Approval dated 5th November, 2007. It is clear from the evidence that the acquisition of the assets varied the terms and conditions of the loan without making the required application as required by the approval. The claimant breached the Approval which was made by the defendant under section 21.02(2) of the IBA. The Central Bank in order to correct that breach issued the Circular. It is therefore difficult to see unreasonableness or disproportion in the Circular which prescribes the accounting treatment of the acquisition of the assets, which acquisition was done in violation of the Approval. For all the reasons above, I am not satisfied that the Circular is unreasonable, disproportionate and does not comply with the requirement of section 45(1) of the IBA.

27. It is further said that the defendant acted for an improper purpose when issuing the circular because the "circular was issued as part of a targeted campaign specifically directed at the claimant and in effect punishing the claimant after the event for carrying out a perfectly lawful transaction." Therefore, according to the claimant, the Circular was issued for a purpose not provided by the section. The Circular, not only applies to the claimant, but to all banks under the IBA, as we

shall see below at paragraph 28. I do not agree, for the reasons above, that the transaction was clearly lawful at the time it was entered into and is still lawful. The claimant also submits that the CBB erred in law in considering the transaction as unlawful in that it was contrary to the approval. As mentioned above, no application was made, as required by the approval, to vary the terms of the loan. It is clear that the acquisition of the assets was done contrary to the approval.

28. The claimant submitted that “The extreme impact of the circular on the applicant illustrates clearly why the applicant was entitled to be heard or consulted by the Central Bank on the terms of the circular before it was issued;” and “at no stage was the claimant afforded any opportunity to make representations on the contents of the circular or its particular wording or requirements.” Considering the impact of the circular, fairness, states the claimant, required “that the claimant and the banking industry should have been consulted before any circular in these terms was issued.” Discussions, say the claimants, on the transaction and on “issues of accounting and impairment” are not enough nor adequate. The question is whether the claimant was afforded an opportunity to be heard on the contents and wording of the circular. It is to be noted that the provisions of the Circular apply to any bank licenced under the IBA, and deal with the manner of treating assets held for sale in the accounts of any bank, including claimant. It has also to be noted that the memoranda of association of the other banks, contain restrictions on real estate dealings, as the claimant points out, which would account for them not stating objections to the circular. It does not necessarily follow that because

the other banks memoranda restrict real estate dealings, they would not ever engage in such dealings. In this sense, the circular is relevant and applicable to them as well. Moreover, the applicability of the circular to the banking industry seems to have been recognized by the claimant who wrote that, “Fairness requires that the claimant and the banking industry should have been consulted.”

29. The evidence is that there were meetings and consultations between the claimant and the defendant on the acquisition of the assets and the transaction. There was, for instance, a meeting on 1st June, 2011 at the request of the claimant where there was discussion on the acquisition. The evidence by affidavit is that the claimant enquired at a meeting with the defendant on 28th June, 2011, as we saw above, about the accounting treatment recommended for recording the acquisition of the assets, and was informed that neither the defendant nor the IBA dealt with such a situation. The evidence also shows that the claimant at the said meeting was asked about what accounting treatment was being applied by the claimant or required by external auditors with respect to the acquisition of the assets. At that meeting, a representative of the claimant was told that at a previous meeting he had committed to provide the defendant with proposed accounting treatment of the assets. The representative said that he did not recall making such a commitment. At that stage, the representative and the claimant knew, or ought to have known, that the issue was the accounting treatment by the claimant of the transaction or the acquisition of the assets, which is the purpose of the circular. There is also an e-mail dated 30th June, 2011 to Thomas Tillett, manager of the

claimant, from the defendant, requesting copies of all related journal entries in relation to the acquisition of the assets. Mr. Tillett also deposed that meetings did occur in relation to the accounting treatment.

30. The above is evidence that the claimant was aware of the subject matter of the Circular and had several opportunities to address it and give its views. The claimant was, on the above evidence, given an opportunity to be heard, and was heard on the subjects contained in the circular, even though the actual circular was not given to the claimant for comments. No authority was cited to show that even though an opportunity was afforded to discuss the subjects contained in the Circular, that the claimant was, at law, still entitled to be given the actual Circular for comments before it was issued. Consequently I do not think that the claimant has a case on the issue that its right to be consulted and heard on the contents of the circular was violated.

Conclusion

31. For all the above reasons, I make the following orders:

- (1) The claims in the claim form in this matter are dismissed.

- (2) The claimant to pay costs to the defendant to be assessed, if not agreed.

Oswell Legall
JUDGE OF THE SUPREME COURT
9th April, 2013

APPENDIX

Item 1	
Revised Licence	Paragraph 6
Item 2	
Circular	Paragraph 8

P.T.O.