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

CLAIM NO. 80 of 2011

THE BELIZE BANK LIMITED CLAIMANTS
BCB HOLDINGS LIMITED
BRITISH CARIBBEAN BANK INTERNATIONAL LTD.

AND

THE CENTRAL BANK OF BELIZE DEFENDANT

Hearings
2012
1st November
2013
4th February

Mr. Eamon Courtenay SC and Ms. Pricilla Banner for the claimants.
Mr. Denys Barrow SC and Ms. Naima Barrow for the defendant.

LEGALL J.

JUDGMENT

Background

1. The claimants are all incorporated companies carrying on business in the banking sector with offices in Belize City. The No. 2 claimant (BCBHL) is the parent company of the No. 1 claimant (BBL); and the No. 3 claimant (BCBIL) is a subsidiary of BBL. The defendant

(CBB) is a body corporate established by section 4(1) of the Central Bank of Belize Act, Chapter 262. There is another bank incorporated and located in the Turks and Caicos Islands, named British Caribbean Bank Limited (BCBL) in which BBL is a shareholder.

2. BCBL was in 1998 solely owned by BBL and there was, in place at that time, an agreed Memorandum of Understanding (MOU) and later a 2004 Multi Lateral Memorandum of Understanding (MMOU) for the exercise of consolidated supervision of the banks, and the sharing of information, by the Financial Services Commission of the Turks and Caicos Islands (FSC) and the CBB. In spite of the MOU and MMOU the FSC, without informing the CBB, permitted, by the process of the issuing of shares, BCBHL to be the new owner of BCBL in place of BBL which had previously held 100% shares in BCBL, but reduced to 23% of the shares in BCBL, which was later increased to 25%, thereby removing BCBL from the regulatory control by CBB through the control of BBL. The CBB in a letter dated 21st February, 2011 therefore informed the FSC, in critical language that, among other matters, because of the above reduction of shares, CBB will "continue to act unilaterally as it sees fit in the interest of Belize, the MMOU not-withstanding." The CBB submitted that this new ownership structure brought into place a parallel banking system between BBL, BCBHL, BCBL and BCBIL.

3. Correspondence between parties to the claim would assist in following the emergence of the alleged parallel banking system. On receiving a letter from Mr. Phillip Johnson, President of BBL, that

BBL was a minority shareholder in BCBL, the CBB by letter to BBL dated 6th July, 2009 wrote that it was "concerned that this may be a case of parallel banking and requested BBL to submit to CBB by 30th July, 2009 an updated group structure chart, and "a list of all shareholders (5% and over) and directors of BBL, BCBL and BCBIL along with the number of shares held by those shareholders." It is not clear whether the requested information was submitted to the CBB. But it seems that the next letter on the issue of parallel banking was not sent by CBB to BBL until between September and December, 2010, more than one year after the letter of July 2009. The governor of CBB in a letter dated 16th December, 2010 on parallel banking wrote to the chairman Mr. Guiseppi of BBL as follows:

> "The fact that BBL and British Caribbean Bank International Limited (BCBIL) are owned and controlled by the same holding company as BCBL and do not come under consolidated supervision, is sufficient evidence that a parallel owned banking structure exists. The fact that you, Micheal Coye, Dr. Uric Bobb, Phillip Johnson, Phillip Osborne and Peter Gaze are directors and/or officers of all three banks or their parent companies is further evidence."

4. The letter concludes that there is reason for CBB to proceed under section 36 of the Banks and Financial Institution Act, Chapter 263 (BFIA), and that BBL would be afforded the opportunity to address all its concerns in relation to the allegation of parallel banking. In

another letter of the same date – 16th December, 2010 – to Mr. Guiseppi and Mr. Johnson of BBL, the CBB wrote:

> "In late July 2010, the Central Bank completed a Special Examination of BBL. … The Central Bank is thus of the view that the facts and circumstances, as set out in the Special Examination Report and other related correspondence, constitute reasonable grounds for the Central Bank to conclude that BBL, in conducting the business of a licensed Bank, has carried out and is pursuing a course of conduct that is detrimental to the interest of its depositors and its customers.
>
> The Central Bank proposes to issue Order or Directives to BBL in respect of its conduct. In accordance with section 36(4) of the BFIA, BBL is here notified that it is entitled to make objections to the Issuance of Orders or Directives, in respect of the aforesaid conduct, on or before 17 January 2011. Any BBL objections can be made at the office of the Central Bank of Belize on Goal Lane, Belize City, Belize, at 11:00 a.m. At this time, the Central Bank will hear BBL's objections (if any) and determine whether or not Orders or Directives should be issued to BBL."

5. By a previous letter dated 3rd September 2010 to BBL, CBB accompanied the letter with a Basel Committee Report on Parallel-owned Banking Structures. The Basel Committee published the report in January 2003 which was prepared by members of a Working Group on Cross Border Banking consisting of persons with

experience in monetary policy, and banking supervisors from several countries, including the UK, France, Germany, Japan, Singapore and the USA and the Caribbean. The claimants do not object to the admissibility of the Basel Report in evidence; but object to the Report on the ground that it is not part of the law of Belize. But at the same time, the claimants rely on aspects of the Report in support of their written submissions. We will consider this Report below.

6. In another letter dated 21st December, 2010 to the second claimant, the CBB wrote: "That the change in the shareholding structure of British Caribbean Bank Limited (BCBL) that took place on 1 December 2008 effectively made BCB Holdings the owner of a parallel banking structure. This resulted from the reduction of the Belize Bank Limited's (BBL) shareholdings in BCBL, to 23.1% which changed BCBL's status from an affiliate as defined by section 2(1) of the Banks and Financial Institutions Act (BFIA). For purposes of consolidated supervision, this effectively excludes BCBL from the BBL group." In the said letter, The CBB states that a parallel banking structure exists because:

(a) BCBL has the same holding company as Belize Bank Limited (BBL) and British Caribbean Bank International Limited (BCBIL);
(b) All three banks share common directors and officers;
(c) BCBL and BCBIL share similar names;
(d) All three banks conduct interlinked banking business and are known to act

in consert;

(e) All three banks are indirectly controlled by the same person; and

(f) BCBL is not subject to consolidated supervision by the Central Bank.

7. Parallel banks are defined as "banks licensed in different jurisdictions that, while not being part of the same financial group for regulatory consolidated purposes, have the same beneficial owners and consequently often share common management and interlinked business: see first affidavit of Glenford Ysaguirre at paragraph 4. Mr. Ysaguirre in his affidavit highlighted problems associated with parallel banking as follows:

> "Parallel banking is undesirable in and of itself. The particular risks associated with parallel-owned banking structures stem primarily from the possibility that officers or directors of one of the parallel banks will expose the bank, either intentionally or unintentionally, to higher risks through transactions with related parallel banks. There is a risk that transactions may not be conducted at arms-length, or that the relationship may be used to fabricate the financial position of one or more of the institutions. For instance, the following may result:
>
> "• One parallel bank may seek to evade legal and other regulatory lending limits by carrying out transactions through its related

parallel banking, thereby increasing concentration risk.

- Assets, earning and losses may be artificially allocated between parallel banks. Similarly, low-quality assets and problems loans can be shifted between parallel banks to manipulate earning or losses and to avoid regulatory scrutiny.

- Capital can be generated artificially through the use of stock purchase loan from one parallel bank to the other. As a result, capital for one of the parallel banks is increased even though there is no external capital injection into either bank.

- One of the parallel banks may be the conduit or participant in a transaction that violates local law or the laws of a foreign country, or that is designed to benefit one of the banks, to the detriment of the other.

- One bank that experiences financial difficulties may pressure the related institution to provide liquidity or other support in excess of legal limits or prudential norms.

- Money-laundering concerns may be heightened, especially when the foreign parallel bank is situated in a country where anti-money laundering standards are not robust.

> The parallel banking structure also facilitates decision by boards of directors and or officers common to both banks that are not necessarily in the best interests of the supervised bank but not subject to Central Bank control because made by a bank which is not subject to the Central Bank's consolidated supervision."

8. The said letter of 21st December, 2010 concluded that the CBB had recommended voluntary acceptance through BBL of consolidated supervision, inclusive of BCBHL and BCBL, but this offer was rejected.

9. The evidence shows that before the directives, considered below, were issued several meetings between the CBB and the first and second claimants were held, during which the CBB informed the claimants that a system that permits parallel banking to occur must be subject to consolidated supervision or be dismantled. Where a parallel banking structure is not remedied, one solution, according to the CBB, is to "ring fence" the BBL who is under the CBB's control, under the BFIA. The term "ring fence" means limiting the exposure of the domestic bank, to its related parallel banks and other members of the corporate group. The purpose of the Directives, according to the CBB, is to ring fence the first claimant. The Governor testified that the claimants were told by him that the Directives were likely to be issued if the situation of parallel banking continued without consolidated supervision. The CBB also informed the claimants that

it would take regulatory action under section 36(1) of the BFIA, which states:

> "36.-(1) Where the Central Bank has reasonable grounds to believe that a licensee, a holding company, an affiliate or an official of such a licensee (hereinafter the "subject person"), in conducting the business of the licensee, holding company or affiliate, is committing or pursuing or is about to commit or pursue any act or course of conduct that is detrimental to the interests of its depositors or customers or a violation of this Act, or any regulation, circular, order, directive, notice or condition imposed in writing by the Central Bank, the Central Bank may direct the subject person to do any or all of the following-
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> (a) cease or refrain from doing the act or pursuing the course of conduct, or
>
> (b) perform such acts as, in the opinion of the Central Bank, are necessary to rectify the situation. In particular, but without limiting the generality of the foregoing, the Central Bank may-
>
> (i) require the subject person to refrain from adopting or perusing a particular course of action or to restrict the scope of its business in a particular way;

(ii) impose any limitation on the subject person's acceptance of deposits, the granting of credit or the making of investments;

(iii) prohibit the subject person from soliciting deposits either generally or from persons who are not already depositors;

(iv) require the revision of any contract to which the subject is a party, or order the subject person to make restitution or recompense to any person aggrieved by its actions; or

(v) require the suspension or removal from office of any director, officer, official or other subject person."

10. In the letter above dated 16th December, 2010 from CBB giving a time period to BBL to object to the issuance of the Directives, Mr. Guiseppi replied by letter dated 23rd December, 2010 that: "BBL is not able to prepare objections to any proposed Orders or Directives in circumstances where the Central Bank has not yet provided the terms of those Orders or Directives. Understandably, BBL will need details of the Orders and Directives that the Central Bank proposes to make in order to consider them and formulate any objections that it may have.".

11. The CBB replied on 4th January, 2011 to Mr. Guiseppi letter that: "In your letter you say that The Belize Bank Limited is not able to prepare objections to any proposed Orders or Directives in circumstances where the Central Bank has not yet provided the terms of those Orders

and Directives. . . . The Central Bank has notified you in detail of the circumstances in which it is considering issuing Orders or Directives. . . . Please review section 36(4) under which the Central Bank issued the notice of 16th December, 2010 as well as the contents of the notice. The Belize Bank Limited is entitled to present objections to the making of any Orders or directives based on the actions or course of conduct of the bank that have been set out in the notice. . . . Formulation of these, (if any), will depend on the representations of the licensee. Accordingly, the 30 day period in which to object to the issuance of Orders or Directives on the circumstances set out by the Central Bank remains as stipulated in my notice of 16 December 2010."

12. Mr. Guiseppi replied by letter dated 7th January, 2011, and pointed out that BBL was entitled to know what action was being proposed in order to make informed objections. Mr. Guiseppi refers to a precedent from CBB, in another matter, where the CBB provided a text of the proposed directive prior to its issuance. This text was given in a letter dated 5th August, 2010 from CBB to BBL informing BBL of its intention to issue a directive, and inviting BBL to make representations why the directive should not be issued. The claimants submit that this precedent should be followed, and it is unfair and in breach of natural justice not to do so.

13. On 17th January 2011 BBL, although previous requests for a copy of the text of the Directives were not complied with prior to their

issuance, still submitted to the CBB elaborate written objections to CBB's proposal to issue the Directives. Having received the objections, the CBB on the 9th February, 2011 sent to the BBL the two Directives, Directives 1 and 2 of 2011 which are subject matters of this case. The Directives were issued under section 36(1) of the BFIA. On the 10th February, 2011, the CBB issued revised terms and conditions of the licence of the BCBIL (the Revisions) under section 8(2) of the International Banking Act Chapter 267 (IBA). Section 8 is as follows:

> "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."

The Revisions replaced a licence previously granted to BCBIL on 3rd August, 2009 by CBB.

The Directives

14. Due to a determination by the CBB that BCBHL and BCBL were conducting parallel banking, which determination found agreement of the FSC; and because BBL reduced its shareholding in BCBL from ownership of BCBL to 23% which the CBB determined enabled and

facilitated the parallel banking system, in which BBL was in active participation and which system according to the CBB, was not in the interest of the stability of BBL its depositors and creditors and the domestic banking system, the CBB issued on 9th February, 2011 to the BBL the following directives:

(a) Directive No. 1

"i) The Belize Bank shall take immediate steps to divest and shall divest of its entire share holdings in the British Caribbean bank Limited located in the Turks and Caicos Island and shall also wind up and cease all its banking relationship with that entity.

ii) The Belize Bank and its subsidiary the British Caribbean Bank International Limited shall not, without the prior written approval of the Central Bank, conduct any further transactions, whether directly or indirectly with British Caribbean Bank Limited or with any of its subsidiaries, affiliates and related parties or shareholders, directors and officers of British Caribbean Bank Limited.

iii) The Belize Bank and its subsidiary the British Caribbean Bank International Limited shall not, without the prior written approval of the Central Bank, conduct any transactions, whether directly or indirectly with BCB Holdings Limited or with any of its subsidiaries, affiliates and related parties or shareholders, directors and officers of BCB Holdings Limited.

iv) The Belize Bank and its subsidiary the British Caribbean Bank International Limited shall not, without the prior written approval of the Central Bank, act or

continue to act as collecting agent for deposits or loan payments on behalf of the British Caribbean Bank Limited.

v) The Belize Bank shall ensure that no member of its board of directors or officers or no member of the board of directors or officers of its subsidiary, the British Caribbean Bank International Limited are allowed to serve on the board or management of British Caribbean Bank Limited or any of its subsidiaries.

Request for any such transactions as described in ii), iii) and iv) above should be presented to the Director Financial Sector Supervision at the Central Bank building on Gabourel Lane, Belize City, Belize with all supporting documentation. The Central Bank upon the request of the Belize Bank Limited may grant standing approval for small recurring transactions at its discretion.

This directive comes into effect immediately and the restrictions contained in ii), iii), iv) and v) above will remain in place until such time as the Central Bank is satisfied that BCB Holdings Limited has effectively relinquished ownership control of the British Caribbean Bank Limited. The Central Bank may vary this directive or any part thereof as it may deem fit."

15. The CBB also determined that a transaction dated 20th January, 2011 whereby BBL acquired 250,000 ordinary shares valued at BZ7.4 million dollars in BCBL, a parallel owned bank, as additional capital contribution from its parent company BCBHL, was not an arms length transaction; and that if the transaction was allowed, that it would present a misleading picture of the capital adequacy and soundness of

BBL, the CBB issued another Directive on the said 9th February, 2011 as follows:

(b) Directive No. 2

> "i) The Belize Bank Limited take immediate steps to reverse the transaction of 20 January 2011 whereby it acquired 250,000 ordinary shares of British Caribbean Bank Limited valued at BZ$7.4 million by way of further capital contribution from its parent company.
>
> ii) The Belize Bank shall provide the Central Bank with proof of the reversal of the said transaction by 15th February, 2011.
>
> This directive is to be complied with forthwith."

Revision and Variation Orders

16. In relation to the revision of the licence of BCBIL, the CBB had issued the licence with terms and conditions under the BCBIL in June 2009. Since the CBB came to the determination that because of the creation and participation in a parallel banking scheme by BBL, and by extension BCBIL, as a subsidiary of BBL, and in the interest of BBL and BCBIL, their customers and depositors, the CBB on 10th February, 2011 issued revised terms and conditions of the licence to restrict actions by BCBIL supportive of a parallel banking structure.

17. The CBB also issued, as mentioned above, two variation orders, Variation orders No. 1 and No. 2 dated 23rd June, 2011 and 22nd December, 2011 respectively for the purpose of varying the terms of

Directive No. 2 of 2011. The factual circumstances under which the variation orders were made were not disputed. The claimants, on 15th February, 2011, on an exparte application, applied for an interim injunction restraining the defendant from enforcing the Directives and the Revision, which injunction was granted on the said date. The claimants, about a week later, filed an application to continue the injunction until the hearing and determination of the claim which was previously filed. On 22nd February, 2011 the defendant filed an application to discharge the injunction. The Supreme Court heard the applications, and on 25th May, 2011, the court, in a written decision of the said date, discharged the injunctions. Since the injunction was discharged on 25th May 2011, the Directives made on 9th February, 2011, according to the defendant, became effective, not from 25th May, 2011, but from 9th February, 2011 when they were made. Therefore the financial statements and reports of BBL for the financial year ending 31st March, 2011, according to the defendant, must comply with the Directive as at 9th February, 2011, and not as at 25th May, 2011 as was done by BBL which should have in its financial statements for the year ending 31st March, 2011 reversed the transaction of 20th January, 2011.

18. BBL disagreed and argued that the financial statements were correct, and in accordance with generally accepted accounting principles. BBL says, if I understand it correctly, that the Directives take effect on the discharge of the injunction on 25th day of May, 2011, that is after the end of BBL's accounting year – 31st March 2011 – and therefore the transaction would be reflected in the financial statements

of the coming financial year – 31st March, 2012. According to BBL its financial statements and reports for the financial year ending 31st March, 2011 were approved by its auditors, accountants and its Board of Directors on 23rd and 24th May, 2011 before the discharge of the injunction on 25th May, 2011. BBL says that since the interim injunction was in effect up to the 24th May, 2011, the directives did not take effect until after the discharge of the injunction on 25th May, 2011 when the financial year had already ended and the financial report had already been approved and audited, and therefore the financial statements cannot now be properly amended. The decision discharging the injunction is not retrospective but prospective and from 25th May, 2011. The factual position, according to BBL, is that the financial statements had already been approved and audited for a transaction that factually occurred during the financial year ending 31st March, 2011 and that fact cannot be changed and it is against accounting principles to change it. The claimants state that the transaction could be accounted for in the financial statements of BBL for the financial year ending 31st March, 2012.

19. The defendant did not agree, and on 23rd June 2011, the CBB, more than three months after the date of the Directives, issued without express notice to the claimants, an order, Variation Order No. 1, under section 36(3) of the BFIA varying Directive No. 2 of 2011 as follows:

> "The Belize Bank Limited and its Executive Chairman, Mr. Lyndon Guiseppi; its Board of Directors namely, Dr. Euric Bobb, Mr. John Searle, Ms. Cheryl Jones and Mrs. Geraldine Davis-Young shall immediately cease and desist from any further public dissemination of its financial statements for the year ending 31 March 2011 until the bank is in full compliance with Directive 2 of 2011 as stipulated by the Central Bank of Belize.
>
> For avoidance of any doubt, full compliance with Directive 2 of 2011 means that The Belize Bank Limited must reverse the transaction of 20 January 2011 whereby it accepted a gift of 250,000 shares in the British Caribbean Bank Limited at a value of $7,403.781 and it must restate and resubmit to the Central Bank of Belize all prudential and financial reports issued since 20 January 2011 to reflect the reversal. This order applies to the audited financial reports for 31 March 2011 which must also restated and resubmitted to the Central Bank of Belize for approval prior to publication in accordance with Section 28(1) of the BFIA."

20. The BBL after much discussion allegedly complied with Directive No. 2 by returning the 250,000 shares and reversing the transaction, and also allegedly complied with Variation Order 1 to the extent that BBL had restated the prudential and financial reports and submitted them to CBB. But these restated financial reports were not shown to have been signed by the directors of BBL, nor to have been audited. Since the CBB took the position that the reports should be signed and audited, it issued on 22nd December, 2012 Variation Order No. 2 that took effect immediately requiring as follows:

"Now therefore pursuant to section 36 of the BFIA the CBB hereby issues the following variation order in support of Bank Directive No 2 of 2011 and Variation Order No 1

1. BBL shall have the restated prudential and financial reports audited by an approved external auditor in the same way as if the said reports were the reports required to be audited by section 28 and in accordance with section 30 of the BFIA.
2. BBL shall have the said reports signed in the usual manner by an on behalf of its board of directors,
3. BBL shall submit the said reports, audited and signed as specified above (the completed reports), to the Central Bank not later than 16th January 2012 and
4. BBL shall thereafter, and not alter than 31st January 2012, publish, exhibit and otherwise deal with the completed reports in the manner specified by section 28 of the BFIA."

The Claims

21. The claimants urge that the Directives 1 and 2, and Variation Orders 1 and 2 are ultra vires the provisions of the BFIA and unlawful, null and void. They further claim that the revision is also contrary to the IBA, unlawful null and void. On 24th February, 2012 the claimants filed an amended fixed claim form, amending a previous claim form filed on 21st February, 2011, claiming the following reliefs:

"1.1 Declarations that Directives 1 and 2 issued by the Central Bank of Belize on 9th February, 2011, Variation Orders 1 and 2

issued 23rd June, 2011 and 22nd December, 2011 and the Revisions to BCBIL's License (each as defined below) are: ultra vires the Central Bank's statutory powers; and/or

(a) are disproportionate; and/or

(b) were made following an unfair procedure; and/or

(c) were made on the basis of an erroneous view of the law; and/or

(d) were made on the basis of an erroneous view of the facts; and/or

(e) were made one the basis of irrelevant considerations; and/or

(f) were made following a failure to consider relevant considerations; and/or

(g) are arbitrary and/or made with an improper motive;

and as a consequence are unlawful, void and of no effect.

1.2 the defendant shall be restrained, by way of an injunction, whether by itself, its servants or agents or howsoever, from acting upon, in consequence of or seeking to enforce the Directives, the Variation Orders, and the Revisions to BCBIL's Licence;

1.3 such other reliefs as the court deems just and equitable; and

1.4 costs."

The Ultra Vires Points

(i) Notice

22. It is submitted by the claimants that CBB failed to comply with section 36(4) of BFIA which requires, prior to the issuance of the directives, a notice containing "a statement of the actual or purposed action or course of conduct" giving rise to the directives, and also

containing the time and place, not less than 30 days when the CBB will hear objections; and therefore the Directives, according to the claimants, are unlawful, null and void and ultra vires the section under which the Directives were made. Section 36(4) of BFIA states:

> "(4) Prior to the issuance of any order or directive under subsection (1) or (2), the Central Bank shall cause to be served on or delivered to the licensee or subject person a notice containing a statement of the actual or proposed action or course of conduct referred to in subsection (1), or of the failure to satisfy the requirements referred to in subsection (2), and specifying a time and place (not less than thirty days after the service or delivery of the notice) at which the Central Bank shall hear objections and determine why an order or directive should not be issued, and if the Central Bank so decides a copy of every such order or directive shall promptly be served on the subject person."

23. The CBB, say the claimants, "failed either to give adequate notice or to give any notice at all" and therefore the Directives are void. Moreover, say the claimants, the letter from the CBB dated 16th December, 2010, a purported notice, "made no mention of alleged parallel bank activities which were plainly the object of the Directive;" and in any event, provisions of the letter did not amount to a "statement of the actual or proposed action or course of conduct" required under section 36(4) above.

24. As shown at paragraphs 3 and 4 of this judgment, the CBB wrote two letters to the BBL dated 16th December, 2010, prior to the issuing of the Directives. One letter stated that there was "sufficient evidence that a parallel owned banking structure exists" and that there was reason to proceed under section 36 of the BFIA, and BBL would be afforded the prescribed time to address concerns. In the other letter given above of the same date, the CBB states that it purposes to issue the Directives, and tells BBL that it is entitled to make objections to the Directives on or before 17th January, 2011 giving BBL the thirty days opportunity stated in section 36(4). In another letter above dated 21st February, 2010, the CBB wrote that BCBHL became the owner of a parallel banking structure, and stated reasons, as we saw above, why a parallel banking structure existed. This letter concludes, that "the Central Bank is now informing you that it will take regulatory action under section 36(1) of the BFIA"… Moreover, the letter above dated 4th January, 2011 reminded the claimant of the period given for their objections. And in another letter dated 5th January, 2011, BBL accepted that it received a previous letter regarding CBB's notice of intention to issue Directives and Orders.

25. In my view the above letters amount to evidence that shows that the claimants, although not supplied with the actual Directives prior to their issuance, knew that Directives would be issued and the subject matter of their contents and proposed action and the reasons for their issuance prior to them being issued. The doctrine of ultra vires ought to be reasonably and not unreasonably understood and applied and whatever may fairly be regarded as incidental to or consequential

upon those things which the legislature has authorized ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires: see ***AG v. Great Easter Ry Co. 1880 5AC 473 at p 478***. In my view, the evidence above satisfies the notice required by section 36(4). The notice, as we saw above, was given in December 2010 and the Directives were not issued until 9th February, 2011 thereby giving adequate opportunities to the claimants to object to the issuance of the Directives, the subject matter of which, and the reasons for which, the claimants knew.

26. After insisting on having prior notice of issuance of the actual terms of the Directives, the claimants on 17th November, 2010 did give in writing to the CBB their objections to the issuance of the Directives. The written objections to the Directives were given in an eight page document containing thirty-three paragraphs containing their objections to the Directives at great length. In my view, this clearly shows that the claimants were heard on the Directives prior to their issuance and shows that the claimants knew the Directives were coming and had knowledge of the subject of their contents and the proposed action.

27. (ii) <u>Requirements</u>

The submission is that Directive No. 1 "purported to make requirements" which section 36(1)(b)(i), under which it was made, did not authorize; and therefore the Directive is unlawful and void. The "requirements" objected to by the claimants are contained at paragraphs (i) and (v) of the Directive 1 given above. The submission

is that paragraph (i) does not fall within the words of the above section 36(1)(b)(i), namely to "refrain from adopting or perusing (sic) a particular course of action." Therefore paragraph (i) of the Directive is void. As I see it, on a careful consideration of section 36 it would be seen that paragraph (i) of the Directive, falls within the said section, especially section 36(1)(a) and (b) of the Act which gives the CBB power to "direct" or "to perform such acts," to rectify a situation. Section 36(1)(b)(i) gives the CBB a discretion "to restrict the scope" of a licensee's business" in a particular way." Paragraph (i) of the Directive in effect restricts the business of BBL in a particular way. This answer is also applicable to the claimants objection to paragraph (v) of Directive 1.

28. (iii) Reversal

In relation to Directive 2, it is said that the requirements of this Directive requiring BBL to reverse the transaction of 20th January, 2011 concerning the 250,000 ordinary shares of BCBL, do not fall within section 36(1)(b)(iv) of the Act under which it is made, because the Directive does not require the revision of any contract, as mentioned in the section, and therefore the Directive is unlawful and void. Section 36(1)(b) clearly authorities the CBB to direct BBL "to perform such acts as in the opinion of the Central Bank are necessary to rectify the situation." The situation the CBB wanted to rectify was the transaction (the Transaction) whereby BBL increased its shareholding on 20th January, 2011 in BCBL by 250,000 ordinary shares valued at $7,403,781 which CBB considered to be not an arms

length transaction and misleading. Surely this situation falls within those general words above of section 36(1)(b) of the BFIA.

29. (iv) Insufficient Evidence

The claimants urge that CBB acted without sufficient evidence and misdirected itself when it issued the Directives 1 and 2 under section 36(1). This section, authorizes the CBB where it has reasonable grounds to believe that a licensee in conducting its business "is committing or pursuing or is about to commit or pursue any act or course of conduct that is detrimental to the interest of its depositors or customers. …" The claimants say that on the facts, reasonable grounds to believe the quoted portion above, did not exist, as there is no evidence that the claimants committed or about to commit or pursue such act or conduct. The evidence in the various letters above between CBB and BBL, shows that a parallel banking structure in existence, involving the claimants and BCBL; and there is also the Transaction which the evidence shows presents a misleading picture of the capital adequacy of BBL. The evidence is that there existed a parallel banking system and it has been shown above the problems of such a system. This evidence, it seems to me, constitutes reasonable grounds under section 36(1) of BFIA to make the Directives. It is true that the drafters of the Directives, instead of including the relevant words of section 36(1) in drafting them, which in my view ought to have been done, used only words in relation to the conduct of BBL such as "facilitation of and participation in parallel banking scheme not in the best interest of the domestic banking system and in consequence its depositors and creditors:" whereas section 36(1)

speaks of licensee "committing or pursuing or is about to commit or pursue any act or course of conduct that is detrimental to the interests of its depositors or customers." But the evidence is that participation in a parallel banking scheme is conduct that is detrimental to the interest of BBL's customers or depositors. It seems to me though that there may not be a meaningful difference between "facilitation and participation in a parallel banking scheme" and "committing or pursuing" such parallel banking scheme.

30. It is true that on the face of the Directive 1 there is no statement that actions by BBL are detrimental to its depositors and customers as submitted by the claimants. Section 36(1) under which the Directive was issued does not require such a specific statement on the face of the Directive, and I have not found any provision in the Act which requires it. The letter of 16th December, 2010 to BBL is evidence that the actions being pursued by BBL are detrimental to BBL's depositors and customers. The Directive No. 1 itself states that participation in parallel banking scheme is not in the best interest of the domestic banking system its depositors and creditors of BBL, who knew of the allegation against it of parallel banking. And there is evidence in the second affidavit of Glenford Ysaguirre highlighting problems associated with parallel banking which could result in detriment to the banks, depositors and customers.

31. (v) <u>Misleading</u>

Directive 2 at the fourth paragraph states that the CBB has determined that if the Transaction is allowed it will present a misleading picture of the capital adequacy and soundness of BBL. The claimants say there is no evidence to support what is stated above in the fourth paragraph of the Directive, or that the Transaction is detrimental to the interest of BBL's depositors and customers. Therefore the Directive 2 is void and unlawful and contrary to section 36(1) of the Act. But there is, in fact, evidence from Mr. Ysaguirre in his fourth affidavit which is supported to some extent by Mr. Guiseppi in his fifth affidavit where a share transfer form dated 31st May, 2011 is exhibited, to the effect that BBL transferred 3,249,999 shares at $1.00 US or ($2.00 BZ) each in BCBL to a company named BB (TCl) Holdings Limited, the parent company of BCBL, for the sum of US$6,701.890.38. The above amount of shares transferred included the said 250,000 shares referred to above in the Transaction which were valued, as we saw above, at $7,403,781, which when divided by 250,000 would result at $29.16 BZ per share, greatly higher than the $2.00 per share above. In relation to the above difference in the price of the shares, Mr. Ysaguirre in his fourth affidavit at paragraph 14 swore as follows:

> "This implies that the other 2,999,999 shares of the exact same class were divested by the BBL for a disproportionately lower price of BZ$2.00 per share i.e. at par value (See Exh. L.G. 36 to fifth affidavit of Lyndon Guiseppi). This is a marked variation in pricing for identical assets of the same class and underscores the Central Bank's concern as to the integrity of the value assigned to the

> 250,000 shares when they were acquired on 20th January 2011. The huge discrepancy in pricing treatment for these identical shares also underscores the Central bank's concerns about financial statements that could mislead the public and hence the need to expunge the entire transaction of 20th January 2011 from the books of BBL."

32. The transfer form giving particulars of the transfer of the 3,249,999 shares at US$1.00 each was given in evidence by Mr. Guiseppi in paragraph 12 of his fifth affidavit. On the basis of the above, it is a misconception, in my view, to submit that there is no evidence to support what is stated in the fourth paragraph of Directive 2.

33. It is further said that there has been no breach by BBL of the BFlA or any regulation, circular, order, directive, notice or condition imposed in writing by the CBB. Once again the evidence is that there was non compliance by BBL of e-mails from CBB not to increase its shareholding in BCBL, – not to engage in the Transaction; and in a letter dated 31st January, 2011 to BBL CBB said it cannot support the Transaction for several reasons, including the valuation of the 250,000 shares at a value of BZ7.4 million or BZ29,16 per share on the ground that it was not derived from an objective arms length assessment, and because CBB did not agree that an investment in BCBL, an entity that is weaker than BBL, can strengthen BBL's capital. BBL by letter dated 1st February, 2011, in spite of the correspondence above from CBB requesting BBL not to complete the Transaction, BBL in the

letter to CBB said that the "transaction had been completed and all steps have been taken including the lodgment and filing of the share transfer in TC1": see e-mail and letters at G.Y. 32 to 37 of the fourth affidavit of Glenford Ysaguirre. The above is clearly evidence of violation of requirements in writing given by CBB to BBL.

34. (vi) Necessary to rectify the situation

It is said by the claimants that section 36(1)(b) only permits the CBB to issue directives where what is required is necessary to rectify the situation – parallel banking. The claimants state that the only action which could be said to be necessary to rectify the situation was dialogue between CBB and FSC. The section states inter alia, that the CBB may direct the licensee to "perform such acts as, in the opinion of the Central Bank, are necessary to rectify the situation." The evidence above shows that parallel banking is a course of conduct that is detrimental to the interest of depositors and customers. CBB therefore had the authority under the general words above of section 36(1)(b) to direct a reversal of the transaction to rectify the situation. Moreover, the relationship between FSC and CBB, as we saw above, was not amendable to dialogue at the date of the Directive, because the relationship had been terminated about one month before because of mistrust and alleged misconduct of FSC in relation to BBL reduction of shares in BCBL without prior information to CBB by FSC. It seems to me, in that environment of distrust, it would have been an unreasonable exercise to engage FSC in productive dialogue,

especially considering the contents of the letters exchanged between the parties.

35. (v) Restrictions

The claimants further state that section 36(1)(b)(i) above authorizes the imposition of restrictions on the subject person, in this case the BBL; but Directive 1, made under the section, requires at paragraph (i) BBL "to do something positive" which requires BBL "to take immediate steps to divest and shall divest of its entire shareholdings in BCBL and shall also wind up and cease all its banking relationship with that entity." The above paragraph (i) of Directive No. 1 does not, according to the claimants, impose restrictions as the section requires, but does something positive, and therefore the paragraph is contrary to section 36(1)(b)(i) of the Act. Once again paragraph (i) is not only consistent with the general power given by section 36(1)(b), but is in conformity with section 36(1)(b)(i) when it required BBL to wind up and cease all its banking relationship with BCBL. This seems to fall within the power of CBB under the section 36(1)(b)(i) to restrict the scope of a licensee business in a particular way.

36. Paragraph (v) of Directive 1 which restricts members of BBL Board of Directors and officers from serving on the board or management of BCBL is also said to be inconsistent with section 36(i)(b)(i) of the BFIA and void. Once again section 36(1)(b)(i) states that the CBB may restrict the scope of a licensee business in a particular way. Paragraph (v) of Directive 1 restricts directors and officers from

serving on the board of BCBL and therefore restricts the business of BBL in a particular way.

37. (vi) Contract

Under section 36(1)(b)(iv) of the BFIA, the CBB is authorized to "require the revision of any contract to which the subject is a party, or order the subject person to make restitution or recompense to any person aggrieved by its actions." The CBB acted under the said section in making Directive 2 which orders BBL to take immediate steps to reverse the Transaction. It is submitted by the claimants that Directive 2 does not cause a revision of any contract, as is required by the section, but orders a reversal of the said Transaction which is different from the requirements of the section and therefore the Directive is ultra vires the section. A careful reading of section 36(1)(b) ought to show that the general power given in that section to the CBB is not limited by subsection (iv) of the said section 36(1)(b). In other words, the Directive 2 clearly falls within the general words above of section 36(1)(b) authorizing CBB to perform such acts as are necessary to rectify the situation, which in this case meant the Transaction. The general purpose of section 36 of the Act would be to prevent a licensee such as BBL from committing or pursuing a course of conduct that is detrimental to the interest of its depositors or customers. Parallel banking, is conduct, as we saw above, that is detrimental to depositors or customers of BBL.

(vii) Opportunity to be heard

38. It is also urged by the claimants that the Revision above of BCBL's licence by CBB was unlawful because it was done without giving BCBL an opportunity to be heard, and because it was done without any evidence to support the purpose for which the Revision was done, which purpose was, as stated in CBB letter of 10th February, 2011 above, "in the best interest of the national banking system, the stability of BBL and BCBL and in consequence, their depositors and customers." In a letter to Mr. Johnson, President of BCBL from the Governor of CBB, it is stated that "The need to revise BCBIL terms and conditions of licence has arisen as a result of the creation of and participation in a parallel banking scheme by BBL and by extension BCBIL as a wholly owned subsidiary." There is evidence, as we saw above, that there existed a parallel banking structure and in which BCBIL was a part; and, we have also seen above the effects that a parallel banking structure can have on the national banking system and depositors and customers of a bank.

39. Though BCBIL was not given actual notice of the Revision of the licence prior to the revision, the letter of 10th February, 2011 gave BCBIL "a twenty-one day period in which to make representations as to why the revisions of the conditions of the licence should be varied or removed." BCBIL was afforded an opportunity to be heard with respect to removing or varying the revision, though after it was made. The revised licence itself states that it may be revoked or varied at any time. In the light of the above opportunities, the court in its discretionary powers, as we shall see below, ought to be reluctant to strike down the revision on this ground.

(viii) No power to make variation orders

40. The variations orders are unlawful, say the claimants, because, firstly, the Directive 2 which they seek to vary is itself ultra vires the BFIA. It is further submitted by the claimants that CBB exceeded its jurisdiction when it purported to make the variation orders under section 36(3) of the BFIA when that section did not authorize the CBB to make the orders. The section provides that any order or directive shall be given by notice in writing to the licensee and the order or directive "may be varied by further written orders or directives." According to the claimants, the variation orders did not vary the Directive, but imposed new and different requirements from those stated in the Directive. In other words, the CBB made "new Directives under the guise of Variation Orders" and therefore acted contrary to section 36(3) of BFIA. In addition, the CBB, say the claimants, imposed the variation orders without notice as required by section 36(4) of BFIA.

41. The words of section 36(3) of BFIA are clear: A Directive may be varied by further written orders or Directives. There is no modification or limitation on the varying power conferred on CBB by the section. Moreover, the Oxford Dictionary defines the word "vary" as "change from one form or state to another;" and the word "varied" is defined as "involving a number of different types or elements." Based on the absence of any limitation on the word "varied" in the section, and also considering the definition of the words, the imposition of new and different conditions in the variation orders, in my judgment, fall within the said section. Moreover, for the reasons

in this judgment I do not find myself agreeing that the Directives are ultra vires the BFIA. In relation to the question of notice, section 36(4) states:

> "(4) Prior to the issuance of any order or directive under subsection (1) or (2), the Central Bank shall cause to be served on or delivered to the licensee or subject person a notice containing a statement of the actual or proposed action or course of conduct referred to in subsection (1), or of the failure to satisfy the requirements referred to in subsection (2), and specifying a time and place (not less than thirty days after the service or delivery of the notice) at which the Central Bank shall hear objections and determine why an order or directive should not be issued, and if the Central Bank so decides a copy of every such order or directive shall promptly be served on the subject person."

42. The variation orders are orders under the section but they were not issued under subsection (1) or (2) of section 36, but under section 36(3): see variation order 1, but see variation order 2 which states it was made under section 36. Section 36(3) states:

> (3) Any order or directive given under subsection (1) or (2) shall be given by notice in writing to the subject person. Such order or directive may be varied by further written orders or directives; and any order or directive may be revoked by the Central

> Bank by notice in writing to the subject person."

It does not seem that a notice in writing is required by the subsection prior to the varying of a directive. Moreover, Directive 2 required, as we saw above, the reversal of the Transaction and required BBL to provide CBB with proof of the reversal by 15th February, 2011. From that Directive it is implied, it seems to me, that such a reversal would involve adjusting the financial statements of BBL, signed and audited, to reflect the reversal, and not to publish such statements until these things are done. These are generally the matters required by the variation orders. The terms of the Directive would imply the matters stated the variation orders, requiring the restatement of financial statements, audited and signed reflecting the reversal stated in the Transaction. Consequently, the BBL knew or must have known the nature of the orders before they were issued. Moreover, by letter dated 31st May, 2011, before the variation orders were made, the CBB in the letter to BBL wrote that: The financial statements as presented are unsigned by any director or manager of BBL and are thus invalid. The BBL then re-submitted signed Financial Statements to CBB on 1st June, 2011 for which the CBB expressed thanks by letter of 3rd June, 2011. In another letter dated 9th June, 2011 to BBL, CBB wrote that full compliance with Directive 2 "requires that BBL now amend all its financial and prudential reports since 20th January, 2011 (the original date of the transaction) including its year end financials to reflect the complete removal of the offending transaction from the records." The

letter states that if BBL fails to comply it will take enforcement action. From the above it seems that BBL had advance knowledge of the contents and nature of the variation orders.

43. The remedy of certiorari is discretionary and therefore the court may refuse this relief even though there has been a clear violation of natural justice: see ***Chief Constable v. Evans 1982 3 AER 141***; ***Hoffmann LA Roche v. Secretary of State 1975 AC 295*** and ***Gladden v. AG Supreme Court Claim No. 692 of 2010***. In the exercise of that discretion the court may consider the conduct of the claimant. In ***White v. Kuzyel 1951 AC 585***, the privy Council refused a remedy to the claimant on the basis of his conduct. The court found that the applicant's right to natural justice was violated, but refused a remedy because of the claimant's conduct in breach of his contract when he failed to comply with terms of the contract with his union, to which he was bound. In the claim before me the BBL reduced its status as owner of BCBIL without informing CBB, and although it reversed the transaction it refused to reflect the reversal in it financial statements from the dates of the Directive on grounds which we saw above. Moreover, section 36(5) of BFIA makes provision for the summary issue of an order or directive. For the above reasons, the court declines to strike down the variation orders on the ground of no notice of actual or proposed action under section 36(4) of BFIA.

(ix) <u>Restatement of financial statements</u>

44. It is further said that section 36 of BFIA does not empower the CBB to make Directives or Orders, including the variation orders, that impose mandatory requirements on a licensee with respect to the circulation, restatement, audit, signature and publication of its financial statements as the Directives and variation orders seek to do. The BFIA does not authorize CBB, according to the claimants, to order or direct these matters, which are matters for the licensee, such as BBL, and its auditors and accountants. And even assuming that these matters can be done by CBB under the section, it does not authorize CBB according to the claimants, to make orders and directives which would have a retrospective effect, as the Directives and Orders in this case seek to do. It is further submitted by the claimants that section 36 of BFIA does not empower the CBB to require a licensee, such as BBL to behave "in the same way as if" section 28 of BFIA applied to the amended and restated financial statements, as paragraph (1) of the Variation Order 2 directed. It was submitted that section 28 did not apply, because the licensee had already complied with section 28 by publication of its financial statements in accordance with section 28. Moreover, section 28 of the BFIA, according to the claimants, sets out the scope and extent of a licensee's duties, such as BBL, in respect of audits. Paragraph (1) of Variation Order 2 imposes, say the claimants, additional audit duties and requirements not specified in the section 36 or in the BFIA and therefore the Variation Order is unlawful and void. Section 36, say the claimants does not, on a proper construction, authorize CBB to direct the way in which audits are or should be carried out. In

addition it was submitted that section 36 did not authorize a particular accounting treatment as the Directives and Orders seek to do.

45. I have to apologize for my repetition of this point, but I think the above submissions fail to consider the general words of section 36(1)(b). The section says that "the Central Bank may direct the subject person to perform such acts as, in the opinion of Central Bank are necessary to rectify the situation, in particular, but without limiting the generality of the foregoing;" and the section goes in to list particular acts the CBB may perform. I think the submissions fail to appreciate that the particular acts mentioned in section 36(1)(b)(i) to (v) do not limit what is stated in 36(1)(b): that the CBB may direct the licensee to "perform such acts as, in the opinion of the Central Bank are necessary to rectify the situation." Directing the circulation, accounting treatment, restatement, audit, signatories and the publication of the financial statement falls within the general words of the quoted phrase above which words are wide enough to include the making of the Directives and Orders to apply to a transaction that occurred before the making of the Directive or Orders. In relation to the submission on section 28, the evidence is that the restated financial statements submitted by BBL to CBB were not, at the date of the Variation Order 2 signed and audited; and therefore could not be properly said to have complied with section 28 of BFIA.

(x) <u>Unreasonable and disproportionate</u>

46. The claimants further submit that although section 36(1)(b) gives the CBB the power to perform such acts as are necessary to rectify the situation, the section does not confer on the CBB arbitrary or absolute power to rectify the situation. The CBB under the section is bound to act reasonably. The Directives and the Revision, according to the claimants, are disproportionate and unreasonable and therefore do not fall within the provision of section 36(1)(b) of the BFIA. The Directive and Revision are disproportionate and unreasonable because (i) the CBB could have achieved the purposes or objectives of the Directives and Revision through consolidated supervision or cooperation with FSC, rather than the draconian and unworkable restrictions contained in the Directives and Revisions; (ii) because BCBL was an affiliate of BBL under section 2(1) of the BFIA, the CBB therefore had all the power necessary to retain adequate regulatory supervision over BCBL and could have used those powers to achieve its regulatory objective rather than issuing the Directives and the Revision; and (iii) that there was no need for the Directives and the Revisions to take effect immediately as is stated therein because CBB was aware since 2009 that BCBL was no longer a wholly owned subsidiary of BBL; and that BBL gave an undertaking that there would be no inter company dealings between BBL and BCBL and there was agreement that this would not change and that would "be sufficient to meet any concern."

47. In relation to (i) above on consolidated supervision with FSC, the relationship between CBB and FSC had been terminated, and prior to this the CBB had offered consolidated supervision but this offer,

according to the evidence, was not accepted. The MOU was a mechanism for consolidated supervision of BCBL as a subsidiary of BBL. But the MOU came to an end because of alleged behaviour of FSC. The CBB made these points in a letter dated 6th January, 2011 to FSC and copied to BBL as follows:

> "Prior to the establishment of a subsidiary in the Turks & Caicos Islands (TCI) by Belize Bank Limited (BBL), the Central Bank of Belize (the Central Bank) signed a Memorandum of Understanding (MOU) with the TCI's Financial Service Commission (FSC), conforming that the Central Bank will be responsible for conducting consolidated supervision of BBL and its subsidiary in TCI. The FSC without consultation with the Central Bank approved a change in ownership of British Caribbean Bank Limited (BCBL) which resulted in BBL owning only 23% of BCBL.
>
> Since the MOU was signed on the principle that the bank in TCI was a wholly owned subsidiary of BBL, the Central Bank can no longer conduct consolidated supervision of BCBL since it is now a minority interest of BBL. On 3 September 2010, the Central Bank attempted to resolve this issue by requesting through BBL that the holding company, BCB Holdings Limited and BCBL voluntarily agree to consolidated supervision. This offer has not been accepted by any of the parties and BBL officially informed the Central Bank that it is not in a position to compel BCBL to accept. Consequently, and given your non-response to our letter of 12 November 2009, by this medium the Central Bank now confirms effective termination of the MOU as per Section 11.1 with retroactive effect from that same date."

Moreover, according to the Examination Report above dated 31st March, 2010, BBL rejected consolidated supervision.

48. In relation to (ii) above, even assuming that CBB could have, under the IBA, used those powers to regulate BCBL, this does not prevent the CBB from exercising its wide and general discretionary power under section 36(1) of the BFIA. In relation to (iii) above, there is, once again no restriction under the BFIA preventing the CBB from directing that the Directives and Revisions to take effect immediately, and therefore it could not be unlawful that they should take effect immediately, bearing in mind that they were issued to prevent parallel banking, the problems of which have already been alluded to above. The numerous letters between the CBB and BBL, some of which have been considered above, show that there is distrust of, and a lack of confidence on the part of both parties; and it is not unreasonable that CBB did not rely on the alleged undertaking and agreement.

49. Mr. Guiseppi in his first affidavit at paragraph 20 (A) to (G) has stated elaborately why the Directives are draconian and unworkable. Briefly, the claimants say that the Directives and Revisions make no financial sense and impossible for BBL to divest its shareholding in BCBL, and this cannot be done immediately. As shown above, there is evidence of the disadvantages of parallel banking which involve risks to the financial position of the banks and risks to customers and depositors of the banks involved. The evidence is that the Directives were issued to avoid these disadvantages and risks. Moreover, the Directives do not state that BBL to divest itself immediately of its

interest in BCBL, though the Directive comes into effect immediately. The Directive states that BBL to "take immediate steps" to divest and to reverse the transaction. In his seventh affidavit, Mr. Guiseppi accepted that Directive 2 required steps for the reversal of the "transaction" and did not therefore require the reversal to take place immediately on the 9th February, 2011, the date of the Directive, but to be done on the 15th February, 2011 which Mr. Guiseppi submitted was an impossible task. The Governor swore, on the other hand, that the reversal could have been done in about three days between the 9th February, 2011, the date the Directives were made, and 15th February, 2011 the date the exparte injunction was granted. I am therefore not satisfied, on a balance of probabilities, that the reversal was an "impossible task."

50. The claimants say that the Directive 1 prohibits dealings with shareholders of BCBHL and "that this is impossible to observe because BCBHL is listed in several national stock exchanges in which stocks are traded daily and consequently shareholders can also changed daily." Moreover, say the claimants, a large number of shareholders in BCBHL hold accounts in BBL. It is to be noted that Directive 1 at paragraph (iii) states that BBL and its subsidiary BCBIL shall not, without written prior approval, conduct any transactions with BCBHL. BCBIL's licence at paragraph 4 makes a similar prohibition. So the Directive and the licence leave the possibility of approval from the CBB for some matters, and the Directive states that the CBB on request may approve "small recurring transactions at its discretion" and that CBB may "vary" the Directive.

So the Directive is not a blanket prohibition but does allow for variation and the approval of some matters which BBL, if it requires, may request, if it thinks terms of the Directive are impossible to observe. Taking account of this, I am not satisfied that the Directive is unreasonable.

51. The claimants then make the further submission that it is not viable for BBL to have to make such a request, because it is "likely to create a significant administrative burden." The option of applying to vary the Directive is available to the claimants, who should put systems in place to ease the alleged administrative burdens. The assumption by the claimants that it would have to wait a long time for a response from CBB of any request is an assumption for which adequate reasons have not been advanced. A request to the CBB for the payment of a utility bill for instance, would, as was submitted, involve long waiting; but I see no reason on the evidence why such a request cannot be immediately responded to by CBB bearing in mind modern communication facilities.

52. Paragraph (v) of the Directive 2 according to the claimants, are unworkable and unreasonable because it would result in BBL and BCBIL having to perform without their management personnel and structure. The paragraph states that no member or officer of the boards of Directors of the two banks is allowed to serve on the board or management of BCBL. The Directive at paragraph (v) does not say that no person being a director or officer of BBL and BCBIL is allowed to serve on the board of BCBL. BCBL can obtain the

services of any person, other than the directors or officers of BBL or BCBIL, aptly qualified to serve on its board or management. Though the Directive comes into effect immediately it does not state that the requirements of paragraph (v) thereof must be implemented immediately. In addition, the Directive states, as we saw above, that the CBB may vary any part of the Directive. If there is need for a period of time to implement paragraph (v) a request by any of the claimants to that effect can under the varying power above be considered by the CBB who is required to respond on reasonable grounds. I have found no evidence of such a request. There is though, as was submitted, ambiguity in the phrase "related parties" as appears paragraph (iii) in Directive 1. There is merit in this submission; but this phrase, on request by BBL, could be explained by a variation or amendment under provisions of the Directive.

(xi) Error of Law

53. It is further submitted by the claimants that the CBB erred in law and exceeded its jurisdiction by relying on the Basel Committee on Banking Supervision Guidelines (the Basel Guidelines) for purposes of justifying the Directives and Revision, because the Basel Guidelines have no force of law in Belize; and because their provisions are not part of any statute or subsidiary legislation in Belize. The claimants do not object to the admissibility of the Basel Guidelines. In fact, they submitted, as we saw above, that the document can be used as guidance. I do not see that the document must be grounded on legislation before it can be considered by CBB

in the exercise of its discretion under section 36(1) of the BFIA. Even if, say the claimants, the CBB could properly rely on the Basel Guidelines, the guidelines provide for close cooperation between regulators; and the CBB erred in not seeking to resolve this matter through close cooperation with the FSC. The claimants accept that a public body can consider relevant policy and guidance, but they submit that CBB in this case considered that it was required by the Basel Guidelines to issue the Directives. The first affidavit of Glenford Ysaguirre at paragraph 12 says as follows:

> "The Central Bank carefully considered the representations made by the claimants at the meeting on 17th January 2011. The rejection by the BCB Holdings Limited (BCBHL) group, in particular BCBL, of the Central Bank's proposed solution of consolidated supervision effectively eliminated any chance of establishing a satisfactory supervisory regime for the group. Under these circumstances, and in the best interest of the domestic banking system, the stability of BBL, and in consequence its depositors and creditors, the Central Bank felt that international standards as laid out by the Basel Committee on Banking Supervision required that the Central Bank direct BBL to immediately divest from BCBL and ring-fence both BBL and its subsidiary British Caribbean Bank International Limited (BCBlL) from activated with BCBL. These considerations contributed to the decision to formulate Directive 1."

54. By considering that the Basel Guidelines required CBB to direct BBL "to immediately divest from BCBL …" CBB, according to the claimants, unlawfully exercised its power under section 36(1) of BFIA since the Basel Guidelines made no such requirement. An examination of the Basel Guidelines shows that it "sets out supervisory guidance for dealing with parallel banks": see page 1 of the document. The claimants therefore submitted that "guidance" should not be treated as automatically determining the outcome of a particular case: it should not be interpreted as meaning required, as Mr. Ysaguirre felt it did.

55. The claimants in support of this submission relied on ***Laker Airways Limited v. Department of Trade 1977 QBD 643*** where the court had to consider a White Paper headed "Future Civic Aviation Policy CCMND 6400" which got parliamentary approval under section 3(2) & (3) of the Civil Aviation Authority Act 1971 (UK), and was presented by the Secretary of State to the UK Parliament. The White Paper had two parts, one of which was headed "Guidance." Paragraph 7 of the "Guidance" constituted in effect an instruction to the Civil Aviation Authority established by the 1971 Act to eliminate competition with the State owned airlines; which in effect was a reversal of previous policy under which competition was allowed; and to revoke a licence previously granted to the claimant under that previous policy to operate an air passenger service known as Skytrain between London and New York for which the claimant had incurred huge capital expenditure. The claimant brought an action for declarations that the "Guidance" was ultra vires the Act; and that the

licence ought not to have been revoked. The court held that though the Secretary of State was entitled to reverse the previous policy by legislation amending the Civil Aviation Act 1971, he had acted beyond his powers in formulating the "Guidance" because any guidance under section 3(2) of the Act had to be consistent with the Act or be done by an amendment to the Act;, and as there was no amendment, and the guidance was inconsistent with the objectives of the Act, the claimant was entitled to the declaration. Lord Denning gives the reasons for the decision: " … the White Paper cannot be regarded as giving "guidance" at all. In marching terms, it does not say "right incline" or "left incline." It says "right about turn." That is not guidance, but the reverse of it … . I am afraid that he (the Secretary of State) went about it the wrong way. Seeing that the old policy had been laid down in an Act of Parliament then, in order to reverse it, he should have introduced an amending Bill and got Parliament to sanction it. He was advised apparently, that it was not necessary and that it could be done by "guidance." That I think was a mistake. . . . It was in this respect ultra vires …" The principles concerning guidance in the White Paper were ultra vires the Act because for the guidance to be effective, it had to be done by an amending Act, and not a White Paper.

56. In this case before me, the "Guidance" of the Basel Guidelines has not been shown to be ultra vires the BFIA or any Act and therefore the CBB is entitled to consider it in the exercise of its discretion under section 36(1) of the BFIA. It may be considered as unfortunate that Mr. Ysaguirre said that the Basel Guidelines "required" that the CBB

direct BBL to divest; but, as the evidence above also shows, the Governor did not rely exclusively on the Basel Guidelines to issue the Directives and the Revision. He considered the provisions of section 36(1); the Transaction and the examination report on BBL dated 31st March, 2010. Moreover, in a letter dated 9th February, 2011 to BBL the Governor states that the Basel Report "strongly recommends" that parallel banking should not be permitted. This letter shows that the CBB also considered the Guidelines as recommending.

57. The claimants further state that the Basel Guidelines "show that it is not parallel banking, (which is denied) that is per se risky, it is the failure to supervise the banks involved that is the risk". But the Basel Guidelines state the particular risk associated with parallel banking. The Basel Guidelines state that the "particular risks associated with parallel banking structures stem primarily from the possibility that officers or directors of one of the parallel banks will expose the bank, to higher risks through transactions with related parallel banks." There is also evidence that in principle parallel banking structures should not be permitted. The evidence above also shows approaches by CBB to achieve consolidated supervision of the banks which was rejected.

(xii) Error of Facts

58. It was submitted that CBB erred on the facts in considering BBL reduction in its shareholding in BCBIL as there is no obligation imposed by CBB that BBL must retain full ownership of BCBIL, and BBL had no control of this at all. The CBB formed the view that the

reduction of BBL shares in BCBL from 100% to 23% created a parallel banking structure which is defined above. There was also the Transaction described above and the disadvantage given. These are facts established by the evidence and on which facts the Directives and variation orders and Revision were issued. It was also submitted by the claimants that CBB considered an inaccurate account of BCBHL's reasons for expansion in Trinidad and Tobacco. There was no oral evidence subject to cross-examination in this matter. The burden is on the claimants to prove this allegation and I am not satisfied on a balance of probabilities that they have done so.

(xiii) Relevant and irrelevant considerations

59. It is said that the CBB took into account in making the Directives and Revision irrelevant considerations; and failed to take into account relevant considerations. It is clear that a public authority in the exercise of statutory discretion must consider matters which are relevant to its decision and exclude from consideration matters which are irrelevant to what it has to consider. If there is failure to do so the authority may be said to have acted unreasonably and unlawfully. The claimants say that the CBB in the exercise of its statutory power to issue the Directives: (1) failed to take into consideration that it had the same regulatory powers under the BFIA in respect of BCBL whether BBL owned 25% or 100% of BCBL shareholding; (ii) took into consideration BCBHL alleged rejection of consolidated supervision when that issue is to be resolved between CBB and FSC and not the claimants; (iii) failed to take into account the impact of the

Directives and Revisions would have on the banking sector in the Turks and Caicos Islands and entered unlawfully on the jurisdiction of FSC; (iv) failed to take into consideration that the issuing of the Directives and Revisions constitute action in breach by the CBB of MMOU between Regional Regulatory Authorities; (v) failed to take into consideration that the increase in BBL shareholding in BCBL made BCBL an affiliate under the BFIA and therefore under the jurisdiction of CBB; and therefore CBB acted unreasonably in issuing the Directives which would result in BCBL no longer being an affiliate under the BFIA.

60. The burden is on the claimants to prove, on a balance of probabilities, that the CBB failed to take the above matters into consideration. On the evidence, the CBB considered that its regulatory powers in relation to BCBL were reduced when BBL no longer wholly owned BCBL. CBB, prior to BBL reduction of shares from 100% to 23%, had indirect control of BCBL. This did not remain the same when BBL reduced its shares in BCBL to 23%. The CBB also considered the transaction where BBL increased its shares in BCBL from 23% to 25%. Moreover, the CBB has duties to regulate licensees in Belize, and I accept the submission of learned counsel for the defendant that CBB "is not responsible for safeguarding the banking sector" of Turks and Caicos islands; and, CBB "is not obliged to consider the FSC nor its jurisdiction when exercising its jurisdiction" in Belize. The claimants in the affidavits in this matter in pointing out the alleged failures, have failed on the evidence to prove the allegations that the CBB failed to take into consideration the above matters when it made

the Directives and Revisions. In relation to consolidated supervision, the evidence is, as I have to repeat, that consolidated supervision was rejected by BCBHL; and the MOU with the FSC had been terminated; so there is no good reason to think that the issue of consolidated supervision could, in the circumstances, be resolved with that body.

(xiv) Perverse and Unlawful

61. It is also said that the variation orders are perverse and unlawful because the required restatement of the submitted financial statements by the orders, would in effect result in them being factually incorrect and misleading and this would make the variation orders unreasonable and therefore unlawful. It is to be noted that BBL published its financial reports and statements which the CBB swore had errors, omissions and were unsigned and not audited. The BBL did restate and resubmit prudential and financial reports and statements approved by accountants Price Waterhouse and auditors Howarth LLP, but these were still found by CBB to be unsuitable. The CBB on commenting on the approval of the financial reports and statements wrote:

> "On the matter of the qualified opinion of Howarth Belize LLP (HBL) I will dismiss your snide inference of Central Bank's interference with an independent audit process as pure malicious ill will … In the case of HBL, we are not satisfied that their qualified opinion was rendered in accordance with generally accepted auditing standards …" see letter dated 9th June, 2011 by Glenford Ysaguirre.

62. Since no expert witness was called to testify on the subject of accounting or auditing, the court is not in a position to decide whether or not the restated reports were made in accordance with accounting or auditing standards. It must be repeated that Variation Order 1 states that BBL must reverse the transaction of 20th January, 2011 and must restate and resubmit to CBB all prudential and financial reports issued since 20th January, 2011 to reflect the reversal. The BBL had submitted financial reports for the year ending March 2011, and the Variation Order stated that these must also be restated and resubmitted. The CBB considered and took the position that BBL must restate and resubmit the financial reports for the year ending 31st March, 2011 to reflect a reversal of the transaction of 20th January, 2011.

63. The claimants on the other hand took the position, as we saw above, that since the court issued an exparte injunction on 15th February, 2011 suspending the two Directives, the directives became effective from the date the injunction was discharged, and as the financial statements for the year ending 31st March, 2011 were already approved and audited, prior to the discharge, it would be unlawful and wrong to direct that the statements be changed. The BBL had transferred back the 250,000 shares to BB (TCT) Holdings Limited on 31st May 2011 but the financial statements for the year ending 31st March, 2011 did not reflect this reversal as the claimants took the position that the Directive became effective from the date of discharge of the injunction on 25th May, 2011 when financial statements were already audited and approved on 23rd and 24th May, 2011 for the

financial year ending 31st March, 2011. The claimants and its auditors say that the transaction or transfer would be accounted for in BBL financial statements for the year ending 31st March, 2012. Mr. Michael Coye in his affidavit admitted the "transaction concerning the 250,000 shares was prohibited and should be completely expunged from BBL's books and records. The CBB argued that compliance with Directive 2 required that all prudential and financial issued since 20th January, 2011 had to be restated and resubmitted because the Directive was effective from the 9th February, 2011, before BBL financial year ended on 31st March, 2011 and it was incorrect for the claimant to say that they were only obligated to comply with the Directives and Orders from when the injunction was discharged on 25th May, 2011. It must be noted that this court on 16th October, 2011 on an application by the claimants, decided that the discharge of the injunction did not change or vary anything in Directive 2 which remained valid. I am not aware of any appeal against that decision. Directive 2 is effective from the date it was made and this was not changed.

(xv) Factual and Retrospective

64. The claimants also say that the variation orders requiring BBL to restate the financial report pose factual problems. According to the claimants the Directives were issued on 9th February, 2011 and they related to the Transaction, and that section 36(1) did not confer power to CBB to make a directive which would have retrospective effect to apply to the transaction that occurred on 20th January, 2011. Further say the claimants, there is no power conferred by the section

authorizing CBB to direct BBL to omit or expunge from BBL's financial statements for the year ending 31st March, 2011, the transaction which factually occurred during the said financial year.

65. Reference is made once again to the general words of section 36(1)(b). The evidence of the CBB in relation to complying with the Directives and Orders is that "Full compliance requires that BBL now amend all its financial and prudential reports since 20th January, 2011 (the original date of the transaction) including the year end financials to reflect the complete removal of the offending transaction from the records": see letter dated 9th June, 3011 from Glenford Ysaguirre. The evidence further shows that "Backdating transactions to their effective date is a permissible and desirable accounting practice once it is done to preserve the integrity and consistency of accounting reports. Therefore there is nothing preventing BBL from making the appropriate retroactive adjustments to its books and records to comply with the Directive as issued on 9th February, 2011: see letter dated 3rd June, 2011 from CBB. The evidence also shows that "BBL have obtained legal advice and have been advised that Directive 1 and 2 did not take effect until the injunction was lifted on 25th May, 2011. Moreover, factually the return of the 250,000 ordinary shares only took place after the lifting of the interim injunction on 25th May, 2011. Therefore BBL would have no legal or factual basis for backdating the 250,000 shares or having taken accounting advice on the point, for amending its financial statements for prior periods – it would be incorrect and misleading to do so": see letter dated 7th January, 2011 from BBL.

66. The burden is on the claimants to prove that an appropriate amendment cannot be done to the financial statements. In the absence of deemed expert witness in accounting or auditing, I am not satisfied, on a balance of probabilities, on the evidence, that an appropriately worded amendment of the prudential and financial reports and statements of BBL cannot be made to explain the factual issue and to comply with the Directives and the Orders.

(xvi) Improper motive

67. The claimants say that the Directives and Revisions were issued arbitrarily for an improper motive, and that the CBB failed to give BBL reasons for making the Variation Orders. The Directives for the reasons above were issued in accordance with section 36(1)(b) of the BFIA; and the Revisions were issued in accordance with section 8(2) of the IBA. By several letters mentioned above several reasons were given for making the Variation Orders.

Conclusion

68. The Directives 1 and 2 and the Variation Orders 1 and 2, varying Directive 2, were made for the purpose of restricting parallel banking and reversing the transaction by BBL. BBL a previous owner of 100% shares in BCBL reduced its ownership firstly to 23% thereby creating a parallel banking system; and later increased the percentage to 25% in BCBL, by the purchase of 250,000 ordinary shares in BCBL for BZ 7.4 million dollars. The Directives and Variation Orders were made for the purpose of directing BBL to reverse this transaction and showing the reversal in the BBL financial statements,

on the ground that the transaction constituted participation in a parallel banking structure involving the claimants which structure has disadvantages for the banks involved as well as their customers and depositors. The Directives and the variation orders were issued in accordance with section 36(1) of the BFIA. The Revision of t he third claimant's licence was made because of the said parallel banking structure and in accordance with section 8(2) of the IBA.

69. Some contents of the letters exchanged between the parties are capable of suggesting that, instead of a spirit of mutual cooperation, there seems to be emotion, hard feelings and perhaps ill will between the parties resulting in several legal claims in the Supreme Court between the parties. Though it is undisputed that the parties have a Constitutional right of access to the Supreme Court, it seems to me that there is more need for professional cooperation between the parties, not only for the purpose of saving the resources and time of the Supreme Court; but also saving the resources and time of the parties; and by extension, perhaps in the interest of customers, depositors and creditors. The CBB does not have to be reminded that it is a statutory body having legal authority to determine questions affecting the rights of individuals, and there is therefore a necessary implication by the law that it is required to observe the principles of natural justice when exercising that authority. Even in cases where "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 ***Byles J in Cooper v. Wandsworth Board of Works 1863 14 CB (HS) 180 approved in Ridge v. Baldwin 1964 AC***

40. The letters between the parties prior to the issuing of the Directives show, as I have held, that the claimants must have known the nature and contents of the Directives. In that case, sending, at least for a short period, copies of the Directives to the claimants to get their response prior to issuing them, as the CBB had previously done in another case, would seem to be something which the CBB may wish to implement in its dealings with the claimants and other banks or institutions, as needs be, under the same circumstances. The claimants, in the spirit of cooperation, ought also to have consulted the CBB prior to undertaking the Transaction.

Orders

70. I make the following orders:

(1) The claims or reliefs in the amended fixed date claim form are dismissed.

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

Oswell Legall
JUDGE OF THE SUPREME COURT
4th February, 2013