IN THE SUPREME COURT OF BELIZE, A.D. 2008

CONSOLIDATED CLAIMS NOS: 850 of 2008 and NO: 851 of 2008

BETWEEN

CLAIM NO: 850 of 2008

CUPONES DORADOS, S. A. **CLAIMANT**

AND

INTER BANK & TRUST LIMITED
(formerly Elca International Bank
and Trust Limited) in Voluntary Liquidation **DEFENDANT**

AND

CLAIM NO: 851 of 2008

HOTEL LA HACIENDA DEL NORTE, S.A. **CLAIMANT**

AND

INTER BANK & TRUST LIMITED
(formerly Elca International Bank
and Trust Limited) in Voluntary Liquidation **DEFENDANT**

Keywords:

Offshore International Banking; The International Banking Act; the Banks and Financial Institutions Act; Advancement of monies; Certificates of Deposits; Authority of Bank to conduct banking business; Voluntary Liquidation; Winding-up; Insolvency.

Companies Act; Pre-Incorporation liability; Bill of Exchange Act; Bills of Exchange; Promissory Notes.

Agency; Authority directors and shareholder to transact banking business;

Practice and Procedure; Pleading; Laches.

Before the Honourable Mr. Justice Courtney A Abel (Ag.)

Hearing Dates: 11th July 2013;
12th July 2013;
24th September 2013;
15th November 2013.

Appearances:

Mr. Anthony Sylvestre, Counsel for the Claimants

Mr. Philip Palacio Counsel for the Defendant

JUDGMENT
Delivered on the 15th day of November 2013

Introduction

[1] The claims by the claimant companies[1] ("the Claimants") in the present consolidated proceedings[2] are for a total of US$2,800,000.00 plus interest[3], and for costs[4] allegedly due under certificates of deposits (CDs) which were advanced to the Defendant bank ("the Defendant"), a private limited company under the Companies Act of Belize, now in voluntary liquidation[5] and which CDs have not been paid (or were dishonoured).

[2] The Claimant, Cupones Dorados, S.A, ("Cupones") claims the sum of US$1,600,000.00, The Claimant Hotel La Hacienda Del Norte SA ("La Hacienda"), claims the sum of US$1,200,000.00.

[3] The Claimants both allege that they advanced the respective sums to the Defendant in the month of April, 2002, against which CDs were respectively issued in their favour by the Defendant on May 20, 2002, and that the sums advanced were repayable on the CDs both due on January 20, 2003 and are

[1] Both incorporated under the laws of the Republic of Costa Rica with registered offices in San Jose, Costa Rica
[2] Both filed on the 17th December 2008.
[3] In relation to Claim No. 850 at the rate of 10.5 per annum and in relation to Claim No. 851 at the rate of 12.25% per annum both from January 20, 2003.
[4] Costs have been agreed by the parties in the sum of $30,000.00 for the consolidated claim.
[5] Since 2005.

accruing interest at the claimed rates of 10.5% and 12.25% per annum, from date of issue.

[4] The Defendant, which was incorporated as 'Elca Bank & Trust Limited[6]':

(a) On the 14th December 2001 received approval of its November 2001 application for an Unrestricted "A" Class Offshore Banking Licence from the Central Bank of Belize with certain preconditions that it had to satisfy before a licence was to be issued in its favour.

(b) In October 2002 obtained an Unrestricted "A" Class Offshore Banking Licence. This unrestricted licence was granted to the Defendant subject to certain special terms and conditions, one of which was that the Defendant "shall not accept deposits from any person, cash or bearer of monetary instruments which when aggregated exceed US$10,000.00 or its equivalent in any currency, in any calendar year."

[5] It is to be observed at the outset, that these claims are brought as civil proceedings in the civil division of the Supreme Court of Judicature of Belize and not as insolvency proceedings (including winding up of companies) in the insolvency division of the same court.

[6] The Defendant denies that it is liable to repay any monies which the Claimants allege were advanced to it; and nor is it liable for such sums which is alleged to be due under the alleged CDs.

[7] The Defendant alleges that there is no record of the CDs or of the Defendants' indebtedness to pay the Claimants in its audited accounts (or any of its accounts) nor in its records; and that if any monies were advanced to the Claimants it is to a third party to whom the Claimants must look for repayment.

[8] In any event the Defendant also relies on "laches and delay" of the Claimants since the Claimants allege to have been entitled to the sums since January 20th, 2003 yet the first demand was made sometime in 2005; and on other technical/legal defences to which it claims it is entitled to rely in the present proceedings.

[6] It changed its name to its present name sometime between the 5th and the 13th December 2003.

[9] In order to better understand the claims it is first necessary to set out their background.

Background

[10] The Claimants are represented in the present proceedings by their President, and also their director, one Mr. Javier Garcia Penon ("Mr. Penon"), a Spanish speaking person[7] who is a businessman, domiciled in Costa Rica, and was their only witness.

[11] Since mid 1990s Mr. Penon had a financial group of companies in Costa Rica which had dealings with an Elca group of corporations, and which, as he testified, was "well respected and privileged in Costa Rica".

[12] The Elca group included a bank, Elca International S. A., also known as Banco Elca ("Banco Elca"), which also sold policies of insurance and offered stock brokerage services as well as other financial services.

[13] In Costa Rica, at the beginning of the year 2000, according to Mr. Penon, the ELCA name "became stronger in a clear way as an entity of financial intermediation, establishing the group of economic interest as a Bank, as an Insurance Company, as a Fiduciary company, and as a stock broker by the end of 2001"[8].

[14] When Banco Elca was only a financial entity the companies which Mr. Penon represented had initiated a financial relation and kept a commercial relation with it, as he considered it a high grade and a solid institution which commanded a lot of confidence in Costa Rica.

[15] Following an application in 2001 by Banco Elca to the Central Bank of Belize for an unrestricted "A" class offshore banking licence to be issued to an entity to be known as 'Elca International Bank and Trust Limited', by a letter dated November 13th 2001, the Central Bank informed the representative of Banco Elca

[7] As a result Mr. Penon gave evidence with the benefit of a translator and his Witness Statement had a stiffness which appeared to result.

[8] Also according to the uncontested testimony of Javir Garcia Penon in his Witness Statement dated 13th July 2009

that the application had been approved conditional on specified pre-opening and post-opening conditions.

[16] The pre-opening conditions included that:

(a) Elca International Bank and Trust Limited be incorporated under the Companies Act of Belize as a company limited by shares.

(b) Elca International Bank and Trust Limited shall have paid up capital of US$1,000,000.00 and shall be lodged in a financial institution acceptable to the Central Bank.

[17] The post-opening conditions included that:

(a) Elca International Bank and Trust Limited shall not establish a branch, subsidiary or representative office without the prior approval of the Central Bank.

(b) Elca International Bank and Trust Limited shall not accept deposits from any person, cash or bearer monetary instruments which, when aggregated exceed US$10,000.00 or its equivalent in any currency, in any calendar year.

[18] In accordance with the instructions of the Central Bank of Belize, Elca International Bank and Trust Limited was incorporated on the 14th day of December 2001 with an authorised share capital of US$5,000,000.00 divided into 5,000,000 shares of US$1.00 each. The shareholders and directors, on incorporation, were listed as Carlos Alvarado Moya (majority shareholder), Javier Filloy Esna, Esteban Chacon Solis and Luis Albert Espat.

[19] At some stage[9], someone offered Mr. Penon and the Claimants, as investors, offshore services "on behalf of ELCA", and it was expressly indicated that was part of the economic interest group".

[20] In the event Mr. Penon decided to invest monies, as only it transpired at trial, in Banco Elca[10]. The monies, the subject of the present consolidated claims, were in fact advanced from an Hispanic bank in Grand Cayman (called BBVA) from

[9] Mr. Penon claimed that it was at the beginning the year 2002 but quite clearly it was earlier possibly sometime prior to the incorporation of the Defendant on 14th December 2001.

[10] Mr. Penon erroneously claimed in his claim that the Defendants advanced the alleged monies to the Defendant.

Cupones to the account of one Carlos Alvarado Moya, who was both the President of Banco Elca in Costa Rica and subsequently, when the Defendant was incorporated, also the President of the Defendant bank in Belize.

[21] The monies advanced were supposedly for the purpose of investing for pre-operational matters for the Belize bank under an agreement that spoke to such pre-incorporation.

[22] Three documents were by the consent of the parties produced at trial, which had not been previously disclosed, which purport to evidence the transfer of funds which are the subject of the claims, and include:

(a) An Investment Agreement dated 21st January 2001 between Banco Elca (represented by Carlos Alvarado) and Cupones (represented by Mr. Penon) acknowledging that Banco Elca had received from Cupones a commercial loan in the sum of US$2,050.00 which were to be used by Banco Elca "as initial working capital for its financial operation in the Republic of Belize" and will be repaid by Banco Elca with interest by three installments namely:

I. $700,000.00 on 21st February 2001.

II. $700,000.00 on 21st March 2001, and

III. $650,000.00 on 21st April 2001.

(b) Letter of Instruction dated the 21st January 2001 from Mr. Penon, as attorney for Cupones, to one Eduardo Lombardia representing Bilbao bank Viscaya, Argentia, to transfer the sum of US$2,050,000.00 to the bank account No. 981.431 of Carlos Alvarado as beneficiary at Bilbao Bank Viscaya, Grand Cayman;

(c) Letter of Instructions dated 10th April 2001 from Javier Garcia Penon, as attorney for Cupones to Dduardo Lombardia (regarding a time deposit of US$1,000,000.00) to the current DDA account of Carlos Alvarado Moya (No. 981.431 at Bilbao Bank Viscaya, Grand Cayman) and to transfer the sum of US$50,000.00 to the current DDA account of Carlos Alvarado Moya (No. 981.431 at Bilbao Banbk Viscaya, Grand Cayman).

[23] From the above Investment Agreement it is clear that the Defendant was to be financially operated by Banco Elca, but not necessarily as its subsidiary (as testified by the Liquidator under cross-examination by Counsel for the Claimant).

[24] Upon incorporation of the Defendant on the 14th December 2001 its shareholders and directors included individuals from Costa Rica, who also held shares in Banco Elca, namely one Mr. Carlos Alvarado Moya, the President of both institutions and one Mr. Javier Filloy, also a director.

[25] Admitted into evidence through Mr. Penon, on behalf of the Claimant, were some three CDs, issued on the 20th day of May 2002, which state the amounts of each[11] and that the Defendant will unconditionally pay to the order of the respective Claimants over a period of 240 days from the date of issue (20th day of January 2003) the respective amounts upon presentment of each on the accrued applicable interest which is payable monthly upon presentment of the "enclosed coupon No. 1 to 8". Also that they were to be paid without deduction, not negotiable, not endorsable and were issued in Belize City, Belize.

[26] The transactions relating to the present proceedings (the CDs), which, according to the witness Mr. Penon, had already been issued, were signed and co-signed, and handed to and received by him (Mr. Penon) at the Belize Consulate in Costa Rica (which is the same address as Banco Elca in Costa Rica). Mr. Penon's group, also on the same occasion, did other business with the Elca Group in Costa Rica.

[27] By letter dated 2nd August 2002 Mr. Javier Filloy Esna, the Secretary of the Defendant, confirmed to Central Bank that the Defendant had complied with all pre-opening terms and conditions.

[28] By the 2nd August 2002 the Defendant did not have the licence applied for (an unrestricted Class "A" banking licence") or indeed any other licence to carry on banking business and was as a result prohibited by law from carrying on any such business within Belize, and was therefore was not legally authorised to and could not validly issue CDs.

[11] Certificate of Deposit No 100-1002-02 in the sum of US1,200,000.00, payable to the order Cupones Dorados, S. A., Certificate of Deposit No 100-1005-02 in the sum of US900,000.00, payable to the order of Hotel La Hacienda Del Norte, S.A, and Certificate of Deposit No 100-1006-02 in the sum of US700,000.00, payable to the order of Cupones Dorados, S. A.

[29] However, as noted in paragraph 4(a) above, on the 1st October 2002 the Defendant was granted an Unrestricted "A" Class Offshore Banking Licence "to carry on the business of offshore banking in or from within Belize", which licence was subject to certain conditions which were attached, including:

(a) Not to establish a branch, subsidiary or representative office without the prior approval of the Central Bank; and,

(b) Not to accept deposits from any person, cash or bearer monetary instruments which, when aggregated exceed US$10,000.00 or its equivalent in any currency, in any calendar year.

[30] On the day of maturity of the CDs (the 20th day of January 2003) Mr. Penon, testified under cross-examination (for the first time and which was not pleaded) that he went to Banco Elca in Costa Rica and he wanted to renew the CDs but he was told that he did not have the new name of the bank which was authorised to issue the new certificates, and that thereafter they (Mr. Javier Filloy and the Defendant) continued paying him interest at the offices of Banco Elca in Costa Rica (which was still the Consulate office of Belize) until they had approved the name, Inter Bank & Trust Company Limited, the new name of the Defendant bank[12].

[31] In the meetings of the Defendant between 30th December 2003 and 1st December 2004[13], none of the documents presented to the Defendant, as disclosed to the court, indicated or disclosed that the Claimants had deposited or advanced any monies to the Defendant.

[32] The audited financial statements of the Defendant for the period ending November 30th 2004 contained no reference to the alleged debt or to the deposits represented by the Certificates of Deposits.

[33] Also upon the appointment of the Liquidator in 2004, according to the testimony of the Liquidator, no record could be found of either the Deposits or the subject CDs.

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[12] It is of interest to note that this was not pleaded in the Claimant's Statement of Claim and nor was it in the Witness Statement of the Witness. Nor was there any evidence presented to the Court of any receipts of the interest payments.

[13] On which latter date its shareholders resolved to voluntarily wind up the Defendant and appoint a Liquidator.

[34] In their Statements of Claim the Claimants pleaded :

> *"The Claimant, since becoming aware in 2005 that the Defendant is in voluntary liquidation has made demand for payment of* [the sums being claimed on the Certificates of Deposits]*.... owed to it by way of" [*the Certificates of Deposits*]*.

[35] The Defendant in its Defence did not specifically respond to this averment of the Claimants but rather by way of general traverse denied the allegation.

[36] The Liquidator gave uncontested evidence, which may therefore be taken as proven, that the Liquidator published notice to creditors for the submission of claim on the 27th September 2005 and the Claimants duly attended the creditors meeting held on the 11th October 2005 and gave notice of their claims under the CDs.

[37] There is no evidence before the court as to the result of the notice of claim by the Claimants to the Liquidator for proof of the debt under the subject CDs; nor indeed whether or not they were admitted to proof. But it could be inferred, which the Court does, that they were not admitted to proof (partial or otherwise) based on the fact of the present claims and the position which the Defendant, through its Liquidator, has taken by way of defence in the present consolidated claims.

[38] In any event it has not been advanced by the Claimants, and it was not contested, and the court therefore accepts, that such claim was made by the Claimants to the Liquidator and not admitted to proof (either in whole or in part by the Liquidator).

[39] The Liquidator testified that he was unable to contact either Mr. Carlos Alvarado or Mr. Javier Filloy and was advised that they were under investigation and detained in Costa Rica in connection with allegations of fraudulent conduct.

[40] Mr. Filloy signed a witness statement in the present proceedings but did not attend trial nor was an explanation given for his absence.

[41] Between the periods of the Defendant's Incorporation in December 2001, and its change of name in December 2003, Mr. Filloy was the Chief Executive Officer, a director, and a shareholder of the Defendant.

The Issues

[42] Prior to the commencement of the trial the parties, by their Counsel, had agreed the following issues for determination of the court.

(a) Whether the claimed monies were indeed deposited with the Defendant's bank.

(b) Whether the Defendant was authorised to conduct the transactions complained of at the time of the transactions.

(c) Whether the Defendant can be held liable for the unauthorized acts of its agents

(d) Whether the Certificates of Deposits in the possession of the Claimants complies with the Bill of Exchange Act or otherwise create an obligation to pay

(e) Whether the Defendant can avail itself of the defence of laches.

[43] However, as a result of the way in which the case developed during the trial, which led to the court making the above findings in relation to the background facts, and as a result of the submissions and authorities which have been provided to the court, the case has somewhat taken a different direction. A number of the facts now appear not to be in issue, and a new question of law has arisen which may be determinative of the case.

[44] In the first place as a result of the above findings of fact on the background there is now no question for determination in relation to the first issue, as it is now clear, and it does not appear in issue, that monies were not advanced in April 2002 to the Defendant as alleged in the Statement of Claim, but instead monies were advanced in April 2001 to Mr. Carlos Alvarado Moya, for pre-operational matters allegedly for the Defendant, prior to its Incorporation.

[45] The implication is clear from the evidence of the advance, which was admitted into evidence by agreement of the parties, including the time that the monies were advanced (when the Defendant had not been incorporated), that the monies could not have been advanced to the Defendant.

[46] It is thus clear that the basis of the Claimant’s case, as pleaded, was completely misconceived as the monies were not only not advanced to the Defendant, but was

advanced, not in April 2002 as pleaded, but about a year earlier in April 2001. This forced the Claimants or they were obliged to rely entirely on the CDs and their validity and enforceability, as the sole basis or ground of their case.

[47] As a result, and from the Claimant's written and oral submissions, the Claimants were forced to more or less abandon (if not formally then strategically) their claim that the monies were advanced to the Defendant (as this argument was no longer available to them).

[48] The advancement of monies, which had provided the substratum of the Claimants claims, in relation to their claims on the Certificates of Deposits, removed, has weakened the merits of their claim. The Claimants were then almost entirely reliant on the technical and un-pleaded ground of being the 'holders in due course' of bills of exchange or promissory notes (which they claimed the Certificates of Deposits were in effect), and that they were thereby entitled to be paid on them.

[49] The question whether the Defendant was authorised to conduct the issuing of such CDs thus still remained a live, and perhaps central issue for the Claimants' case. This was alongside their case, which was never specifically pleaded as such, and which raised the issue, whether the CDs were bills of exchange or promissory notes and the Claimants were holders in due course of such bills or notes.

[50] Finally, the question of the nature of the proceedings arose specifically as to whether the claims were within the winding-up of the Defendant or outside of it, and what is the consequence to the present proceedings of the answer to this question.

[51] I will deal with the last question first as logically and legally, for reasons which will become apparent, it appears to be a first order question for determination and could conclusively resolve or be determinative of the consolidated claims before the court.

Were the Claims within or outside of the Liquidation?

[52] Both parties made submissions on this matter.

[53] The Claimants accept, along with the Defendant, that the question of whether the Defendant company is in liquidation is of significance for them because if the

Defendant is in liquidation and the Claimants' claims are successful, the Claimants would be unsecured creditors, possibly ranking behind other unsecured creditors, with the result that the Claimants may obtain a judgment which at best (putting a dollar value to them) might be worth very little and at worse may be worthless.

[54] On this present issue, the Claimants submit that the Defendants are not legally in liquidation, based on their non-compliance with the various statutory provisions for voluntary winding-up of a banking institution.

[55] First the Claimants relied on Section 38(1) of the International Banking Act[14] which provides as follows:

> *"The provisions of Part VIII of the Banks and Financial Institutions Act shall apply mutatis mutandis to the winding-up and dissolution of licensees under this Act."*

[56] The Claimants then referred the court to Section 39(1) and (2) of the Banks and Financial Institutions Act,[15] which provides:

> *"39.- (1) Except with the prior written approval of the Central Bank, no licensee may be wound-up voluntarily.*
>
> *(2) Approval for a voluntary winding-up of a licencee may be given by the Central Bank only if it is satisfied that:*
>
> *(a) the licensee is solvent and has sufficient assets to repay its depositors and other creditors in full and without delay;*
>
> *(b) subject to subsection (3), the winding-up has been approved by the holders of at least two-thirds of the issued voting shares of the licensee.*
>
> *(3) Where the Central Bank finds in respect of a licensee that there is imminent danger of its insolvency, the Central Bank may waive the requirement for the shareholder approval of the winding-up of the licensee voluntarily, if-*

[14] Chapter 267, Revised Edition 2003, Laws of Belize.
[15] Chapter 263, Revised Edition 2000, Laws of Belize

(a) the winding-up is to be effected in whole or in part through the sale of any of the assets of the licensee to another licensee; and

(b) the deposit liabilities of the licensee to be wound-up are to be assumed by that other licensee.

[57] The Claimants then submit that the Banks and Financial Institutions Act then goes on to set out a procedure to be followed by the licensee involving the surrender of licences, and also sets out the rights of creditors in an approved winding-up, including the rights of a depositor or other creditor to settlement in full of his claim,[16] and a procedure of disputed claims[17] etc.

[58] The Claimants then submitted that no written approval had been given by the Central Bank, as required, for the purported voluntary winding-up of the Defendant, although the Defendant has been operating as though it were in voluntary liquidation (albeit non-compliant with the statutory requirement), with the conclusion that the Defendant is not legally in voluntary winding-up.

[59] The Defendant, in response, correctly brought to the courts attention, that that the question of the permission of the Central Bank for the voluntary winding-up has not been raised on the pleadings and that consequently no evidence was led on it as it never became a live issue between the parties at the trial.

[60] I would go further and note that the Claimants in the short title of their claims observed or noted that the Defendant was "in voluntary Liquidation".

[61] I would further observe that in paragraph 9 of their Statement of Claim the Claimants specifically plead that the Defendant: *"applied for and has been in voluntary liquidation since 2005."*

[62] In addition, in paragraphs 10 of their Statements of Claim the Claimants plead:

> *"The Claimant, since becoming aware in 2005 that the Defendant is in voluntary liquidation has made demand for payment of* [the sums being claimed on the Certificates of Deposits]*.... owed to it by way of"* [the Certificates of Deposits].

[16] Ibid, Sections 42(1) and 43.
[17] Ibid Section 43 (2).

[63] Finally in paragraphs 11 of the Statements of Claim the Claimants plead that:

> *"The Defendant has not honoured the Certificates of Deposits and that they remain unpaid."*

[64] In its Defences to the consolidated claims the Defendant admitted that: *"it has been in voluntary liquidation since 2005"*[18] and averred that

> *"there was never any application made to commence such liquidation. Rather, that the voluntary liquidation was commenced after a resolution of the Defendant was passed authorizing the same."*[19]

[65] This was then followed by a general traverse of each and every allegation in the Statement of Claim, including, oddly, the allegation in paragraph 11 of the Statement of claim that: *"The Defendant has not honoured the Certificate of Deposits and request for payment and the Certificate Deposits remain unpaid."*

[66] The Claimant, perhaps unsurprisingly, did not advance any position through its witness, on the question of whether the claim was within or outside of the liquidation.

[67] It was only after the Court asked the question about the nature of the present proceeding (whether within the liquidation or outside of it), realizing the serious implication that would arise for writing a decision in this case, and for any order that might be made, including it might be added, for the later conduct of the winding up, and by the Court seeking to obtain Counsel's clarification by way of submissions, or agreement on the nature of these proceedings, that questions were then asked, of the witness for the Defendant, its "Liquidator" about this issue.

[68] The Liquidator frankly, under cross-examination, then admitted that he did not recall if Central Bank's approval was given for the Defendant to be in voluntary liquidation by any document; but then explained, by way of testimony in cross-examination, that he had been in frequent communication with the Central Bank, and that the Central Bank aware of the fact that the liquidation of the Defendant

[18] Paragraph 5 of the respective Defences in the two consolidated claims.
[19] Ibid.

is taking place and had not made objection or complaint other than it is taking too long.

[69] The Liquidator also testified under cross-examination, that the shareholders meeting, as was pointed out to him, was followed by subsequent meetings of which notice was given to the Companies Registry, and suggested that it may be that these minutes do not fully comply with the law, especially because it doesn't refer to the confirmatory meeting required for the passing of a special resolution, but that the notice of the Registry indicates that those meetings were subsequently held and it seems therefore that any error would have been corrected.

[70] It seems to me, on the question whether the Defendant is or is not legally in liquidation (based on their alleged non-compliance with the various statutory provisions for voluntary winding-up of a banking institution) that on the unsatisfactory state of pleadings and on the evidence before the court, on balance, the court could properly come to the conclusion, which it did, that it had little or no alternative but to rule positively, and in favour of the Defendant.

[71] This is on the basis that the Claimants had made common cause, and it became part of their case, that the Defendant was in liquidation, and that this position was accepted by the Defendant.

[72] Further that the person who has been defending the present consolidated claims throughout the present proceedings, has been the Liquidator of the Defendant, and as such no objection has been taken to this course of action by the Claimants.

[73] As a result the court felt that it can properly come to the conclusion, which it did, that there never was a live issue before the court as to whether the Defendant was or was not in liquidation, but on the contrary the whole of the consolidated claims have been premised on the basis that the Defendant is in voluntary liquidation.

[74] I therefore find that the Claimants are now precluded, if not estopped, from arguing that the Defendant is not properly in liquidation, whether because, as it now claims the Defendant did not comply with the statutory requirements of Section 39(1) and (2) of the Banks and Financial Institutions Act, or otherwise.

[75] It seems to me therefore, that I must proceed with the case on the basis that the Defendant is properly in voluntary liquidation, and this I do.

[76] I will now go on to consider whether the present consolidated claims are within the liquidation of the Defendant or outside of it.

[77] Again the evidence is unfortunately unsatisfactory and somewhat inconclusive.

[78] Although the parties have acknowledged and accepted that the Defendant is in voluntary winding-up (and in any event the court has now so found), the present case from the general appearance and format of the proceedings, the pleadings and on the evidence, has progressed on the basis that these proceedings are not by way of an appeal within the winding-up but by ordinary action.

[79] On the contrary all the indications are that the present proceedings are, and do constitute, ordinary civil claims or actions invoking the civil jurisdiction of the Supreme Court, governed by the Rules of the Supreme Court 2005, and are not insolvency proceedings (whether by way of the winding-up of a company or a banking institution)[20].

[80] In addition the basis of the Claimants claims is not on the basis of an appeal by way of dissatisfaction with a decision of the Liquidator in not allowing proof of debts in the liquidation, but rather is by way of ordinary civil claims against a banking company which has dishonored the payment of Certificates of Deposits when allegedly due – which I so find.

[81] As a result of the legal submissions which the Defendant made in its closing submissions this case has taken on a yet further twist, beyond the effect which any judgment may have for the Claimants as to whether any judgment to which the Claimants may be entitled, would result in them being an unsecured creditor (possibly ranking behind other secured or other unsecured creditors) and thereby affect the value of such a judgment.

[82] The Defendant has made the submission as a question of law, on the question whether the Claimants, which have attempted to prove the present claims in the winding-up of the Defendant, can also bring an action in this court for adjudication of these very claims. Or put another way, whether the proper course was for the Claimants to appeal from any Liquidator's decision disallowing (or I

[20] See Paragraph 5 above.

might add not allowing) their claims in the liquidation of the Defendant rather than bring the present civil claims.

[83] As noted above in the background, the Claimants had pleaded that the since becoming aware in 2005 that the Defendant was in voluntary liquidation they had made demand for payment of the sums allegedly owed by way of the subject Certificates of Deposits. Also that the Defendant alone had adverted by way of evidence to the relevant fact that a notice of claims by the Claimants had been made at a creditor's meeting on 11th October 2005 in respect of the Certificates of Deposits the subject of the present proceedings.

[84] The Defendant relied on the UK Court of Appeal case of **Graven V Blackpool Greyhound Stadium and Racecourse Ltd**[21] in support of the proposition, that the Claimants having submitted claims to the Liquidator in the winding-up of the Defendant in respect of the subject matters of the present action, ought not then to be in a position to select another method of adjudication.

[85] The case of **Graven V Blackpool Greyhound Stadium and Racecourse Ltd** was, it seems to me, certainly applicable to the circumstances of the present case. There, similar to the present case, a person did put in a proof in the voluntary liquidation of a company which, in that case was allowed, and the person being dissatisfied with the amount awarded to him, brought an action for damages against the company in the High Court. The Court of Appeal held that the High Court should have granted a stay on the basis that a creditor who has selected one method of having his claim adjudicated upon, which gives the person a right to question the decision of the liquidator if dissatisfied, should not be allowed to select another method of having it adjudicated. The result is that the court would not have jurisdiction to make a second order which may conflict with an earlier order which was liable to an appeals process[22].

[86] The Banks and Financial Institution Act provides a procedure for dealing with claims and disputed claims which the Claimants could have pursued and possibly

[21] Reported at (1936) 3 ALL ER 513, C.A.
[22] See the decisions of Greer, LJ (page 515 -516) and Scott LJ (page 516-517)

still could pursue which include that the distribution of the remaining assets of a licensee may be made:

> *"before all such claims of depositors and other creditors have been settled, or, in the case of a disputed claim, before it licensee has deposited with the Central Bank sufficient funds to meet any liability that could arise under that claim".*[23]

[87] On this basis I find the argument of the Defendant very persuasive, and adopting the reasoning of the UK Court of Appeal, determinative of the Claimants claims herein, and I would dismiss the Claimants' claim on the ground that this court does not have the jurisdiction to entertain the present claims by the Claimants.

[88] The Claimants are free to pursue its claims under the procedure provided by the Banks and Financial Institutions Act and any appeals procedure that may arise under this Act.

[89] However on the basis that this point was raised after the trial of the matter and in closing submissions I would make no order as to costs on the consolidated claims.

[90] However, in the event that I am found to be wrong about this determination and as the claims were tried and fully argued before me and to assist any procedure under the Banks and Financial Institutions Act, and also to avoid the further unnecessary delay, indeed waste of time, I will go on to consider the case on the other issues which have been raised on the claims herein.

Whether the claimed monies were indeed deposited with the Defendant's bank?

[91] As already noted above this issue does not any longer arise as it is now clear what the position is: that monies were not advanced in April 2002, but in April 2001, to Mr. Carlos Alvarado Moya for pre-operational matters of the Defendant prior to its incorporation in December 2001, the substratum of the Claimants' case on the Certificates of Deposits, were thus undermined.

[92] Any monies advanced to the Defendant could not have been by way of banking business in 2001 as the Defendant had not only not been incorporated, but could

[23] See Section 43 (2) of the Banks and Financial Institutions Act.

not have been entitled to conduct banking business such as to take deposits and issue CDs at any time prior to its incorporation in December 2001.

Whether the Defendant was authorised to conduct the transactions complained of at the time of the transactions.

[93] The question arises whether the Defendant was authorised to transact the issuing of CDs on 20th day of May 2002 when it was alleged that the Defendant issued Certificates of Deposits to the Claimants for the alleged sums.

[94] It is clear from the background facts as found by me that the Defendant was not on the 20th day of May 2002 authorised to conduct banking business.

[95] Indeed, as late as 2nd August 2002 the Defendant had still not received the licence applied for or indeed any other licence to carry on banking business and therefore any banking business which was carried on, or purported to be carried on by the Defendant would have been contrary to law.

[96] I therefore have no hesitation in finding, as I do, in relation to the present issue, that the Defendant was not authorised to conduct the issuing of any certificate of deposit to the Claimants or indeed to anyone.

Whether the Certificates of Deposits in the possession of the Claimants comply with the Bill of Exchange Act or otherwise create an obligation to pay;

[97] The Claimants' argument is that on the 20th May 2002, when the CDs were allegedly issued by the Defendant, the Defendant, as a legally existing company, not necessarily as a banking institution, under the laws of Belize, had the power to enter into agreements and issue bills of exchange and promissory notes etc, and did so by the persons who signed the CDs, Carlos Alvarado Moya and Javier Filloy Esna, as the former was a majority shareholder and the latter the Chief Executive Officer, a director and shareholder of the Defendant.

[98] The Claimants then relied on Section 79 of the Companies Act[24] which provides as follows:

[24] Chapter 250, Revised Edition 2000, Laws of Belize.

"A bill of exchange or promissory note shall be deemed to have been made, accepted, or endorse on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority"

[99] The Claimants then went on to submit that the CDs conform to or satisfy the provisions of Sections 3(1) and 85(1) of the Bills of Exchange Act, Cap 245, Revised Edition 2000, Laws of Belize, and therefore may be considered instruments in the nature of Promissory Notes, as distinct to CDs.

[100] The Claimants alternatively submitted that even if the instruments were considered CDs, that by and under Section 3 of the International Banking Act the terms of the specific definition of prohibited "international banking" did not include the transaction allegedly effected between the Claimants and the Defendant as it was not "receiving, borrowing or taking up of foreign money exclusively from non-residents at interest or otherwise on current account, savings account, term deposit…" etc, as the monies raised was by way of start-up capital, which the company was empowered so to do.

[101] Somewhat confusingly the Claimants, in the same breath submit "that the monies were not advanced by the Claimants to the Defendant as deposits, but as an investment transaction"[25] and was not a banking transaction within the meaning of the international Banking Act, and the Defendant could issue the instruments as promissory notes.

[102] The Claimants also submit that the Claimants are "holders in due course" of the CDs which may also be considered Promissory Notes and that Section 31(1) and (2) of the Bills of Exchange Act[26] apply to them (as promissory notes) with necessary modifications[27]. Further that under Section 2 of the Bills of Exchange Act, the Claimants, as "the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof", as the holders of the promissory notes and as the payees in possession of them, are by Section 30(1) of the Bills of Exchange Act deemed to have provided valuable consideration. By this device the

[25] See Section 52 of the Submission on Behalf of Claimants
[26] Chapter 245, Revised Edition 2000, Laws of Belize
[27] See Section 91(1) of the Bills of Exchange Act.

Claimants attempt to get around the fact or need to prove that monies were advanced to the Defendants.

[103] The Claimants however, quite properly referred the court to Section 30(2) of the Bills of Exchange Act which provides as follows:

> *"In particular, the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."*

[104] The Defendant, in response to the Claimants' arguments, submitted that the presumption which arises under Section 79 of the Companies Act (its deeming provision) only can subsist in the event that there is existing no evidence to the contrary.

[105] The Defendant then relied on the evidence from Mr. Penon that the monies were lent to Mr. Carlos Alvarado Moya and not to the Defendant (which did not exist at the time that the monies were advanced) pointing to discrepancies between the Investment Agreement and the evidence of Mr. Penon and the Claims themselves, and then submits that such evidence destroys any presumption in favour of treating the CDs as promissory notes.

[106] On balance I prefer the submissions of the Defendant.

[107] In addition, and moreover, the case which the Claimants pleaded was never that the instruments, upon which they were relying, were Promissory Notes.

[108] The Claimants' pleaded case was that they were suing on instruments which were "Certificates of Deposits" and therefore the case was never tried on the basis of such instruments being Promissory Notes but as Certificates of Deposits.

[109] It was only during the middle of the trial, when the Claimants for the first time produced to the Court (and indeed to the other side) the evidence relating to the advancement of monies, which clearly demonstrated that the same was done in May 2001, prior to the incorporation of the Defendant for the start-up of the Defendant, that the Claimants changed their whole case and sought to convert

their case from being advancement of monies to the Defendant giving rise to Certificates of Deposits, to that of advancement of monies as an investment into the start-up of the Defendant giving rise to promissory notes.

[110] As a result the Defendants were not able to mount a proper defence to this new claim of monies due under promissory notes by pleading any available defences (including that the Claimants obtained the alleged promissory notes by fraud, unlawful means or illegal consideration or that it was negotiated in breach of faith or under circumstances which amount to fraud) which might have been available to the Defendant under Section 30(2) of the Bills of Exchange Act.

[111] Thus the Claimants by their conduct created circumstances which do not amount to a level playing field as is sought to be established by the rules of pleading such as to effect a just disposal of this case. For this reason, in addition to those advanced by the Defendants, and indeed on this basis alone, I am unwilling to entertain this new defence of the Claimants.

[112] In addition I am quite satisfied that, on the evidence, the Defendant has proved, which it is not their burden to do, that the Claimants probably obtained the Certificates of Deposits (if considered promissory notes) by unlawful means or for illegal consideration (past or no consideration) and/or that it was negotiated in breach of faith or under circumstances which amounted to or may have been fraud.

[113] In the present circumstances I have determined that the Claimants have failed to prove that the subject transactions on which they relied (Certificates of Deposits) were other than in the nature of banking transactions (i.e. instruments of Promissory Notes which the Defendant was entitled to issue), and that such transactions, which were clearly banking transaction, were other than in the nature of a 'term deposit' prohibited for the Defendant to issue at the time that the instruments were signed.

[114] Also I have determined that the Certificates of Deposits, if they were considered promissory notes and thereby bills of exchange were, as unlawful banking transactions, obtained by unlawful means, for illegal consideration and negotiated

in bad faith under circumstances which may have amounted to fraud (quite possibly by Mr. Carlos Alvarado and Mr. Javier Filloy). But, I might add for my present decision I do not believe it is necessary for me to arrive at this conclusion as I do not believe that such a case was pleaded. The case was not conducted to determine these issues and Mr. Carlos Alvarado and Mr. Javier Filloy were not parties before the court to answer any such allegations against them.

Whether the Defendant can be held liable for the unauthorized acts of its agents?

[115] The Claimants' submission is that Mr. Carlos Alvarado and Mr. Javier Filloy, who signed the CDs, were indeed agents or authorised signatories of the Defendant.

[116] I have no hesitation in holding that there is ample evidence that at the time that the subject instruments (CDs) were signed, on the 20th day of May 2002, Mr. Carlos Alvarado and Mr. Javier Filloy may have had authority (Mr. Javier Filloy Esna almost certainly as CEO of the Defendant) to act on behalf of the Defendant, and indeed may have been authorised signatories of the Defendant to do so. It is uncontested that they were both directors of the Defendant and that the former held the position of Chief Executive Officer and the latter may have been the Secretary.

[117] I am also prepared to accept that Mr. Carlos Alvarado and Mr. Javier Filloy may have personally received and handled monies allegedly advanced by the Claimants; but in view of my findings above I am not prepared to hold that the Defendant is liable for the alleged acts of Mr. Carlos Alvarado and Mr. Javier Filloy, as in the circumstances of the present case, such acts could not have been legally authorised by the Defendant and I doubt whether they were in fact so authorised.

Laches

[118] Given my above determinations I do not consider it necessary to consider this heading of the Claimants' submissions. But if I am wrong I do not believe that a

delay of 3 years amounts to delay such that injustice would have been caused to the Defendants.

Costs

[119] That there be no order as to costs as the jurisdictional point was raised at the close of the trial of the claims herein and not earlier as it ought to have been done.

Disposition

[120] The Court dismisses the Claimants' claim for a total of US$2,800,000.00 plus interest, and for costs allegedly due under CDs Nos. 100-1005-02, 100-1006-02 and 100-1002-02 and allegedly made payable to the Claimants, which was presented for payment but remains unpaid on the ground that this court does not have the jurisdiction to entertain the present claims by the Claimants.

[121] Alternatively this Court would otherwise Order and Declare:

(a) That the claimed monies totaling US$2,800,000.00 were not advanced in April 2002, but in April 2001, to Mr. Carlos Alvarado Moya for pre-operational matters of the Defendant prior to its incorporation in December 2001 and therefore could not have been by way of banking business in 2001 such as to take deposits and issue CDs.

(b) That the claimed monies were advanced or lent to Mr. Carlos Alvarado Moya and not to the Defendant which destroys any presumption in favour of treating the CDs as promissory notes.

(c) That the CDs, which Mr. Carlos Alvarado and Mr. Javier Filloy signed, may have been signed by them as authorised signatories, but ought not, in the circumstances of the present case, to be treated as Promissory Notes.

(d) That even if the CDs could be treated as Promissory Notes such Promissory Notes probably were obtained by unlawful means (being prohibited term deposits) or for illegal consideration (past or no consideration) and/or that it was negotiated in breach of faith or under circumstances which amounted to or may have been fraud. Such

Certificates were not supported by monies which had been advanced to the Defendant, but to others otherwise connected with the Defendant.

(e) That the Defendant is not liable for the alleged acts of Mr. Carlos Alvarado and Mr. Javier Filloy, as in the circumstances of the present case, such acts could not have been legally authorised by the Defendant and it is doubted whether they were in fact so authorised.

The Hon Mr. Justice Courtney A. Abel (Ag.)