

IN THE SUPREME COURT OF BELIZE, A.D. 2016

CLAIM NO: 256 of 2016

BETWEEN

**TAPATIO CAPITAL GROUP INC.
VULCAN VENTURES LLC
LION CAPITAL S.A.
INFINITY ALLIANCE HOLDING LLC**

**1st CLAIMANT
2nd CLAIMANT
3rd CLAIMANT
4th CLAIMANT**

AND

**BELIZE BANK
INTERNATIONAL LTD.**

**DEFENDANT/
ANCILLARY CLAIMANT**

CENTRAL BANK OF BELIZE.

ANCILLARY DEFENDANT

Keywords: Banking; Relationship between Bank & Customer; Debtor Creditor Relationship; Foreign Currency (United State Dollar Deposits); Deposits; Correspondent Banking Relationships; Unpaid Cheques; Transfer of funds (United State Dollars Accounts); Bank Accounts; Unclaimed Bank Drafts; Closing of Accounts; De-risking;

Banking Contracts and Agreements; Express Terms of Contract; Standard Terms & Conditions; Exclusion, Indemnity and Limitation Clauses; Non-Belize Dollar Accounts; Risk of Loss of Funds; Restriction, Freeze, Seizure or Forfeiture; Gross negligence; Willful Misconduct; Request for Release of Funds; Anti-Money-Laundering; Banking AML and Regulatory Requirements;

Central Bank of Belize; Cancellation of Agreement; Terms of Contract; Custom and Usage of Trade;

Trust; Resulting Trust; Presumed Resulting Trust; Constructive Trust; Common Intention of Parties; Presumption of Resulting Trust;

Contract; Agency; Impossibility and/or Force *Majeure*; Commission,

USA Indictment for Securities Fraud and Money Laundering; Request for Extradition; Search & Seizure; Freezing Order; Financial Intelligence Unit; Mutual Legal Assistance and International Co-operation Act 2014;

Mutual Legal Assistance Request made by the USA; Due Diligence;
Money Laundering and Terrorism (Prevention) Act; Reasonable Grounds
to Believe Property Represents Proceeds of Crime; Serious Crime;

Procedure Defences; Indemnity and/or Contribution;

Before the Honourable Mr. Justice Courtney A. Abel

Hearing Dates: 31st January 2017
10th February 2017
1st March 2017.

Appearances:

Ms. Leslie Mendez for the 1st, 2nd, 3rd & 4th Claimants.

Mr. Nigel Ebanks for the Defendant/Ancillary Claimant

Mr. Denys Barrow S.C. and Mr. Jaraad Ysaguirre for the Ancillary Defendant.

WRITTEN JUDGMENT

Orally and substantially delivered on the 10th day of February 2017

Introduction

- [1] The present claim has being brought by the Claimants for the recovery of funds totaling US\$1,431,551.09 (“the Funds”) deposited by the Claimants with the Defendant bank (“BBIL”).
- [2] An amount purporting to be the Funds were transferred by BBIL to the Central Bank of Belize (“CBB”) when BBIL feared it would lose its ability to deal with foreign currencies.
- [3] The funds have not been repaid by BBIL despite demand by the Claimants for payment; neither has CBB repaid BBIL despite demand by BBIL.
- [4] BBIL is now claiming against CBB that the latter is liable for BBIL’s failure to return the Funds to it or the Claimant.

- [5] The evidence in the case is largely uncontested; but requires the determination, of interesting legal, contractual and banking issues, with an international component.
- [6] These issues centrally concern whether BBIL is liable to the Claimants for the return of the Funds, the nature of CBB's own liability to BBIL, with allegations by CBB that the Funds are the subject of money laundering and/or are the proceeds of crime which makes the return of the Funds problematic.
- [7] Such allegations arise because of an existing US Indictment and other Belize proceedings against the Claimants and others connected with it.

The Issues

- [8] The issues are as follows:
- (a) Whether the defences raised by BBIL, relating to the contractual arrangements between them (specifically concerning the true meaning terms and effect of certain exclusion, indemnity and limitation clauses) relieve BBIL of any liability to the Claimant for the repayment and/or damages for the failure to return such funds?
 - (b) Whether the defence raised by BBIL of impossibility of repayment and/or so-called *force majeure* absolves BBIL of any liability to the Claimant for the Funds as monies received by them and due to the Claimants?
 - (c) Is BBIL entitled to an indemnity and/or contribution from CBB in relation to the Funds and any liability which BBIL has to the Claimants?

Background

The Accounts

- [9] Between 3rd February 2012 and 30th March 2012 applications by the Claimants (respectively and individually "Tapatio", "Vulcan", "Lion Capital" and "Infinity") were approved to open bank accounts with BBIL.
- [10] As a part of BBIL's standard account opening process, the Claimants all duly executed and agreed to the terms and conditions for operating those accounts as contained in BBIL's agreement with the Claimants, referred to as its "Standard Terms & Conditions."¹

¹ Initially such agreement was contested but later was accepted by the Claimants.

[11] These terms and conditions contained certain Clauses upon which BBIL relies in defence of this claim.

The Deposits

[12] The Claimants each held with BBIL, in due course, non-Belize Dollar accounts (Unites States Dollar accounts), with sums standing to their credit as follows:

- a. Tapatio Bank Account No. 200-11-1-59700 US\$801,935.99
- b. Vulcan Bank Account No. 200-11-1-58720 US\$104,835.74
- c. Lion Capital Bank Account No. 200-11-1-59394 US\$107,431.00
- d. Infinity Bank Account No. 200-11-1-72277 US\$417,348.36

The US Indictment and the Belize Extradition Proceedings

[13] On the 8th of September 2014, the United States of America (USA) unsealed an indictment against the Claimants, Mr. Kelvin Leach (“KL”), a director for the 1st and 2nd Claimants and who may be the beneficial owner of the these companies, and Mr. Rohan Knowles (“RK”) a Director and the beneficial owner of the 3rd and 4th Defendants, as well as against Titan International Securities Inc. (‘Titan’) and several other individuals and companies, none of which included any of the Claimants (“the Indictment”).

[14] The Indictment, which remain untried and unproved allegations of securities fraud and money laundering against KL and RK, were not produced to this court. The details of such allegations could however be gleaned from the judgment which KL produced to this court².

[15] Shortly thereafter, the USA apparently made a formal request to the Government of Belize (GOB) to extradite KL and RK to the USA in relation to the Indictment for offences in the USA alleged to have been committed in connection with their relationship to Titan.

² See Supreme Court of Belize Claim No: 700 of 2014 Titan International Securities Inc. V The Attorney General of Belize & The Financial Intelligence Unit, per Judgment of Abel, J delivered on the 15th January 2016.

[16] KL and RK filed a constitutional claim challenging these extradition proceedings which is currently still pending and is as yet apparently unresolved before this very court.

Search and Seizure

[17] On the 9th of September 2014, the Financial Intelligence Unit (“FIU”) and officers of the Belize Police Department conducted a search and seizure at the offices of Titan pursuant to a warrant issued under the Mutual Legal Assistance and International Co-operation Act 2014.

[18] This search and seizure was carried out in purported compliance with a Mutual Legal Assistance Request made by the USA to the office of the Attorney General of Belize.

[19] On the 21st of January 2016, this court ruled on the unconstitutionality of this search and seizure. Its finding include that the search and seizure was conducted in an unreasonable and excessive manner and abused the authorization granted to search Titan’s premises. It also found that items were seized in breach of Titan’s constitutional rights against arbitrary or unlawful interference with its privacy. Significant orders for damages were, as a result, made for financial compensation in favour of Titan³.

Failure to Declare

[20] On the 12th of September 2014, KL and RK were detained and were searched for foreign currency. They were subsequently arrested and charged for breach of section 37 (1) of the Money Laundering and Terrorism (Prevention) Act. It was alleged that they were attempting to leave Belize without declaring that they had in their possession the equivalent of more than BZD \$10,000.00. These charges were, however, on the 25th of February 2015, dismissed.

Discharge of Freezing Order

[21] On the 24th of September 2014, this Court granted the FIU’s urgent ex parte application for a freezing order against KL, RK, five other individuals and seven

³ Ibid.

companies. The freezing order was in respect of certain listed accounts and all funds held in their names or on their behalf in any financial institution in Belize. While the Claimants were not named parties in those proceedings, some of the accounts frozen belonged to the Claimants.

- [22] All aggrieved parties filed a Notice of Application for the discharge of the freezing order.
- [23] On the 7th of November 2014, this Court, having heard all parties involved, discharged said freezing order.
- [24] The discharge was on the basis that the FIU had failed to satisfy the Court that there was any reasonable cause to believe that the property in question is/was tainted in relation to an offence.
- [25] It was also determined that failed to satisfy the Court that the accused derived a benefit, directly or indirectly, from the commission of the offence for which they have been indicted in the United States of America⁴.

BBIL Closes Accounts with Claimants

- [26] In or around 25th November 2014 BBIL informed KL and RK and the Claimants that BBIL had exercised its right to close all accounts which KL, RK and the Claimants had with BBIL.
- [27] BBIL prepared international bank drafts in the above respective amounts standing to their credit with BBIL, to refund the Claimants their close out balances and which bank drafts BBIL also notified KL, RK and the Claimants were available for collection from BBIL. All of the Claimants apparently failed to collect these drafts.

BBIL's Transfer of Funds to CBB

- [28] BBIL, apparently fearing the prospect of a loss of its correspondent banking relationship, decided to transfer sums representing the Funds (the balances of the Claimants' unclaimed drafts to CBB) to CBB ("the unclaimed drafts" or "the unclaimed balances").

⁴ See Supreme Court of Belize Claim No: 531 of 2014 The Financial Intelligence Unit V Robert Banfield, Andrew Godfrey, Kelvin Leach, Rohn Knowles et al, per Judgment of Hon. Chief Justice Kenneth Benjamin delivered on the 7th November 2014.

- [29] BBIL testified that it felt that it was necessary for it to do so in order to avoid the Funds becoming effectively frozen in its custody with no ability to pay them out.
- [30] At the time of the transfer to CBB of the sums representing the Funds, so BBIL's witness testified, it was apparently understood and agreed by CBB with BBIL that the CBB would facilitate the onward transfer of what was transferred to it (the unclaimed balances) to the Claimants whenever the Claimants would be willing and able to accept sums.
- [31] BBIL's director also testified, unchallenged, that, without 'Bank of America' ("BOA") as a correspondent bank of BBIL, which it feared it may lose, the drafts could no longer be presented to BOA for collection.
- [32] CBB have later declined to transfer to the Claimants any of the monies transferred to it, as agreed, and neither has BBIL transferred any monies to the Claimants, which has resulted in the present claim by the Claimants for the Funds.

Loss of Correspondent Banking Relationship

- [33] The corresponding banking relationship with BOA was provided for under BBIL's mandate with the Claimant.
- [34] Such relationship could be used in the course of or in connection with its banking business, including to enable and allow dealing with foreign currency (including US currency) and as a method of transfer of any such funds with the Claimants, but always as an agent of BBIL.
- [35] BBIL indeed lost its correspondent banking relationship with BOA on 30th April, 2015. Initially, this was scheduled to occur on 20th January, 2015 but BOA granted BBIL an extension to 30th April, 2015.
- [36] BBIL then wrote to the CBB on 10th May, 2015 requesting its assistance with holding the balances of the Claimants' unclaimed drafts in order to not have such balances effectively frozen in BBIL's custody after the loss of its correspondent banking relationships.
- [37] Apparently, as testified by the witness for CBB, they considered such drafts "*abandoned property*", but they nevertheless considered and understood that they would be required to assist BBIL in paying out these funds at a later date.

- [38] BBIL subsequently wired US funds to the CBB as cover for the total sum of all unclaimed drafts. On 14th May, 2015, CBB confirmed acceptance of these funds to cover the unclaimed drafts.
- [39] By letter dated 28th May 2015 CBB informed BBIL of what necessary, including beneficiary information, it would need from BBIL to facilitate the transfer of funds to BBIL's customers, including sums representing the Funds (being the Claimant's unclaimed drafts).
- [40] BBIL further lost its correspondent banking relationship with Commerzbank on June 30, 2015. As of then, BBIL had lost its capacity to effect US Dollar wire transfers and thereby effectively to transact in US Dollars.
- [41] BBIL's loss of its correspondent banking relationships was due to the correspondent banks' general "de-risking" activities. This was apparently through no fault of BBIL and there is no evidence that it had anything to do with any activities of the Claimants or their directors.
- [42] It is therefore uncontested that the CBB received the Funds from BBIL and the latter states that it has always been and remains ready and willing to return the Funds in a lawful manner to the Claimants which it no longer has and is seeking to recover from CBB.
- [43] It may be significant to note that at no point, prior to the alleged transfer of the Funds by BBIL to CBB, were the Claimants notified of the same. BBIL, therefore, had unilaterally decided to transfer sums which it considered represented the Funds without the knowledge, consent or approval of the Claimants.

Claimants Request to BBIL for Release of the Funds

- [44] On or about June 2015, the Claimants requested of BBIL the release of their funds but were informed by BBIL that the Funds were being held by CBB. By this time the Claimants knew, or ought to have known, that their accounts had been closed since November, 2014.
- [45] By letter dated 1st July 2015 CBB wrote a letter to BBIL in relation to the 'USD unclaimed bank drafts' and in response to a CBB's letter dated 9th June 2015 and emails dated 16th June 2015. CBB referred to its due diligence checks which

revealed the contents of the Indictment and stated that given such information CBB “is unable to process payment on behalf of [BBIL] for these customers and any other customers who are linked to these individuals or their companies”.

[46] CBB further stated that it could not therefore process any payments on behalf of companies linked to Titan which the Claimants were. CBB finally stated that: “While the Central Bank would have liked to assist BBIL in this regard, it must also ensure that it complies with all AML and regulatory requirements of its correspondent banks in order to protect its relationship”.

[47] It appears that CBB’s concerns, and the general issue surrounding the Claimants’ participation in banking activities, arose from the fact that the Claimants’ principals, KL and RK, were then the subject of multiple court actions both in Belize and the United States (the Indictment) which affected their banking relationship with BBIL.

[48] Further, in July, 2015, the 3rd Claimant (only) requested a transfer of funds to their Attorneys-at-law, Courtenay Coxe. However, the 3rd Claimant’s account had already been closed by then and BBIL had already lost its correspondent banking relationships as described below.

Claimants Further Request of BBIL to Transfer the Funds

[49] Between 25th August 2015 and 21st October 2015 the Claimants individually wrote to BBIL through their Attorneys requesting that all of the Funds be transferred to either Bahamas or their Attorneys at law in Belize. Either BBIL has failed to effect any such transfer or has instructed the Claimants that funds could not be transferred.

CBB Cancels Agreement with BBIL to Transfer the Funds

[50] By email dated 14th October 2015, CBB informed BBIL that it would be cancelling the previous arrangement to assist in transferring the monies in relation to the unclaimed drafts of which the Claimants were beneficiary, to BBIL, but would return such funds to BBIL once information about BBIL’s correspondent bank was provided.

[51] CBB indicated that it had no objection to returning such monies to BBIL but advised that payments would only be made by them to the Claimants through a foreign bank account in the name of the original account holder.

[52] By letter dated 30th October 2015 CBB informed BBIL that:

“Given the current challenges the jurisdiction is facing with US correspondent banking relationships, we must place on record our strong objections to the participation of your bank in any further activities or transactions that may adversely impact our efforts on the international level. Furthermore, until the Central Bank can make a risk-based review of the current arrangements in place to assist with wire transfers and the settlement of unpaid checks, we are suspending such services to BBIL until further notice.”

Further Communications between Parties

[53] On 10th November, 2015, Lion Capital and Vulcan requested an update from BBIL on its instructions for the transfer of their funds.

[54] BBIL then immediately requested that Lion Capital and Vulcan provide proof that the Funds requested be transferred to Courtenay Coye LLP, Marine Parade Chambers and Glen Godfrey & Co. LLP were for legal services by providing invoices to that effect.

[55] Consequently, on 26th, 27th and 30th of November, Lion Capital and Vulcan provided BBIL with Pro Forma Invoices from all three firms. However, the Funds were still not transferred or released.

[56] On 1st December, 2015, BBIL wrote to the CBB requesting that the latter transfer the balances representing the Funds, then amounting to US\$2,881.789.40, because BBIL had been in receipt of claims on those balances.

[57] On 2nd December, 2015, CBB wrote back to BBIL by email informing it that the former had ceased conducting transfers on behalf of BBIL until further notice.

[58] On 27th January, 2016, the Claimants’ Attorneys-at-law, Courtenay Coye LLP, issued a demand letter to BBIL Bank demanding that all funds belonging to Tapatío, Vulcan, Infinity and Lion Capital be released before the close of business

on 29th January, 2016. To date BBIL have failed to effect any transfer or release of the Claimants' funds.

[59] The Claimants have therefore on a number of occasions requested and demanded that BBIL make payment of the said sums standing to their credit, namely, the sum of US\$1,431, 460.00, but BBIL has refused to honor such requests and demands.

[60] BBIL Bank relies on the indemnities and waivers in its Defence, in order to escape any of its obligations to the Claimants.

[61] On 2nd August, 2016, the CBB wrote to BBIL further informing it that :

“The Central Bank is unable to assist further with individual payments for these drafts and will no longer permit Belize Bank International Limited to use its reserve account to facilitate the return of these funds from the Unclaimed Draft account.”

[62] The CBB also promised BBIL that CBB would be prepared to transfer the balances back to BBIL by way of two separate transfers once BBIL established a correspondent bank account.

[63] By letter dated 7th September 2016 BBIL demanded that CBB immediately return funds it was holding on BBIL's behalf through the latter's 'Oppenheimer account'.

[64] By letter dated 15th September 2016 CBB informed BBIL that it was:

“..just as eager to return these funds but in a manner that is in keeping with international standards for AML/CFT transparency in corresponding banking.”

[65] For reason stated CBB also stated, in this letter, that it found BBIL's responses to queries *“inadequate to meet our minimum requirements for AML/CFT due diligence.....”*, and expressed the view that its: *“demand for an indemnity or some declaration of awareness from the receiving bank as a more than reasonable request”*.

[66] CBB also wanted an explanation of how BBIL: *“will make final payments to these customers once the funds reach the Oppenheimer account. We take these measures in the interest of the reputation of the jurisdiction and the protection of our own correspondent banking relationships”*.

- [67] CBB responded to a letter dated 23rd September 2016, regarding the transfer of fund to BBIL. CBB confirmed its earlier intimation to BBIL that CBB was “*prepared to do only a bulk transfer once BBIL establishes a correspondent bank account. At that point we will also inform the receiving bank of the nature and origin of the funds*”. CBB stated that it had “*no confidence in the AML/CFT due diligence conducted on these clients by BBIL. ... Once again, we act in the interest of our jurisdiction and in preserving our won international banking relationships*”.
- [68] On the 19th of December 2016, the Claimants’ attorney-at-law, Godfrey P. Smith, wrote a letter to BBIL Bank informing them that if the lack of having a correspondent bank is the main concern, the Claimants would be prepared to accept the Funds in Belizean currency.

The Court Proceedings

- [69] By the Claim form filed by the Claimant on the 9th May 2016 the Claimant claims payment of US\$1,431,551.09, owned by BBIL to the Claimants being money received by BBIL from the Claimants for the establishment of accounts. Further for interest and costs as well as alternatively for damages in the same sum.
- [70] BBIL filed a Defence and Counterclaim on the 11th July 2016. In the Defence BBIL, relying on the Clauses of the Agreement with the Claimants, and force Majeure, it denies any liability to the Claimants. In the Counterclaim BBIL claims an indemnity from the Claimants.
- [71] The Claimant filed its Defence to Counterclaim on the 15th September 2016 in which they join issue with BBIL
- [72] The Claimant filed its Reply to Defence to Counterclaim on the 26th September 2016.
- [73] Case Management directions were given on the 26th September 2016 including for the filing of an Ancillary Claim by BBIL and for Disclosure.
- [74] BBIL on the 3rd October 2016 filed an Ancillary Claim against the CCB for an indemnity or contribution from the Ancillary Defendant in relation to the claim and also asks the court to direct the Ancillary Claimant to pay the Funds representing the balances of the unclaimed drafts for the Claimants either to BBIL or directly to the Claimants.

- [75] The Ancillary Claimant on the 27th October 2016 denies that the Ancillary Claimant is entitled to any of the reliefs sought.
- [76] A further Case Management hearing was held on the 21st November 2016 and on the 5th December 2016 at which an application for summary judgment by the Claimants was stood down and further directions given for an early trial.
- [77] At the trial the Claimants witnesses were KL, RK; BBIL's witness was one of its directors, Mr. Michael Coye; and the Ancillary Defendant's witness was Ms. Michelle Estell its Director of the Banking and Currency Department. The evidence of most of these witnesses were largely uncontested.
- [78] The court had the benefit of substantial written and oral submissions for which it is grateful.

The Law

The General Law Governing a Bank and its Customer

- [79] The principles relevant to the present case which governs the relationship between BBIL (as a bank) and the Claimants (as its customer) may be summarized in the following terms.
- [80] The relationship of BBIL and the Claimants is contractual and both parties would generally be bound by any expressed written terms and conditions by which they have agreed to be so bound.
- [81] Such relationship would, however, be subject to applicable statute, any instrument made under any such statute, international agreements, any rule of law (including any principles of interpretation devised by the courts as an aid to such interpretation) or any commercial usage or practice which makes relevant the meaning of 'bank' and 'banker'; and of course subject to any such terms which may be implied by the courts.
- [82] Any such written terms of agreement between BBIL and the Claimants would certainly include the written exemption, indemnity or limitation of liability clauses; subject to any obligations resulting from the relations of the parties and any of the aforementioned applicable legal matters.
- [83] A characteristic of such relationship between the Claimants and BBIL includes the situation of BBIL accepting the Funds from the Claimants and placing such monies

to the Claimants' credit, which subject to the terms and condition of agreement between them, generally and indisputably legally constitutes BBIL the debtor of the Claimants.

[84] BBIL by such 'Standard Terms & Conditions', its contract with the Claimants, inter alia, undertakes to receive money from them. The proceeds so received are not to be held in trust for the Claimants as customer, but BBIL borrows the proceeds and undertakes to repay them. The promise is to repay the monies and includes a promise to repay any part of the amount due against the written order of the Claimants addressed to the BBIL. BBIL does not have to make a payment to the Claimant in respect of a current account except on demand.⁵

[85] The Funds placed in the custody of BBIL, as banker, is, to all intents and purposes, the money of BBIL, to do with it as it pleases. BBIL is guilty of no breach of trust in employing it; BBIL is not answerable to the Claimants if BBIL puts it into jeopardy or it engages in a hazardous speculation. BBIL is not bound to keep it or deal with it as the property of the Claimants as principle; but it is, of course, answerable for the amount, because it has contracted, subject to the contract, having received that money, to repay to the Claimants, when demanded, a sum equivalent to that paid into its hands⁶.

[86] The Claimants balance on a current account with BBIL becomes due upon demand or upon the termination of the relationship of BBIL (as the bank) and the Claimants (as the customer)⁷.

[87] The Agreement between BBIL (as the bank) and the Claimants (as the customer) should be interpreted *contra proferentem*, strictly, against the Bank⁸.

The Standard Terms & Conditions (US Accounts; Indemnities & Limitation of Liability)

[88] BBIL's defence in relation to the applicable exclusion clause arises from the written contractual 'Standard Terms & Conditions' agreed upon between the Claimant and BBIL.

⁵ See the judgment of Atkin L.J. in *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110; also the judgment of Lord Diplock in *United Dominion Trust Ltd. v Kirkwood* [1966] 2 QB 431.

⁶ *Foley v Hill* (1848) 2 HL Cas 28.

⁷ See *Re Russia Commercial Bank* [1955] 1 ALL ER 75.

⁸ See *Atlantic International Bank Limited v Fulton Data Processing* Civil Appeal No. 19 of 2014.

- [89] The extent of BBIL’s liability under the applicable indemnity clauses would depend on their nature, true meaning, terms and effect within the context of the contract as a whole; and the present case must be governed, in general, by its own facts and circumstances.
- [90] It is well established that on the facts and circumstances of the present case that *“Rights of indemnity may arise from contract, express or implied, from an obligation resulting from the relation of the parties, or by statute”* and *“Whether in any particular case any right of indemnity arises, and the extent of any such indemnity, will depend upon the terms of the contract or statute in question, or the nature of the relationship”⁹.*
- [91] It is also to be noted that in considering whether to imply terms into a written contract, that in the absence of an indication of a contrary intention, the right to an implied indemnity, would be excluded by any such express contractual provision relating to the same subject matter: *“for, where there is an express contract, the parties must be guided by it, and one party cannot relinquish it or abide by it as it may suit his convenience to do”¹⁰*
- [92] Quite apart from the way in which the applicable exclusion clause¹¹ will be approached it must generally be interpreted in accordance with the principle of business commonsense¹².
- [93] The words of any such an indemnity, exemption or limitation clause in the written ‘Standard Terms & Conditions’¹³ contained in the contractual agreement between the Claimants and BBIL, are more specifically to be construed in the same way as any other clause in a contract. Such clauses are to be given their ordinary meaning, i.e. the meaning which the parties understood by it, and is to be given effect to according to that meaning provided always that it is reasonable in the circumstances of the particular case.

⁹ Halsbury’s Laws of England, (Volume 49 (2015) par. 882.

¹⁰ Halsbury’s Laws of England, (Volume 49 (2015) par. 886.

¹¹ Clause 30.

¹² See *Kudos Catering UK (Limited v Manchester Central Convention Complex Limited*[2013] EWCA Civ 38.

¹³ Specifically Clauses 30, 38 & 39.

- [94] This may be the case even to the extent that it has been held, in an English Court of Appeal decision, that an indemnity clause may be wide enough to cover the negligence of the indemnified party. There, the Court also went on to find that “*it is not the function of a court of constitution to fashion a contract in such a way as to produce a result which the court considers that it would have been fair or reasonable for the parties to have intended*”¹⁴.
- [95] This court is cognizant that in the interpretation of the indemnity, exemption or limitation clause, the subject of the present case¹⁵, it is equally conceivable and may be permissible for such clauses, upon their true construction, to include loss arising from damage to the subject-matter of the contract. In such cases, such clauses may even be held to operate effectively as between the indemnifying party and the indemnified party and that there may be no ground for excluding loss arising from damage to the subject-matter of the contract¹⁶.
- [96] BBIL, as the holder of an indemnity, when acting within the scope of its authority, is generally entitled to recover the amount payable by it by virtue of any judgment recovered against or compromise reasonably made by it in any legal proceedings in respect of any matter compromised by the indemnity, together with all costs properly incurred in defending such legal proceedings, including his own costs.¹⁷
- [97] The indemnities contained in the present ‘Standard Terms & Conditions’¹⁸ are expressly intended to cover a broad range of circumstances and events. The operation of those indemnities under the strict terms of such clauses, may be limited only by circumstances where BBIL is liable for some willful neglect or fraud.

Money Laundering and Terrorism (Prevention) Act

- [98] A relevant statute which can impact the relationship of BBIL and the Claimants may be the **Money Laundering and Terrorism (Prevention) Act** of Belize (MLA).
- [99] Section 3 of the MLA states as follows;

¹⁴ Gillespie Brothers & Co. Ltd. v. Roy Bowles Transport Ltd. and another [1973] 1 All ER 193.

¹⁵ Clauses 30, 38 & 39.

¹⁶ Great Western R.Y. Co. v Port Talbot Dy Dork Co. Ltd. [1944] 2 All ER 328.

¹⁷ Halsbury’s Laws of England, (Volume 49 (2015)) par. 889.

¹⁸ Clause 38.

“(1) A person commits the offence of money laundering if the person knowing or having reasonable grounds to believe that any property in whole or in part, directly or indirectly, represents any person’s proceeds of crime,

- (a) Converts or transfer that property for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the crime to evade the legal consequences of his action;*
- (b) Conceals or disguises the true nature, source, location, disposition, movement, rights with respect to or ownership of that property;*
- (c) Acquires, possesses, uses or otherwise deals with that property; or*
- (d) Participates in, associates with or conspires to commit, attempts to commit, or aids and abets, or facilitates, counsels or procures the commission of any of the above acts.*

(2) For purpose of proving a money laundering offence under subsection (1) of this section it shall not be necessary to prove which serious crime has been committed or who committed the crime.”

[100] It is stated in the interpretation section of the MLA that proceeds of crime refers to property, in this case money, “... derived, obtained or realized, directly or indirectly, as a result of or in connection with a serious crime ...”

[101] A “serious crime” is defined to include an “*offence against a provision of,*

- (a) ...*
- (b) A law of a foreign state, in relation to acts or omissions which, had they occurred in Belize, would have constituted an offence for which the maximum penalty is ... deprivation of liberty for a period exceeding 24 months...”*

[102] Thus, it does not matter that the money is or is reasonably believed to be the proceeds of crimes in the United States for which the Indictment mentioned above were issued.

The Transfer of Property; Resulting in a Resulting Trust.

- [103] Where there is a voluntary transfer of property by one person to another with clearly no intent to make a gift to the other person a presumption will arise in law that the person transferring the property did not intend to make a gift to the other person with the result that the property will be held by the person to whom the property was transferred under a presumed resulting trust for the person transferring the property¹⁹.
- [104] The transfer of the Funds by a person to another on an agreed basis that the person to whom the property is transferred is not free to use it as his own but must (or may) use it exclusively for a particular purpose like paying a creditor will result in the creation of a debtor-creditor relationship to arise, and equity will presume that until then the person to whom the property is transferred holds the property from the outset on a resulting trust for the person transferring the property²⁰.
- [105] Such a transfer for a particular purpose would conceivably include a transfer to CBB under an agreement to facilitate the onward transfer of the Funds to a third party whenever the third party is willing and able to accept the transfer.
- [106] Both types of resulting trust are regarded as examples of a 'trust' in equity, giving effect to the common intention of the parties²¹.
- [107] Obviously the presumption of a resulting trust can be rebutted by evidence that the transferor intended to part with the beneficial ownership²².
- [108] Alternatively, where property is transferred into the possession of a person to effect or assist a purpose which is never carried out, there is a resulting trust of it for the transferor who can make good any claim to the property.²³
- [109] BBIL relies on these principles of law in support of its case that it is entitled to an indemnity from CBB in relation to the Funds transferred to CBB.

¹⁹ Halsbury's Law of England/ Trust and powers Volume 98 (2013)/1 Nature and Creation of Trusts and Powers/(3) Constructive and Resulting Trusts/(ii) Resulting Trusts/A In General/132. Nature of Resulting trust.

²⁰ This is known as a Quistclose trust after the name of the case in which the principle was established. Ibid.

²¹ Ibid. See Note 15.

²² Ibid.

²³ Halsbury's Law of England/ Trust and powers Volume 98 (2013)/1 Nature and Creation of Trusts and Powers/(3) Constructive and Resulting Trusts/(ii) Resulting Trusts/C. Failure of Particular Purpose/138.

Whether the terms and effect of the exclusion, indemnity and limitation clauses relieve BBIL of any liability to the Claimant for the repayment and/or damages for the failure to return such funds?

The relevant terms of the ‘Standard Terms & Conditions’.

[110] The terms and conditions upon which BBIL relies includes the clauses contained in the ‘Standard Terms & Conditions’ agreed to by the Claimants with BBIL, as follows:

*“30. **Non Belize Dollar Accounts Balances** in non-Belize dollar accounts shall be maintained in the Bank’s name for Customer’s account with correspondent banks or other institutions that may or may not be located within the principal jurisdiction in which the currency shall be legal tender. The maintaining of non-Belize dollar accounts shall be at Customer’s risks as regards to (a) any restrictions imposed, or freeze, seizure or forfeiture exercised in respect thereof by any governmental, judicial, quasi-judicial or regulatory authority or (b) any taxes, levies or imposts applicable to the balances in question (including, without limitation, exchange control or currency restrictions). Without prejudice to the generality of the foregoing, Customer shall bear the sole risk of loss (if any) to the Account or to the Bank arising from or incurred as a result of the Bank in its absolute discretion placing funds from the Account with a correspondent bank or other institution whether in Belize or elsewhere.”*

.....

37. Closing of Account

Bank may, at any time, in its discretion, close the Account without prior notice with or without cause.....Bank will have no responsibility for items which it does not pay or deposits it does not accept after the account has been closed. This Agreement will

continue to govern matters relating to the Account which arose before termination or which may arise later.”

“38. Indemnities

A. *The Bank shall not be responsible for liability, loss or damage which may be caused by it acting in accordance with applicable laws, regulations, or rules (including without limitation, rules and regulations of the various payment systems), or with the terms of the Bank’s agreement with other banks or financial institutions regarding the transaction of business with those banks or institutions notwithstanding that the customer may have given instructions to the contrary.*

B. *The Bank shall not be liable to the Customer for any action taken or not taken by it under the terms of this document unless directly caused by the Bank’s gross negligence or wilful misconduct.*

C. *The Customer shall indemnify defend and hold harmless the Bank and its officers, directors, shareholders, related companies, employees, agents and attorneys (hereinafter called “the affected parties”) from and against any and all liability, damage, fine, penalty, loss or expense (including attorneys’ fees and costs and all fees and costs associated with enforcing this indemnification) suffered or incurred by the Bank or any of the affected parties (including any seizure or forfeiture of the assets or property of the Bank or the affected parties) resulting from any claim, action or proceeding whether criminal or civil against the Customer.*

D. *In addition to any rights of set-off and any similar express or implied rights, the Bank may at any time, as a continuous right, without notice or demand and at its sole and absolute discretion, freeze, retain for and indemnify itself and appropriate in or towards satisfaction of any liability damages or loss suffered or*

incurred by the Bank or the affected parties any money in any account of the Customer with the Bank.”

*“39. **Limitation of Liability** The Bank shall not be liable to the Customer for any action taken or not taken by the Bank under this Agreement unless directly caused by the Bank’s wilful misconduct or fraud. Notwithstanding any oral or written advice from any person respecting the purpose of any instrument or instruction, the Bank shall not be liable for any consequential loss or special damages. The Bank shall have no responsibility or liability to any person for any reduction in any account due to taxes or depreciation in the value of the funds credited to the Account, or for unavailability of such funds due to restrictions on transfer, payment, convertibility or due to any requisitions, involuntary transfers, distress of any character, exercise of military or usurped power or any other cause beyond the control of the Bank. In such event, the Customer shall have no claim, action or other recourse against the Bank, or any branch, subsidiary or affiliate of the Bank.”*

Submissions by the Parties

- [111] The Claimants demand payment of the total sum of the credit balances standing in their account at BBIL.
- [112] There is no dispute between the parties that the sum of US\$1,431,551.09 was standing to the Claimants’ credit on the date BBIL closed their accounts²⁴.
- [113] BBIL relies on the meaning and effect of the ‘Terms & Conditions’, the contractual provisions which it has with the Claimants.
- [114] BBIL submits that the indemnities are expressly intended to cover a broad range of circumstances and events and that their operation (the terms, true meaning and effect of those indemnities) is limited only by circumstances where the bank is liable for some willful neglect or fraud.

²⁴Paragraph 3 of the Defence

- [115] BBIL submits that the Claimants indemnified BBIL against all losses by the terms and conditions of the bank mandate which governed their relationship.
- [116] BBIL also submits that the mandate also limited and excluded the Defendant's liability in circumstances such as those concerned in this case.
- [117] BBIL is relying on the terms of clause 30 of the Agreement, under which, it is claimed, the Claimants assumed all risks associated with their holding US Dollar accounts, including the risks associated with acts, omissions and restrictions imposed with respect to the wire transfer of funds and risks associated with placing funds with correspondent banks or other institutions, including CBB, at BBIL's sole discretion.
- [118] BBIL submits that its transfer of the Funds to CBB was not on account of any negligence or fraud by the Defendant. That it was compelled by the then impending and imminent loss of its correspondent banking accounts and that it had to take some step to prevent the Claimants' balances from being frozen in its custody with no means of being able to pay these balances back to the Claimants.
- [119] BBIL submits that these were events and causes beyond BBIL's control which it contends constitute events of force majeure, liability for which it is arguing is expressly excluded and/or limited under the Limitation of Liability Clause.
- [120] BBIL contends that as it could not perform the Claimants' purported instructions and requests, once it lost its correspondent banking relationships, and had to transfer the Claimants' close-out balances to the CBB as a matter of necessity, and that all purported instructions and requests made by the Claimants after such loss and the transfer of those funds were therefore impossible for BBIL to perform.
- [121] BBIL also submits that in these circumstances, the Defendant did what it could to avoid any losses to the Claimants who are its former customers.
- [122] BBIL therefore submits that it indeed acted reasonably, prudently and with the patent intent to do the best that it could for the Claimants and that therefore its actions in that regard, to attract liability to the Claimants, would have to had to involve negligence or fraud, neither of which has been alleged by the Claimants.

[123] Finally BBIL asserts that the Court should dismiss the Claim with Costs to it and to grant judgment in BBIL's favor on the Claim, Counterclaim and Ancillary Claim with Costs.

Determination

The Claimant's US Dollar Account & Risks of Loss of the Funds

[124] Generally the Funds, being United States Dollars, and not Belize Dollars, undoubtedly have attached to them peculiar legal and other commercial risks, giving rise to special contractual considerations to deal with such risks²⁵. Such risks have been identified in the contractual arrangements between the Claimants and BBIL as involving the possibility of restrictions being imposed, or a freeze, seizure or forfeiture by governmental, judicial, quasi-judicial or regulatory bodies and may otherwise involve taxes, levies and impositions,

[125] This court considers that it may be required to assess such risk of loss to the Funds which arises from such funds being United States dollars and thereby having to be placed with a corresponding bank or with CBB.

[126] In view of this court's findings of fact above²⁶, this court considers that the refusal of CBB to transfer to BBIL or the Claimants the monies representing the unclaimed drafts or balances may certainly be considered a restriction or freeze imposed by CBB, as an institution, on the transfer of such balances. The question then arises whether such restriction or freeze is temporary or permanent in which latter case it may amount to a seizure or forfeiture.

[127] This court is prepared to find, indeed on balance does so consider, that there is no legal basis before it to conclude that there is any justifiable argument for a permanent restriction or freeze such as to amount to such a seizure or forfeiture.

[128] Indeed, this court would go further to surmise that any such act, amounting to a seizure or forfeiture, could not on the evidence be legally justified; and may thus be unlawful. But this may be going beyond anything which the CBB has been

²⁵ See Clause 30 of the Standard Terms & Conditions.

²⁶

arguing and indeed, therefore, nothing more need be said about this aspect of the case.

[129] This court has to otherwise consider whether some of these temporary risk, of restriction or freeze, have materialized in connection with the facts and circumstances of the present case in connection with the maintaining and/or transferring by BBIL of the monies representing the unclaimed drafts of the Claimants.

[130] Such temporary risks, and the legal consequences for the parties, will have to be assessed by this court. In this connection this court has carefully looked at and considered the provision which the parties have made for dealing with such temporary risks (Clause 30) and has concluded that, in the circumstances of the present case, the risk of loss by BBIL has not yet arisen; as there has not been any seizure or forfeiture by CBB of the Funds or any monies which may be considered the Funds.

[131] Indeed, this court considers that there may not even have been a restriction or freeze of the Funds.

[132] Whether there is any such restriction or freeze may depend on whether the monies which were transferred by BBIL to CBB was the Funds; or may otherwise be considered BBIL's monies. These are matters which this court will later consider.

The Indictment

[133] Also generally the Indictment has loomed somewhat large in, and has even had a brooding presence in the present case, especially as presented by Counsel for CBB; and its impact will undoubtedly, for transparency and due process, also have to be carefully considered by this court in its consideration of the issues before it.

[134] The terms, true meaning and effect on the present case of the Indictment will therefore have to be considered and assessed by this court in relation to the MLA in its consideration of the issues before it.

[135] The MLA is clearly a penal statute and therefore in accordance with well-established principles this court must interpret its terms strictly.

- [136] The question arises whether, because of the nature of the proceedings in Belize and/or the Indictment, CBB is deemed to know or to have “*reasonable grounds to believe*” that the Funds “*in whole or in part, directly or indirectly, represents any person’s proceeds of crime*”.
- [137] This court certainly considers that because of the nature of the existing²⁷ proceedings in Belize (the extradition proceedings) and/or the Indictment (untried and as yet untested suspicion as contained in the indictment) there may be grounds to believe that the Funds in whole or in part, directly or indirectly, may represent the proceeds of crime.
- [138] Based, however, on the totality of evidence before this court, and the undoubted fact that any supporting evidence relating to the source of the Claimants’ funds were not explored in the present case to any extent, and indeed may possibly not have been capable of being so fully explored, this court is unable to arrive at any definitive conclusion about the reasonableness of any grounds for BBIL or CBB to arrive at any conclusion about the source of the Claimant’s funds; and whether such funds in any way might represent the proceeds of crime; or be deemed to have any such knowledge.
- [139] This court considers that one possible and transparent way in which such a conclusion could have been, or might be properly arrived at, is or was if the Claimants or any of them (or indeed any person associated with them including KL or RK), had been charged with an offence under Section 3 of the MLA. There is, however, no such evidence before me that anyone has been so charged. Such a charge would then have provided a legally acceptable means by which any evidence in support of any such charge could be analyzed and considered by this court.
- [140] In the absence of any such pending charge this court feels obliged to conclude that all that remains is ‘suspicion’ and not any means of assessing the ground, much less any “reasonable ground” or basis for arriving at any conclusion about the source or legality of the Claimants funds.

²⁷ All other proceedings having been heard and resolved directly in favour of those connected with the Claimants and indirectly in the Claimant’s favour.

The Purported Transfer of the Funds to CBB by BBIL

- [141] This court has now to consider whether the monies which were transferred by BBIL to CBB were the Funds or otherwise BBIL's monies; and the effect of the purported transfer to CBB of what was considered or represented by BBIL to be the Claimants' unclaimed balances.
- [142] In the first place, this court would start from the premise that the Funds once deposited with BBIL becomes to all intents and purposes, the money of BBIL, to do with it as it pleases.
- [143] This starting position is based on the the nature of the relationship between the Claimants and BBIL, as customer and banker, and the general characteristic of such relationship by BBIL accepting the Funds from the Claimants and placing such monies to the Claimants' credit. But this starting position is subject to the terms and condition of agreement between them, legally constituting BBIL the debtor of the Claimants.
- [144] As a result of this starting position BBIL is of course, answerable to the Claimants for the amount so deposited, because, subject to the contract, having received the Funds, it has to repay them to the Claimants, when demanded, a sum equivalent to that deposited into it.
- [145] The question arises whether, under the terms of the contract between the Claimants and BBIL the Funds are to be treated any differently from the premised position.
- [146] Having carefully reviewed the 'Terms & Conditions', specifically the provision relation to Non-Belize Dollar Accounts, this court is unable to conclude that the characteristic and general 'creditor-debtor relationship' is thereby changed by any such provision.
- [147] By such provisions BBIL holds the 'balances' of the Funds in its own name with any correspondent bank or institution, and not the Funds itself; and as a result there may have been created a further debtor-creditor relationship as between BBIL and such corresponding bank or institution; with possibly similar effect as in relation to the Claimants and BBIL.

- [148] In any event this aspect of the case was not fully argued before me and as a result this court would not want to make any definitive determination on this matter. All this court is prepared to conclude, and does so conclude, is that it is not satisfied that the monies which were transferred by BBIL to CBB was the Funds or indeed the Claimants' monies.
- [149] This court does accept, however, that BBIL and CBB likely, perhaps even erroneously, have accepted that it represented such monies, and was the unclaimed drafts belonging to the Claimants (as BBIL certainly considered it to be). Thus this court has determined that the purported transfer of the Funds may not have indeed been the Funds but BBIL's monies which BBIL and even CBB may have considered was the unclaimed drafts or balances belonging to the Claimants.
- [150] In any event, this court considers that in the absence of any evidence that BBIL, prior to purportedly transferring the Funds to CBB, by not notifying or attempting to notify the Claimants of its intention to transfer what it considered to be the Funds to CBB, to be of some importance.
- [151] This court would certainly consider that if BBIL intended to put what it considered to be the Funds at risk by placing it with CBB, with possible loss of control over it, it ought to have made some effort, despite it contractually having "absolute discretion" of placing what it considered to be the Funds with CBB, to have notified the Claimants of its intention.
- [152] It is the view of this court that BBIL, by, unilaterally deciding to transfer the Funds without attempting to inform the Claimants of such intention and without seeking to obtain their consent or approval, and that BBIL may have been behaving unreasonably and taken upon itself some of the contractual risk which may otherwise, by the terms of Clause 30, have had to be borne by the Claimants.
- [153] Even if this court is wrong about implying this term of reasonable conduct upon BBIL, which it may be found to be, that before transferring what it considered the Funds to CBB, this court nevertheless considers that there is likely to have arisen a resulting trust as between the Claimants and BBIL by the voluntary transfer of the Funds by BBIL to CBB: as there was clearly no intent to make a gift to CBB, resulting in a presumption that BBIL did not intend to make a gift to CBB.

[154] As a consequence of any such resulting trust there likely would have arisen a rebuttable presumption that any such fund may have been held under a presumed resulting trust for BBIL.

[155] This will be considered under the following issue relating to possible liability of CBB by way of indemnity or contribution which this court will have to later examine.

The effect of Transfer of the Funds by BBIL to CBB

[156] This court has carefully considered the circumstances under which BBIL transferred the sums it considered to be the Funds to CBB to the latter institution. In particular, this court has carefully weighted and considered:

- (a) its finding above in relation to the risk involved in dealing with non-Belizean dollars in relation to which the parties had made specific contractual provision,
- (b) the Indictment and evidence of the possible source of the Funds, and
- (c) the purported transfer of the Funds to CBB by BBIL,

and has concluded that any purported transfer of the Funds by BBIL to CBB was ineffectual as was any reliance on the terms of the exclusion clause in 30 of the terms & Conditions.

[157] I will now carefully consider the substance of BBIL's defence by placing reliance on the terms of the indemnities and limitations clauses.

The Indemnities, limitations of liability

[158] It is now uncontested that the indemnities, limitations of liability clauses in the 'Standard Terms & Conditions' are indeed valid, enforceable and may be applicable to the instant case and relied on by BBIL; the question arises what are their true meaning, terms and effects.

[159] It is also uncontested that BBIL made the request to CBB to pay out the Funds in favour of the Claimants.

[160] BBIL has established a correspondent bank account with Crown Agents but to date, CBB has failed to return the sums representing the Funds (being the balances for the unclaimed drafts) despite such request to pay out by BBIL.

- [161] This court considers that the Funds have not been lost and indeed have not been lost as a result of any restriction or freeze imposed by CBB on the transfer of the Funds. This court has already determined that any loss or damage which BBIL may have suffered as a result of any restriction or freeze was its own loss, damage or restriction of its own money.
- [162] This court considers that the indemnity under Clause 38 for liability loss or damage which may be caused by BBIL applies to any restriction or freeze imposed by CBB. This court does not consider that on a true meaning of this clause it was intended by the parties to negate the very basis of the relationship of banker and customer which existed between the Claimant and BBIL.
- [163] Such an interpretation would negate and undermine the very basis of such relationship which could not have been reasonably intended by the parties to have been excluded by the 'Terms & Conditions'.
- [164] This court has concluded that any monies transferred was not covered by Clause 38 and/or 39 of the Terms & conditions.
- [165] This court has therefore concluded that questions of 'gross negligence' or willful negligence', 'willful misconduct' or any operation of such indemnity or limitation of liability clause contained in the Terms & Conditions were not intended to protect BBIL from any claims by the Claimants.
- [166] This court has also therefore determined that BBIL is liable to the Claimants for the payment of US\$1,431,551. 09, owed by BBIL to the Claimant being money deposited by the Claimants into and received by BBIL from the Claimants for the establishment of accounts with BBIL.
- [167] Alternatively, this court has therefore determined that BBIL is liable to the Claimants in damages in the sum of US\$1,431, 551. 09 being money received, and deposited with BBIL and not returned when duly demanded by the Claimants.

Whether the defence of impossibility and/or force majeure absolves BBIL of any liability to the Claimant for the funds as monies received by them and due to the Claimants?

Submissions

- [168] BBIL submits that the loss of its corresponding banking relationship with BOA on the 30th April and with Commerzbank on 30th June 2015, and thereby its capacity to effect US Dollar wire transfers and issue US Dollar drafts, through no fault of its own, constituted events of force majeure contemplated the parties in their contractual agreements.
- [169] BBIL also submits that the effect of transferring funds representing those cash balances to the CBB was to move the value of those funds off BBIL's Balance Sheet, and as there are no corresponding amounts in BBIL's reserves to meet such significant payouts of cash, any such payouts would therefore have to come from other reserves of cash which could again have potentially adverse consequences as it relates to BBIL's ability to satisfy the cash requirements of other customers.
- [170] BBIL therefore contends that the BBIL ought not to be held liable for the consequences thereof. That these events and causes being beyond BBIL's control it ought not to be visited with any liability.
- [171] The Claimants submit that the defence of *force majeure* and impossibility does not make sense and is a misconception of the relationship between the Bank and customer. That the receipt of money by a bank from a depositor creates a legally binding contractual debt, constituting the bank the debtor of the depositor, which is repayable upon demand. It matters not what the bank might have done with the depositor's funds.

Determination

- [172] It is clear from this court's determination in relation to the legal position of BBIL as a bank with the Claimant, as its customer, that this court agrees with the Claimants submissions on this issue.
- [173] On this basis, this court therefore considers that the defence of *force majeure* and impossibility is not a valid and effective defence to the present claim and as such will fail.

Is BBIL entitled to an indemnity and/or contribution from the Ancillary Defendant in relation to the Funds and any liability which BBIL has to the Claimants?

Submissions

- [174] BBIL submits that CBB received the Funds for the specific purpose of paying them out to the Claimants once the occasion to do so arose, and, being entrusted to do so on a resulting trust, that short of doing so, and if it is unable to do so, it will have failed to achieve the specific purpose of the trust and an obligation in equity arises to repay the Funds back to BBIL.
- [175] BBIL submits that CBB has no lawful basis entitling it to continue holding onto those funds, and that were the Court to not order the return of those funds from CBB, it appears that the Funds would simply remain with CBB unjustifiably and unjustly.
- [176] BBIL contends that there is no lawful reason for CBB to withhold payment of the Funds.
- [177] BBIL therefore submits that it would be inequitable and unlawful to allow CBB to remain with the balances.
- [178] That such unlawfulness arises because for CBB to remain with the balances would be tantamount to allowing CBB to inequitably assert full beneficial ownership of the Funds which was never intended.
- [179] Also, if CBB is not ordered to pay the moneys out, then it will remain with those funds free to retain and invest them as it chooses with no legal or lawful basis on which it can continue to withhold the retransfer of these balances.
- [180] The result would be that the Claimants will continue to be deprived of the Funds unless the Court orders BBIL to pay them to the Claimants, in which case then, BBIL will be forced to find around three million dollars to pay the Claimants until it can recover the same from CBB.
- [181] BBIL therefore submits that the Court should order CBB to pay the said sums out by way of an order of contribution or indemnity, as trustee or bailee, which obliges CBB to pay out these sums when called upon to do so.
- [182] BBIL submits that CBB has no proprietary right or any right independent of its capacity as trustee or bailee to be entitled to continue withholding these sums.

- [183] BBIL submits that there is no lawful reason for CBB to withhold payment of the Funds.
- [184] As already noted CBB makes no submissions concerning any liability which BBIL may have to the Claimants but simply submits that it remains ready and willing to return to BBIL, in a lawful manner, the fund which BBIL seeks to recover from CBB.
- [185] CBB however maintains that once it received information about the beneficial ownership of the Funds, and BBIL obtains a corresponding bank, both of which has now taken place, CBB can request its own corresponding banker, BOA, to transfer such funds, which CBB does not wish to retain, but it is certain that BOA would absolutely refuse to touch these funds.

Determination

- [186] This court entirely agrees with the submission of BBIL.
- [187] This court holds CBB to its word and given its determinations above in relation to the sums which had been transfer to CBB, purportedly representing the unclaimed drafts of the Claimants, that such sums were indeed legally BBIL's monies.
- [188] This court does not consider that there is any proper basis on which CBB can continue to withhold repaying BBIL its monies, whether because of concerns which CBB has about its source or concerns that it is tainted in any way.
- [189] This court does not consider that there is any merit in CBB's argument that it is entitled to delay repaying BBIL's monies, which BBIL entrusted to it, and therefore CBB should without delay do everything in its power and by any and every means available to it, to transfer such sums to BBIL.
- [190] In view of this court's findings of fact and determination above this court considers that BBIL still owes a debt to the Claimants' under its agreement with the Claimants as any monies transferred by BBIL to CBB was not the Funds, and therefore not the Claimants monies.
- [191] In view of this courts findings that BBIL transferred its own money to CBB, and not the Claimant's money, this court however is not able to determine that BBIL is entitled to be repaid such monies as an indemnity or by way of contribution as claimed by BBIL.

[192] But this court is able to determine that the sums transferred to CBB, representing the Funds (the balances of the Claimants' unclaimed drafts to CBB), is due to BBIL and ought to be returned to it.

[193] This court could see no basis on which BOA could refuse to refund BBIL its monies which was entrusted to CBB at a time that BBIL was fearful of losing its corresponding banking arrangements and its ability to deal with US currency. CBB ought therefore to fully refund BBIL its monies transferred to CBB. This court anticipates and expects CBB, as a responsible national institution of Belize, to fully comply with the findings and determinations of this court.

[194] But for technical reasons, to do with the specific claim which BBIL made against CBB, only for an indemnity and/or contribution, this court is not able to grant the orders which the Claimants seek against CBB, despite largely succeeding against CBB.

Costs

[195] In view of this court's findings and determination above, and that the Claimants have succeeded against BBIL, this court, after hearing from the parties on the 1st March 2017 in relation to costs and interest, considers that the Claimants are entitled to its costs against BBIL on the claim and counterclaim to be agreed or as prescribed by Rule 64.5 of CPR 2005 with the value of the claim being the amount ordered herein to be paid by this court.

[196] Given that BBIL has largely succeeded, but technically has not done so on the Ancillary Claim, this court orders that BBIL is not entitled to its costs against CBB on the Ancillary Claim.

[197] However because BBIL has otherwise, than technically, succeeded against CBB, this court considers that the reasonable and just order to make will be no order for costs in the Ancillary Claim.

Disposition

[198] For the reasons given above, the orders of this court will be as follows:

1. (a) BBIL shall pay the Claimants the sum of US\$1,431,551.09, (One Million Four Hundred and Thirty One Thousand Five Hundred and fifty-one and nine cents United States Dollars) owed by BBIL to the Claimants

being money deposited by the following Claimants and received by BBIL into the respective, non-Belize Dollar accounts (Unites States Dollar accounts), with BBIL as follows:

- a. Tapatio Bank Account No. 200-11-1-59700 US\$801,935.99
- b. Vulcan Bank Account No. 200-11-1-58720 US\$104,835.74
- c. Lion Capital Bank Account No. 200-11-1-59394 US\$107,431.00
- d. Infinity Bank Account No. 200-11-1-72277 US\$417,348.36

(b) That the Claimants shall be paid by the BBIL its costs on the claim and counterclaim to be agreed or as prescribed by Rule 64.5 of CPR 2005 with the value of the claim being the amount ordered to be paid by this court.

(c) The Claimants are entitled to interest on its judgment against BBIL pursuant to sections 166 and 167 of the Supreme Court of Judicature Act at the rate of 6% from the date that the claim herein was filed until judgment herein is satisfied.

2. That there shall be no order as to costs in relation to BBIL's Ancillary claim against CBB.
3. Liberty is granted to the parties to apply for further or other relief as may be necessary to give effect to the above orders.
4. This judgement will take effect as of today the 1st March 2017.

Hon. Mr. Justice Courtney A. Abel