IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 516 of 2011

BRITISH CARIBBEAN BANK INTERNATIONAL LIMITED **CLAIMANT**

AND

CENTRAL BANK OF BELIZE **DEFENDANT**

Hearings
2012
3rd February
29th February

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

LEGALL J.

JUDGMENT

1. This matter comes before me at this interlocutory stage to continue an exparte injunction or interim relief granted on an application by the applicant dated 10th August, 2011 by Arana J on 12th August, 2011 restraining the defendant from acting upon, in consequence of or seeking to enforce any alleged breach of the restrictions or

requirements of the circular made by the defendant, namely, Circular No. 5 of 2011, until 26th August, 2011. The court also granted a suspension of the said circular until the said date. There is also a claim or application for a similar injunction at paragraph (c) of the claim in this matter.

2. At this interlocutory stage it is not the function of court to resolve conflicts of evidence on affidavits as to facts, especially without the benefit of oral testimony or cross-examination; nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with by the judge at the trial of the claim. At this interlocutory stage, the court no doubt must be satisfied that the claim is not frivolous or vexatious; that there is a serious question to be tried: see Lord Diplock in ***American Cyanamid Co. v. Ethicon Ltd., 1975 1 AER 504, at p. 509***. Where it is found that there is a serious question to be tried, the next question to determine is whether damages would be an adequate remedy. If there is doubt as to the adequacy of damages available to either party or to both, the next question of balance of convenience arises. At this interlocutory stage too the court has a discretion to grant an injunction "in all cases in which it appears to the court to be just or convenient to do so: see section 27(1) of the Supreme Court of Judicature Act Chapter 91.

3. Having shown the above basic principles, I may now proceed to examine the facts available at this stage that generated the application for the injunction and interim relief. The claimant is the largest

offshore bank incorporated in Belize with registered offices at 60 Market Square, Belize City. The defendant is a statutory body established under the Central Bank Belize Act Chapter 262. The claimant, by an application to the defendant dated 15th November, 2007, requested permission from the defendant to increase loans or credit facilities from US$20,000,000 to US$23,000,000 to Caribbean Holdings Inc. a registered company (CHI). This application was approved (the Approval) by the defendant, acting under section 21.02(2) of the International Banking Act Chapter 267 (the IBA) on 5th December, 2007 on certain terms and conditions, including the following:

> "The Central Bank's Board of Directors has approved BBIL's request to grant a temporary increase of $3,000,000 in outstanding credit facilities from $20,000,000 to $23,000,000 to Caribbean Holdings Inc. for a period of 12 months expiring at the end of November 2008, subject to the following terms and conditions:
> 1. Total credit facilities shall at no time exceed the approved limit of $23,000,000 during the twelve month period ended November 2008, after which the facilities must revert to within the $20,000,000 limit; non-compliance will result in a penalty fee of $5,000 being levied for each day that the facilities exceed their approved limit:
> 2. A new application will be required at least six weeks prior to the date on which the bank wishes to implement the following changes: grant facilities in excess of the approved limit, vary the terms and

> conditions of the credit, or vary the collateral arrangements." (the Approval)

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

4. CHI was expected to repay the loan and interest from the sale of villas on a 265 acres of land on the private island of Caye Chapel in Belize, which island and villas (the assets) were held as security or collateral by the claimant for the loan to CHI. There were spectacular failures over about three years, on the part of CHI, to repay the loan and interest; and the loan became a "bad debt" or a "non performing loan." The claimant decided to take action to deal with the failures to repay the loan. In a first move in this direction, the claimant acquired in March 2010, with the agreement of CHI, six of the villas; and as a second move, in March 2011, the claimant acquired, again with the agreement of CHI, the remaining assets held as collateral for the loan in settlement of CHI indebtedness to the claimant (the acquisition). In effect, the claimant acquired by agreement of CHI, the island of Caye Chapel and the villas, which the claimant already had as security or collateral for the said loan. Instead of showing on the claimant's balance sheet or accounts the loan as a non performing one, the acquisition of the assets was described therein as an investment held for sale.

5. The defendant felt that the acquisition of the assets by the claimant was in breach of clause 2 of the Approval, on the basis that the

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

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

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

> "We have reviewed your verbal request to have the transfer of the Caribbean Holdings Incorporated loan of US$24.0 million remain as an investment held for resale by British Caribbean Bank International Limited (BCBIL) and must now reconfirm our original position that there is nothing in BCBIL's Memorandum of Association that permits it to undertake such a transaction. Consequently, the Central Bank requires that the entry be reversed as of the transaction date of 31 March 2011.
>
> As discussed in our meeting of 1 June 2011, it was agreed that you would consult with the Central Bank on the treatment of this matter before the BCBIL's audited financial statements for 31 March 2011 were finalized. Therefore, the loan must be reported in the audited financial statements, for 31st March, 2011 as originally booked otherwise it would be not only a violation of your articles but a misrepresentation to the

> public if it were reported as an investment held for resale.
> BCBIL must submit copies of the reversing entries to the Central Bank by 24 June 2011."

7. Armed with a legal opinion in a letter dated 23rd June, 2011 from learned senior counsel Mr. W.H. Courtenay who wrote that "While we readily concede that the language of paragraph 26 does not expressly comprehend the acquisition of real property for investment purposes, ... the acquisition of real and other property . . .. as an investment for resale falls squarely within the scope of the investment activities permitted by" clause 3(4) of the Memorandum, "and is not ultra vires the Company's objects;" the claimant replied in a letter dated 24th June, 2011 to the defendant's letter of 21st June, 2011, that it is "abundantly clear that BCBIL's Memorandum of Association does permit BCBIL to undertake the transaction." The defendant having received the above response from the claimant issued "a revision to the terms and conditions of the licence of BCBIL to eliminate any doubt as to the intention to restrict BCBIL from the further unauthorized acquisition of assets": see paragraph 25 of affidavit of Glenford Ysaguirre. The revision of the licence added a further condition thereto – Condition 15 – to the existing licence. The licence with the new condition 15 is given as item 1 in the appendix to this judgment.

8. On the 28th June, 2011 the claimant was invited, presumably by the defendant, for further consultation on the acquisition and Condition

15. At that meeting it is stated in the minutes prepared by Adrian Arana an employee of Central Bank of Belize that "Mr. Guiseppi agreed that the conversion of the loan to an investment held for sale should not have been done." Mr. Guiseppi, in his first affidavit at paragraph 18 states what occurred at the meeting of 28th June, 2011 as follows:

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

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

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

The Circular states, among other things, as follows:

> Summary
>
> "This circular is to restrict the acquisition of assets for sale, by a bank, from a borrower in exchange for the settlement of the borrowers indebtedness, and to implement treatment where any such transaction has already taken place.
>
> Restriction
>
> Banks licenced under the IBA are henceforth prohibited from acquiring an asset for sale from a borrower in exchange for the settlement of the borrower's indebtedness."

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

9. The claimant, no doubt dissatisfied with the action of the defendant in issuing the revision or Condition 15 and the Circular, filed a fixed date claim form dated 10th August, 2011 asking specifically for a declaration and an order be issued that the above revision or Condition 15 and the Circular were unlawful, void and of no effect, and an injunction restraining the defendant from acting upon or enforcing the Circular or revision.

Serious Questions to be tried?

10. At this interlocutory stage the court has to consider if there is a serious question to be tried. Learned counsel on both sides have opposing opinions on whether, on the facts at this stage, there are serious questions to be tried. The claimant conceded that the Circular did not

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

(i) Consultation and right to be heard

11. The claimant submitted that "The extreme impact of the circular on the applicant illustrates clearly why the applicant was entitled to be heard or consulted by the Central Bank on the terms of the circular before it was issued;" and "at no stage was the claimant afforded any opportunity to make representation on the content of the circular or its particular wording or requirements." The claimant relies on the judgment of the Court of Appeal of Belize in ***British Caribbean Bank***

Limited v. The Attorney General Civil Appeal No. 30 of 2010 where the court held that persons were entitled to be heard by the minister before he issued compulsory acquisition orders – subsidiary legislation – to acquire their property under the Constitution. The court agrees with Conteh CJ in ***Bruce v. AG No. 929 of 2009*** that it is "elementary fairness and justice that a person whose land is about to be compulsorily acquired should know before and be afforded an opportunity, if he wants, to make representation to dissuade the decision maker." This finding is no doubt consistent with the basic principle of a right to be heard. But, as the English authorities show, there is an exception to this basic principle in relation to the making of legislation. The Court of Appeal followed some South African decisions in preference to the English cases in arriving at their conclusion. But the relevance of this decision is doubted because the Circular is not legislation and did not compulsorily acquire property of the claimant. But before returning to the relevant issue of whether there was a hearing, does ***British Caribbean Limited*** mean that Parliament, where it enacts legislation that compulsorily acquires property under the Constitution, as it is entitled to do, has, before the enactment of the legislation, to hear the person whose property is the subject of the legislation?

12. But let us return to the issue of a hearing in the context of this case. The question is whether the claimant was afforded an opportunity to be heard on the content or wording of the Circular. It is to be noted that the provisions of the Circular apply to any bank licenced under the IBA, and deal with the manner of treating assets held for sale in

the accounts of the bank, including the claimant. The evidence by affidavit at this stage is that the claimant enquired at a meeting with the defendant on 28th July, 2011, as we saw above, about the accounting treatment recommended for recording the acquisition of the assets and was informed that neither the defendant nor the IBA deals with such a situation. The evidence at this stage also shows that the claimant at the said meeting was asked about what accounting treatment was being applied by the claimant or required by external auditors with respect to the acquisition of the assets. At that meeting, a representatives of the claimant was told that at a previous meeting he had committed to provide the defendant with proposed accounting treatment of the assets. The representative said that he did not recall making such a commitment. At that stage the representative and the claimant knew, or ought to have known, that the issue was the accounting treatment by the claimant of the acquisition of the assets, which is the purpose of the Circular. There is also an e-mail dated 30th June, 2011 to Thomas Tillett, manager of the claimant, from the defendant, requesting copies of all related journal entries in relation to the acquisition of the assets.

13. The above is evidence that the claimant was aware of the subject matter of the Circular and had several opportunities to address it and give its views. The claimant was, on the above evidence, given an opportunity to be heard on the subjects contained in the Circular, even though the actual circular was not given to the claimant for comments. No authority was cited to show that even though an opportunity was given to discuss the subjects contained in the Circular, that the

claimant was, at law, still entitled to be given the Circular for comments before it was finalized. Consequently I do not think that the claimant has an arguable case, or raises a serious question to be tried, on the issue that its right to be consulted and heard on the contents of the Circular was violated.

(ii) Legitimate expectation

14. The Governor of the Central Bank had, prior to this matter, and not in this case, but on the general subject of non performing loans, had written a letter to the claimant proposing to issue three circulars – No. 1 of 2011 dealing with classification of loans; No. 2 of 2011 dealing with loan loss reserves for banks; and No. 3 of 2011 dealing with treatment of interest on loans. In the said letter, the Governor of the defendant had informed the claimant that he was "enclosing copies of the proposed revised circulars for your perusal and would appreciate receiving your written comments and concerns." It was therefore submitted by the claimant that the sending of the three circulars constituted a practice and gave the claimant a reasonable expectation that the defendant would have, in this case, continued with that practice, which expectation was breached by the defendant. Hence, the claimant's submission that its rights to legitimate expectation were violated.

15. It is desirable that public officials and government departments should not arbitrarily depart from legitimate established practices or conduct on their part which have led a member of the public or the citizen to believe or expect they would continue to adopt or pursue. A member

of the public is entitled to reasonably and legitimately expect that the public official or government department would continue with such established practice and conduct. The concept of legitimate expectation is based on good faith on the part of a public official towards members of the public, and may arise either from an express promise on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue: see ***Council of Civil Service Unions v. Minister of Home Affairs 1984 2 AER 935, at p. 943***. In the West Indian classic, ***Kent Garment Factory Ltd., v. Attorney General and another 1991 46 W.I.R. 176 at p. 187***, Chancellor George captured the core and essence of legitimate expectation:

> "It is a concept that is based on the desirability of and indeed the necessity for, propriety and good faith on the part of a public official or authority towards a citizen, not to depart from a course of action which the latter has been led to believe or expect would be pursued or adopted and which departure would adversely affect his property or liberty without due and adequate notice and if appropriate, being permitted an opportunity to be heard."

The defendant's past conduct of sending circulars for the comments of the claimant on the same question of non performing loans, raises, in my view, a serious question whether the claimant alleged legitimate expectation that that conduct or practice would have continued, was violated.

(iii) Unreasonableness and proportionality

16. The claimant alleges that the Circular is unreasonable and a disproportionate response by the defendant to the acquisition of the assets by the claimant. As I understand the submission it is that if a 100% accounting entry is made for the acquisition of the assets valued at US$30 million in the accounts of the clamant, as paragraph 2 of Part B of the Circular requires, it would reduce the claimant's capital from about US$42 million to US$12 million, and this would have serious consequences for the claimant, including the size of loans that the claimant bank could advance, and would have an impact on the profitability of the claimant. It must be remembered that the acquisition of the assets was done contrary to the Approval dated 5th November, 2007; and it was accepted by the claimant that the evidence was that the collateral arrangements in relation to the loan were varied without the approval of the defendant. The claimant breached the Approval which was made by the defendant under section 21.02(2) of the IBA. The Central Bank in order to correct that breach issued the Circular. It is therefore difficult to see at this stage, unreasonableness or disproportion in the Circular which prescribes the accounting treatment, not only for the claimant but all banks under IBA, of the acquisition of the assets, which was done in violation of the Approval.

17. It is further said by the claimant that the requirements of the Circular are unreasonable, because the Circular is in breach of accepted accounting principles. In order to make a decision on such an alleged breach, evidence of expert witnesses on both sides trained in the

principles of accounting may be required at the trial. If the contents of the Circular are in breach of accounting principles, as is submitted by the claimant, expert witnesses may be required to assist the trial judge in deciding on the merits or demerits of this submission. At this stage I do not have such witnesses. It seems to me that this issue raises a serious question to be tried.

(iv) Clause 26 of the Memorandum

18. By e-mail from the defendant dated 20th May, 2011 to the claimant the defendant requested the claimant to change the entry in its accounts from investment for sale to a loan with respect to the acquisition, because describing it in the accounts as an investment was "contrary to the BCBIL's Memorandum of Association." In a letter dated 27th June, 2011, the Governor of the Central Bank wrote to the claimant that the need to revise the claimant's licence arose because of "BCBIL's decision to acquire the property of Caribbean Holdings Inc., ... as an investment for sale in violation of clause 26 of BCBIL's Memorandum of Association." The reason for the revision of the claimant's licence was because the Central Bank felt that the acquisition of the assets was contrary to clause 26 of the memorandum of association of the claimant; and wanted to restrict any such future acquisition. Clause 26 states some of the objects for which the claimant is established:

> "26. To purchase, take on lease, or in exchange, or otherwise acquire, hold, undertake or direct the management of

> work, develop the resources, of, and turn to account any estates, land, buildings, tenements, and other real property and property of every description, whether of freehold, leasehold, or other tenure, and wheresoever situate, and any interests therein, rights and powers conferred by, or incident to, the ownership of any such property for the purpose of conducting its banking business or housing its staff or providing amenities for its staff having regard to any reasonable requirements for future expansion of its banking business or staff."

19. Since the defendant based its decision to issue the revision or Condition 15 on its interpretation of clause 26, I cannot, with respect, agree that clause 26 of the memorandum is not relevant to this case. The question for the trial judge to decide is whether the defendant was correct in deciding that the recording by the claimant of the acquisition of the assets as an investment held for sale was contrary to the clause 26 of the claimant's memorandum. The claimant disputes the defendant's position holding that recording the acquisition as an investment for sale in the accounts was permitted by the memorandum. The dispute between the parties, on this issue, is in my view, a serious question to be tried.

Damages

20. Having decided that there are serious questions to be tried, the next stage is the issue of damages because if damages would be an adequate remedy no injunction should normally be granted. The

claimant states that if the injunction is not granted it would result in the enforcement of the Circular and the revision or Condition 15, which would, in turn, result in possible criminal proceedings against the claimant, and it would reduce as alleged above, the applicant's capital significantly, which may result in the possibility of a "bank run," resulting in substantial damage to the applicant's reputation and standing in the business community. The Circular would significantly, according to the submission, affect the day to day running of the claimant's business and its banking practice in Belize.

21. On the other hand, if the injunction is granted it would result in putting into abeyance the carrying out of the defendant's statutory duties under the IBA, and facilitate continued disobedience of the Approval made under the said IBA. It ought also to be considered that the statutory duties of the defendant, including being lender of last resort, may result, if the injunction is granted, in the defendant having to extend credit facilities to the claimant. The extent of any alleged damage or harm to the claimant and the defendant as a result of the granting of, or refusing the injunction is not, at this stage of the evidence, enough to arrive at a decision on a balance of probabilities, that damages would or would not be an adequate remedy. There is at this stage some doubt as to the adequacy of damages to both sides. "It is," says Lord Diplock, "where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises": see ***American Cyanamid above at page 408***.

Balance of Convenience

22. The most difficult part for me on this application for the injunction is to decide where the balance of convenience lies – where the balance of justice lies. I have to consider the prejudice which the claimant may suffer if no injunction is granted, or the prejudice the defendant may suffer if it is granted. I must remember the underlying principle is that the court should take whichever course seems likely to cause the least prejudice to one party or the other. In considering where the balance of justice lies, consideration ought to be given to the views of Lord Diplock in ***American Cyanamid*** above, quoted with approval by the Privy Council in ***Olint Corporation Ltd.*** above, as follows:

> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies. Let alone to suggest the relative weight to be attached to them": see page 408 of ***American Cyanamid*** and para 17 of ***Olint Corporation***."

Lord Hoffmann in ***Olint*** above proceeded to state that, among matters which the court may take into account, are:

> "The prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award and

> the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties cases."

23. The court is required to examine what, on the particular facts and circumstances of the case, the consequences of granting or withholding of the injunction are likely to be. If it appears that granting of the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low.

24. The claimant submits that the balance of convenience lies in favour of granting the injunction. It is said that the claimant may suffer criminal liability if the Circular remains in place, before the substantive claim is heard and determined. If the circular is enforced the claimant, it is submitted, stands to suffer serious damage to its reputation and standing in the business community, because the 100% accounting requirement of the US30 million dollars would reduce the claimant's capital, it is submitted, from US$42 million, to about $US12 million, a reduction in the capital of the claimant of about 75%.

25. This reduction, it is said, would have serious negative consequences for the claimant's bank, including affecting the size of loans the bank can advance; and eventually would affect the claimant's profitability, and may result in the claimant showing a loss, the reporting of which

would "give rise to the real possibility of a speculative and potentially disastrous bank run," and would cause irreparable damage to the claimant's reputation in the business community. The Circular would also damage the daily administration of the bank and expose it to greater default from borrowers. There is therefore, according to the claimant, "a clear risk of irremediable harm" to the claimant. Further states the claimant, if the injunction is granted there will be no detriment to the Central Bank of Belize.

26. For the defendant it is stated that if the injunction is granted and the claimant is allowed to continue to treat in its accounts the acquisition of the assets as an investment helf for sale, it would amount to misleading the public, because the loan to CHI remains a debt up to present and has not been paid. To report it in the accounts of the claimant as an investment held for sale, rather than a non performing loan, which the defendant says it is, is misleading to the public. Moreover, says the defendant, the loan remains a non performing loan, and if it was so described in the claimant's accounts, it would have amounted to a non performing loan to the level of about 38% which would, according to the defendant, have been evidence of the claimant "being on the verge of insolvency," and the public is entitled not to be misled.

27. Where does the balance of convenience lie? The Central Bank, I would imagine, owes a duty to the public and other banks and financial institutions to discourage or prevent what it considers to be misleading accounting information of any bank, because such

misleading accounting information may mislead the public as to the solvency of the bank and may affect monetary stability and credit conditions conducive to the growth of the economy of Belize. Whether or not the treatment in the accounts of the claimant of the acquisition of the assets is misleading and contrary to accounting principles is for the trial judge. The defendant at this stage submits that it is.

28. The Central Bank of Belize Act Chapter 262 (the Bank Act) gives the objectives and functions of the Central Bank among which are the objects of fostering monetary stability and promoting credit and exchange conditions conducive to the growth of the economy of Belize. The evidence is that the defendant is lender of last resort to other banks. Where banks are having solvency problems, it would seem that under the general powers given to Central Bank under section 6 of the Bank Act to promote stability and economic growth, and specific powers, under section 41 and 42 of the said Act to grant loans and extend credit to banks and financial institutions, there may be some detriment and inconvenience to the defendant if the injunction is granted, in that the defendant would be prevented from implementing the provisions of the Circular which is directly or indirectly connected to the above objectives and functions of the defendant as stated in the Bank Act.

29. It must also be noted that the Approval granted by Central Bank in December 2007 was admittedly breached by the claimant. If the injunction is granted, this breach would continue thereby prolonging behaviour by the claimant, admittedly in contravention of the

Approval made under the IBA. In addition, the defendant has the statutory power to grant and vary licences to carry on offshore banking business from within Belize: see section 8 of the Central Bank Act. Prior to granting such a licence, the defendant has authority to examine the memorandum and articles of Association of the company applying for the licence: section 52(c) of the Act. This authority undoubtedly gives the defendant some power to influence the objects and functions of the applicant company for a licence. It was in the exercise of that power that the defendant in the letter to the claimant dated 10th June, 2005 stated amendments to the memorandum of the claimant, including clause 26. The defendant therefore has the statutory powers to exercise influence and some control over the contents of the memorandum and a licence issued under the IBA; and, by extention, control and influence over the objects and activities of licenced offshore banks. The defendant would suffer detriment or inconvenience if it is, by an injunction, prevented from carrying out its above statutory duties in issuing Condition 15, when it is not shown, at this interlocutory stage, that in making Condition 15, the defendant acted contrary to section 8 of the IBA.

30. The evidence at this stage is that banks acquiring land for sale at a significant price, is contrary to a basic principle of banking, that a bank, including the claimant, should not take part in real estate, because of the risk involved in real estate speculation; and because it does not form part of the fundamental business of a bank. The defendant, as is clear from the letter dated 5th August, 2011, wishes to

regulate what it considers to be a risky real estate venture to protect the interest of bank depositors in accordance with the general function of the bank under the Bank Act. A reply by the claimant dated 11th August, 2011 to the defendant's letter dated 5th August, 2011, did not specifically deal with the allegation of the defendant that the acquisition of the assets for sale was a risky venture that involves real estate speculation.

31. For the claimant it is further said that the balance of convenience is on its side because of the fact that the assets are marketable security; and therefore the loan could not be a loss because the assets could be sold for more than would be needed to satisfy the debt. In support of this contention, the claimant exhibited a brochure of the assets; a letter dated 23rd December, 2011 from a company in Canada making an "initial offer" to purchase the assets, and also expressing "our intention to purchase" the assets for $35 million USD and awaiting the claimant's "Acceptance"; and another letter of intent to purchase the assets for $US40 million by a real estate group named PASAJ whose address I do not find on the letter; and a document labeled "binding agreement for sale" with the parties named as the claimant and Federal Equity Limited of Australia. The claimant states that the above, and another letter of possible intent by an unnamed buyer, constitute evidence that the assets are marketable; can be sold and are not a loss. Taking all these matters into consideration, says the claimant, the balance of convenience is on its side, and therefore the injunction should be granted.

32. The brochure is not necessarily evidence of marketability of the assets; and there is no evidence at this stage of any acceptance or further action in relation to the initial offer, and the letter of intent from PASAJ. The "binding agreement for sale" is a draft document that is not signed by any of the named parties and without a specific commencement date. There is also no evidence of any follow up action to the above alleged offers. I am not at this stage satisfied on a balance of probabilities that on the above evidence it can be considered that the assets are and have always been, a "marketable security" as was submitted.

33. The defendant, a public authority, has by statute a public role or objective to achieve as shown above. The claimant is a public company, but its general role is not, statutorily speaking, as wide as the statutory objectives of the defendant. Bearing in mind the lack at this stage of detailed and specific evidence of harm to the business and reputation of the claimant as a result of the Circular, and also bearing in mind the claimant many concerns referred to above, including alleged reduction of capital and loss of customers and depositors and possible criminal sanctions against it and its officers, where does the balance of convenience lie?

34. It is required in cases where a party is a public authority, carrying out general duties of a public nature, conferred upon it by statute, that the court "must look at the balance of convenience more widely and take into account the interest of the public in general to whom these duties are owed": See ***Brown LJ in Smith v. Inner London Education***

authority 1978 1 A.E.R. 411 at page 422, approved by Lord Goff in ***Exp Factorame Ltd. (N0. 2) 1991 1 AC 603***. In considering the balance of convenience in relation to a public authority discharging statutory duties particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society and the duty placed upon certain authorities to enforce the law in the public interest. Lord Goff in ***Exp Factorame said at p 673***:-

> "Particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience."

At this stage in this matter, the defendant's actions have not been found to be ultra vires the IBA.

35. A fundamental principle to be considered when adjudicating on whether or not to grant an interlocutory injunction is that the court should take whichever course appears to carry the lower risk of injustice, if it should turn out to have been wrongly granted: see Lord Jauncey in ***Exp Factorame above at page 683***. This is generally consistent with the views expressed by Lord Hoffman in ***Olint*** above that the "basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or

the other." I may also repeat that by statute the court may grant an injunction in all cases in which it appears just or convenient to do so: see section 27(1) of the Supreme Court of Judicature, Act Chapter 91.

36. When one considers the evidence on both sides on the question of balance of convenience, and also the opinions of their Lordships in the authorities above, including ***Factorame*** and **Smith**, and the evidence at this stage, where does the balance of convenience lie? Doing the best I can, on the evidence at this stage, I think the balance of convenience lies in favour of the defendant.

37. I therefore make the following orders:

(1) The orders of the court dated 12th August, 2011 suspending Circular 5 of 2011 and restraining the defendant from acting upon, in consequence of or seeking to enforce, any alleged breach of the restrictions or requirements of the Circular 5 of 2011 are discharged.

(2) The application to restrain the defendant whether by itself, its servants or agents from acting upon, in consequence of or seeking to enforce Circular 5 of 2011 or Condition 15 of the claimant's licence, is refused.

I will now hear the parties on the question of costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
29th February, 2012

APPENDIX

Item 1

New Condition 15

Item 2

The Circular