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

CLAIM NO. 433 of 2010

1.	**BELIZE BANK LIMITED**	**CLAIMANTS**
2.	**BCB HOLDINGS LIMITED**	

AND

1.	**CENTRAL BANK OF BELIZE**	**DEFENDANTS**
2.	**ATTORNEY GENERAL**	

Hearings
2012
11th May
3rd July

Mr. Eamon Courtenay SC and Mrs. Ashanti Arthurs-Martin for the claimants.
Mr. Denys Barrow SC and Mrs. Liesje Barrow-Chung for the defendants.

LEGALL J.

JUDGMENT

1. The claim in this matter is mainly for declarations that a directive issued by the Central Bank of Belize is unlawful and contrary to section 36(5) of the Banks and Financial Institution Act (BFIA)

Chapter 263. The directive was issued on 4th June, 2010, and is in relation to the balance sheet of the first claimant for the year ended 31st March, 2010. The directive using language peculiar to banking industry is in these terms.

> "BBL derecognize the asset by passing a prior period adjustment for the $20.0 million, in addition to any accrue interest capitalized and restate the financial statements for the period in which the asset was first recognized."

2. As I understand it, the directive directs BBL to remove an asset of BZ$20 million dollars, along with any accrued interest, from its balance sheet by making the necessary accounting adjustments. The facts which triggered the directive are largely not in dispute. The first claimant (BBL), by letter dated 25th October, 2002, confirmed lending a total of BZ$17 million to a local company, named Universal Health Services Company Limited (UHS) of Belize City. The loan was increased to BZ$19 million in May, 2004; and then to BZ$29 million on 9th December, 2004. The government, on the said 9th December, 2004, entered into a guarantee with BBL, under which the government guaranteed the proper performance of UHS of all its obligations under the loan agreements. On 23rd March, 2007, BBL and the government, in order to settle all claims owed under the guarantee of December, 2004, which, as at March, 2007, due to interest payments, amounted to US$33,545.820, entered into a settlement deed of the same date for the purpose of discharging the guarantee and releasing the

government from debts owed to the bank under the guarantee. The Settlement Deed states that upon its execution, the government shall pay BBL the sum of one Belize dollar, and execute and deliver to BBL a loan note, under which terms the government shall pay to BBL BZ$33,545.820 in accordance with terms of the loan note which was attached as a schedule to the Settlement Deed, By the loan note, executed the same date – 23rd March, 2007 – by the Prime Minister and the Attorney General, the then government promised to pay to BBL the principal sum of BZ$33,545.820 together with interest of thirteen percent per annum. The said government promised under the loan note to make monthly payments of interest to BBL commencing from 23rd April, 2007. As the said government failed to make the monthly payments under the loan note, the BBL wrote on 2nd May, 2007, a letter to the then Prime Minister pointing out the default and requesting compliance with the loan note.

3. On 2nd May, 2007 a group of persons calling themselves the Association of Concerned Belizeans brought a claim against the Attorney General, No. 218 of 2007 for declarations that the guarantee and loan note were unlawful. BBL was joined as an interested party to this claim, as well as UHS. In addition, and in accordance with clause 9.2 of the Settlement Deed dated 23rd March, 2007, BBL filed on 31st May, 2007, a request for arbitration to the London Court of International Arbitration (LCIA) for declarations that the said Settlement Deed and loan note were valid; and claiming the sums due under them. The arbitration tribunal made a partial award on jurisdiction, holding that it had jurisdiction in the matter. While the

parties were awaiting the substantive decision of the arbitration, both parties reached a settlement known as the 2008 Settlement Agreement. This agreement seems to be oral; as I find no single document laying out its terms and signed by the parties. From the evidence there were about seven parties to the 2008 Settlement Agreement, including BBL and the then government. The claimants' case is that under the said agreement, the government agreed to pay to BBL, BZ$20 million, in partial satisfaction of its debt to BBL under the loan note, from a gift from the Government of Venezuela of US$20 million to the Government of Belize. This gift from Venezuela was expressly stated by the Government of Venezuela that it was a gift to be used for construction and repair of houses for low income persons. The government also received as a donation, US$10 million from the Government of Taiwan, which were also received by BBL to satisfy the said government's debt to BBL under the loan note, according to the claimants. At about January, 2008, the BZ$20 million of the Venezuelan gift and the 20 million Taiwanese donation, according to the claimants, satisfied the total debt owing including interest, to BBL under the Settlement Deed and loan note.

4. In February 2008, after a general election, a new government was elected. On 7th March, 2008, the No. 1 defendant, the Central Bank of Belize (CBB) conducted a special examination of BBL. As a result of that examination, the then governor of CBB, Sydney Campbell wrote to BBL on 14th March, 2008 outlining irregularities in relation to US$10 million or BZ$20 million of the Venezuelan gift. The letter stated that the gift was wire transferred to the BBL and gave

instructions and payment details from the Venezuelan government that the money was disbursed to the "Government of Belize for construction and repairs of houses." The governor continued in the letter:

> "The funds were subsequently deposited by BBL into the account of Universal Investment Holdings LLC (UIH) at the Belize Bank (Turks and Caicos) Ltd., which was obviously a diversion of funds. BBL should have ensured that the payment details were strictly adhered to and funds were credited to the account of the Government of Belize. Quite apart from other legal implication of such action, this was a serious irregularity and requires rectification without delay. The money remitted by the sender was for a special purpose and should not have been diverted to any other purpose."

5. Due to these alleged irregularities, the CBB issued a directive dated 14th March, 2008 to BBL as follows:

> "1. BBL should forthwith credit GOB's account with the Central Bank of Belize with US$10.0 million as per "Payment Details" stated on wire transfer instructions sent by Bandes-Fideicomisos De Venezuela on the "Cash Payment Confirmation" dated 28 December 2007, and
> 2. BBL should forthwith provide to the CBB, written documentation regarding the authority to deposit funds to the account of UIH regarding the US$10.00 received from the Embassy of The Republic of China (Taiwan)."

6. The BBL filed proceedings in the Supreme Court challenging this directive as unlawful and requesting an injunction restraining CBB from enforcing it. The injunction was refused; and after other proceedings, including one before the Appeal Board established by the BFIA, were unsuccessful, Mr. Phillip Johnson, chairman of BBL wrote on 11th August, 2008 to the Attorney General and the Government of Belize that "without prejudice to our position that the above Directive is unlawful …. we now enclose a cheque for US$10 million made payable to the Government of Belize in full compliance with the above directive …." In spite of this payment to the government, BBL still included the amount paid, the US$10 million ($20 million BZ), to the government, as a receivable or assets in its balance sheet for 2008 on the general grounds that that was in accordance with BBL auditors and accountants, and was in accordance with US GAAP accounting principles.

7. In a reply letter to Mr. Phillip Johnson, the CBB pointed out that although the BZ$20 million dollars were paid to the government by BBL, still BBL recorded the said 20 million as an asset in its balance sheet on the stated ground that it believed "the court will rule that the government either return this money or be liable to repay the Universal Health Service loan." (emphasis mine). The letter then proceeded to make, in my view, a point vital to this case – that it cannot be disputed that the 20 million dollars "are now in the possession of the Government of Belize and are consequently being included in the calculation of the official foreign reserves. BBL

balance sheet – entry creates a situation of double counting which is untenable." BBL replied to the effect that it was confident that "it will be found that the directives should be set aside and the US$10 million returned to it by the government." One basis for this view seems to be, as the letter shows, that the US$10 million dollars relate "to funds received by BBL as part of an agreement entered in January 2008 to settle disputes arising out of and in connection with the Settlement Deed entered into by BBL and the government dated 23rd March, 2007." The January 2008 agreement is the 2008 settlement agreement referred to above.

8. In its award dated 11th August, 2009, the LCIA arbitration which was requested by the claimants, decided and declared, among other things, that "The 2008 Settlement Agreement between the Government of Belize and the claimants in so far as it concerned the use of Venezuelan funds is void for illegality." The reasons given by the arbitral tribunal for its finding of illegality in the 2008 settlement agreement are expressed thus:

> "(b) the Venezuelan Funds constituted "moneys raised or received by Belize" for the purposes of Article 114(1) of the Belize Constitution and section 3 of the Finance Act, and – as both the Government of Belize and the claimant were aware at the time of negotiating the 2008 Settlement Agreement – should therefore have been paid into the Consolidated Revenue Fund or a special fund;
>
> (c) by the 2008 Settlement Agreement, the

> claimant and the Government of Belize agreed to the effect that the Venezuelan Funds would be transferred to the claimant for the purpose of executing the Trust Structure;
>
> (d) the claimant thereby received the Venezuelan Funds as trustee for the Government of Belize: and . . . ."

9. The question which arises is whether the settlement agreement of March 2007 and the loan note are different from the $20 million Venezuelan gift, and therefore has nothing to do with the agreement and loan note. It will be recalled that when the said settlement agreement and loan note were made in March 2007, there was no gift of the US$20 million from Venezuela at the time. The gift came around December 2007. In other words, the loan note and the Venezuelan gift were different transactions done at different times. We will return to this point below.

10. In spite of the letter above from CBB, BBL continued to show the BZ$20 million dollars of the Venezuelan gift as an asset in its balance sheet for the years including March 2009 and March 2010. The CBB then wrote BBL on June 4th, 2010 stating that showing the $20 million as an asset was "improper" and issued the directive above. For convenience I quote the directive again:

> "BBL derecognize the asset by passing a prior period adjustment for the $20.0 million, in addition to any accrue interests capitalized and restate the financial

> statements for the period in which the asset was first recognized."

11. The claimants' position is that the directive is unlawful, and they filed a claim asking for declarations to this effect. The claim will be examined below. For now, it may be recalled that Claim No. 218 of 2007 above was before the High Court for declarations that the loan note was unlawful; and the court, in April 2009 made a decision and granted a declaration to this effect. On an appeal to the Court of Appeal by BBL, the court dismissed the appeal. On a further appeal to the Privy Council, it was held, allowing the appeal, that the loan note was not invalid. Because the claimants perhaps believed that a difference did not exist between the debt owing by virtue of the loan note, which debt had grown, due to interest and other charges, to about $33,545.820; and the $20 million Venezuelan gift, wrote to the lawyers for CBB requesting advice whether CBB was "prepared to unconditionally withdraw the Directive" on the basis that since CBB had expressly said that the Directive stemmed from the local decision of the courts that the loan note was invalid, and now that the Privy Council, then the highest court for Belize, has held that the loan note is not invalid, BBL is entitled to recognize the amount as an asset in its balance sheet. The lawyers for the CBB replied that the directive of 4th June, 2010 will remain in place because "The loan note is not the same as the $US10 million (BZ$20 million)," to use the words of Ms. Lois Young SC for CBB.

12. This is a vital point made by learned senior counsel for the CBB. I think the claimants failed to agree or appreciate that the debt on the loan note and the 20 million Venezuelan gift are two different transactions. The decision of the Privy Council is relevant to the debt in the loan note said to be owed to BBL by the government. That decision is not relevant or applicable to the US $10 million sent as a gift by Venezuela to the Government of Belize to build houses for low income Belizeans. The Venezuela money is a different transaction from the loan note. The loan note was one transaction between the government and BBL. The Venezuela money was another transaction between the Government of Belize and the Government of Venezuela. The BBL had no valid ground to continue to report the Venezuela's money as an asset of itself when the 2008 settlement agreement above by the then government for BBL to do so, was void for illegality as the LCIA arbitration requested by the claimants had found. In my view, the facts show that the claimants continued to put the US$10 million Venezuelan gift in their balance sheet, as their asset when the said US$10 million did not belong to them; but belonged to the Government of Belize as a gift from Venezuela to construct homes for low income Belizeans. When the CBB directed therefore that the BZ$20 million be returned and that adjustments be made to the claimants' balance sheet, it was on considerations such as the above. But the claimants' case in these proceedings is to nullify the directive, although the $20 million dollars are owned and in possession of the government and not in the claimants' possession.

13. It is also the claimants' case that the CBB had no jurisdiction to issue the directive and that the directive is ultra vires section 36(5) of the BFIA and in breach of the Constitution. The claimants further case is that section 36(5) of BFIA is contrary to section 6 of the Constitution and null and void; and that instructions given to BBL by CBB in a letter dated 6th January, 2012 "to remove from its books the $34.94 million that was recognized in the banks current year's profits, and as an other assets in its balance sheet, "were unlawful, null and void. It seems that this amount is the debt under the loan note. The claimants therefore made the following claims:

> "(1) A declaration that the defendant has no jurisdiction to issue the directive contained in a letter dated 4th June, 2010 addressed to the first claimant, namely:
> "BBL derecognize the asset by passing a prior period adjustment for the $20.0 million, in addition to any accrued interests capitalized and restate the financial statements for the period in which the asset was first recognized" (the Directive)
> (2) A declaration that the Directive
> (i) is ultra vires the powers conferred on the Central Bank by the provisions of the section 36(5) of the Banks and Financial Institutions Act, Cap 63 and generally; and/or
> (ii) is disproportionate; and/or
> (iii) was made on the basis of an erroneous view of the law; and/or
> (iv) was made on the basis of an unreasonable exercise of discretion
> (3) A declaration that section 36(5) of the banks and Financial Institutions Act, Cap 263

contravenes section 6 of the Constitution of Belize and is therefore unlawful and void.

(4) A declaration that the Directive contravenes the Constitution of Belize and is therefore void and of no effect.

(5) A final injunction restraining the defendant whether by itself, its servants or agents or howsoever from in any way acting in consequence of or acting to enforce any of the directives to the first claimant in its letter to the first claimant dated 4 June, 2010.

(5A) A declaration in the alternative that the decision not to withdraw the Directive following the handing down of the judgment of the Joint Committee of the Privy Council in Belize Bank Limited v the Association of Concerned Belizeans (2011) UKPC 35 is unlawful

(5B) A declaration that the decision of the Central Bank as contained in its letter of 6 January, 2012 to instruct the First Claimant:

"to remove from its books the $34.94 million that was recognized in the bank's current year's profits and as an Other Assets in its balance sheet" ad "resubmit all affected BR1s and Bank Return-6s (BR6s), starting with those for the week ending 9 November 2011, tor reflect this removal" was:

(i) ultra vires the powers of the Bank and its supervisory jurisdiction as vonferred (sic) on it by the provisions of the BFIA and/or

(ii) made on the basis of material errors of fact; and/or

(iii) made on the basis of an error of law in holding that the transaction was not compliant with US GAAP and/or the BFIA Circulars of 1996

(iv) disproportionate and/or

(v) Wednesbury unreasonable;

And is therefore unlawful and of no effect

(6) Further or other relief

(7) Costs."

14. Important to a decision on the above claims are the interpretation of section 36(5) of BFIA and also whether the directive is contrary to the section 6 of the Constitution. The central question is whether CBB is authorized by section 36(5) to issue the directive. Section 36(5) states:

> "(5) If the Central Bank determines that the acts or course of conduct in question may pose a serious risk to the condition of a licensee, cause a significant financial loss to a licensee or personal gain arising from the foregoing to the person which is the subject of the order or directive, or otherwise seriously prejudice the interest of a licensee's depositors or customers, the Central Bank may issue a summary order or directive which shall take effect promptly on delivery to the subject person affected, who shall be afforded the opportunity to present his views to the Central Bank within ten days after the delivery of the order or directive on whether the order or directive in question should be removed or varied."

15. I think a useful starting point in the process of interpreting section 36(5) is the celebrated ***AG v. Great Eastern Ry Co. 1880 5 AC 473***. In this case, the Lord Chancellor says: "It appears to me to be important that the doctrine of ultra vires as it was explained (***in Ashbury Railway Co. v. Riche, Law Report 7 HL 653***) should be

maintained … This doctrine ought to be reasonably, and not unreasonably, understood and applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires": see p478. In addition, section 65(a) of the Interpretation Act Chapter 1 of the laws of Belize states some principles to be applied in the interpretation of statutes, among which, is the principle that "where more than one construction of the provisions in question are reasonably possible, a construction which would promote the general legislative purpose underlying the provision is to be preferred to a construction which would not." There may be more than one construction of the phrases "serious risk," "significant financial loss" and "seriously prejudice" as appear in section 36(5) above.

16. The general purpose of section 36 would seem to prevent a licensee such as BBL from committing or pursuing a course of conduct that is detrimental to the interests of its depositors or customers. To insert, and continue to insert, in the balance sheet of BBL as an asset, the Venezuelan gift of US10 million dollars, which is not in BBL's possession, and which gift is a different transaction from the loan note, and which money was a gift to the Government of Belize from the Government of Venezuela, and therefore belonged to the Government of Belize, when BBL knew the findings above of the illegality of the 2008 settlement agreement, is misleading financial information to the public in general and depositors and customers of the bank in particular, which gives the misleading impression that the

bank is in possession of more financial resources or assets than it really has. Surely this conduct could seriously prejudice the interest of customers and depositors by giving them a false sense of confidence, based on misleading financial information, to save and invest in the bank. As the evidence shows, "material overstatement of assets can mislead the bank's directors, the CBB and other users of financial statements as to the true soundness of the bank and its true capacity to observe losses." The evidence further shows that "to allow BBL to continue to report in 2010 that it has a higher asset value and capital than it truly does could prejudice decision making that could destabilize the bank …." and "mislead depositors about the financial status of the bank.": see first affidavit of Glenford Ysaguirre. In the light of the misleading information in the BBL balance sheet, certainly the CBB is authorized under section 36(5) to issue a directive to correct it, and require that the true position be stated; not only on the basis of a literal construction of the section 36(5); but also considering the general purpose of section 36, and that the Directive can fairly be regarded as incidental to and consequential upon the provisions of the section.

17. It is also urged by the claimants that the CBB, contrary to the BFIA, exercised the role of an auditor when it issued the directive which contained accounting treatment of an asset on the balance sheet of BBL. The powers of the CBB, under section 36(5) are not so wide as to issue any directive, but, according to the claimants, the section must be "narrowly construed." There is no power given to CBB under the BFIA, say the claimants, to specifically direct particular accounting

treatment in relation to individual institutions, as the CBB did in the Directive. The claimants further submitted that issuing the Directive without notice to the BBL, the CBB failed to direct itself properly as to the exercise of its powers under section 36(5) of the BFIA. Further, according to the claimants, the decision to issue the directive was because CBB believed that BBL was in breach of GAAP accounting rules, which belief was wrong and in error. Finally, the claimants say that the decision by CBB not to withdraw the directive after the decision of the Privy Council on the loan note, was perverse, unreasonable and one which no reasonable public authority could properly make. Briefly, the claimants say, the Directive is disproportionate, unreasonable, erroneous as a matter of law and unconstitutional. Due to my findings above that the Directive was issued in accordance with the provisions of section 36(5), dispenses, in my view, with the submissions of the claimants that the CBB exercised the role of auditors by issuing the directive; that CBB should withdraw it; that the section 36(5) does not confer on the CBB power to issue the Directive to a particular licensee; and that the Directive is disproportionate, unreasonable and erroneous as a matter of law.

18. In relation to the submission that the directive was in breach of US GAPP accounting principles, experts submitted reports disagreeing with each other. These experts were not called to give evidence and were not cross-examined. The court was therefore left with the reports of the experts without any test of their credibility by way of cross-examination. Since the court is not versed in US GAAP

accounting principles, it would be to engage in conjecture to say which expert is right. In the light of this, the court is not satisfied that the claimants have proven that the directive is in breach of US GAAP accounting principles.

19. In relation to the submission that the Directive was issued without notice it is urged by the claimants that the CBB erred when it issued the Directive without first giving notice to the claimants. Section 36(1) of the BFIA gives the CBB power to issue orders and directives to a bank, and subsection (3) of that section states that any directive under the subsection shall be given by notice in writing to the subject person. Under section 36(5) notice is required to be given ten days after the delivering of the directive. The intention of the BFIA is that notice under section 36(5) has to be given after the directive. If Parliament intended otherwise it would have, as in section 36(3), stated in section 36(5) that at the time of, or before the Directive, notice is to be given.

20. Moreover, there is overwhelming circumstantial evidence in this case which shows that the claimants must have known that a directive would be issued, and the subject matter of its contents. As would be recalled, the first Directive was issued on 14th March, 2008 which the claimant complied with and credited on 8th August, 2008 the US$10 million to the government. That Directive indicated to the claimant that the accounting treatment by the claimants in their accounts of the said US$10 million Venezuelan gift as an asset was being questioned by the CBB. CBB in a letter to the BBL dated 20th October, 2008

stated that although the money was paid back to the government, the BBL still recorded the US$10 million, "as a foreign receivable" in its balance sheet. The rationale for the BBL's accounting treatment of the US$10 million was because it felt that "the court will rule that the government must either return this money, or be liable to repay the UHS loan." It was pointed out in the said letter that the facts remain, whatever the feelings of the claimant as to the outcome of court proceedings, that the money was in possession of the government and a part of the "official foreign reserves" and that the CBB "requires BBL to amend its balance sheet accordingly." A reply to the above letter by the BBL dated 29th October, 2008 justified the amount as an asset in its balance sheet on the ground of its confidence that the US$10 million will be fully recovered and "returned to it by the government," and therefore BBL was "entitled to, and indeed ought to, recognize it as an asset on its balance sheet," to use the words of BBL's letter. BBL therefore in April 2009 published its balance sheet containing the said US$10 million as an asset. On 30th March, 2010 based on the judgment of the Court of Appeal that the loan note was unlawful, the CBB wrote to the BBL that "In view of the judgment, the current accounting treatment for the $20 million foreign accounts "receivable" on BBL balance sheet can no longer continue. BBL insisted that it was justified in treating the US$10 million as an asset on its balance sheet. On 4th June, 2010 the CBB issued the Directive.

21. The above evidence shows that BBL knew that the CBB was objecting to its accounting treatment on its balance sheet of the US$10 million as an asset and that that accounting treatment can no longer

continue. They knew, or must have known, that if they continued with that accounting treatment, a directive to correct that accounting treatment would be issued. The Directive of 4th June, 2010 is to direct that the treatment of the US$10 million as an asset of BBL in its balance sheet can no longer continue. It is true that the BBL did not see the actual directive before it was issued, but they knew, or must have known, from the correspondence above on the subject that a directive would be issued and the purpose or subject matter of the directive.

22. The fact that the letter above of 20th March, 2010 states that in view of the Court of Appeal's judgment, BBL cannot continue to treat the US$10 million as an asset, does not change the fact that the loan note and the gift from Venezuela of the US$10 million are not the same and are different transactions, and that the US$10 million were then in the possession of the Government as we saw above. The continued inclusion by the claimants in their balance sheet of the US$10 million gift from Venezuela to help low income Belizeans, although the claimants knew that the Settlement Agreement of 2008 was declared void and knew of the Venezuelan gift, is conduct that would not surprise one if it is described as deliberately misleading. The Directive had all to do with the Venezuela gift and to correct the treatment of this gift in the claimants' balance sheet.

23. By letter to the claimants dated 6th January, 2012 the CBB pointed out that the BBL's returns for the week ended on 9th November, 2011, sent to CBB, included a sum of $34.94 million on its balance sheet as

other assets, and since BBL under the loan note had not received that sum, the sum must be removed from its books as an asset. The CBB on the same date of the letter issued to the claimant the following instructions:

> "BBL is hereby instructed to remove from its book the $34.94 million that was recognized in the bank's current year's profits and as an Other Assets in its balance sheet. BBL is also required to resubmit all affected BR1s and Bank Return #6s (BR6s), starting with those for the week ending 9 November 2011, to reflect this removal. Documented proof of the removal along with the revised BR1s, BR6s, and Variance Reports must be presented to the Central Bank by 13 January 2012."

The BBL by letter dated 13th January, 2012 complied with the instructions above; but stated that it was "without prejudice to the bank's position that the receivable is properly recordable on its balance sheet and its right to challenge the Central Bank's decision in court." The challenge is stated in the claim above. As with the Directive, the claimant insists on showing the $34.94 million as an asset on its balance sheet, when it has not received this amount on the loan note and which is not in its possession. To include this amount as an asset in the claimants' balance sheet, to use the words of learned senior counsel for the defendant "is to mislead the public into believing that BBL has more money than it actually does." We have

shown above the evidence in relation to the effect of misleading information on the depositors or customers of the bank in relation to the Directive and this is also applicable to the instructions. In light of that misleading information the CBB is authorized under section 36 to issue the instructions or orders to BBL to correct the situation.

24. The claimants further submit that whether or not the said amount $34.94 million could be included as an asset in the balance sheet is a matter of US GAAP accounting principles, and the claimants by including it as an asset were acting in accordance with US GAAP principles. The claimants rely on an expert accountant's Report by Dr. Bala G. Dharan who supported the claimants' position. Accountants Castillo Sanchez & Burrell submitted an expert report supporting the position taken by CBB. These were the same experts mentioned above in relation to the Directive. Castillo Sanchez concluded in its report that the CBB directive was correct "since BBL is prematurely recognizing an asset whose potential existence is contingent on the outcome of future events that are out of BBL's control." Dr. Dharan says that "I do not agree with the opinion of Castillo Sanchez because under GAAP if there is a probable future benefit to BBL deriving from the receivable …. It should be recorded as an asset in the financial statements." Both expert reports dealt with the US$10 million Venezuelan money. As pointed out above in relation to the directive, the experts were not called to give evidence and were therefore not cross-examined. In the absence of cross-examination of the experts to test their credibility the court is left unaware as to which expert is more credible, and thus could be

believed. For this reason, I am not satisfied that the claimants have proven that the entry in their balance sheet of the amount of $34.94 million was in accordance or complied with GAAP accounting principles.

25. It was also submitted that section 36(5) of BFIA was unconstitutional, in that it was contrary to section 6 of the Constitution. Section 6 deals with certain procedural rights and natural justice rights of a person charged with a criminal offence; and the submission was made that the Directive issued by the Central Bank constituted a criminal charge for purpose of section. Section 6 is applicable in situations where a person is charged with a criminal offence. I have no evidence of any charge laid against the claimants for a criminal offence; and it is, in my view, misconceived to submit that the Directive in this case is a criminal charge or offence. Moreover, as shown above, the claimants were given an opportunity to respond, and did respond, before the Directive was issued; and therefore the basis for challenging section 36(5) as unconstitutional is also, in my view, misconceived.

26. For all the above reasons I make the following orders:

(1) The claims in this matter are dismissed.

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

Oswell Legall
JUDGE OF THE SUPREME COURT
3rd July, 2012