IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 27 OF 2015 (ASCJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND

IN THE MATTER OF CALEDONIAN BANK LIMITED (IN OFFICIAL LIQUIDATION)

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 15TH DAY OF JULY 2015

APPEARANCES: Mr. Rupert Bell, Ms. Fiona McAdam and Ms. Catherine Barbour of Walkers for the JOLs.
Mr. Jeremy Walton and Ms. Victoria King of Appleby for the Liquidation Committee of CBL
Ms. Gràinne King of Harneys for creditors (on watching briefs)
Ms. Rene Cauderion of Campbells (for creditors, on watching briefs)

Liquidation of banking company – classification and treatment of certain deposits transferred to the bank at or around the time of the suspension of business – interpretation of legislation providing for deposits in limited amounts to be treated as preferential debts – the identification of depositors eligible for preferential dividends.

REASONS FOR DECISIONS

1. The voluntary liquidation of Caledonian Bank Limited (In Official Liquidation) ("**CBL**") commenced on 10 February 2015. Subsequently, a winding up order was made in respect of CBL by this Court on 23 February 2015 and Keiran Hutchison and Claire Loebell of Ernst & Young Ltd. were appointed as the joint official liquidators of CBL (the "**JOLs**") (having previously been appointed by the Cayman Islands

Monetary Authority ("**CIMA**") as the joint controllers of CBL on 10 February 2015). CBL was, prior to being placed into liquidation, a Class 'A' licensed bank in the Cayman Islands.

2. CBL's principal business activities included issuing financial instruments and providing fiduciary and administrative services, including custody services to customers of its non-debtor broker-dealer affiliate, Caledonian Securities Limited (an entity over which the JOLs have also been appointed as joint official liquidators by this Court). More specifically, CBL accepted deposits from depositors in CBL at fixed rates for various periods and sought to earn an interest margin by placing these funds with creditworthy counterparties at higher rates.

3. On 9 June 2015, the JOLs filed a summons pursuant to section 110 of the Companies Law (2013 Revision) (the "**Companies Law**") and Order 11 of the Companies Winding Up Rules (2008 Revision) seeking the sanction of this Court to take what are, broadly speaking, two steps in the liquidation of CBL.

Hanging Payments

4. The first step concerns dealing with the considerable number of payments that were received by CBL for credit to the accounts of certain depositors of CBL, at or around the time of the suspension of all of CBL's operations implemented by CBL's board of directors (the "**Board**"). This suspension that took effect from 10.50am on 9 February 2015 (the "**Suspension**") and the effect it has had upon them, has resulted in payments being referred to during the liquidation as the 'hanging payments'. In this regard, the JOLs have been required to resolve whether the monies which represent the hanging payments either: (i) belong beneficially to CBL and are therefore to be included as part of the assets of the liquidation estate of CBL; or (ii) are held by CBL

on trust for the respective originators of these payments and should in those circumstances be returned in accordance with the originators' instructions.

5. In keeping with the legal advice which the JOLs have obtained with respect to this issue, the JOLs' summons seeks the following orders:

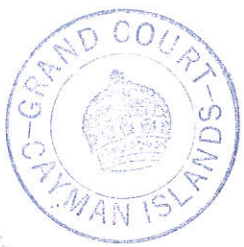
(a) that they be authorised to return all deposits/payments received by CBL for credit to the accounts of depositors in CBL after the implementation of the Suspension to the relevant originators of such deposits/payments (the "**Post-Suspension Originators**") in accordance with the Post-Suspension Originators' instructions and to take all steps as necessary to return such deposits/payments to the Post-Suspension Originators in accordance with such instructions; and

(b) that the JOLs be authorised to return all deposits/payments received by CBL for credit to the accounts of depositors in CBL before the implementation of the Suspension but which had not been credited to the relevant depositors at the time of the Suspension, to the relevant originators of such deposits/payments (the "**Pre-Suspension Originators**") in accordance with the Pre-Suspension Originators' instructions and to take all steps as necessary to return such deposits/payments to the Pre-Suspension Originators in accordance with such instructions, (hereinafter the "**Hanging Payments Application**") (emphases added).

Priority Dividend to Eligible Depositors

6. The second step concerns the payment of a priority dividend (being up to CI$20,000 or the equivalent thereof) to those depositors of CBL who are eligible to receive it, being a "*preferential debt*" or "*preferred debt*" pursuant to section 141(1) and

Category 2 of Schedule 2 of the Companies Law. As is outlined in more detail below, Category 2 of Schedule 2 of the Companies Law sets out various criteria by which it is determined whether a depositor of CBL holds a preferential debt and is therefore eligible to receive the priority dividend. The JOLs consider that there is some ambiguity on the plain reading of certain sections of Category 2 of Schedule 2 of the Companies Law which has presented certain difficulties in the JOLs determining which depositors of CBL qualify to be eligible for the priority dividend. Accordingly, with respect to this issue, the JOLs Summons seeks the following:



(a) directions as to the interpretation of sections 1, 2(a) and 2(b)(ii) of Category 2 of Schedule 2 of the Companies Law in order for the JOLs to determine which depositors of CBL constitute a "*preferential debt*" or "*preferred debt*" and are therefore eligible to receive the priority dividend; and

(b) an order that the JOLs be authorised, to the extent applicable, to pay each depositor that is eligible to receive the priority dividend in full, (the "**Eligible Depositor Application**").

7. The Summons is supported by the Third Affidavit of Keiran Hutchison sworn on 9 June 2015 ("Hutchison 3") together with Exhibit "KH-3" thereto.

8. The Summons and Hutchison 3 were provided to Appleby, Cayman Islands legal counsel to the liquidation committee of CBL (the "**Liquidation Committee**"), on 29 June 2015. The Liquidation Committee is represented on this application and does not oppose the relief sought in the Summons, save that the Liquidation Committee (per Mr. Walton) takes a contrary view to the JOLs' interpretation of section 1 of Category 2 of Schedule 2 of the Companies Law. This issue is set out and addressed in further detail below.

9. Notice of the hearing of the Summons was also provided to all creditors of CBL in a circular that was sent to creditors by email on 1 July 2015 and as included in the evidence. As at today's date, the JOLs inform me that they are not aware of any creditors (apart from those represented today on watching briefs) seeking to appear at the hearing of the Summons.

Background to the hanging Payments Application

10. From their investigations into the business and affairs of CBL, the JOLs are aware that the accounts of depositors of CBL are governed by the terms and conditions set out in a master account agreement (exhibited at pages 1 to 2 of Exhibit "KH-3") (the "**Master Account Agreement**"), subject to any additional conditions that may have been agreed between CBL and a specific depositor.

11. Clause 20.1 of the Master Account Agreement states that:

> "*In exceptional circumstances [CBL] may at any time suspend the operation of any or all of the services but [CBL] will promptly notify you of any such suspension.*"

12. On 6 February 2015, the United States Securities and Exchange Commission (the "**SEC**") filed a complaint in the United States District Court for the Southern District of New York (the "**US District Court**") against, *inter alia*, CBL, alleging breaches of various securities laws in the United States (the "**SEC Proceedings**"). On the same day, the US District Court granted a temporary restraining order (the "**TRO**") freezing all of CBL's United States-based assets and ordered the repatriation of proceeds from CBL's stock sales to the United States from wherever they may be located.

13. CBL was subsequently able to negotiate with the SEC a reduction to the amount of the assets frozen by the TRO in an attempt to ensure that the business of CBL could continue as usual. However, by 9 February 2015, CBL had received a substantially larger number of withdrawal requests from depositors of CBL than expected rendering CBL cash flow insolvent. As such, the Board was satisfied that "*exceptional circumstances*" existed which justified CBL exercising its rights pursuant to clause 20.1 of the Master Account Agreement. Accordingly, the Board imposed the Suspension by resolving by way of unanimous written resolution "*...to suspend the operation of all services to [CBL's] customers, including the acceptance of all deposits and the processing and payment of all withdrawals until further notice...*" with effect from 10.50am Cayman Islands time on 9 February 2015 (the "**Suspension Resolution**") (a copy of the Suspension Resolution is exhibited at page 3 of Exhibit "KH-3").

14. CBL had relationships with a number of correspondent banks including, amongst others, The Northern Trust International Banking Corporation ("**Northern Trust**"). The JOLs understand that during the morning of 9 February 2015 (whilst the imposition of the Suspension was being considered by the Board), the Board was informed by Northern Trust that Northern Trust was continuing to receive amounts by wire transfer as correspondent bank to CBL which Northern Trust had transferred to CBL's reconciliation account with Northern Trust in the usual way. Following the passing of the Suspension Resolution, the Board then passed the following additional resolutions in respect of payments received through Northern Trust on 9 February 2015 (the "**Trust Resolutions**"):

"1. *That Northern Trust be instructed to continue to process all incoming wire transfers to [CBL] for the account of [CBL's] customers on 9 February 2015 in accordance with the relevant wire transfer instructions.*

2. *That all funds received by [CBL] from Northern Trust as correspondent bank on 9 February 2015 are to be held by [CBL] on trust in a segregated account in the name of the relevant [CBL Depositor] pending a decision by the Board regarding whether or not to lift the Suspension.*

3. *If the Suspension is lifted, the [CBL Depositors] are to be contacted in order to obtain their instructions regarding the application of the funds held on trust by [CBL] for their benefit, which shall be either the application of such amounts to their account at [CBL], or the payment of the funds to another account outside of [CBL], whereupon in either case such trust arrangements shall end.*"

15. As will be explained below, the Trust Resolutions would purport to run contrary to a constructive trust which the JOLs have been advised, is deemed to have arisen in respect of certain wire transfer payments to CBL.

16. From the investigations carried out by the JOLs and their staff and their review of the books and records of CBL, I am assured that the JOLs have not become aware of any other resolutions having been passed by the Board in respect of wire transfers received by CBL from any other correspondent bank on or around the time of implementation of the Suspension. The JOLs understand that the TRO was served on

Northern Trust (being in the United States) by 9 February 2015 but was not served on any other correspondent bank until after the implementation of the Suspension. This may provide an explanation as to why Northern Trust was contacting the Board on the morning of 9 February 2015 and why the Trust Resolutions were only passed in respect of Northern Trust and no other correspondent bank.

Types of Hanging Payments

17. At the commencement of the liquidation of CBL, the JOLs identified eight different types of hanging payments that were made either prior to the implementation of the Suspension (the "**Pre-Suspension Payments**") or after the implementation of the Suspension (the "**Post-Suspension Payments**") that are the subject of the JOLs' Hanging Payments Application, set out as follows:

	Type of Suspension Payment	Number of Payments	Value of Payments
1	Pre-Suspension Payment: Incoming wire transfer received on or before 6 February 2015 that has not been credited to customer's account (that is, held in a CBL reconciliation account)	15	US$1,219,106.04 & €2,952.50 & GBP 10,144.80
2	Pre-Suspension Payment: Incoming wire transfer received by Northern Trust before 10.50am on 9 February 2015 that has not been credited to the customer's account (that is, held in a CBL reconciliation account)	12	US$1,619,575.99

3	Pre-Suspension Payment: Incoming wire transfer received by a correspondent bank (other than Northern Trust) before 10.50am on 9 February 2015 that has not been credited to the customer's account (that is, held in a CBL reconciliation account)	3	CAD367.75 & €1,386.03 & CHF25,469.28
4	Post-Suspension Payment: Incoming wire transfer received after 10.50am on 9 February 2015 that has not been credited to the customer's account (that is, held in a CBL reconciliation account)	13	US$1,177,948.84 & €10,913.53
5	Post-Suspension Payment: Incoming wire transfer received after 10.50am on 9 February 2015 that has been credited to the customer's account	15	US$2,346,497.49 & €5,292.39
6	Post-Suspension Payment: Incoming wire transfer received on 10 February 2015 that has not been credited to the customer's account	20	US$4,537,994.99
7	Post-Suspension Payment: Incoming wire transfer received on 10 February 2015 that has been credited to the customer's account	13	US$610,937.22
8	Post-Suspension Payment: Incoming wire transfer received on or after 11 February 2015 that has not been credited to the customer's account	39	US$1,896,755.76 & CHF2,976.45
	Total Number/Value of Payments in US dollar	122	US$13,408,816.33
	Total Number/Value of Payments in Euro	4	€20,184.45
	Total Number/Value of Payments in GBP	1	GBP10,144.80
	Total Number/Value of Payments in CHF	2	CHF28,445.73
	Total Number/Value of Payments in CAD	1	CAD367.75

18. From their investigations in respect of the hanging payments, the JOLs understand that there are a total number of 130 hanging payments which fall into one or other of the categories listed above in the total value of US$13,477,024 (with other currencies converted to US$).

Legal Advice

19. On the basis of the legal advice the JOLs have received, there are essentially two legal principles involved:

(a) the principle that a money wire transfer between two banks is not regarded as completed until the receiving bank has, with the authority of its customer, accepted the payment on its customer's behalf. Until that has occurred, the receiving bank holds the money as agent and hence as trustee for the transferor bank; and

(b) the principle that money paid by mistake will be held on constructive trust for the payer if the circumstances render it unconscionable for the payee to retain the money as against the payer. This will be the case if the money was paid by mistake and the payee was or should have been aware of the mistake when it received the money.

20. I accept that these are the applicable principles and will come to apply them below. I note here my gratitude for the comprehensive arguments presented on behalf of the JOLs and by Mr. Walton on behalf of the Liquidation Committee.

Completion of Payments

21. It is stated in leading text books to be a generally accepted banking principle that in the case of inter-bank transfers, where funds are transferred between accounts held at different banks, an intended payment between the originator of the transfer and the beneficiary is complete when the beneficiary's bank receives directly (or in this case indirectly through a correspondent bank) payment instructions from the originator's bank and decides to make an unconditional credit to the beneficiary's account in the

equivalent amount[1]. This principle applies on the assumption that the beneficiary's bank has the beneficiary's actual or ostensible authority to accept the transfer on the beneficiary's behalf[2]. As such, there are issues to be met to determine whether an incoming wire transfer payment is complete:

(a) Has the beneficiary bank made the decision to make an unconditional credit to the beneficiary's account in the equivalent amount?

(b) Does the beneficiary bank have the actual or ostensible authority to accept the transfer on the beneficiary's behalf?

Decision to be made by beneficiary bank

22. As further explained in *Paget's Law of Banking*, the mere receipt of funds by the beneficiary's bank is not enough to constitute payment; it is the beneficiary's bank's decision to accept those funds for the beneficiary's account that is determinative. It is not necessary for the beneficiary bank to have completed the credit entry to the beneficiary's account and/or notify the beneficiary of such credit entry; its decision to do so is all that is required to complete the payment. Until the beneficiary's bank reaches its decision to accept the funds for the beneficiary's account, it holds those funds as agent for the originator of the transfer and not for the beneficiary. Until the determinative event, the funds constitute an unaccepted tender by the originator and do not discharge any underlying money obligation between the originator and the beneficiary which may exist. The beneficiary's bank must be aware that the funds

[1] Ali Malek QC and John Odgers QC, *Paget's Law of Banking* (14th ed., 2014) p. 628-629, citing inter alia, Mardorf Peach & Co. Ltd. V Attica Sea Carriers Corpn. Of Liberia, The Laconia [1977] AC 850; and RM Goode, *Commercial Law* (4th edn, 2010, Penguin), p.508.

[2] *The Laconia* [1977] AC 850 (above).

have been transferred for the account of a particular beneficiary if it is to accept them on that beneficiary's behalf[3].

23. Although the payment by the originator bank to the beneficiary bank (directly or indirectly) is what enables the beneficiary's bank to recognise the beneficiary as its creditor for an equivalent sum, it is not that payment which discharges the originator's debt to the beneficiary to the extent it exists but the resultant decision by the beneficiary's bank to credit the beneficiary's account[4].

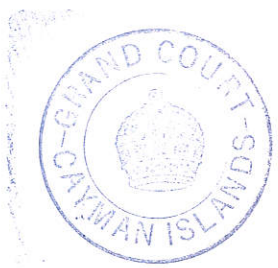
24. This can be determinative because the beneficiary bank may be unable or unwilling to make the decision to credit the beneficiary's account at the time of receipt due to a variety of reasons including, amongst others, the cessation of the bank's operations (as was the case with CBL).

25. The case law is illustrative.

26. In *Royal Products Ltd v Midland Bank Ltd*[5], it was held that a transfer of funds from a customer's account with one bank to its account with another bank was complete only when the funds were available to the other bank and it was notified for whose credit they were to be held.

27. In *Customs and Excise Comrs v FDR Ltd*[6], Laws LJ held in terms which are applicable here, at paragraph 37 (following *Momm v Barclays Bank International Ltd*[7]) that:

> "... *a transfer of money means no more nor less than the entry of a credit in the payee's account and the entry of a corresponding debit in the payer's account. There may be – will be – problems in cases of error or fraud in the posting of entries to the accounts. But however*



[3] *Paget's Law of Banking* op cit (14th ed., 2014) p. 628-629; and RM Goode, *Commercial Law* (4th edn, 2010, Penguin), p.508.
[4] RM Goode, *Commercial Law* (4th edn, 2010, Penguin), p.508.
[5] [1981] 2 Lloyd's Rep 194.
[6] [2000] STC 672.
[7] [1977] QB 790.

those fall to be resolved, there is no further, elusive event, by which the money is really transferred.... The pro and con entries constitute the transfer. There is nothing else."

Authority of beneficiary bank

28. As mentioned above, payment as between originator and beneficiary will only be complete where the beneficiary's bank has the beneficiary's actual or ostensible authority to receive and accept a tender of payment on the beneficiary's behalf. In *Mardorf Peach* (above)[8], the charterers of a ship made a late tender of payment hire to the owners' bank. The tender was accepted by the bank without objection, but later rejected by the owners when they became aware of the lateness of the tender, citing the provision of the charter party which required "punctual payment". When the owners tried to invoke a forfeiture clause in the charter party on the grounds of late payment of hire, the charterers argued that their breach had been waived through acceptance of the late tender by the owners' agents that is, the owners' bank. The House of Lords (unanimously reversing the decision of the Court of Appeal), held that the owners' bank only had limited authority to receive the payment and to obtain instructions from the owners, it did not have authority to accept the late payment on behalf of the owners and had no authority to waive the owners' right to withdraw the vessel. Even though the owners' bank had taken delivery of the payment order and had begun to process it, these acts were held to be purely ministerial acts that is, provisional and reversible and given that the owners' bank did not have the authority from the owners/ beneficiaries to accept the payment, it was held that payment was

[8] [1977] A.C. 850.

not complete in those circumstances[9]. Put simply, the payment was not "punctual payment" as required by the charter party.

29. No such issue arises in this case and so the authority of CBL is unlikely to be in dispute given the terms and conditions as set out in the Master Account Agreement. Nor are the JOLs aware of any evidence of revocation of authority by any CBL customer at least until prior to the Suspension.

30. Rather, the issue here to be discussed further below is whether CBL as the beneficiary bank, made the decision in every instance, to make an unconditional credit to the beneficiary's account in the respective equivalent amounts of the payments. The answer to the question whether a hanging payment became the property of CBL or whether it remained the property of the originator of the transfer will depend on CBL's actions in that regard.

31. I will return to express my conclusions on this issue below.

Constructive Trust Where Payment Made By Mistake

32. In *Paragon Finance plc v DB Thakerar & Co*[10], Millett LJ provided a general definition of the doctrine of constructive trusts:

> "*A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another*".

[9] *Paget's Law of Banking* (op cit) p. 628-630.
[10] [1999] 1 All ER 400 at 409 a –b.

33. Lord Millett went on *(ibid)* to explain that there are two classes of constructive trust. The first class, that which is said to be applicable here and which I agree arises *in case where "the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property".*

34. On the basis of that principle where money is paid to someone by mistake and the recipient knows of the mistake but retains the money, the recipient will be a constructive trustee of the money for the payer. A payment made by mistake may be of fact or law and arises from the date that the recipient became aware of the mistake. It was considered in the English trusts law case of *Westdeutsche Landesbank Girozentrale v Islington LBC* that the recipient will not be a constructive trustee of the money for so long as it is ignorant of the mistake. Furthermore, Lord Browne-Wilkinson commented on when a constructive trust might arise where a payment had been made by mistake:

> *"Although the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust."* [11]

35. In *Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd.*[12] where a sum of money was mistakenly paid over twice by a New York bank to a London bank and the recipient bank shortly after receiving the mistaken second payment entered into insolvent liquidation, Goulding J. held that the money that had been paid over by

[11] [1996] A.C. 669, HL at 715; citing, *inter alia; Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391, 473-474.
[12] [1981] Ch.105.

mistake was held on trust for the payer, thereby allowing the payer to trace and recover that money even though the payee was by then insolvent[13]. Lord Browne-Wilkinson clarified in *Westdeutsche Landesbank* (by differing from the reasoning of Goulding J. while approving of his decision) that the unconscionable act which led to the imposition of a constructive trust in *Chase Manhattan* was the knowledge of the recipient of a payment that the payer had made a mistake and would therefore require repayment. It follows therefore and I accept that conscience in a constructive trust context does not require that there has been some dishonesty or theft practised by the defendant, only that there be some treatment by the defendant of property in which the claimant has rights which treatment is considered to be unethical in a broad sense.

36. Again, the subsequent case law is illustrative.

37. In the Australian case of *Wambo Coal Pty Ltd v Ariff & 1 Or*[14], the New South Wales Court of Appeal held that monies that had been paid by the plaintiff to the defendant in the mistaken belief that the plaintiff owed the defendant money, were held on constructive trust by the defendant for the plaintiff from the time when the defendant became aware that they had been paid by mistake. White J. held at paragraph 43 that "*...once the recipient is aware that, by a mistake, he has got something for nothing, a proprietary remedy is appropriate. The fact that the company is insolvent does not affect this conclusion. It would be an unwarranted windfall for the company's creditors to share in the payment...*".

[13] *Chase Manhattan* was followed in *Commerzbank Aktiengesellschaft v I.M.B. Morgan Plc* [2005] 1 Lloyd's Rep. 298 and in *Re Farepak Food and Gifts Ltd. (In Administration)* [2006] EWHC 3272 (Ch.); unreported at [2007] 2 BCLC. Ch. D. 1 at paragraphs 39 to 40 per Mann J. However, it should be noted that the case's precedential status has been diminished by the comments made by Lord Browne-Wilkinson in *Westdeustche Landesbank* at paragraphs 704 to 706 but the result of inferring a constructive trust in circumstances where a payment has been made to a recipient after such recipient has ceased to trade remains good law.

[14] [2007] NSWSC 589.

38. In the English case of *Re Farepak Food and Gifts Ltd*[15], a case which involved the receipt by a company of payments after it had ceased to trade, Mann J. stated (at paragraph 40) that:

> *"If and in so far as it could be established that moneys were paid to Farepak by customers at a time when Farepak had decided that it had ceased trading, and indeed at a time when it had indicated that payments should not be received, then there is a strong argument for saying that those moneys would be held by the company as constructive trustee from the moment they were received."*

39. Accordingly, in circumstances where a company receives funds after it had decided to cease trading (such as, by way of example in the case of CBL, after the implementation of the Suspension), it is settled principle that such payments are held by the company as constructive trustee from the moment that the funds had been received (or accepted) and (whether or not they had been automatically credited) as happened with some payments received by CBL after the Suspension, as explained below.

40. As a practical matter, the manner in which hanging payments are to be treated will also be affected by the CBL Protocol regarding incoming payments, as I now explain.

CBL Protocol Regarding Incoming Payments

41. From their investigations within CBL, the JOLs understand that the usual protocol for the receipt by CBL of an incoming wire transfer payment ("**Incoming Payment**") was that it would initially be received into a CBL reconciliation account held with a CBL correspondent bank. The Incoming Payment would then either be:

[15] See footnote 13 above.

(a) automatically credited (through automated processes which had been previously established by CBL in relation to its reconciliation account with the correspondent bank) to a CBL depositor account, where all details and formatting contained in the relevant payment instructions are correct; or

(b) held as outstanding in the CBL reconciliation account with the relevant correspondent bank and would be required to be reviewed by "four eyes" (that is two staff members) of CBL prior to being manually credited to the relevant CBL depositor account at the instruction of a member of staff in the CBL Operations Department.

42. A reconciliation account is one of the accounts held in CBL's name with each of its correspondent banks into which all Incoming Payments are made. Incoming Payments which cannot be automatically credited to CBL customer accounts remain in the relevant CBL reconciliation account until CBL makes a decision as to whether to credit the CBL depositor account or return the funds to the originator (noting that for the avoidance of doubt, all payments received by a CBL correspondent bank were credited to the CBL reconciliation account held with such bank and no correspondent bank directly credited – or had access to credit – any CBL depositor account).

43. According to Mr. Hutchison, the JOLs' investigations have revealed that at open of business on 9 February 2015, the members of staff in the CBL Operations Department were verbally instructed by Mr Barry McQuain (one of the joint chief executive officers of CBL) not to carry out any work with respect of Incoming Payments whatsoever until further notice. Accordingly, all Incoming Payments which were held in a CBL reconciliation account and not automatically credited to a CBL customer account up to open of business on 9 February 2015, were never

reviewed by members of CBL's Operations Department. Further, any Incoming Payments received into a CBL reconciliation account after open of business on 9 February 2015 that were not automatically credited to a CBL customer account, were never the subject of any review by the CBL Operations Department.

44. Due to the way in which CBL's electronic banking system worked and the fact it remained fully functioning, Incoming Payments continued to be received on 9 February 2015 in the usual way, both before and after the implementation of the Suspension. Accordingly, where the necessary criteria were fulfilled (that is, where all details and formatting contained in the relevant payment instructions were correct) those Incoming Payments were automatically credited to the relevant CBL depositor account before and after the Suspension took effect. All other Incoming Payments were paid into CBL's reconciliation account with the relevant correspondent bank. All of the automatic features on CBL's electronic banking system were eventually deactivated by 11 February 2015.

Conclusions on Hanging Payments

45. On the advice of their legal advisers and on the basis of the case law as reviewed above, the JOLs invite me to arrive at the following conclusions at which they have arrived. The conclusions would carry obvious consequences for depositors who would, as the result fall within or outwith the liquidation of CBL.

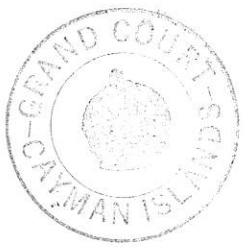
(a) Money received by CBL before the Suspension and credited (by automated processes which had been set up by CBL long before the Suspension) to the CBL depositor's account belongs beneficially to CBL. This is on the basis that, prior to the Suspension, CBL undoubtedly had the authority of each of its customers to accept money wired to it for the account of its customers and the

fact that it had been automatically credited to a customer's account before the Suspension constituted an unconditional acceptance of the money by CBL so completing its transfer both in law and equity;

(b) Money received before the Suspension but which was never credited to the CBL depositor's account belongs beneficially to the relevant originator and a constructive trust would be accordingly imposed in respect of the monies in favour of the relevant originator; (i.e.: the client instructing the transferor bank). This is on the basis that these payments required manual vetting in accordance with the "four eyes" process set out above before it was accepted by CBL and, because these payments were never vetted (as the relevant personnel at CBL had been instructed not to vet payments for a short period prior to the Suspension), these payments were therefore not completed; and

(c) Money received after the Suspension belongs beneficially to the relevant originator irrespective of whether it was credited or not to the customer's account and a constructive trust would be accordingly imposed in respect of these monies in favour of the relevant originator. This is on the basis that, following the Suspension, CBL no longer had authority to receive payments on behalf of its customers so it therefore could not have unconditionally accepted the money. Alternatively, it was or must have been obvious to CBL that payments made after the Suspension were made by mistake in that it is inconceivable that an originator would have made it had it been aware that CBL had imposed the Suspension. In those circumstances, it would be held to be unconscionable for CBL to retain the monies as against the originators.

46. The position with respect to those hanging payments received by Northern Trust on 9 February 2015 requires further analysis due to the Trust Resolutions that were passed by the Board (as set out in paragraph 14 above) after the time of the implementation of the Suspension. The Trust Resolutions appear to appreciate that CBL was aware that any payments received after the Suspension was implemented would have been received by mistake. However, the Trust Resolutions purport to declare a trust over any Post-Suspension Payments received by CBL from Northern Trust on behalf of the relevant depositor of CBL. I am invited to accept that the Trust Resolutions were not effective because if the Post-Suspension Payments received by CBL from Northern Trust were already subject to a constructive trust for the Post-Suspension Originators, it would not be open to CBL to subject the monies to a different trust in favour of the relevant depositor of CBL.



47. Accordingly, the JOLs consider that the hanging payments should not be retained by CBL and therefore seek the Court's sanction to return those monies in accordance with the instructions of the Pre-Suspension Originators or the Post-Suspension Originators, as appropriate.

48. If sanction is granted, the JOLs propose to contact each Pre-Suspension Originator and Post-Suspension Originator to obtain their instructions in respect of returning the relevant hanging payments to them and then subsequently to take all steps as necessary to promptly transfer such monies in accordance with the instructions obtained.

49. On the basis of my acceptance of the factual context and the applicable law as set out above, I grant sanction to the JOLs acting accordingly.

ELIGIBLE DEPOSITOR APPLICATION

50. This is the second main issue raised by the JOLs' summons. It relates to the entitlement to the payment of priority dividends.

51. Section 141 of the Companies Law establishes a category of debts referred to as "*preferential debts*". It states as follows:

> "*(1) In the case of an insolvent company, the debts described in Schedule 2 shall be paid in priority to all other debts.*
>
> *(2) The preferential debts shall-*
>
> *(a) rank equally amongst themselves and be paid in full unless the assets available, after having exercised any rights of set-off or netting of claims, are insufficient to meet them in which case they shall abate in equal proportions; and*
>
> *(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures secured by, or holders of any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.*"

52. The JOLs consider that there are sufficient assets of CBL to make payment of the preferential debts in full.

53. Schedule 2 of the Companies Law sets out the categories of preferred debts but the only category with which the Court is concerned here is that relating to debts due to bank depositors. It is in Section 1 of Category 2 in these terms:

> "Category 2: Debts due to bank depositors

Any sum due to eligible depositors who have deposits with a company which-

(a) is incorporated in the Islands; and

(b) held an "A" licence issued under the Banks and Trust Companies Law (2009 Revision),

and which does not exceed the deposit limit."

54. Section 3 of Category 2 of Schedule 2 of the Companies Law states that the deposit limit is set at CI$20,000 in respect of each Eligible Depositor or its equivalent in any foreign currency ("**Deposit Limit**"). Section 3 reads:

> "*The deposit limit is twenty thousand dollars in respect of each eligible depositor or its equivalent in any foreign currency for which purpose the applicable exchange rate shall be that determined by the Court in accordance with section 150.*"

55. Section 2 of Category 2 of Schedule 2 of the Companies Law ("**Section 2**") excludes certain bank depositors from being Eligible Depositors for the purposes of Schedule 2 of the Companies Law. In particular, the following persons are said <u>not</u> to be an Eligible Depositor:

(a) "*a person who holds or is considered to hold a deposit after the presentation of the petition for the winding up of the bank or the commencement of the voluntary winding up of the bank (except in the case of the death of the owner of the deposit)*" (Section 2(a) of Category 2 of Schedule 2); and

(b) a person making a deposit as "*a person authorised, licensed or recognised as a bank or deposit holder in a country or territory outside the Islands*" (Section 2(b)(ii) of Category 2 of Schedule 2).

56. I will need to determine the precise meaning of these provisions and will return to do so below.

57. Section 4 of Category 2 of Schedule 2 of the Companies Law ("**Section 4**") outlines the following principles to be applied in calculating the amount of eligible deposits:

(a) *separate deposits in the same legal or beneficial ownership shall be aggregated and treated as one deposit;*

(b) *the ownership of a deposit in joint names shall be deemed to be divided equally between the joint depositors;*

(c) *the ownership of a deposit in the name of a partnership shall be deemed to be divided equally among the partners;*

(d) *a deposit which is a client account, and which is designated as such, shall be treated as a separate deposit, made by the client of the depositor, of amounts corresponding to the amount to which such client is entitled; and*

(e) *the amount of each eligible deposit shall be reduced by the amount of any liability of the depositor to the bank in respect of which a right of set-off existed at the date of the presentation of the petition for the winding up of the bank, or the commencement of the voluntary winding up of the bank.*

58. Accordingly, an Eligible Depositor will receive a priority dividend in the liquidation of CBL for a preferred debt up to a maximum amount of CI$20,000 or its equivalent in any foreign currency (as calculated in accordance with the principles set out above from the provisions of Category 2 of Schedule 2).

59. The purpose of the JOLs' Eligible Depositor Application is to seek directions from this Court in respect of certain criteria which need to be applied when determining which depositors in CBL should be considered an Eligible Depositor.

Interpretation of Section 1 of Category 2 of Schedule 2 of the Companies Law

60. The first criteria in respect of which the JOLs seek directions from this Court is the interpretation of Section 1 of Category 2 of Schedule 2 of the Companies Law. (see paragraph 53 above).

61. Clearly, CBL meets the criteria of being incorporated in the Cayman Islands and having held an "A" licence under the Banks and Trust Companies Law (as Revised) (the "**BTC Law**"). However, the issue that has arisen is whether Section 1 applies to:

(a) sums due to all Eligible Depositors up to the amount of the Deposit Limit (as is contended by the JOLs); or

(b) sums due to only those Eligible Depositors whose deposit/s with CBL do not exceed the Deposit Limit (as is contended by Mr. Walton on behalf of the Liquidation Committee).

62. In economic terms, the JOLs admit that the difference between all Eligible Depositors and those Eligible Depositors whose deposit/s with CBL do not exceed the Deposit Limit is likely to be quite significant. The actual number will be determined according to the criteria contained in Section 2 of Category 2 of Schedule 2 and principles outlined in Section 4 but by way of indication only, there are 675 depositors of CBL whose deposits with CBL do not exceed the Deposit Limit.

63. The basis of the JOLs' interpretation of section 1 of Category 2 of Schedule 2 is set out below. The material question of construction is whether the words "*and which does not exceed the deposit limit*" should be read as applying to the first CI$20,000

deposited by all Eligible Depositors or only to those Eligible Depositors who held deposits of CI$20,000 or less.

64. The disputed wording is "*and which does not exceed the deposit limit*". Mr. Bell for the JOLs says that on a plain and ordinary reading, the use of the singular "*does*" here must correspond with a singular noun in the beginning of Section 1.

65. The only singular noun in Section 1 is "*any sum due to eligible depositors*". He therefore argues that Section 1 is making reference to "*any sum due to eligible depositors*" up to the Deposit Limit; irrespective of whether a depositor has deposited an amount in excess of the Deposit Limit. Accordingly, it is argued that Section 1 applies to sums due to all Eligible Depositors up to the amount of the Deposit Limit.

66. On behalf of the Liquidation Committee, Mr. Walton disagrees and argues as follows.

67. He emphasises that the Liquidation Committee, with no axe to grind and no personal interest in the outcome of this issue, is keen to ensure that the proposed treatment of depositors is correct as a matter of law, and that CBL's small depositors get the preferential treatment that the Companies Law seeks to provide for them.

68. Mr. Walton submits that the JOLs' analysis, based on whether or not the phrase "*which does not exceed the deposit limit*" refers to a singular noun in the foregoing sub-clause, misses the point. The issue is rather whether, if a deposit does exceed the deposit limit, it is then excluded from the section and is not deemed to be a preferential debt for the purposes of s.141 of the Companies Law. He submits that there are compelling arguments, both in terms of statutory interpretation and public policy, to this effect.

69. The operative provision, he submits, is as follows:

"*Any sum due to eligible depositors who have deposits [...] which does not exceed the deposit limit* [shall be paid in priority to all other debts pursuant to s.141]".

70. The phrase "*which does not exceed the deposit limit"* refers back to "*any sum due*" at the beginning of the section.

71. Thus, as a matter of basic construction, says Mr. Walton, it is the single sum due to a depositor under an admitted proof of debt (Company Law Form 27) – regardless of the number of accounts held by that depositor - which must not exceed the *"deposit limit"*.

72. I agree with Mr. Walton that meaning and weight must be given to the Legislature's use of the term *"deposit limit"*: clearly it means a limit referable to the total amount of a depositor's deposit(s). It does not serve as a limit on the amount which may be distributed to eligible depositors: if that had been the intent, I agree that a defined term like "distribution limit" or words such as "up to a limit of CI$20,000" would have been used.

73. The section therefore isolates certain depositors whose claims in the liquidation total CI$20,000 or less from those whose claims in the liquidation exceed CI$20,000. It carves these debts out as preferential debts and allocates them a particular ranking in the order of priorities.

74. A provision such as the foregoing which might be said to protect smaller investors is certainly not, as Mr. Bell for the JOLs appears to contend, an absurd result. Indeed, it is clear from Category 1 of Schedule 2 (which prefers payments due to employees) that the policy behind s.141 is to protect those small stakeholders for whom the effect of an insolvency would otherwise prove devastating rather than large commercial

interests for whom a recovery of CI$20,000, against a stake which might be in the tens or even hundreds of millions, might be negligible. Furthermore, there is another clear policy reason for the Legislature to ensure that small depositors are removed from the liquidation process by an early payout, as this eases administration of the estate by reducing the number of constituents[16]. The effect is that the elimination of the disproportionate costs of administering small claims results in overall economies of scale for the entire liquidation and so to the benefit of large depositors as well.

75. Nonetheless, Mr. Bell submits on behalf of the JOLs that it could not have been the intention of the Legislature to have simply chosen an arbitrary number (that is, the Deposit Limit of CI$20,000) which could have vastly different treatment in respect of returns made in the liquidation, depending upon which side of the Deposit Limit that a depositor falls. However, even on the JOLs' own interpretation of the section, the Legislature has indeed applied an arbitrary number (that is, the Deposit Limit of CI$20,000) to be preferred in respect of all eligible depositors – even those with deposits in the millions. I agree with Mr. Walton that the reality is that any preference scheme which has a defined dollar limit may appear arbitrary, especially to those near the cut-off point, but some number must nevertheless be chosen for the scheme to work.

76. Another of the JOLs' objections to the Liquidation Committee's interpretation of this provision is that depositors with deposits slightly in excess of CI$20,000 would not be considered to have preferred debts but might only receive cents on the dollar from the estate. However, that simply describes the *pari passu* distribution which is

[16] As had been directed by this Court in the liquidation of BCCI (Overseas) Ltd. with marked success – a fact that would have been well known to those advising locally on the Legislative reforms.

enshrined in s.140(1) of the Law and from which s.141 does not purport generally to derogate.

77. Nor does it purport generally to derogate from the orders of priority which would otherwise apply. Yet, if the JOLs' argument is correct, we see from section 141(2)(b) (above at paragraph 51) that so far as the assets of the Company available for payment of general creditors are insufficient to meet them (i.e.: a state of insolvency) the preferential debts of depositors shall bear priority even over the claims of secured creditors, including debenture or floating charge holders. In practice this would mean according to the JOLs, that every depositor would have a priority claim to the first $20,000.00 of his deposit, even if this means the extinguishment of the rights of secured creditors. In my view, only a radical departure from the established law of priorities would require the clearest legislative expression not to be found in the provisions being considered here.

The legislative history

78. I consider that the construction at which I have arrived is also supported by the legislative history as it tracks the changes to the Companies Law. The initial form of the wording of Section 1 of Category 2 in the Cayman Islands can first be found in the Companies (Amendment) (Protection of Depositors) Bill, 1997 (the "**1997 Bill**") which provided for the insertion then at section 161 of the Companies Law (1995 Revision) of the following for the purposes of identifying this category of preferred debt:

> *"Money due to depositors who have deposits with a company which is being wound up and which*

(a) is incorporated in the Islands; and

(b) is the holder of an "A" licence issued under the Banks and Trust Companies Law (1995 Revision),

subject to the conditions, provisions and limits contained in Schedule 2."

79. The Memorandum of Objects and Reasons which accompanied the 1997 Bill provided as follows:

> "*Paragraph 2 provides that precedence is only given to the first $20,000 of each deposit, and sets out provisions to be observed when calculating such amount.*"

80. Further, in the parliamentary discussion of the 1997 Bill on 12 December 1997, the Hon. George A. McCarthy noted as follows:

> "*The [1997] Bill will provide for certain classes of depositors to be given precedence in the event of the failure of a bank. This will be achieved by amending section 161 of the Companies Law to include in the preferential debts in the winding up of a category A bank, the first 20,000 of a customer's deposit with the bank.*"

81. The 1997 Bill was passed by the Legislature on 15 December 1997 and commenced in force on 18 February 1998 (the "**1997 Law**").

82. The Companies Law was later amended by the Companies Amendment Law 2007 (the "**2007 Law**") which, relevantly moved Section 161 to Schedule 2 and amended the wording of section 1 of Category 2, as set out above at paragraph 53. The revised wording now included "*and which does not exceed the deposit limit*".

83. There is no explanatory commentary or parliamentary discussion around this amendment, except for the following in The Companies (Amendment Bill) 2007 (the "**2007 Bill**"):

> "*The new Second Schedule sets out categories of preferred debts and the Third Schedule specifies the powers of the liquidators.*"

84. However, the Report of the Law Reform Commission (Review of the Corporate Insolvency Law and Recommendations for the Amendment of Part V of the Companies Law) of April 2006 (the "**2006 Report**"), provided proposals for the 2007 Bill and recommended, *inter alia*, that the existing law and best practice be codified by re-writing Part V of the Companies Law, as follows at paragraph 16.2:

> "*The new Second Schedule does not create any new category of preferred creditors. It is intended to clarify the existing law by removing anomalies and updating the provisions relating to a company's employees.*"

85. The 2007 Bill was the result of the recommendations of the 2006 Report. The 2007 Bill was passed by the Legislature on 19 October 2007 and the relevant sections commenced in force as the 2007 Law on 1 March 2009. It is by reference to this history that Mr. Bell, on behalf of the JOLs, argues that it would appear from the wording of the 2006 Report that the intention of the Legislature in its amendments to Schedule 2 was only to clarify the Law as it was expressed in 1997. Given that all previous commentary and parliamentary discussion had clearly stated that Section 1 related to the first CI$20,000 of each eligible deposit, he submits that Section 1 as it now stands should be read in this light.

86. The difficulty with this argument though, as attractive as it is, is that it would invite me to deny the plain meaning in section 1 of Category 2 of Schedule 2 of the phrase "*and which does not exceed the deposit limit*" as it relates to the preceding phrase *"sum due to eligible depositors... "*.

87. It is plain that the latter is meant to qualify or condition the former such that the change of meaning from the earlier wording when read together could not have escaped the legislative draftsman or the Legislature.

88. The choice of words must therefore have been deliberate. No longer would precedence be given to the "*first $20,000 of each deposit*" as per the Memorandum of Objects and Reasons of the 1997 Bill or to "*the first $20,000 of a customer's deposit with the bank*" per the Hon. George McCarthy (per the Hansards on the passage of the 1997 Bill) but the "*sum due to eligible depositors... which does not exceed the deposit limit*" (of $20,000).

89. The difference between the two concepts is stark and clear and it is not for this Court to ignore it, and in so doing the cardinal presumption that the words in the statute mean what they say[17] by arriving at a construction thought by the Court to be more in keeping with the legislative history or policy.

90. Indeed, the very different wording adopted by the 2007 Bill and Law points to the legislative intent that the policy should change to one aimed at protecting "*small*" depositors who are due no more than $20,000, and away from the former policy that would have allowed all depositors to receive preferential payment of up to $20,000.

[17] The presumption that the literal meaning is to be followed: *Bennion Statutory Interpretations,* Section 2185, 6th Edition, Lexis Nexis, 2013.

91. As the JOLs admit, the potential economic impact of the change in policy can be very significant, and this is another reason emphasising my earlier concerns, for avoiding a construction which would presume that the law-makers were not aware of it.

92. By way of further illustration in the present context of CBL, I am told that the total number of depositors is 1284. This would require that the first $16.6 million be applied to meet preferential payments on the JOLs' construction, allowing each depositor $20,000.

93. By contrast, there are 675 "small" depositors owed up to $20,000 and who, by the same measure, would require a maximum of only $3.6 million for preferential payments.

94. On the JOLs' interpretation (leaving aside those depositors of the 1284 who would be ineligible under section 2 of Category 2 of Schedule 2); once the preferential payments are made, the *pari passu* principle that generally governs distributions would be further offended because of the varying proportionate impact the payment would have upon depositors remaining in the liquidation with varying claims above the $20,000 limit.

95. This point is illustrated by the following diagram which is an amalgam of the work of Mr. Walton and Mr. Bell. Although the proportional impact of the preferential payments lessens, the larger the depositor's return becomes; the diagram does confirm that the JOLs' interpretation would upset the *pari passu* principle expressed in terms of percentage returns:

Deposit amount	40,000	80,000	100,000	250,000	500,000	1,000,000	10,000,000
Less priority amount	20,000	60,000	80,000	230,000	480,000	980,000	9,980,000
Assume	10,000	30,000	40,000	115,000	240,000	490,000	4,990,000

50% dividend							
Total received	30,000	50,000	60,000	135,000	260,000	510,000	5,010,000
Percentage return	75%	62.5%	54%	52%	52%	51%	50.1%

96. By contrast, the Liquidation Committee's interpretation, using the same illustration, would mean that in the event of an insolvency, all depositors owed more than $20,000 would receive the same percentage return, once the small depositors have been cleared off by receiving their preferential payments.

97. I find this to be a more acceptable proposition – that which as a matter of policy the legislature would more likely have intended – and one which would not require the general upsetting of the well-established principles.

98. For all the foregoing reasons, I prefer the Liquidation Committee's interpretation and conclude that only depositors owed up to $20,000 are eligible for the priority payment.

Interpretation of Section 2(a) of Category 2 of Schedule 2 of the Companies Law (see paragraph 55 above)

99. The concern as to the interpretation of this sub-section, which is exclusionary, is that all depositors of CBL held deposits with CBL at the time of the commencement of the voluntary liquidation of CBL (being the earlier in time than the presentation of the winding up petition by CIMA and therefore the relevant time in respect of CBL). On its face, this criteria would therefore prevent the JOLs from making payment of a priority dividend to any depositor of CBL.

100. The JOLs seek directions from this Court as to whether this criteria should be read literally or whether it should be read to apply to those persons who became depositors or are considered to have become depositors after the commencement of the

voluntary winding up of CBL. The JOLs contend that it should be the latter interpretation.

101. As Mr. Bell submits, the wording of Section 2(a) of Category 2 of Schedule 2 appears to have been largely lifted from paragraph 1(a) of Schedule 2 of the 1997 Law but amended to account for a change in the syntax of Section 2. Paragraph 1(a) of Schedule 2 of the 1997 Law read as follows:

> "*The following shall not be eligible for the precedence in priority granted by section 161-*
>
> *the amount of a deposit, the ownership of which* ***becomes held, or comes to be treated as held*** *(except in the case of the death of the owner of the deposit), by a person after the presentation of the petition for the winding up of the bank or the commencement of the voluntary winding up of the bank;" (emphasis added).*"

102. This previous wording made it clear that the exclusion only relates to those persons who become depositors after the commencement of the voluntary winding up.

103. This is supported by the original commentary to the 1997 Bill which inserted Schedule 2 into what became the 2007 Law, and which provides as follows:

"*Paragraph 1 lists deposits which are excluded from preference. They are amounts which become due after the commencement of the winding up....*".

104. Given that the remainder of Schedule 2 remains exactly as in the 1997 Law, it would appear that the change in drafting is to account for the reference to a "*person*" who holds a deposit, rather than "*the amount of a deposit*". It is submitted and I accept that the amendment is designed to account for a change in syntax rather than a change in the intention of the law-makers.

105. In the light of the above, and the fact that any other interpretation would make the remainder of Schedule 2 irrelevant to the liquidation of a bank, it is submitted by Mr. Bell and I accept that Section 2(a) should be read only to include a depositor who became a depositor after the commencement of the winding up[18].

Interpretation of Section 2(b)(ii) of Category 2 of Schedule 2 of the Companies Law (see again para. 55 above)

106. This is a final point for construction arising out of the wording in Schedule 2. The vast majority of depositors of CBL are located outside the Cayman Islands. Accordingly, the concern as to the interpretation of this sub-section is whether the reference to "*deposit holder*" is a reference to all depositors of CBL; essentially making those depositors of CBL located outside of the Cayman Islands ineligible to receive a priority dividend in respect of a preferred debt.

107. The wording remains the same as in paragraph 1(b)(ii) of Schedule 2 of the 1997 Law and again, the original commentary to the 1997 Bill, which originally inserted Schedule 2 into what became the 2007 Law, provides helpful assistance as to the intention of the drafters:

> *"...Paragraph 1 lists deposits which are excluded from preference. They are...deposits in the name of other banks, whether licensed in the Islands or overseas..."*

108. This commentary would suggest that "*deposit holders*" refers solely to a deposit held in the name of another bank.

[18]For instance, in a case like CBL, if deposits were still being taken by correspondent banks and automatically credited through automated processes after the resolution to wind up or the filing of the petition to wind up but before notification of the petition. In such a case, the liquidation would have commenced from the moment of passage of the resolution or the petition was filed: see section 100 of the Companies Law.

109. Further, if the sub-section is interpreted to include all depositors of CBL, this would be contrary to the intention of the policy as stated in the 2006 Report. Specifically, paragraph 3.2 of the 2006 Report lists the characteristics which should be preserved and re-confirmed in the form of black letter law. One of the characteristics to be preserved is that "*...all creditors are treated equally, irrespective of their nationality*". The only way Section 2(b)(ii) can be read in compliance with this objective is to read it as the extra-territorial provision relating to Section 2(b)(i) which provides as follows:

> "*... a person licensed under section 6(1) of the Banks and Trust Companies Law (2009) Revision.*"

110. Under Section 6(1) of the BTC Law "*...any person desirous of carrying on banking business and any company desirous of carrying on trust business...*" can apply to be licensed in the Cayman Islands. It is submitted by Mr. Bell that a "*deposit holder*" should therefore be viewed in this light as an entity regulated to undertake banking or trust business (whether within or outside the Islands) but a depositor would fall outside this definition.

111. There is no definition of "*deposit holder*" in the Companies Law. In addition, there is no other reference to "*deposit holder*" in the Companies Law, or in fact in any Cayman Islands legislation, says Mr. Bell. Any reference to persons who hold deposits in a financial institution is to "*depositors*".

112. He submits therefore that the intention is to refer to a different, more specific class of persons; most likely those in the legal sense holding deposits on behalf of a third party, rather than in the sense understood in common usage and the JOLs seek a

direction from this Court accordingly. This would mean that *"deposit holder"* would be regarded as synonymous with a licensed bank.

113. I agree and direct accordingly.

Payment of Eligible Depositors in full up to the Deposit Limit

114. Upon the foregoing resolution of the interpretation of sections 1, 2(a) and 2(b)(ii) of Category 2 of Schedule 2 of the Companies Law, the JOLs propose to:

(a) identify the Eligible Depositors in accordance with the criteria contained in Category 2 of Schedule 2 of the Companies Law;

(b) proceed in calculating the preferred debt in respect of each Eligible Depositor (up to a maximum amount of the Deposit Limit each) in accordance with the directions sought from this Court and the principles set out in Section 4 of Category 2 of Schedule 2 of the Companies Law; and

(c) take such steps as are necessary to promptly make payment of the relevant amount of the priority dividend to each Eligible Depositor.

115. As there is expected to be a number of Eligible Depositors whose preferred debt will be the equivalent of CI$20,000 or less, the JOLs seek that they be authorised to pay all such Eligible Depositors in full.

116. I grant that authorisation in keeping with the interpretation of "Eligible Depositors" reached above.

Dated the 23rd day of July 2015

The Hon. Anthony Smellie
CHIEF JUSTICE