

IN THE COURT OF APPEAL OF BELIZE, A.D. 2004

CIVIL APPEAL NO. 8 OF 2004

BETWEEN:

**BELIZE PRINTERS ASSOCIATION LTD.
BRC PRINTING LIMITED**

APPELLANTS

AND

**MINISTER OF FINANCE AND HOME AFFAIRS
ATTORNEY GENERAL**

RESPONDENTS

BEFORE:

The Hon. Mr. Justice Mottley	-	President
The Hon. Mr. Justice Carey	-	Justice of Appeal
The Hon. Mr. Justice Morrison	-	Justice of Appeal

**Ms. Lois Young-Barrow, SC for the appellants
Mr. Elson Kaseke, Solicitor General and Ms. Minnet Hafiz for
the respondents**

October 2004: 9 March 2005.

MOTTLEY P.

1. This appeal relates to the failure of Barrow J (Ag) to accede to the request of Belize Printers Association Limited (BPAL) and BRC Printing Limited (BRCPL) to order discovery of an inventory of the assets sold to Print Belize Limited (PBL).

The facts are set out in Civil Appeal No. 7 of 2004.

2. Objection to the production was taken by the Minister of Finance. The basis of his objections was set out in the affidavit of the Financial Secretary. He stated:

1. *“In keeping with the government’s commitments to provide equity contribution to the Developments Finance Corporation (DFC) at the same time containing and reducing government’s recurrent expenditure the Cabinet of Belize decided in early 2003 that the government would transfer its property interest in the Government Printing Department to the Development Finance Corporation. This was done on the 15th July 2003.*
2. *The transfer of the Government Printing Department assets to DFC was done with a view to their ultimate disposal by DFC. This contained and reduced the Government recurrent expenditure because (a) the Government did not have to provide thereafter money for the operation and maintenance of printing equipment and paper, and (b) the Government did not have to provide thereafter money for wages and salaries of the public officers within the Government Printing Department, since they ‘moved’ to Print Belize Ltd. the company which purchased the property of the Government Printing Department from DFC.*

3. *After the sale of the Government Printing Department assets to Print Belize Ltd. by DFC, the Government entered into a printing services agreement with Print Belize Limited which recognized that the Government Printing needs cost approximately \$2.5 million annually, and which required Print Belize Limited to charge 10% mark-up on Government printing business.*
4. *The decision to transfer the Government assets to DFC as an equity contribution was done at the highest policy level in Belize, namely by Cabinet. The decision to enter into a contract for printing services was similarly made as a Cabinet policy in the public interest to contain Government's recurrent expenditure, and overall it significantly reduced Government's operating costs. The contract itself reflects Government's economic policy in this matter, and is the culmination of the views of the Cabinet, Ministers and senior public officers to protect the public interest of Belize in the matter of ultimately controlling public expenditure in Belize by introducing an economic policy package of divesting Government of responsibilities in areas which are essentially "non-governmental" in nature. I therefore object to the production of the printing services contract and any other contract or documents in this matter on the basis of public interest immunity".*

3. The Government was in fact alleging that the only contract which existed for the sale of the assets of the Government Printing Department was between the DFC and PBL and not the Government.
4. Counsel for BPAL and BRCPL submitted that the statements contained in the Press Release issued by the Government were fundamentally inconsistent with the statement contained in the affidavit of the Financial Secretary. In the Press Release dated July 15, 2003 the Government announced the sale of the Government Printing Department to PBL (Counsel contended that treated the award of the contract for printing services and the sale of the assets as one). In addition reference is made to a letter dated January 19, 2004 from Financial Secretary to PBL. No where in this letter is there any mention of that DFC sold the asset to PBL.
5. The Solicitor General had submitted that BPAL and BRCPL sought an order for the production of “an inventory of the assets sold to Print Belize Limited but in truth and in fact no assets were sold by the Government to PBL. Consequently there was the document which could be the subject of an order for discovery.
6. Barrow J (Ag) held at p 175:

“Where does that leave the application for production of an inventory of the assets sold to the company? I have already noted that the printers thought that it was the Government that had sold the assets. I gave the printers leave to move for judicial review of the alleged decision by Government to sell to the company and the alleged contract by which this decision was effected. The

printers have now been shown to have been wrong. There was no such decision and no such contract. I must not be taken as deciding the point because I have not heard counsel thereon but it does seem to me that the printers will have to abandon the challenge to the sale. The printers did not ask for leave and were not granted leave to move for judicial review of the decision to transfer the assets to DFC. The inventory of assets is therefore not relevant or material to any issue in this case that is now a live issue. I therefore refuse the application for the production of an inventory of the assets sold to the company.”

Barrow J (Ag) concluded that, while the statements contained in the affidavit of the Financial Secretary may be inconsistent with the impression derived from earlier material, BPAL and BRCPL could not show that the Press Release contained any statement that it was the Government which had sold the assets to PBL.

7. On appeal BPAL and BRCP alleged that the judge had erred in law when he refused to order production of an inventory of the assets sold to PBL. The gravamen of this ground is that the judge misconstrued the request as being a request for the production of the contract for sale by the Government to PBL of the assets of the Printing Department. Counsel submitted that the application related to the inventory of the assets sold to PBL the request did not relate to a sale by the Government.

8. The Solicitor General submitted that the decision to privatize the Government Printing Department and the subsequent decision to transfer these assets to DFC to create equity capital are two separate and distinct decisions. He referred to the letter dated August 15, 2003 written by the Financial Secretary where it is stated:

“In relation to your first contention we advise that no assets were sold directly by the Government to said company. You may therefore wish to approach DFC for an inventory and valuation of the assets.”

He also referred to the letter dated April 15, 2004 from the legal counsel of the Ministry of Finance and Home Affairs to Mrs. Young-Barrow informing her that:

“As regards the sale of the Government Printers please be advised that no assets were directly sold by the Government to the Company.”

In both of these passages it is stated that assets were not “directly” sold by the Government. There is not absolute denial of any sale by the Government to PBL.

9. The Solicitor General further submitted that the affidavit of the Financial Secretary made it clear that the Government had made a decision, as part of its privatization policy, to divest itself of the assets of the Printing Department. In so doing, it transferred the assets to the DFC as part of the government equity contribution to the DFC. As a result there was no transfer of assets from the Government to PBL. In these circumstances there was no inventory of any assets.

10. BPAL and BRCPL sought disclosure of an inventory of the assets of the Government Printing Department that were sold. It is clear that the trial judge misconceived the nature of the application. BPAL and BRCPL did not seek of the production of the contract for the sale of the assets of the Printing Department. The judge had granted leave to review the decision to sell to PBL the publicly owned printing assets which constituted the Government Printing Department. No mention is made of a sale by the Government.
11. It is clear from the evidence that, while Cabinet made the decision to privatize the Government Printing Department, the assets were not transferred from the Government to PBL. As stated by the Financial Secretary, the assets were in fact transferred to the DFC as part of the Government policy of increasing the equity of DFC. The DFC was then required to transfer or sell the assets to PBL from \$2.4 million.
12. It is necessary to examine the Press Release in order to understand its true impact. Following the decision of the Cabinet, the Ministry of Finance announced the transition of the Government Printers from a public sector subsidized department to a private enterprise. It pointed out that after several months developing a private sector management system at the Government Printers, a private company PBL would purchase the assets of the Department. The Government Printers would form a company which would purchase the assets of the Printing Department. The

purchase was being financed through the DFC. This was the sole reference to the DFC.

13. Implicit in the decision to privatize the Printing Department is the decision of the Government of Belize to divest itself of the assets of the Printing Department. The Press Release did not state how this divestiture would take place. It did not state that the Government would enter a contract with the new company to sell the assets. As part of its policy to increase the equity contributions of DFC, the decision was taken to transfer the assets to DFC who would then sell them to the new company BPL.
14. The Cabinet took a policy decision to sell the asset of the Printing Department to a new company. The implementation of that decision was by way of vesting the assets in the DFC which would then sell them to BPL. No evidence was given about the manner in which these assets were vested in DFC.
15. In my view, what BPAL and BRCPL were seeking is an inventory of the assets of the Government Printing Department which the Government had taken the decision to sell for \$2.4 million. This was being done in the context that leave had been granted to review the decision of the Minister of Finance to sell the publicly owned printing assets of the Government Printery.

16. The appeals of BPAL and BRCPL were allowed. The order of the Court below was set aside and the Minister of Finance and Home Affairs was ordered to produce the inventory of the assets sold to PBL.

MOTTLEY P

CAREY, J.A.

1. This is a companion appeal to CA 7/04 where the role of the parties is respectively reversed. This appeal is concerned with that part of the judge's order whereby he refused to order discovery of the inventory assets sold to Print Belize Ltd.
2. A background sketch of the facts will suffice to put these proceedings in context. On 15 July 2003 government issued a press release announcing (inter alia) a decision that the assets of the Government Printing Department would be sold to Print Belize Ltd for approximately \$2.4 million. The appellants were granted leave to apply for judicial review of the decision of the Minister of Finance and Home Affairs to enter into contracts with Print Belize Ltd. for the supply of printing services to government and to sell to the same company the publicly owned assets which constituted the Government Printing. The appellants applied for discovery of an inventory of the assets sold to Print Belize Ltd. and of the contract with Print Belize Ltd. The judge delivered a preliminary judgment on the day of the hearing in which he refused the application to produce the contract of sale of the assets of the Government Printing Department and ordered production for his inspection of the contract of services between Print Belize Ltd. And the government. When the judge delivered his reserved judgment at a later date, there was an amendment or a variation to the earlier

orders. He confirmed the order for production of the printing services contract to himself or the trial judge but he varied the order whereby he refused production of the contract of assets of the Printing Department, by substituting for contract, the words “an inventory of the assets sold to the company”. We are concerned in this appeal with this latter order.

3. Before Barrow J (Ag.), the objection taken to the production of the inventory of assets was essentially, factual. The Solicitor General helpfully set out the objections, thus - “first, the respondents do not have such an inventory. Second, the government did not effect the sale of the assets and the Respondents cannot produce a list of assets which the government did not sell”. These objections found favour with the judge who accordingly denied the application for discovery.
4. Having heard submissions on 13 October 2004, we allowed the appeal, set aside that order and promised our reasons for doing so. I now set out my reasons for agreeing with the result.
5. The material evidence placed before the judge is derived from a press release issued by the government on its website, in which it was announced that following a decision of the Cabinet, a private company Print Belize Ltd. would provide printing services to the government. The Printers Association communicated with the Prime Minister, their lawyers wrote the Ministry of Finance seeking

information under the Freedom of Information Act. It is sufficient to say that the information solicited amounted to this no assets were sold directly by the government to the said company: the assets were transferred to the Development Finance Corporation. The Financial Secretary deposed in an affidavit claiming public interest immunity for the printing services contract “and any other contract or documents in the matter,” that this transfer “was done with a view to their ultimate disposal by the DFC”.

6. The learned judge found as a fact that it was the Development Finance Corporation which sold the assets to the company and in doing so acted in its own right and on its own behalf and not as agent of government. He based this on credible evidence given by the Financial Secretary. Seeing that the judge was relying on affidavit evidence, this court is in no less of a disadvantage than the judge in evaluating it.
7. It is not in dispute that the Printing Department which is government property was sold to Print Belize Ltd. The Financial Secretary swore it was “not directly” sold by government. But it is both good sense and good law that only the owner has the legal right to sell what he owns. Broadly speaking, absent fraud, a person acting for the owner is the only other person entitled to sell and he does so on behalf of the owner. By whatever nomenclature he is regarded as an agent. When the Financial Secretary stated that government did

“not directly” sell, I venture to suggest that this is the only way his statement could be understood. Indeed if the affidavit is to be accorded the gravitas of which the learned judge speaks, that is the ineluctable conclusion. With all respect to the learned judge’s finding I would suggest the judge regrettably did not appreciate the true significance of the evidence before him.

8. The learned judge held that the Development Finance Corporation acted “in its own right and on its own behalf and not as the agent of Government”. But I fear this is plainly inconsistent with the Financial Secretary’s statement that the assets were transferred to the Corporation “for ultimate disposal by the Corporation”. It must follow as night the day, that the Corporation was acting as the government’s agent. I cannot therefore agree with the learned judge’s view that what he had to consider on a balance of probabilities, was, on the one hand, the suspicions of the printers and on the other, the evidence of the Financial Secretary. In my respectful view, when the Financial Secretary’s “facts” are, analysed, they amount to evidence supportive of the material supplied by the appellants.
9. Having regard to the conclusion at which I have arrived, I do not think it is necessary to consider the learned judge’s exegesis on principles of company law. The government selling albeit indirectly,

through the Development Corporation its assets, must know what it sold.

10. On the question of relevance the judge said that leave to move for judicial review was not granted in respect of the decision “to transfer the assets to the Development Corporation” and accordingly an inventory of assets was neither relevant or material.
11. Seeing that leave was, in fact, granted to move to review the decision to sell the Government Printing to Print Belize, I do not doubt that the judge would have held that an inventory of the assets was both relevant and material.
12. I conclude therefore that this is sufficient to dispose of the appeal in the way it was announced last October.

CAREY JA

MORRISON JA

1. The background to this appeal is fully set out in paragraphs 1 to 9 of my judgment in Civil Appeal No. 7 of 2004 and I will not therefore repeat it in this judgment.
2. Belize Printers appealed against Barrow J (Ag)'s refusal of an Order for the production of an inventory of the assets sold to Print Belize. The grounds of appeal were as follows:
 - 1.1 the learned trial judge misconstrued the request as being a request for production of "the contract for the sale of the assets of the Printing Department"
 - 1.2 the learned trial judge failed to consider, or to consider adequately, the matrix of the evidence that:
 - 1.2.1 one of the decisions which the Respondents announced on 15th July 2003, was the decision that the assets of the Government Printing Department would be sold to Print Belize Limited for the sum of approximately \$2.4 million dollars
 - 1.2.2 On 30th April 2004 the Court granted permission to apply for judicial review, seeking, inter alia, a Declaration that the decisions of the Minister of Finance and Home Affairs on 15th June 2003 to enter in contracts with Print Belize Limited for the supply of printing services to the Government and to sell to Print Belize Limited the publicly owned printing assets which constituted the Government Printery at the price of \$2.4 million, are unlawful.
 - 1.2.3 The evidence of Hugh McSweeney for the Respondents dated 5th May 2004 to the effect that, inter alia,
 - On the 15th July 2003 the assets of the Government Printing Department were transferred by the Government to the Development Finance Corporation (DFC) for the express purpose of

having the DFC execute the sale of those assets to Print Belize Limited.

- The assets of the Government Printing Department which were transferred to the DFC, were the assets which the DFC sold to Print Belize Limited.
- After the sale of the assets by the DFC to Print Belize Limited, GOB entered into a contract with Print Belize Ltd for printing services.

1.2.4 The evidence in the Respondents' Press Release of 15th July 2003 to the effect that on the 15th July 2003, there existed an agreement between the Government and Print Belize Limited, for the provision by the latter of printing services.

1.3 The decision is against the weight of the evidence.

1.4 As a result, the learned trial judge wrongly concluded that "the DFC contract is therefore not relevant or material to any issue in this case, as the issues are presently framed", in that, the decision under challenge remained the decision of the Government of Belize to sell the assets of the Government Printing Department for 2.4 million Belize dollars notwithstanding that that decision was allegedly executed through the instrumentality of the DFC.

The submissions

3. Ms Young Barrow SC for Belize Printers submitted that an inventory of the assets sold to Print Belize was highly material to the application for judicial review of the decision to sell the assets of the Printing Department for \$2.4 million "whether by the Government itself or through the instrumentality of the DFC". Taken either way, the decision to sell which it was sought to impugn "remained the decision of 15th July 2003 as set out in the

Respondents' Press Release". Her further submission was that on the facts the DFC was, as a matter of law, "the agent, nominee or conduit of the Respondents" and that there was no evidence that DFC acted "in its own right and for its own benefit" in the part it played in the transaction.

4. In support of these submissions we were very helpfully referred by counsel to **Canada Rice Mills Ltd. v R [1939] 3 All ER 991** (to make the point that the Court ought to look at the totality of the transaction), **Duncan v Attorney General (Grenada) [1998] LRC 414** (for the statement by Byron CJ at page 421 "that the court must determine the true nature of the event or transaction, whatever term is used to describe it") and **Regina (Burkett) Hammersmith and Fulham London Borough Council [2002] 1 WLR 1593** (for the statement by Lord Steyn at page 1604 that "in public law the emphasis should be on substance rather than form").
5. Ms Young Barrow SC accordingly asked this Court to look at the true nature of the transaction and to order production of an inventory of the assets. In any event, she submitted, restrictions in Belize on the disposal of publicly owned assets apply equally in respect of the Minister's disposal of the Printing Department's assets to the DFC (assuming for the purpose of this submission that DFC was not the agent of the Government of Belize), "as much

as they would apply in respect of the Minister’s disposal of those assets to Print Belize Ltd.”

6. The learned Solicitor General in response submitted firstly that the request for the production of an inventory of the assets of the Printing Department cannot be complied with because there is in existence no such inventory. Secondly, he said, the Minister having transferred the assets of the Printing Department to DFC, it was not in a position to say which of those assets were sold by DFC to Print Belize. It was submitted further that Barrow J (Ag) fully considered the evidence before him on this issue and gave appropriate weight to that evidence. And finally, that there was no evidence to support Belize Printers’ argument that DFC acted as an agent for the Minister and the court ought to decline, as Barrow J (Ag) had done, to “pierce the corporate veil” in order to establish an agency relationship in the circumstances between DFC and the Minister.

The applicable law

7. In my view, the principle stated by Lord Edmund-Davies in the **Air Canada** case (referred to at paragraph 14 of my judgment in Civil Appeal No. 7 of 2004) is equally applicable to this appeal. So that if the material sought is such as is likely to advance the case of the person seeking discovery, either affirmatively or by weakening the case of his opponent, then that material ought ordinarily to be

disclosed. I say “ordinarily” because of the limitation that the doctrine of public interest immunity, where it applies, may impose on the breadth of the right to discovery (see paragraph 15 of my judgment in Civil Appeal No. 7 of 2004). But that limitation has not been said to apply in this appeal, as the Minister’s resistance to the application for discovery of the inventory of assets was based rather on the legal effect of the transfer of those assets to DFC, with the result that this Court has to determine whether that disposition had the effect of knocking the heart out of Belize Printers’ challenge on this aspect of the matter, as Barrow J (Ag) clearly thought it did (see paragraphs 32 and 33 of his judgment).

8. I approach the matter on the basis that Ms Young Barrow SC’s submission that the court must look at the totality of the transaction to determine its true substance, whatever terms may be used by the parties to describe it, and that in this regard what matters most in public law is substance and not form, is correct. It is certainly irresistible in principle in my view and, happily, supported by authority (see paragraph 4 above).

The result

9. Looked at in this way, it appears to me that at the end of the day the challenge by way of judicial review launched by Belize Printers remained in substance the same as it had been at its inception; that is, a challenge to the Minister’s decision to sell the assets of the

Printing Department to Print Belize for \$2.4 million, as set out in the Government's Press Release of 15 July 2003. It matters not, it seems to me, that the modality of the sale decided upon by the Minister ultimately involved the DFC, a statutory corporation wholly controlled by the Government (see section 7 of the Development Finance Corporation Act). What took place was on the evidence plainly in fulfillment of Government's decision to transfer the assets out of public ownership into the private domain and that remained in fact the true substance of the transaction. As the Financial Secretary in his affidavit sworn to on 5 May 2004 indicated, the transfer of the Printing Department assets to DFC was done 'with a view to their ultimate disposal by DFC'.

10. I therefore think that the company law principle of separate legal personality, which was set out by *Barrow J (Ag)* with unsurprising lucidity and accuracy, is, with the greatest respect to the learned judge, quite beside the point, either because DFC acted throughout as an agent for the Minister, as Belize Printers contend, or because all aspects of the transaction were "indissolubly linked" (as, this Court was told, the Solicitor General himself had in fact submitted at an earlier stage of the proceedings).
11. It was not seriously contended on the Minister's behalf that, absent the interposition of the DFC, an inventory of the assets of the Printing Department was immaterial to the issue formulated in

Belize Printers' challenge to the decision to sell those assets. Quite apart from the lawfulness of the sale, an inventory of the assets is obviously material in the light of the contention that the price at which they were sold was so much lower than their market value as to make the decision to sell at that price disproportionate to any power the Minister may have had to sell, not to mention irrational. It is therefore hardly an answer to this to say, as the Minister has sought to, that there is no inventory of the assets: an "inventory" is no more than a detailed list or catalogue which, if it does not exist, can be compiled in very short order. I would have expected myself, in any event, that the fixing of the sale price of the publicly owned assets by Cabinet at \$2.4 million was premised on reasonably precise information having been supplied to it as to their extent and value.

12. It is for all of the reasons given above that I concurred in the decision to allow this appeal and to order that the respondents produce the inventory of the assets sought within fourteen days.

Costs

13. The appellants are entitled to the costs of this appeal, to be agreed or taxed.