

**IN THE SUPREME COURT OF BELIZE, A.D. 2005**

**CLAIM NO. 116**

**GILBERT SMITH**

**Claimant**

**BETWEEN AND**

**BELIZE TELECOMMUNICATIONS  
LTD.  
THE ATTORNEY GENERAL**

**First Defendant  
Second Defendant**

—  
**BEFORE** the Honourable Abdulai Conteh, Chief Justice.

Mr. Michael Peyrefitte for the Claimant.  
Mr. Michael Young S.C. for the First Defendant.  
Mr. Elson Kaseke, Solicitor General, for the Second Defendant.  
Ms. Lois Young Barrow S.C. for Ecom Ltd., an Interested Party.  
Mr. Lionel Welch for Belize Telecom Ltd./Innovative Communication Corp., an Interested Party.

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**RULING/DECISION**

The proverbial cows will never come home if the stratagem, and I put it no higher than that, which Belize Telecom Ltd. and Innovative Communication Company Ltd. embarked upon through their attorney Mr. Welch, in their application which is headed “Preliminary Objection”, were allowed or be indulged in.

2. In short, it will make the hearing and determination of Mr. Gilbert Smith’s claim for the several declarations he seeks be on the never-never; thereby inordinately and interminably prolonging his claim.
3. The rub of the application by Mr. Welch, the learned attorney on behalf of BT and ICC is that Mr. Smith’s substantive claim should be stayed until the Court of Appeal delivers judgment in Civil

Appeal No. 6 since, in his view, that judgment will determine a number of issues of fundamental importance to the proper adjudication of Mr. Smith's claim.

4. I must say with the greatest respect and some constraint that Mr. Welch's application is misconceived and meretricious for the simple reason that if Mr. Smith's claim were stayed to await the outcome of the Court of Appeal's judgment in Civil Appeal No. 6 (presumably of 2005 although Mr. Welch's application did not state the year, nor for that matter the parties to that appeal), it is not clear or certain when that judgment will be delivered, the earliest and next session of the Court of Appeal being due next October. And of course, the pronouncement of the Court of Appeal on that appeal may well not be the last word as there may well be the possibility of an appeal from that judgment to Her Majesty's Privy Council in London.
5. But all this may be conjecture. However, I feel that to dangle the-as-yet undelivered judgment of the Court of Appeal in a separate case as a reason to stay Mr. Smith's claim is, at least, chimeric. I say so with the greatest respect and without prejudice to whatever the outcome of that appeal may be.
6. But more fundamentally, I am of the considered view that that appeal before the Court of Appeal has little or nothing to do with the substance of Mr. Smith's present claim before me for the following reasons:
7. **First**, Mr. Smith is not **qua** a shareholder of the 1<sup>st</sup> Defendant BTL, a party to that appeal. He has brought his claim as a **shareholder** complaining that certain shares transfer by the 2<sup>nd</sup> Defendant transgresses certain provisions of the Articles of Association of BTL on the limitation of shareholding in the 1<sup>st</sup> Defendant BTL, in particular, Article 36 of its Articles of Association.

8. Secondly, the Articles of Association of a company have, as between the members of the company and the company itself, the effect of binding between them as a covenant. Section 14(1) of the Companies Act – Chapter 250 of the Laws of Belize, Revised Edition 2000, stipulates that:

*“14(1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his executors and administrators, to observe all the provisions of the memorandum and of the articles, subject to the Act.”*

9. Mr. Smith, a shareholder of BTL (therefore a member of the company) sued the company, and then the Attorney General, on behalf of the Government of Belize (a major shareholder in BTL and therefore also a member) applied to be joined in this suit as the 2<sup>nd</sup> Defendant. Therefore, the effect of section 14(1) of the Companies Act is, in my view, that the Articles of BTL, which Mr. Smith claims will be breached by the 2<sup>nd</sup> Defendant, operate as a binding contract, containing covenants, between BTL and its several shareholders and between these shareholders themselves.

In Wood v Odessa Waterworks Co. (1889) 42 Ch. D 636 at p. 642, for example, Stirling J. expressed the position thus:

*“The articles of association constitute a contract not merely between the shareholders and the company, but between each shareholder and every other.”* (Emphasis added)

Again, in Welton v Saffery (1897) A.C. 299, at p. 315, Lord Herschell stated the position as follows:

*“It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights inter se.”*

(Emphasis in the original)

(I might add in parenthesis here that this dictum of Lord Herschell, according to the learned authors of Palmer’s Company Law, 21<sup>st</sup> ed. 1968, by Clive Schmitthoff and James Thompson, at p. 109, *“has never been dissented from.”*)

10. Therefore, I am of the view that Mr. Smith can, all things being equal, maintain and prosecute this action as against BTL the company of which he is a shareholder/member, and the action relating as it is, to an alleged breach of the articles of the company. In Wood v Odessa (supra), Stirling J. for example, granted an injunction, at the instance of a member, to restrain the defendant company from contravening its articles of association.
11. Therefore, I am quite unpersuaded by the contention of Mr. Welch that because the judgment of the Court of Appeal in Civil Appeal No. 6 of 2005, in which the uncertainty of who really constitute the Board of the 1<sup>st</sup> Defendant might be decided, this case should therefore be stayed until then, whenever that might be. This, as I said earlier, might be a case of waiting until the cows come home!
12. In any event, BTL as a company, is bound to its members in the same way as the members are bound to the company. The wording in section 14(1) of the Companies Act *“(the) articles*

*shall...bind the company*” has in analogous situations, been held to mean that the company is deemed to have covenanted with its members as provided in its Articles of Association. Thus, in **Johnson v Lyttle’s Iron Agency (1877) 5 Ch. D 687**, an irregular forfeiture of shares was impeached by a member and set aside by the English Court of Appeal on the ground, as James LJ said, that the notice prior to forfeiture *“did not comply strictly with the provisions of the contract between the company and the shareholders which is contained in the regulations.”* That is, the company’s articles.

Also, in **Oakbank Oil Co. v Crum (1882) 8 App. Cas. 65**, it was held that the plaintiff, a member, was entitled, as against the company, to insist on the observance of the articles as to dividends so long as the articles stood unaltered.

13. Moreover, Mr. Smith is entitled to a speedy hearing of his claim as well as against the 2<sup>nd</sup> Defendant, who as I said earlier volunteered to join this case as a party. This decision to join might have been a calculated strategy by the 2<sup>nd</sup> Defendant so as to put to rest perhaps the possible controversy surrounding the expression “permitted person” found in Article 36 of BTL’s articles of association regarding limitations on its shareholding.
14. **Thirdly**, therefore, it is for this additional reason that Mr. Welch’s contention for a stay of the present proceedings cannot and must not be allowed to detain this case to await the outcome of the Court of Appeal’s decision in Civil Appeal No. 6 of 2005. That case is about the right of classes of shareholders of BTL and their entitlement to appoint members of its Board. The instant case before me is about the interpretation, effect and application of the limitations on the holding of shares in BTL and who a “permitted person” is for the purposes its articles of association; and the status

of the Special Shareholder. This is, strictly speaking, in my view, quite unrelated to the issue of the appointment of the Board of BTL.

This, of course, is not to say that the shareholding and class of shares are not related as to the right to the appointment of certain class of directors of BTL's Board. There is some correlation. But the issue of who is by the company's articles "a permitted person" so as to be outwith the limitations on shareholding is, in my view, a different kettle of fish altogether. In my view, who in law and by BTL's articles of association, a "permitted person" is, is an issue that touches and concerns the acquisition, transfer and holding of shares in BTL.

15. Of course, by the provisions of Article 36, the Board of BTL, individually and collectively, has some responsibilities in the determination of who a "Relevant Person" is for the purpose of holding the shares of BTL and the necessary actions by way of Required Disposal to ensure the percentage of shares held by any "Relevant Person" is within the permitted ceiling of 25% of its issued share capital. But these are responsibilities on the Board and its members, regardless of who constitute the Board.

Therefore, I do not think the outcome of the appeal to the Court of Appeal on which Mr. Welch has pitched his tent for seeking a stay of the instant action before me, is terra firma, whichever way the outcome of that appeal might go.

16. It is for all these reasons that I find myself unable and unpersuaded to grant the stay Mr. Welch seeks on behalf of Belize Telecom Ltd. and Innovative Communication Ltd., who are in any event, only interested parties and have chosen not to defend or join this action as parties.

17. Moreover, when this matter came before me in chambers on 27<sup>th</sup> June, on an interlocutory application for an interim injunction by which time the 2<sup>nd</sup> Defendant had joined the fray as it were, I granted an interim injunction against any transfer or registration of the shares of BTL, the 1<sup>st</sup> Defendant, until the hearing and determination of Mr. Smith's claim. This was in the light of the evidence put before me, in particular, the affidavit of the Attorney General of 24<sup>th</sup> June 2005, which stated that a divesture of the shareholding of the Government of Belize was imminent. The Attorney General stated in paragraph 7 of his affidavit that a part of the divesture was in favour of Ecom Ltd., an interested party in these proceedings, who is already the holder of some of BTL's shares, and which would bring Ecom Ltd's shareholding in BTL to "approximately 25% or more of the issued share capital of BTL." The Attorney General further averred in the same paragraph 7 that *"However, Ecom Ltd. is a Permitted Person pursuant to BTL's Articles of Association."*

It then struck me that the matter of the transfer or registration of shares of BTL should be held in abeyance until the hearing and determination of Mr. Smith's claim. Hence my order enjoining any transfer or registration of BTL's shares.

This added, in my view, an element of urgency to the proceedings as the effect of my order was to chill any transfer or registration of BTL's shares. This situation, if allowed to continue for too long, is bound to work hardship and inconvenience on shareholders who may want to realize the value of their shares, such as the Government of Belize in this case. Hence the need for dispatch to hear and determine the present action.

For this reason as well, I am unable to accede to Mr. Welch's application for a stay of the present proceedings. I am of the considered view also that to accede to this request would not be furthering the overriding objective of the Supreme Court (Civil Procedure) Rules 2005, which mandate the Court to deal with cases justly by ensuring, among other things, that a case is dealt with expeditiously.

18. I find Mr. Welch's application therefore, to be the antithesis of expedition.

Finally, on Mr. Welch's application for a stay of the present proceedings to await the outcome of the appeal to the Court of Appeal, I do not believe that it can be seriously argued that whatever the outcome of that appeal may be, it would operate as res judicata so as to bind the present parties in the instant case before me thereby to preclude either Mr. Smith or any of the defendants or the interested parties from bringing or pursuing or maintaining the present action. That appeal will not determine or decide the meaning, operation or effect of either Articles II or 36 as far as they relate to the shareholding in BTL. This however, is the woof and substance of Mr. Smith's present claim before me.

19. I accordingly therefore, refuse a stay of his claim as applied for by Mr. Welch.

#### *Ecom Ltd's Application*

20. Mr. Smith's claim, it must be said, is not without travails, for having successfully surmounted Mr. Welch's attempt to hold it in abeyance until the decision of the Court of Appeal in Appeal No. 6 of 2005, it now faces perhaps a more fundamental challenge aimed at stopping it in its tracks. This time around, the challenge comes



from an unexpected quarter. I say unexpected because, it is from Ecom Ltd. an interested party and one of the intended beneficiaries of the proposed divestiture of the Government of Belize's shares in BTL (see paragraph 2 of the Attorney General's affidavit of 24 June 2005).

However, by notice dated 1<sup>st</sup> July 2005, Ms. Lois Young Barrow S.C. for Ecom Ltd. sought permission to raise what she called preliminary objection for (sic) the Court's consideration, viz:

*“That there is no dispute creating a lis between the parties and the Court ought not to render an advisory opinion.”*

21. Two affidavits were filed in support of Ecom Ltd's application viz, i) by Lord Ashcroft and ii) by Mr. Jose Alpuche. Both affidavits are dated 1<sup>st</sup> July 2005.
22. **First**, in so far as Lord Ashcroft's affidavit is concerned, he describes himself as a businessman and that he represents Seascope Holdings Ltd., a 'B' director on the Board of Directors of the 1<sup>st</sup> Defendant company, BTL. The thrust of Lord Ashcroft's affidavit however is to take issue with the affidavit of Mr. Wilman Black dated 24<sup>th</sup> June 2005 filed in support of BTL, the 1<sup>st</sup> defendant. In his affidavit, Mr. Black states that: *“The issue of the interpretation of Article 36 is one of importance and is one in respect of which guidance is needed.”* Mr. Black also states in his affidavit that he is the corporate secretary of the 1<sup>st</sup> Defendant (then Respondent on the interlocutory application for an injunction against the transfer or registration of the shares of BTL - see paragraph 17 above) and that he is the custodian of the corporate books of BTL, the 1<sup>st</sup> Defendant, including the Minutes Book of its Board of Directors and the keeping of records of its correspondence. Lord Ashcroft

however avers that neither Seascope Holdings (a 'B' director of the Board of BTL) had individually or jointly with the other directors of BTL instructed Mr. Black to sign the affidavit filed on behalf of BTL nor indeed any other affidavit.

Lord Ashcroft as well in his affidavit, takes to task Mr. Michael Young S.C. for acting as the attorney for BTL in this matter before me: see in particular Lord Ashcroft's letter to Mr. Young S.C. dated 30<sup>th</sup> June, annexed to his affidavit.

23. I must say however, that Mr. Young S.C. is on record as representing BTL, the 1<sup>st</sup> Defendant. Perhaps the ire, if I might call it that, of Lord Ashcroft, or at least his rebuke of Mr. Young S.C., is that in both his skeleton arguments and submissions on the hearing of the application for interim injunction restraining the transfer or registration of the shares of BTL, until the hearing and determination of Mr. Smith's claim, he took the position that the application would not be resisted by BTL, the 1<sup>st</sup> Defendant.

The same might as well be said of Lord Ashcroft's position in his affidavit regarding the affidavit of Mr. Black wherein he Mr. Black may be seen as promoting the cause for this Court to give an interpretation of Article 36 of BTL's articles of association.

24. Be that as it may, I do not think Lord Ashcroft's affidavit should preclude this Court from entertaining Mr. Wilman Black's affidavit or Mr. Young's representation of BTL, the 1<sup>st</sup> Defendant. I do not feel that I need, in order to determine Mr. Smith's claim, to be overly concerned or bothered by, with respect, Lord Ashcroft's protestations as stated in his affidavit, as I do not think that I need, for present purposes, to inquire into the regularity of the internal proceedings of BTL, that is, its indoor management – see the rule in Royal British Bank v Turquand (1856) 6 E & B, 327; and

Mahony v East Holyford Mining co. (1875) L.R. 7 H.L. 869

at page 898.

I therefore put no store on Lord Ashcroft's affidavit as a reason to hold or find that there is no dispute creating a lis between Mr. Smith as the Claimant, and BTL as the 1<sup>st</sup> Defendant or the Attorney General as the 2<sup>nd</sup> Defendant for that matter: for whether Mr. Black was authorized to make his affidavit or Mr. Young was properly instructed to defend BTL neither in my view advances or refutes Mr. Smith's claim.

25. In a similar attack by the learned Solicitor General on Mr. Black's affidavit for lack of authority to make it at the hearing on 27<sup>th</sup> June 2005, I had ruled that de bene esse, I would let Mr. Black's affidavit stand.

*Is there a dispute creating a lis between the Parties?*

26. I therefore turn now to the more fundamental and formidable challenge to Mr. Smith's claim.
27. In his original Statement of Case filed on 10<sup>th</sup> June 2005, Mr. Smith sought four declarations from this Court. I will refer to only the first two of these as subsequently at the hearing on 28<sup>th</sup> June, Mr. Peyrefitte, the learned attorney for Mr. Smith, by written notice applied to abandon claims three and four which relate to previous transactions by the 1<sup>st</sup> Defendant concerning the transfer of its shares and the Special Share; he substituted instead one additional ground of claim.

The first two claims of Mr. Smith therefore reads as follows:

- “1. *A Declaration that on a true construction of Article 36(A) to 36(L):*

*A Permitted Person can only be (a) a trustee of any employees' share scheme of the company (b) a Minister of government of Belize (c) the holder for the time being of the B Ordinary Shares or (d) a person who would act on behalf of the government of Belize and NOT in his own private capacity.*

2. *A Declaration that on a true construction of Article 11(A), the holder of the Special Share can only be a Minister of the Government of Belize or a person who would act on behalf of the government of Belize and NOT in his own private capacity.”*

The additional substituted claim reads as follows:

*“That the first Respondent (sic) be prevented from authorizing or approving or registering any transfer of shares to any entity (either by itself or together with or through any affiliate whether directly or indirectly), save and except for a trustee of any employee scheme, to hold more than 25% of the shares in the first defendant company.”*

28. Against these claims, Ms. Lois Young Barrow S.C., the learned attorney for Ecom Ltd., an interested party and who from the affidavits of the learned Attorney General is the intended transferee of some of the shares of the Government of Belize in the first defendant company (see in particular paragraphs 2 and 3 of the Attorney General's first affidavit and paragraph 3 of his second affidavit of 27<sup>th</sup> June 2005), has taken what, in effect, is an in limine objection. That is to say, there is no dispute creating a lis between the parties and this Court ought not therefore to render what is an advisory opinion. In support of this objection, Mr. Jose

Alpuche who describes himself as a director of Ecom Ltd. has filed an affidavit dated 1<sup>st</sup> July 2005.

29. It is clear that two of the now remaining three declarations Mr. Smith is seeking are agitated by Article 36 of the 1<sup>st</sup> defendant's articles of association.
30. Article 36 of BTL's articles of association, it must be said, is not written in a plain and straightforward manner. It is headed "Limitations on shareholdings"; it represent the longest of the company's one hundred and fifty six articles, and is subdivided into twelve paragraphs – (A) to (L) representing nearly half of the letters of the alphabet; with paragraph (A) alone being further subdivided into five sub-paragraphs numbered in Roman Numerals (i) to (v). But the whole scheme and structure of Article 36 is, as its heading states, to put limitations on shareholdings in BTL, the 1<sup>st</sup> Defendant. These limitations on shareholdings are sought to be given effect by the use of certain terms, phraseology and definitions in particular in paragraph (A) of Article 36. This Article itself is invested by its paragraph (L) with some supremacy over any other Articles of the company.
31. The intent and effect of Article 36 although perhaps, not so manifestly, clearly or easily expressed, as might be desired, is to limit the holding of shares in BTL to not more than 25% of its issued share capital by anyone who is described as a "Relevant Person." If it appears to the Board of BTL or if it determines that this "Relevant Person" has or appears to have an interest in BTL's shares which carry 25% or more of the total votes attached to its issued share capital, then the Board shall call upon this "Relevant Person" to effect what is termed a "Required Disposal" of shares (called "Relevant Shares") so as to bring the shares held by the "Relevant Person" below the ceiling of 25%. The purpose of Article

36 is, in the quaint phraseology of its paragraph (B), to prevent any person from remaining a “Relevant Person” other than a “Permitted Person” for the purpose of holding the shares of BTL. That is to say, a “Permitted Person” is allowed to hold more than 25% of BTL’s shares.

32. A “Permitted Person” is said to mean for the purpose of Article 36:

*“(a) a trustee (acting in that capacity) of any employees’ share scheme;*

*(b) a Minister of the Government of Belize, the holder from time to time of the ‘B’ Ordinary Shares or any person acting on the written authority of the Government of Belize.”*

33. Now in the present action, Mr. Smith as a claimant is seeking from this Court declarations regarding who a “Permitted Person” is. But at the heart of his quest is the contention that a “Permitted Person” cannot hold 25% or more of BTL’s shares in his own private capacity, which I take to mean for his own beneficial interest. Therefore, Mr. Smith contends that BTL should be prevented by this Court from authorizing or approving or registering any transfer of shares to any entity (either by itself or together with or through any affiliate whether directly or indirectly) except for a trustee of any employee scheme, to hold more than 25% of BTL’s shares (the substituted claim also being sought by Mr. Smith).

34. The first thing I should say is that the trustee of an employees’ share scheme is expressly by Article 36(A)(i)(a) a “Permitted Person” and can therefore hold more than 25% of the shares of BTL. It follows therefore that no declaration is needed or necessary from this Court on this.

35. But more fundamentally both Ms. Lois Young Barrow S.C. and the learned Solicitor General have objected to any further hearing of Mr. Smith's claim relating to a "Permitted Person" status and the entitlement of that person by the Articles of BTL, to hold 25% or more of the shares of BTL. The basis of their objection is that as things stand presently, there is no dispute or cause for dispute that should necessitate the granting of the declarations relating to the "Permitted Person" status sought by Mr. Michael Peyrefitte, the learned attorney for Mr. Smith. The core of their objection is that it is premature to seek or ask for these declarations, at least for now.
36. Mr. Peyrefitte on the other hand contends that there is a dispute between the parties that this Court can adjudicate upon and grant the declarations Mr. Smith seeks regarding the permissible percentage holding of BTL's shares and the status of a "Permitted Person."
37. For a determination of these opposing positions, it is necessary to look at the evidence to ascertain whether there is a dispute.

*The Evidence on whether there is a Dispute*

38. I had earlier at paragraphs 8, 9, 10 and 12 of this Ruling stated what, in my view, is the effect of the articles of association of a company both as between it and the members of the company as well as between members of the company themselves. Article 36 of the articles of association of BTL regarding the limitations on the holding of shares in the company is, in my view, of legal force and effect: see in particular the cases mentioned in the paragraphs I have just referred to and section 14(1) of the Companies Act. Article 36 is therefore, binding on BTL as a company as well as between its several members.

39. Mr. Wilman Black in his affidavit of 24 June 2005 gives at paragraph 11 the distribution of the issued share capital of BTL. I have with the cooperation of all the attorneys, produce herein the present share capital of BTL including its authorized share capital and its issued share capital and its class and the present distribution of its shares. This presentation of BTL's share structure and distribution is, I believe, largely common ground between all the parties:

**BELIZE TELECOMMUNICATIONS LIMITED**

**SUMMARY OF ISSUED SHARE CAPITAL**

**UPDATED – MARCH 23, 2005**

**1. NOMINAL SHARE CAPITAL OF BTL 100,000,001**

**2. ISSUED SHARE CAPITAL OF BTL: 36,876,727**

Share Composition:

a. "B" Shares 8,000,000

b. "C" Shares 28,876,726

c. Special Rights Share 1

**36,876,727** (See details below)

	"B" Shares	Percentage	"C" Shares	Percentage	Special Share	Total Shares Owned	Total Percentage Owned
a. Belize Telecom Ltd. owns	480,000	6.0%	10,902,998	37.76%	1	11,382,999	30.87%
b. Government of Belize owns	3,520,000	44.0%	10,292,173	35.64%		13,812,173	37.45%
c. Mercury Communications Limited owns			2,906,949	10.07%		2,906,949	7.88%
d. Carlisle Holding Limited owns			750,001	2.60%		750,001	2.03%
e. ECOM Limited owns	4,000,000	50.0%	1,531,278	5.30%		5,531,278	15.00%
f. New Horizon Limited			12,500	0.04%		12,500	0.03%
g. Belize Holding Inc. Group Pension Plan			22,023	0.08%		22,023	0.06%
h. PSU & BNTU owns			567,666	1.97%		567,666	1.54%
i. Other Minority Shareholders owns			1,891,138	6.55%		1,891,138	5.13%
	8,000,000	100.0%	28,876,726	100.00%	1	36,876,727	100.00%



40. It is readily apparent from the above table at paragraph (a) that Belize Telecom Ltd. holds more than 25% of issued share capital of BTL, standing at 30.87%, while the Government of Belize holds 37.45%. There is of course no issue with the latter in view of Article 36(A)(i)(b). But in so far as Belize Telecom Ltd. is concerned, there was no evidence led to impugn its 30.87% holding as impermissible or that it is not a "Permitted Person." And Mr. Welch who appeared for Belize Telecom Ltd. as an interested party, did not feel called upon to address this aspect. Like him, I therefore, do not feel called upon to make any declaration regarding its shareholding.
41. Suffice it however to say that absent the "Permitted Person" status, no shareholder in BTL can continue to hold more than 25% of its shares if its Board of Directors so determines and makes a requisition on that shareholder to effect a "Required Disposal" so as to bring his shareholding within the 25% margin stipulated in Article 36.
42. In this case however, there was no evidence directed against any other shareholder other than Ecom Ltd. It is no doubt for this reason that Ms. Young Barrow has launched her pre-emptive strike against the continuation of this case because she (together with the learned Solicitor General) says it is premature and only seeks an advisory opinion on a hypothetical issue, there being no live issue.
43. Indeed, on the evidence, Mr. Paul Perriott, the president of the Belize Communications Workers Union, in his affidavit filed in support of Mr. Smith's claim, deposes to negotiations for the sale of Government of Belize's shares in BTL and exhibits a copy of an agreement between the government and Ecom Ltd. for the acquisition by the latter of the former's shares in BTL. Annexed to Mr. Perriott's affidavit as well is a draft letter to Ecom Ltd. from the Prime Minister purporting to confer "Permitted Person" status on

Ecom Ltd. for it to hold 25% or more of BTL's shares. The Attorney General in his own affidavit of 24 June 2005 exhibits a copy of the actual text of the Prime Minister's letter. The Attorney General also states in his affidavit that the Government of Belize which currently hold 37.5% of BTL's shares "*intends to divest by sale ... 12 1/2% of the issued share capital of BTL to Ecom Ltd.*" He further avers at paragraph 7 of his affidavit that he understands that after the sale "*Ecom Ltd's shareholding in BTL will be approximately 25% or more of the issued share capital of BTL. However, Ecom Ltd. is a Permitted Person pursuant to BTL's Articles of Association.*"

Mr. Nestor Vasquez in his two affidavits in this matter also speaks specifically of Ecom and the proposed sale to it of more BTL's shares. He states, for example, in paragraph 5 of his affidavit of 27 June 2005 "*... if Ecom or any other member of the Carlisle Group ... is allowed to own more BTL shares, their holdings as a group would exceed 25% of the total shares of BTL and they would become a Relevant Person as defined in Article 36(A)(ii) because they would have an interest in shares which carry 25% or more of the votes of the issued shares in BTL.*" (Emphasis added)

44. There is however, in evidence on the other hand, an affidavit by Mr. Jose Alpuche of 1<sup>st</sup> July 2005. He describes himself as a director of Ecom Ltd. duly authorized to swear to this affidavit. It is pertinent, I think, to reproduce the material parts of this affidavit in the light of the objection taken against the further hearing of Mr. Smith's claim regarding the limitations on the holding of BTL's shares. This stands unrefuted and it states in terms:

*“Position of Ecom*

3. *Although Ecom is not a party to this action (and does not wish to become one), I should comment upon the terms of the proposed transaction which is summarized at paragraph 2 of the Affidavit of Francis Fonseca dated 24 June 2005. Mr. Fonseca confirms that the Government of Belize holds 37.5% of the issued share capital of BTL (although I understand this is being disputed by Belize Telecom) and that it intends to divest 12.5 % of its holdings to Ecom Limited. I should clarify that Ecom does not intend to buy more than 10% of the Government of Belize’s holdings, and has entered into no binding agreement in this regard. In the event that any such transaction goes ahead Ecom will increase its current shareholding in BTL from 15% to 25%.*

4. *On 30<sup>th</sup> June 2005 Ecom Ltd. issued a press release informing the public that it does not intend to purchase BTL shares to bring its shareholding beyond 25%. A copy of this press release is now produced and shown to me and marked J.A.1.*

5. *Mr. Black, at paragraph 13 of his affidavit, suggests that Ecom is directly or indirectly controlled by Lord Michael Ashcroft and/or the Carlisle Group. This is incorrect. Ecom is a wholly owned by a charitable trust whose stated aims include the alleviation of poverty in Belize.”*

Annexed to Mr. Alpuche’s affidavit is the text of a Press Release put out by Ecom Ltd. abjuring any interest in the 12 ½% of BTL’s shares offered to it other than only 10%. This may well be a well-meaning, but self-denying ordinance imposed on itself by Ecom

Ltd. But, in my view, nothing much turns on it and I am not sure how much reliance can legally be placed on it. The fact remains however, and there is no evidence to the effect, that Ecom's current holding of BTL's shares makes it a "Relevant Person" on whom a notice of "Required Disposal" has been served. For now, Ecom Ltd. only holds about 15% of BTL shares.

45. I have adverted to the evidence in this case at some length in order to determine the objection raised by both Ms. Lois Young Barrow S.C. and the Solicitor General against Mr. Smith's claim for declarations and injunction relating to the limitations on shareholdings in BTL, the first defendant.
46. However, I repeat again what I have already stated at paragraph 41 above: absent the "Permitted Person" status, no shareholder in BTL may hold or continue to hold more than 25% of its issued share capital if its Board of Directors so determines and makes a requisition on that shareholder to effect a "Required Disposal" so as to be within the 25% ceiling stipulated in Article 36.
47. There is however, no evidence before me that Ecom Ltd. holds 25% or more of BTL's shares or has acquired such holding. This is so even though from the Attorney General's affidavit of 24<sup>th</sup> June 2005 is annexed a letter from the Prime Minister dated 22<sup>nd</sup> March ostensibly conferring a "Permitted Person" status on Ecom Ltd. for the purposes of Article 36 of BTL's articles of association.
48. I must in the circumstances, therefore, absent any evidence of Ecom Ltd. holding 25% or more of BTL's shares or acting to so acquire as a "Permitted Person", agree with both Ms. Young Barrow and the learned Solicitor General that Mr. Smith's claim for the declaration and injunction he seeks regarding the shareholding in BTL is premature and unsustainable on the present evidence to

found a declaration by this Court. I agree with the learned Solicitor General that Article 36 is by its scheme and structure is retrospective and that it is only brought into play when a shareholder, by the level of his shareholding, has become a “Relevant Person.” Then, the Board of BTL can by notice on such a shareholder, cause him to effect a “Required Disposal.” Failure to do so may give rise to a live issue or dispute which the Courts can properly adjudicate upon.

49. I reluctantly agree that though Mr. Smith’s claim regarding the shareholding in BTL by Ecom Ltd. may be well-meaning and his attorney Mr. Peyrefitte has put up a spirited fight, it represents nonetheless, an invitation to this Court to make a declaration or grant an injunction in a situation in which there is no live dispute yet.

I am of the opinion that on the evidence, there is no lis or live dispute between the parties, for neither BTL has registered shares for Ecom Ltd. that would make it a “Relevant Person”, nor is there evidence that Ecom Ltd. has utilized its “Permitted Person” status to acquire more shares nor, for that matter, is there evidence that there has been transfer of shares of BTL to Ecom Ltd. by the Government of Belize that may make it a “Relevant Person.” Even though Ecom Ltd ostensibly has had conferred on it a “Permitted Person” status there is no evidence that it has utilized this status.

50. There is perhaps a lis mota, but it has not yet reached the stage for this Court, on the evidence, to conclude that there is dispute creating a lis which would necessitate declarations from me relating to the 25% limitations on shareholding in BTL or the “Permitted Person” status. But for now Mr. Smith’s claim is hypothetical and in reality seeks an advisory opinion. This is

evidenced by the concluding paragraph 30 of Mr. Black's affidavit when he states: *"The issue of the interpretation of Article 36 is one of importance and is one in respect of which guidance is needed."* Mr. Young S.C. correctly stated in argument that there is a budding dispute, but I do not think however that the bud has flowered yet.

51. I have had occasion in the recent past that it is not the inclination of the Courts in Belize to respond to hypothetical questions or issues or to give advisory opinions – they pronounce on live issues supported by admissible evidence. In this case, there is no live issue regarding the 25% limitation on the holding of BTL's shares. The fact that Mr. Smith, the claimant in this case, may have an immediate practical interest in the declaration he seeks is not sufficient to render real an issue that is, so far on the evidence, hypothetical – see **Re Barnato** (1949) Ch. 21, affirmed in (1949) Ch. 258. See generally **Zamir & Woolf, The Declaratory Judgment** 3<sup>rd</sup> ed. (2002) especially at pp 140 – 163.
52. On the disinclination of the Courts to pronounce on hypothetical situations or render advisory opinions, I find support also from judgments in other countries of the Commonwealth. In the Australian case of **Pacific Brands Household Products Pty Ltd. v Singan Investment Pty Ltd** (unreported decision of the Supreme Court of Victoria of 21 March 2003), the plaintiff, as in the instant case before me, sought a declaration as to the proper legal construction of the same phrase in two related leases concerning the exercise of an option to purchase which had not yet taken place. In dismissing the application, Mr. Justice Habersbenger held that:

*“... the plaintiff is asking the court for an **advisory opinion**. Unless and until the plaintiff exercises the options to purchase there is no dispute in respect of which the court can be asked to adjudicate. ... unless and until the plaintiff exercises the option to purchase in one or both leases, any question as to the proper construction of the relevant phrase in the option to purchase clause is hypothetical ... the Court should not consider the question because to do so would involve it in giving an **advisory opinion**.”*

Also, the recent decision in the Canadian case of **Behr v College of Pharmacists of British Columbia (2005) B.C.J. No. 1331** decided by the Supreme Court of British Columbia on 13 June 2005. The applicant in that case, a pharmacist, sought a declaration concerning a prescription issued by a third party practitioner to a patient with whom there was believed to be no professional relationship. Mr. Justice Cohen in dismissing the application cited with approval the statement in **Vision Avant-Garde Inc. v Canada (Superintendent of Financial Institutions) (200) B.C.J. No. 486 -**

*“... the authorities show that the question here is really academic and presently there is no actual lis between the parties. In such hypothetical circumstances, the court should not entertain the granting of a declaration.”*

And concluded that:

*“... the applicant seeks the courts opinion about the meaning of a section of the By law in the absence of a true lis between the parties, I find the application must be dismissed.”*

(I must record my appreciation to Ms. Lois Young-Barrow S.C. for bringing these recent decisions from other parts of the Commonwealth to my attention).

53. It is for these reasons that I uphold the objection that the claim in respect of the declarations sought on the limitations of BTL's shareholding is, on the evidence as presented, hypothetical and seeks an advisory opinion. Any declaration I may make concerning the construction of Article 36 is for the moment hypothetical.

This disposes of the first declaration sought by Mr. Smith and the injunction preventing BTL from "authorizing or approving, or registering any transfer of shares to any entity save and expect for a trustee of an employee share scheme, to hold more than 25% of the shares in BTL." The latter is a matter for the Board of BTL, by Article 36 through the mechanism of a "Required Disposal." There is no evidence that the Board has failed to do or will fail to do so if the situation contemplated in the substituted claim were to arise. But for now everything is in the realm of conjecture.

*The Claim regarding Article 11*

54. I now turn to the declaration sought in relation to Article 11 of BTL's articles of association. This in truth concerns the Special Share created by Article 11. Mr. Smith claims a declaration "*that on a true construction of Article 11(A), the holder of the Special Share can only be a Minister of Government of Belize or a person who would act on behalf of the government of Belize and NOT in his own private capacity.*"
55. I must commend the candour of the learned Solicitor General who on behalf of the Attorney General, in both his written submissions and arguments before me, frankly admits that the Special Share was sold.



56. This candour on the Solicitor General's part is confirmed by the evidence in this case relating to the Special Share: In an agreement for the acquisition of shares in BTL dated 22<sup>nd</sup> March 2004 between the Government of Belize and Innovative Communications Corporation (ICC), an interested party in these proceedings before me, the Government of Belize did sell its shares in BTL including the one Special Share rights Redeemable Preference share to ICC – see paragraph 10 of Mr. Nestor Vasquez's affidavit of 27<sup>th</sup> June 2005, to which is annexed the said agreement.
57. It is, therefore, not in dispute that the Special Share is no longer in the possession of the Government of Belize; it is also admitted that it sold it.

*Can the Government of Belize sell the Special Share so as to alienate it from its possession?*

58. This is at the heart of Mr. Smith's claim for the declaration regarding the special Share.

This Court has had the occasion to pronounce before on this Special share in BTL – see the Decision of this Court in Actions Nos. 179 and 190 of 2005 delivered on 6<sup>th</sup> April 2005. I am made to understand that this decision is on appeal; although I am not sure if the appeal relates to what I said in that decision concerning the Special Share. I will therefore exercise some restraint in due deference to the Court of Appeal. What is undeniable is that until 22<sup>nd</sup> March 2004, the Special Share had always been in the hands of the Government of Belize.

59. The Special Share itself is provided for in Article 11 of BTL's articles of association. And this much, in my view, is clear by the provisions of the articles of association on the Special Share:

- 1) It may be transferred only to a Minister of the Government of Belize or any person acting on the written authority of the Government of Belize
- 2) Certain sections of the articles of association of BTL can only be effected with the consent in writing of the Special Shareholder – these relate to:
  - a) Article 2 on the definition of some provisions in the article of association
  - b) Article 11 itself on the rights of the holder of the Special Share
  - c) The limitations on shareholding in BTL as stated in Article 36 on “Relevant Person”
  - d) Article 88 on the right of the Special Shareholder to appoint two of the directors of BTL Board called “Government Appointed Directors”
  - e) Article 113 on the proceedings of the Board, and
  - f) Articles 116 and 120 on the election of the Chairman and Managing Director.
- 3) Its holder is entitled to receive notice of, and to attend and speak at any General Meeting or any meeting of any class of shareholders of the company, but without the right to vote or any other rights at any such meeting – Article 11(C).

- 4) Its holder has no other right to participate in the capital or profits of BTL, but in the event of a distribution of capital in a winding up of the company, its holder shall be entitled to repayment of the capital paid up on the Special Share in priority to any payment of capital to any other member – Article 11(D).
- 5) Subject to the provisions of the Companies Act (and the written approval of the Government of Belize), the holder of the Special Share may require the company to redeem the Special Share at any time by serving written notice upon the company and delivering the Share Certificate.

60. It is therefore manifest that the holder of the Special Share, notwithstanding its nominal value of BZ\$1.00, is invested with certain important rights and privileges. Hence the natural expectation, which operated until 22<sup>nd</sup> March 2004, that it will always be in the hands of the Government of Belize. Because of these rights and privileges, it came to be regarded as the Golden Share.

This expectation explains and confirms my earlier statement in the Decision of 6<sup>th</sup> April 2005 in Actions Nos. 179 and 190 of 2005 that *“the Special Share was meant to be in the hands of the Government representing perhaps some national patrimony, even if only nominal, in BTL.”* The provenance of BTL underlies this expectation. In 1972 by Ordinance No. 22, the Belize Telecommunications Authority was established as a Statutory Body to operate, maintain and administer the national telecommunication services and to regulate, control and plan all other internal and external telecommunications

services. BTL as a company was incorporated on 3<sup>rd</sup> April 1987 as a public limited liability company with the object of succeeding to the business of the Belize Telecommunications Authority. It was incorporated with an authorized share capital of \$100,000,001 divided into 100,000,000 ordinary shares and one Special Rights Redeemable Preference Share (the Special Share whose status is in issue in this part of the present proceedings). On December 30<sup>th</sup> 1987, the Government of Belize vested the assets of the former Belize Telecommunications Authority in BTL, and on 1<sup>st</sup> January 1988 BTL was granted a License to operate the telecommunications services, both internal and external of Belize.

On BTL's incorporation, the Minister of Finance of Belize became the holder of the One Special Rights Redeemable Preference Share of \$1.00 and Article 11(A) of its articles reflects this by providing that

*“(A) The Special Share may be transferred only to a Minister of the Government of Belize or any person acting on the written authority of the Government of Belize.” (Emphasis added)*

61. It is however, manifestly clear that on the literal wording of Article 11(A) the Special Share, if it is not in the hands of a Government Minister, can only be transferred to any other person on **the written authority of the Government of Belize.**
62. Did the disposal of the Special Share by the Government to ICC/BT on 22<sup>nd</sup> March 2004 constitute a transfer of it on the written authority of the Government of Belize? This may well be so, as the then Minister of Finance in the Government of Belize signed off on the agreement by which ICC/BT came to acquire the Special Share – see the text of the Agreement annexed to Mr. Vasquez's affidavit of 27<sup>th</sup> June 2005 for the signature of the then Minister of Finance

of the Government of Belize. I believe however that it would do violence to ordinary language and common sense to say that where, as in this case, a seller, (the Government of Belize represented by its Minister of Finance), signs off on a written agreement with a buyer (ICC/BT), that the transfer of the subject-matter of the sale (the Special Share in this case), was other than on the written authority of the seller, that is, the Government of Belize.

63. Mr. Peyrefitte on behalf of Mr. Smith further argues that by Article 11(A) it would be absurd for the Special Share with all its rights and privileges to be available for transfer to just any person authorized in writing by the Government as this would mean that that person could hold it in his own right.
64. Mr. Welch the learned attorney for ICC/BT however, contends that Article 11(A) does not state the capacity in which any other person can hold the Special Share or have it transferred to him: all the article says is it should be transferred on the written authority of the Government of Belize.
65. I am much in sympathy with Mr. Peyrefitte's arguments given the origins of BTL as I have briefly outlined above. But I must agree with Mr. Welch; for all Article 11(A) stipulates for is that the transfer of the Special Share to any other person than a Minister of the Government of Belize, must be on the written authority of the Government of Belize. Once there is the written authority of the Government of Belize, I think that the person who holds the Special Share, holds it legally in his own right unless the written authority provides otherwise. It is difficult however to conceive of a situation where a buyer is said to be the agent of the seller.

66. My sympathy for Mr. Peyrefitte's argument stems from the provenance of BTL. It is the successor of the Belize Telecommunication Authority, a Statutory Corporation whose assets (public property) were vested in BTL. Hence the expectation that the Special Share would represent the public interest, the national patrimony, if you will, in BTL as held by the Minister of Finance. Therefore to divest itself of this Special Share by way of sale as seemed to have happened in this case may be, though not in express breach of the Articles of Association, a big let down and cause for disappointment. But this is not the forum to address this, absent a clear breach of the articles themselves. The sale by the Government of the Special Share (on its written authority) though not in keeping with the expectation that had hitherto attended its possession, I find, may be regrettable. But I regret I cannot grant the declaration Mr. Smith seeks on this score.

My regret is compounded by the fact that the holder of the Special Share has, by the articles, the right to appoint two of the eight-member Board of Directors of BTL, with the high-sounding, if ironic appellation of these two as "Government Appointed Directors"!

A perusal of Article 11 as a whole will disclose that the Special Shareholder may with the written approval of the Government require BTL to redeem the Special Share at par at anytime by serving written notice on BTL and delivering the relevant share certificate. This I also believe underscores the point that the holder of the Special Share can hold it in his own right.

#### Conclusion

67. It is for the reasons I have stated above that I find myself unable, if reluctantly, to entertain further or grant any of the declarations or the injunction Mr. Smith has sought in his claim. In particular:

- 1) I uphold the submissions by the learned Solicitor General and Ms. Lois Young Barrow S.C. that it is premature to allow his claim for a declaration for the construction of Article 36 of BTL's Articles of Association to proceed, for on the evidence, such as it is, it did not disclose a live issue or dispute. I therefore find that I was being asked to pronounce on a hypothetical situation thereby rendering an advisory opinion.
- 2) Consequently, I am unable to order the first defendant, BTL, to refrain from authorizing or approving or registering any transfer of shares to any entity (either by itself or together or through any affiliate whether directly or indirectly) save and except for a trustee of any employees share scheme to hold more than 25% of the shares of BTL.
- 3) Accordingly the interim injunction I ordered on the 27<sup>th</sup> June enjoining any transfer or registration of BTL's shares is hereby vacated.
- 4) I refuse the declaration sought that on a true construction of Article 11(A), the holder of the Special Share can only be a Minister of the Government of Belize or a person who would act on behalf of the Government of Belize and NOT in his own private capacity.

68. I will now hear counsel on the question of costs.

**A. O. CONTEH**  
**Chief Justice**

**DATED: 7<sup>th</sup> July, 2005.**