

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

CONSOLIDATED

ACTIONS NOS. 179 AND 190

IN THE MATTER of an interpretation of Articles 90 (E) 90 D(i) and 90 D (ii) of the Articles of Association of Belize Telecommunications Limited, a company incorporated under the Companies Act, Chapter 250 of the Substantive Laws of Belize, Revised Edition 2000

THE ATTORNEY GENERAL
and
ECOM LIMITED

Claimants

BETWEEN AND

BELIZE TELECOM LTD
INNOVATIVE COMMUNICATION
COMPANY LLC
and
BELIZE TELECOMMUNICATIONS
LIMITED

Defendants

—
BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Elson Kaseke, Solicitor General for THE ATTORNEY GENERAL and Mr. Dean Barrow S.C. for ECOM LIMITED, Claimants.
Mr. B.Q. Pitts S.C. together with Mr. Lionel Welch for BELIZE TELECOM LTD and INNOVATIVE COMMUNICATION COMPANY LLC, Defendants.
Mr. Michael Young S.C. for BELIZE TELECOMMUNICATIONS LIMITED, Defendant.

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DECISION

Introduction

The proceedings in the matter before me were launched by three applications. The first in time was the application by an Originating Summons on behalf of the Attorney General as plaintiff and filed on

30 March 2005. This Summons had Belize Telecom Ltd. (BT) and Innovative Communication Company LLC (ICC) as defendants.

2. The second and third applications were related and were filed on the same date, 1st April 2005. These two applications had ECOM Ltd. as the claimant and Belize Telecom Ltd, the Attorney General of Belize and Belize Telecommunications Ltd. as respondents. One application in substance sought an interim injunction to restrain Belize Telecom Ltd and the Attorney General of Belize as respondents from causing a meeting of the board of directors of Belize Telecommunications Ltd (BTL hereafter or the company) which includes any “C” directors appointed by BT, the first respondent, until the determination of the substantive application.
3. The substantive application by ECOM Ltd like that of the Attorney General, sought from this Court the construction of certain provisions of the Articles of Association of BTL.
4. BTL it must be said, is the hapless and captive prey that is the subject of all these proceedings. And these proceedings are about the heart and soul of BTL. That is to say, who controls it or should control it?
5. After a preliminary hearing in chambers on Monday morning, 4th April 2005, I granted an interim injunction against any meeting of the board of BTL until after the hearing and determination of the substantive applications relating to the shareholding and the right to appoint directors as provided for in the Articles of Association of BTL.
6. When the substantive hearing was moved into open Court, the Attorney General of Belize was dropped as a respondent from ECOM Ltd's application. And together with the latter formed a common cause in the consolidated hearing of the two substantive

applications. This left Belize Telecom Ltd and ICC as the substantive respondents together with BTL as an unfortunate party but with able representation by Mr. Michael Young S.C. I have advisedly described BTL as hapless and unfortunate for in truth it has no dog in this fight. The fight is really between the other parties to these proceedings and it is about control of BTL.

7. The applications in these proceedings and their attendant circumstances raise, in my view, in a stark form, some of the difficulties and problems that may arise from the submission to the jurisdiction of a foreign country separate and apart from the jurisdiction of the courts of Belize, especially in a contract. They raise as well the issues of forum non-convenience and the law of the domicile of a corporation for the purposes of its management.
8. By way of a general background, I think it is fair to say that these applications have been prompted by the pronouncement of the United States District Court of the Southern District of Florida sitting in Miami, U.S.A., of 24th March 2005 (The Miami Court). The learned Attorney General in his affidavit of 29 March 2005, in support of the applications says, for example, there have been conflicting interpretations of these pronouncements regarding the shareholding and the right to appoint directors of BTL (see para. 8).
9. For the avoidance of doubt, let me say right away that I do not sit or regard it as part of my function, to interpret or apply, with respect, the pronouncement of the Miami Court. But however, judicial comity would require me to give it due regard. But it does not bind me. I am nonetheless grateful to the parties for providing me with copies which they annexed to their affidavits in the proceedings. I should also say that I find the judgment of the Miami Court, with respect, instructive and helpful. But again, it does not bind me in my determination of the several issues canvassed by the parties in

these proceedings relating as they do to the Articles of Association of BTL, a Belizean company.

10. I am of the considered view that all matters concerning the constitution of a corporation are governed by the law of the place of incorporation of the corporation – see Rule 156(2) on Capacity and Internal Management of Corporations in Dicey and Morris on Conflicts of Laws (12th Edition, by Lawrence Collins) at p. 1111 and the cases cited therein, for example, Bateman v Service (181) 6 App. Cas. 386 at 389 (P.C.); Carl Zeis Stiftung v Rayner and Keeler Ltd. (No. 2) (1967) 1 A.C. 853 at 972; Jarred Properties Ltd v ENIT (1989) 2 All E.R. 444; and J. H. Rayner (Mincing Lane) Ltd v Department of Trade (1990) 2 A.C. 418.

What the Applicants seek in their Applications

11. The applications were, as I have said, consolidated for the purposes of the hearing. The Attorney General seeks, in the main, the following:

- “1. That it may be determined on the true construction of the said Article 90D (ii) of the Articles of Association of Belize Telecommunications Limited (“the Company”), whether the “C” Directors appointed by the holder of the Special Share under that Article during the time and for so long as such holder of the Special Share was the holder of “C” Ordinary shares amounting to 37.5% or more of the issued share capital of the Company continued to hold office after the holder of the Special Share no longer and had ceased to hold “C” Ordinary shares amounting to 37.5% or more of the issued share capital in the Company, or whether such Directors automatically cease to hold office after the holder of the Special Share no longer held “C” Ordinary shares amounting to 37.5% or more of the issued share capital of the Company.
2. The procedure to be followed to appoint two new Directors in place of the Directors referred to in paragraph 1.”

The Solicitor General in the course of his arguments and submissions on behalf of the Attorney General also sought two further declarations as follows:

- “(i) A Declaration that on a true construction of Article 88(C), the non-executive chairman appointed by the holder of the Special Share is not entitled, in the event that the holder of the Special Share ceased to be the holder of 37.5% or more of the issued share capital of BTL, to continue to be non-executive chairman.*
- “(ii) A Declaration that on a true construction of Article 11(A), any person holding the Special Share on the written authority of the Government can only do so in the capacity of Government Agent.”*

ECOM Ltd’s application seeks principally the following:

- “1. Whether on a true construction of Articles 90(E), 90(D)(i) and 90 D(ii), any “C” directors appointed under Article 90 D(ii) cease to be “C” directors from such time as the party who has appointed the said “C” directors under Article 90(D)(ii) ceases to hold either the Special Share or the requisite number of “C” Ordinary Shares required to appoint or remove the said “C” directors under Article 90 (D) (ii).*
- 2. Alternatively, whether on a true construction of Article 90(E) of the Articles of Association of Belize Telecommunications Limited (“the Company”), the holders of a majority of the “C” ordinary shares may remove any “C” directors appointed under Article 90 (D) (ii) from such time as the party who has appointed the said “C” directors under Article 90 (D) (ii) ceases to hold either the Special Share or the requisite number of “C” ordinary shares required to appoint or remove the said “C” directors under Article (D) (ii).*
- 3. A Declaration that on a true construction of Articles 90 E, 90 (D) (i) and 90 (D) (ii) the holders of the majority of the “C” ordinary shares apart from the holder of the Special Share or any Associate of such holder for the time being issued, are entitled, in the event that the holder of the Special Share ceases to be the holder of 37.5 per cent or more of the issued share capital of the company, to appoint any four persons to be “C” directors.”*

12. It is clear and manifest therefore that these applications before me raise quintessentially issues relating to the constitution (the Articles of Association) of BTL concerning in particular, the appointment of

certain class of its directors: the issues raised relate to the interpretation and application of the provisions of the Articles of Association of BTL concerning in particular the appointment and removal of the directors of certain class of its shareholders.

The Question of the Proper Forum to determine the Issues

13. The question of the forum to determine these issues, in my humble view, I would have thought, falls ordinarily and properly, to the Courts and the laws of the place of incorporation of BTL, unless these issues are as such expressly provided for otherwise. This I would think would be highly unlikely as the issues touch and concern the Articles of Association of the Company incorporated in Belize under the company law regime in Belize.
14. It is common ground between the parties and one which cannot in any shape or form be doubted or contradicted, that BTL whose Articles of Association as to the appointment and removal of directors of certain classes of its shareholders, are in issue here, is a Belize company incorporated in Belize under the provisions of the Companies Act – Chapter 250 of the Laws of Belize Rev. Ed. 2000, and having its principal place of business in Belize with its headquarters in Belize City at Esquivel Telecom Centre, St. Thomas Street, Belize City.
15. I am of the settled view therefore that the issues raised by these applications concerning the appointment and removal of directors of certain class of shareholders, in accordance with the Articles of Association of BTL, a Belizean company, are preeminently and properly a matter for the determination of the Courts of Belize. I draw some comfort for this view from the pronouncement of the Miami Court itself when it expressly stated at footnote 14 at p. 29 of its judgment in relation to the identification of the holders of the “B”,

“C” and “Special Rights” shares and the extent of their holdings that
*“But for the waiver of sovereign immunity and forum selection clause in the
Share Pledge Agreement, this inquiry no doubt would be better conducted by a
Belizean Court.”*

Such an exercise, without doubt, would be crucial for the determination of who among BTL’s shareholders and the class of those shareholders whether, singly or in combination, was entitled, according to its Articles of Association, to appoint or remove which class of directors of the company.

16. *A fortiori* therefore, in my view, the interpretation and application of the Articles of Association of BTL would, with respect, be better conducted by the Belize Courts.
17. This of course, is not to discount the waiver of immunity and forum selection provisions in the Share Pledge Agreement which the Government of Belize succeeded to from the International Bank of Miami when it made good on the failure by ICC and Belize Telecom to pay the bank for the pledged shares. The Government of Belize may well be bound by the waiver of immunity and the forum selection clause in favour of the Miami Court. But I do not think such a waiver or choice of forum could logically extend to the Court in Miami sitting and interpreting and applying provisions of the Articles of Association of BTL, an undoubted foreign company in so far as the Miami Court is concerned, in which there are other shareholders other than the Government of Belize. These other shareholders are not a party to the Share Pledge Agreement and any waiver of immunity or forum selection provisions it might contain. It is therefore, not easy to appreciate how the Miami Court could interpret and apply Articles of Association of a Belizean company that was not even before it and whose other shareholders

might well be affected by that Court's interpretation of those Articles.

Logic and common sense, as well as practicality would, as well, in my view, make the Courts in Belize the proper forum to construct and apply the Articles of Association of BTL, an undoubted Belizean company, in law and in fact.

18. Moreover, the substance of the claims by Belize Telecom Ltd and ICC against the Government of Belize before the Miami Court, relates to breach of contract, rescission of the Share Pledge Agreement, and alleged fraudulent inducement by the Government of Belize relating to the Share Pledge and Share Purchase Agreement: See in particular, the statement of these claims by the Miami Court at p. 7 of the learned judge's order.

With respect, these claims are quite unrelated to shareholding and the right to appoint directors of BTL in accordance with its Articles of Association. It is therefore, in my respectful view, a long leap, from those claims to begin to pronounce on the appointment of directors of BTL in the light of its Articles of Association.

19. It is for all these reasons that I am of the considered view that the questions raised by the applications before me concerning the construction and application of certain provisions of the Articles of Association of BTL are properly for the Courts of Belize.

I now turn to the questions raised by the applications in these proceedings.

The provisions of BTL's Articles of Association on the appointment and removal of its directors

Analysis

20. Several of the Articles of Association of BTL deal with its board of directors: such as their maximum number, their appointment and removal, their disqualifications, their remuneration and pension etc. A perusal of these articles would readily show that they are not as clear in some cases or felicitously worded as might be desired or expected.
21. The number of directors is fixed at eight by Article 85 which goes on to say that this number shall be appointed by the members of the company at each Annual General Meeting.
22. A close perusal of the Articles as a whole however shows that there are three categories of directors of BTL's board: 1) **Government Appointed Directors** who are appointed by the Special Shareholder, and shall not be more than two at any time (Article 88); 2) **'B' Directors** – these are appointed by the holders of the majority of the 'B' Ordinary shares of the BTL and their number shall not exceed two at any time (Article 90 (B)); 3) **'C' Directors** – these are stated to be four in number (one half of the maximum number of directors authorized). These directors are to be appointed by the holders of the 'C' shares of BTL.

However, it is the formula for the appointment of the 'C' directors that I believe, has given rise to the principal questions in the applications before me.

Paragraph D of Article 90 contains two provisions for the appointment of the 'C' directors. Sub-paragraph (i) gives the total number of "C' directors at four and provides that they shall be

appointed by the holders of the majority of the 'C' shares of the company. However, sub-paragraph (ii) of Article 90 D also provides that the holder of the special share so long as it is the holder of 'C' shares amounting to 37.5 % or more of the issued share capital of BTL will be entitled to appoint two of the four directors designated as 'C' directors.

23. Therefore, notwithstanding the somewhat tortuous rendition of paragraph 90 D of the Articles of Association on the appointment of 'C' directors of the company, the following is, in my view, the position:

First, the number of 'C' directors is fixed at four of the eight directors of BTL.

Secondly, the holders of the majority of the 'C' shares may appoint the 'C' directors up to the maximum of four.

Thirdly, the holder of the Special Share (more on this later) shall, so long as it holds as well 'C' shares of BTL amounting to 37.5% or more of the issued share capital of the company, be entitled by written notice served on the company, to appoint two of the maximum of four 'C' directors.

Fourthly, therefore, for the holder of the Special Share to be entitled to appoint two of the four 'C' directors, it is clear, that it must, at the same time be the holder of 'C' shares of BTL amounting to 37.5% or more of the issued share capital of the company.

Fifthly, any 'C' director appointed by the holder of the Special Share who must simultaneously hold 37.5% or more of the issued share capital of the company, is excluded from voting at the board

meeting of BTL on any matter relating to the setting or amendment of the tariff policies of the company.

Therefore, in addition to the requirement that the holder of the Special Share must hold simultaneously 37.5% or more of the issued share capital of the company to be entitled to appoint two of the four 'C' directors, any such director appointed by the holder of that Special Share is precluded from voting on matters relating to rates or tariffs of BTL.

Tenure and Removal of 'C' Directors

24. From a close reading of the Articles of Association, it seems there are two provisions that touch directly on the tenure of the 'C' directors of BTL depending on whether they fall under either paragraph (i) or (ii) of Article 90 D.
25. **First**, if all the 'C' directors were appointed by the majority of the holders of the 'C' shares of the company as is possible when there is no appointment under Article 90 (D) (ii), then by the operation of Article 90 (E) the same holders of the majority of these shares can at anytime remove these directors from office. (This Article itself is as it stands, somewhat confusing with its reference to Article 112 of Table A!).

But if two of the four 'C' directors were appointed by the holder of the Special Share who must at the same time hold 37.5% of the issue share capital of the company, as provided for in Article 90 (D) (ii), then these two 'C' directors cannot be removed by the holders of a majority of the 'C' shares. This, I find, is the effect of the sentence in bracket in the middle of Article 90 (E); "except as regards any Director appointed pursuant to paragraph D (ii)."

Secondly, by Article 92 (A) the company may by extraordinary resolution remove any director other than a 'B' director or a Government appointed Director or a 'C' Director appointed pursuant to Article 90 D (ii), that is, by the Special Shareholder who possesses at the same time 37.5% or more of the company's issued share capital. It follows therefore that any other 'C' director can be removed by an extraordinary resolution such as when there is no 'C' director appointed under Article 90 (D) (ii).

26. Ominously however, the Articles of Association are silent as regards the situation where the holder of the Special Share who held 37.5% or more of the issued share capital of the company and appointed 'C' directors pursuant to Article 90 (D) (ii) loses that holding or the percentage of his holding is reduced below 37.5% of the issued share capital of the company.
27. In my view, it would seem to follow that in such a case, the 'C' directors so appointed by the holder of the Special Share would not qualify to be on BTL's board as 'C' directors, for the basis of their appointment, that is, that the holder of the Special Share possessing simultaneously 37.5% of the issued share capital of the company would no longer be present. Therefore, such 'C' directors, absent, the holding of 37.5% or more of the issued share capital of the company by their appointer, are not entitled to sit on the Board of BTL.
28. In such a case, it is quite in conformity with the Articles of Association for the majority of the holders of the 'C' shares to then appoint 'C' directors to the maximum of four pursuant to article 90 (D) (i).
29. This, in my view, is the meaning and effect of Article 90 (D) (i) and (ii).

The Position of the Special Shareholder or Special Share

30. The Articles themselves give a somewhat Delphic definition of what a **Special Share** or who the **Special Shareholder** is (see Article 2 on the meaning of certain words used in the Articles). It is however clear that they refer to the one special rights redeemable preference share of **BZ \$1.00**. This beguilingly nominal value notwithstanding, the Special Share or its holder is by the Articles of Association invested with certain special rights and privileges.
31. Article 11 sets out the provisions relating to the Special Share or its holder. **Paragraph A** of this Article states that *“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.”* **Paragraph B** of Article 11 specifies certain matters which shall be deemed to be a variation of the rights attaching to the Special Share and which can only be done effectively with the consent in writing of the Special Shareholder.

I need point out here that **Article 90 (D) (ii)** (relating to the right of the Special Shareholder to appoint two of the ‘C’ directors if it holds at the same time 37.5% or more of the issued capital of the company), is not among the matters stated in **Article 11 (B)**.

32. It is manifest however, from a close reading of the provisions of the Articles on the Special Share or its holder, that it was the **Government of Belize** that was clearly contemplated to be the holder of this Special Share or some other person, acting on the written authority of the Government of Belize.

Therefore, for example, notwithstanding its nominal value, the Special Shareholder is granted expressly by **Article 88**, the right to

appoint two of the eight-member board of BTL. These two directors are expressly stated to be "Government Appointed Directors."

Moreover, by Article 88 (C), if, at anytime, the Special Shareholder is the holder of 'C' shares of the company amounting to 37.5% of the issued share capital of the company, it may appoint any Government Appointed Director or any 'C' director appointed pursuant to Article 90 (D) (ii) as non-executive Chairman of the company's Board of Directors.

Importantly also, it is provided in Article 88 (D) (ii) that the provisions of the Articles on the removal of directors by Extraordinary Resolution shall not apply to Government Appointed Directors.

33. In my view therefore, only the Special Shareholder can remove a Government Appointed Director and this it can do at anytime. This conclusion is directly deducible from the combined operation of paragraphs (A), (C) and (D) of Article 88.

34. Quite how this inestimable piece of special share (notwithstanding its nominal value at BZ \$1.00) came to be out of the possession of the Government of Belize may be an unsolvable mystery, and it is not for this Court to speculate. But the possession of this Special Share guarantees two seats on the Board of BTL which insulates these two so-called Government Appointed Directors from removal by Extraordinary Resolution. I am afraid I gained no more enlightenment as to how this valuable Special Share left the possession of the Government from paragraph 3 of the learned Attorney General's affidavit, wherein he simply states that Belize Telecom Ltd, the first defendant in these proceedings, "*held as of the 9th February 2005 10,902,997 'C' ordinary shares, 480,000 'B' ordinary*

shares, and the Special Rights Redeemable Preference Share (‘the Special Share’) in the Company.” (emphasis added) Quite how Belize Telecom Ltd came to possess it is not explained.

Application of analysis to the issues raised in the Applications

35. I should make it clear that it is not the wont of the Courts in Belize to go in search of evidence not for that matter to respond to hypothetical questions or give advisory opinions. In Belize, the Courts decide or pronounce upon live issues supported by admissible evidence adduced by or on behalf of the parties before the Court. I must therefore state that no matter the public opinion or amount of information swirling around the melodrama that seems to engulf BTL everyday, I can only pronounce on the issues raised by these applications in the light of the evidence available to me.
36. Substantively, there are only two affidavits before me in these proceedings. One is by the learned Attorney General and the other by Mr. Jose Alpuche. Both affidavits are in support of the claimants. That is, the Attorney General and ECOM Ltd who is the holder of both ‘B’ and ‘C’ shares in BTL. There is no affidavit by or on behalf of any of the defendants. Therefore the several averments in the two affidavits in support of the claimants remain unrebutted or unchallenged. I should also point out that in the course of the hearing I offered several opportunities to the learned attorney Mr. Welch for the defendants, to have an adjournment to seek further instruments and if necessary, to file affidavits in support of the respondents. But this was to no avail.

The resolution of the issues in the applications is inextricably linked to the shareholding in BTL.

The evidence on the shareholding in the Company

From the evidence, the total issued share capital of BTL is comprised of 36,869,719 (see the affidavit of the Attorney General who however gives the total as 36,869,718 and the affidavit of Mr. Alpuche). These shares are divided into 28,869,178 'C' ordinary shares and 8,000,000 'B' ordinary shares, and one Special Rights redeemable preference share of BZ \$1.00. Mr. Alpuche on behalf of the claimants and relying on Mr. Wilman Black, the company secretary of BTL, gives the current shareholdings in BTL as follows:

“(i) The 1 special rights redeemable preference share of BZ dollar (“Special Share”) is held by Belize Telecom acting on the current written authority of the Government of Belize.

<i>(ii)</i>	<i>Government of Belize</i>	<i>-</i>	<i>10,292,173</i>	<i>“C” ordinary shares</i>
<i>(iii)</i>	<i>Ecom Limited</i>	<i>-</i>	<i>1,531,278</i>	<i>“C” ordinary shares</i>
<i>(iv)</i>	<i>Belize Telecom Ltd.</i>	<i>-</i>	<i>10,902,997</i>	<i>“C” ordinary shares</i>
<i>(v)</i>	<i>Other shareholders</i>	<i>-</i>	<i>6,143,270</i>	<i>“C” ordinary shares</i>
<i>(vi)</i>	<i>Government of Belize</i>	<i>-</i>	<i>3,520,000</i>	<i>“B” ordinary shares</i>
<i>(vii)</i>	<i>Ecom Limited</i>	<i>-</i>	<i>4,000,000</i>	<i>“B” ordinary shares</i>

A copy of E-com Ltd.’s share certificates for 4,000,000 “B” shares and 1,531,278 “C” shares are now produced and shown to me and together marked J.A. 2.” (emphasis added)

37. There is nothing to refute or challenge the shareholding structure in BTL as put before me.

Determination

From the analysis of the current shareholding in BTL I can now turn to a determination of the several issues in the applications in the light of the provisions of the Articles of Association of the company.

First, the appointment of two 'C' directors pursuant to Article 90 (D) (ii): It is clear that none of the shareholders at the moment, including Belize Telecom, holds 37.5% of the issued 'C' shares of

BTL. In fact BT even though it is said to be the holder of the Special Share, falls way short of holding of the 'C' issued shares to the amount of 37.5% or more of the issued share capital of the company, the threshold that would entitle it to appoint two 'C' directors pursuant to Article 90 (D) (ii). It plainly does not have what it would take to bring Article 90 (D) (ii) into play in its favour. It holds only 10,902,997 'C' shares, well short of 37.5% of the company's issued share capital.

It follows therefore that on a true and proper construction of Article 90 (D) (ii) any 'C' director appointed in the circumstances pursuant to this Article, is ineligible to sit as a 'C' director from such time as the appointer ceases to hold either the Special Share or the requisite amount of 'C' ordinary shares representing 37.5% or more of the issued share capital of BTL.

I accordingly declare that such a 'C' director is not entitled to sit on the Board of BTL. But the majority holders of 'C' ordinary shares are however not entitled to remove any such 'C' director appointed under Article 90 (D) (ii). The majority of the holders of 'C' shares are however, entitled, absent anyone holding at one and the same time the special share plus such amount of the 'C' shares representing 37.5% or more of the issued share capital of the company, to appoint 'C' directors up to a maximum of four pursuant to Article 90 (D) (i).

38. I further hold and declare that in virtue of Article 90 (E), any 'C' director but excluding the two 'C' directors appointed pursuant to Article 90 (D) (ii), may at any time be removed from office by the holders of the majority of the 'C' shares. And for the avoidance of doubt, I find and declare, as well, that the two 'C' directors, if any, appointed pursuant to Article 90 (D) (ii) (that is, in virtue of a combination of holding by the Special shareholder with a 37.5% 'C'

shares of the company) shall not be entitled to continue to sit on the board of BTL if and when their appointer (the special shareholder together with 'C' shares) representing 37.5% or more of issued share capital falls below the threshold of 37.5% holding of 'C' shares, representing 37.5% or more, of the company's issued share capital, even if he continues, nonetheless, to be the special shareholder.

39. In the light of the analysis earlier, I find and declare that on a true construction of Article 90 (D) (i) and (D) (ii), the majority holders of 'C' shares are entitled, apart from the holder of the Special Share or any associate of such holder, in the event that such special shareholder ceases to hold less than 37.5 per cent of the issued 'C' shares of the company, to appoint any four persons to be 'C' directors pursuant to Article 90 (D) (i). Any such 'C' director may be removed by the holders of the majority of the 'C' shares pursuant to Article 90 (E).

40. A further Declaration sought by the learned Solicitor General is the effect of Article 88 (C) on the position of the non-executive Chairman of the company appointed by the Special Shareholder who ceased to hold 37.5% or more of the issued share capital of the company. I am of the considered view that in such a case the non-executive Chairman ceases to be Chairman. It must be remembered that the privilege to appoint any Government Appointed Director or any 'C' director appointed under Article 90 (D) (ii) as non-executive Chairman is predicated on the Special Shareholding, as well as 'C' shares of the company in the amount of 37.5% or more. Absent either the Special Share or the requisite percentage holding of the 'C' shares of the company by the appointer of the non-executive Chairman would therefore disentitle

that non-executive Chairman to continue in office. I therefore so hold and declare.

41. The other Declaration sought by the learned Solicitor General is the status of a person holding the Special Share on the written authority of the Government of Belize.

I have analyzed above the particular position of the Special Share created by Article 11. I had adverted to the paucity or rather lack of evidence of how this Special Share came not to be in the possession of the Government. It is clear that by the provisions of the Articles of Association, this Special Share was meant to be in the hands of the government representing perhaps some national patrimony, even if only nominal, in BTL. It is expressly stated in Article 11 (A) that this Special Share may be transferred only to a Minister of the Government of Belize or to any person acting on the written authority of the Government of Belize.

I am accordingly unable in the light of the lack of evidence surrounding the transfer of this Special Share to BT, to find, declare or hold that any person holding it does so only in the capacity of Government's agent. The evidence is that Belize Telecom Ltd is in possession of this Special Share, in the absence of further evidence or particulars of its transfer to it, I am unable to grant the declaration sought on this score. I am confident however, it is not beyond the means or ingenuity of the Government to regain the Special Share from Belize Telecom Ltd. But on the state of the evidence before me, I am unable to find, hold or declare that it holds that Special Share in the capacity of Government agent.

Conclusion

42. Before concluding, I must state that Mr. Welch the learned attorney for the defendant sought somewhat valiantly but ingenuously to

dissuade me from entertaining the declarations sought by the claimants. He urged on me to find that the claimants ought first to have exhausted the internal mechanism of the company before approaching the Court. I find myself however, unable to accede to this. Because of the swirling controversy as to who constitute the board of BTL given the changing shareholding in it, I think a measure of stability ought to be given to the company. Hence, recourse to this Court by the claimants for the several declarations they seek.

Accordingly, in conclusion, I find and **declare** as follows:

- 1) On a true construction of Article 90 (D) (i) and (ii) any 'C' director of BTL appointed pursuant to Article 90 (D) (ii) ceases to be a 'C' director from the time the party who appointed the said 'C' director ceases to hold either the Special Share or the requisite amount of 'C' shares, that is, representing 37.5% of or more of the issued shares of the company. I further declare that the majority of the 'C' shareholders need not vote to remove such 'C' director but that that director ceases to qualify to be a 'C' director for the purposes of Article 90 (D) (ii).
- 2) I further hold and **declare** that the holders of the majority of 'C' shares of the company may pursuant to Article 90 (E) remove any 'C' director other than a 'C' director appointed pursuant to Article 90 (D) (ii) but such a 'C' director appointed pursuant to Article 90 (D) (ii) shall cease to be a 'C' director when his appointer no longer possesses the Special Share and the requisite percentage (37.5%) of the company's issued 'C' shares.

- 3) I also find and declare that on a true construction of Article 90 (D) (i) the holders of the majority of 'C' shares are entitled, absent the holder of the Special Shareholding as well sufficient or more of the 'C' shares of the company amounting to 37.5% of the company's issued share capital, to appoint 'C' directors whose number shall not exceed four.
- 4) I further find and declare that on a true construction of Article 88 (C) the non-executive Chairman appointed by the holder of the Special Share, who holds as well 'C' shares amount to 37.5% or more of the issued share capital of the company, whether from either the Government Appointed directors or 'C' directors appointed pursuant to Article 90 (D) (ii), is not entitled to continue as a non-executive Chairman of the company if the Special Shareholder no longer holds 37.5% or more of the issued share capital of the company.

Costs follow the event to be agreed or taxed against the 1st and 2nd Defendants.

A. O. CONTEH
Chief Justice

DATED: 6th April, 2005.