IN THE SUPREME COURT OF BELIZE A.D.2009

CLAIM NO: 317 OF 2009

BETWEEN:	THE ATTORNEY GENERAL OF BELIZE	CLAIMANT-APPLICANT
	AND	
	1.BELIZE TELEMEDIA LTD	1ST DEFENDANT-RESPONDENT
	2.BELIZE SOCIAL DEVELOPMENT LTD.	2ND DEFENDANT-RESPONDENT

Mr. Michael Young S. C. for the claimant-applicant, Attorney General.
Mr. Nigel Plemming Q.C. and
Mr. Aamon Courtenay S.C., for the first defendant-respondent.
No appearance by the second defendant-respondent.

17.7.2009 D E C I S I O N

1. *Notes:* *Interim restraining order in a claim challenging enforcement of a foreign arbitration award – Arbitration Act Cap 125, ss:13, 19, 20, 28 and 30; whether the claim in domestic court disclosed serious questions of illegality on the grounds that the three agreements were contrary to the Constitution and other statutory laws, and to public policy so that it cannot be enforced in Belize. Procedure; discharge of an order made without notice; requirement that applicant must reapply in writing for an order continuing the interim restraining order made ex parte. R. 17.3, 17.4 (4) and 17.4(7).*

2. On 7.4.2009, this court made an interim restraining order on the application of the Attorney General, the claimant-applicant. The application was made without notice to the defendants-respondents, Belize Telemedia Limited and Belize Social Development Limited. The order restrained the respondents until further order, from: "enforcing or causing to be enforced the final award issued on the 18th March 2009, by the London Court of International Arbitration Tribunal (LCIA)…", in Arbitration Award No. 21079 (or 81709). It further, restrained the respondents from causing the LCIA to further hear any related arbitration claims; and from, "commencing or continuing any other legal or arbitral proceedings relating to or arising out of the award made by LCIA."

3. The award made by the LCIA made several declarations in favour of BTL, against the Government of Belize, regarding a certain "accommodation agreement," dated 19.9.2005, and three amended agreements dated, 21.11.2005, 15.12.2006 and 7.12.2008. In addition the LCIA ordered the Government to pay to BTL, damages in the sum of $35,415,427 and costs in the sum of $2,948,797.33. Both sums to bear interests.

4. The restraining order was worldwide, it applied to enforcement proceedings and further related arbitration claims in Belize, the UK and any other jurisdiction. It was to last until 5.5.2009, which was 27 days, that is, within 28 days of the making of the order *ex parte,* as required by ***R 17.4 (4) of the Supreme Court (Civil Procedures) Rules 2005.*** The respondents were given permission to apply earlier on seven days notice, for an order discharging the order of 7.4.2009, made on an application without notice to the respondents.

5. On the return date of the order, 5.5. 2009, the date intended for *inter partes* hearing of the application of the Attorney General, learned counsel Mr. Aamon Courtenay S.C., appeared for the first respondent. He applied for adjournment of the hearing until July, 2009. Learned counsel Mr. Michael Young S.C., representing the Attorney General, and learned counsel Ms. Lois Young Barrow S.C., representing parties intended to be joined, did not oppose the application. The court adjourned the hearing to last Thursday 9.7.2009.

6. Rather surprising, Mr. Courtenay in a letter dated 30th June 2009, to the Registrar, requesting that the respondents' own application for, a

declaratory order recognizing the arbitral award, and an order for a stay of this claim, be heard with the application for the restraining order, complained that, "Telemedia will have been subjected to this serious and exceptional form of relief… for three months." Two of the three months were at the request of counsel himself.

7. The direction of the court regarding the request of the first respondent that the court hear its own application with the application for interim restraining order, was to refuse it and limit the hearing last Thursday to the hearing on notice, of the application of the Attorney General, and the cross-application of BTL for an order discharging the interim restraining order made on 7.4.2009, without notice.

8. Belize Social development Limited was not represented and has not filed any papers in answer to the original application without notice. The case papers did not even identify it, except by bare name. The terms of the arbitration award the subject of this claim, do not really concern Belize Social Development Limited. It was intimated at the hearing of this application that, BTL intended to assign the benefit of the arbitration award to Belize Social Development Limited. That is

not in issue at this stage. However, my view is that eventhough Belize Social Development has not bothered to oppose the application of the Attorney General, the court will not issue a restraining order against it unless the court has determined that it is appropriate to do so.

9. ***Determination:***

As a reaction to the restraining order made on 7.4.2009, BTL filed an application asking for among others, an order discharging the restraining order. So, instead of these proceedings being conducted only as a renewed application of the Attorney General on notice, the proceedings were conducted as the hearing of the application for an order to discharge the order made on 7.4.2009 as well. It is a matter of mere detailed technicality, but it is worth mentioning that the interim restraining order would have expired on the adjourned date, last Thursday anyway, but for the fact that the applicant attend court to repeat on notice, his earlier application.

10. Naturally, I start my determination by enquiring whether there is any premise on which to base the application for an interim restraining

order. The premise is always a serious question that may go to trial, disclosed by the case papers, in particular by the affidavit that supports the application. In this application, the grounds stated in the substantive claim of the Attorney General, and the affidavit of Mr. Gian Ghandi, must disclose a serious question appropriate to go to trial, in order for the court to proceed to consider discretion to grant a restraining order.

11. The substantive claim of the Attorney General is for a number of declaratory reliefs to the effect that enforcement of the award made by the London Court of International Arbitration (LCIA) on 18.3.2009, in an arbitration Proceedings No. 81079 between the Government of Belize and Belize Telemedia Limited, would be contrary to the Constitution of Belize and several statutory laws of Belize. To effect the declaratory reliefs, if granted, the Attorney General asked for a permanent restraining order, restraining BTL and Belize Social Development Limited from taking steps to enforce the award and from commencing any related proceedings in Belize, the UK and in any other jurisdiction.

12. In his oral submission in court in support of the application of the Attorney General, Mr. Young relied largely on "public policy", stated in s: 20 (1) of the Arbitration Act Cap. 125, as a ground that will bar enforcement of an arbitration award. But in his written submission he relied largely on illegality, namely, that the original, "accommodation agreement", and the two subsequent, "amended accommodation agreements," were contrary to: the Constitution of Belize; the Income and Business Tax Act, Cap 55; the Finance and Audit (Reform) Act, No. 12 of 2005, Customs and Excise Duties Act, Cap 48; the Telecommunications Act; Cap. 229; and the Public Utilities Act, Cap. 223. Mr. Young did not go into much detail about the meaning of public policy in the context of the Arbitration Act; nor did learned counsel Mr. Nigel Plemming Q.C., for the first respondent. Some case law would have been useful.

13. It was apparent to me that so far without the benefit of respondents' defence, illegality or legality of the three agreements, and whether the decision of the arbitrators must be regarded as final even on questions of law, would be the issues to be joined. It was also expected that the

question of jurisdiction of this court was likely to be added by the defendants to the issues.

14. Mr. Nigel Plemming did not concern himself much with the question of illegality of the agreements. He was content to say that the LCIA considered and decided all the questions raised regarding illegality. He, however, conceded that the Attorney General raised serious questions in his claim, but contended that the Attorney General raised the claim, "the wrong way; he should have raised it at the supervising court in England." Counsel further contended that by bringing this claim in the Supreme Court in Belize, the Government was trying to open the case already decided by the LCIA.

15. The agreements the subject of the claim were made and performed in Belize until the Government changed, and the new Government challenged the agreements and refused to perform duties under them. The agreements stipulated that the law of Belize would apply to them, but that the seat of arbitration would be London, the UK.

16. The arbitrators decided on all the questions of law that, the law of Belize was the same as the law of England. Opinion of an expert in the law of Belize was not sought. Secondly, the arbitrators seemed to rely on past actions of the Prime Minister Hon. Said Musa, who signed the agreements in issue on behalf of the Government of Belize, as a practice and the basis of the lawfulness of these agreements. On the face of it, and logically, that seems erroneous. Thirdly, the arbitrators decided that, "the agreements were entered into in the ordinary or necessary course of Government administration," regardless of the requirement of the law that such agreements had to be approved by Parliament. About secrecy, it appears that Mr. Gandhi's evidence about it would be a direct and first hand one, despite aspersion cast on him by Mr. Dean Boyce in his affidavit. Several persons who were said to have participated in negotiation were named. Many more detailed affidavits might have been expected.

17. From the above, it is obvious that serious questions arise in the several contentions of illegality of the agreement, raised by the Attorney General. That in turn raises a serious question as to whether

enforcement of the award will not be contrary to the Constitution, the other statutory laws and public policy. ***Section 20 of Arbitration Act,*** requires that for an award to be enforced, *"the arbitration agreement must be valid under the law by which it was governed",* and the enforcement, *"must not be contrary to public policy or the law of Belize".*

18. It was suggested that the Attorney General needed to wait until the respondent had filed an application in the Supreme Court of Belize or in courts in England, the seat of arbitration, before taking up the challenge to the arbitration award. That may be the convenient thing to do; it does not mean that the person against whom an award has been made cannot initiate his own claim. Arbitration Act does not require so. The letter dated 30.3.2009, of Allen & Overy Solicitors, for BTL, had made certain demands to the Attorney General, based on the arbitration award, and threatened taking steps. Attorney General considered, whether correctly or erroneously, that certain rights of the Government were threatened. He was entitled to take the matter to court for determination. In any case, there is now an application dated and filed on 20.5.2009, asking for a declaration that the award made

on 18.3.2009, by the LCIA, "is valid and binding". That is already an indirect way to seek enforcement of the award.

19. Mr. Plemming devoted most of his submission to arguing that the order made on 7.4.2009, should not have been made on an application without notice to the respondents. The arugument, no doubt, stated correctly the principle in ***r:17.3 and 4 of the Supreme Court (Civil Procedure) Rules 2005,*** however, it was of no use in deciding this application which was already at the stage of an application on notice. The hearing last week on 9.7.2009, was not an occasion for demonstrating that the order made on the application without notice on 7.4.2009, was wrong and should be discharged. The order expired when the application came up for hearing on notice last week.

20. Before 9.7.2009, the respondents had ample opportunity to apply for the discharge of the order made on the application without notice. That would be the opportunity to challenge the order. A clause was specifically included in the order that, the respondents were given permission to apply on seven days notice to have the order discharged. Obviously the respondents preferred not to apply; BTL waited for the

inter partes hearing. The order of 7.4.2009, simply expired by effluxion of time.

21. The argument that the provision of the Arbitration Act, regarding enforcement of an arbitration award might have not been "disclosed" to the court on 7.4.2009, and so there was "non-disclosure", a ground for setting aside the order made on the application without notice is, with much respect, misleading. Non-disclosure as a ground for setting aside an order made on an application without notice is still primarily about non-disclosure of material fact, not of, the point of law in the claim. The quotation from the judgment in the case of ***Memory Corporate Plc and Another v Sidhu[2000] 1WLR 14 43,*** cited by counsel, is misleading if taken out of context. In that case, the judge had not been shown the supporting affidavit and a draft order which was not in the usual from, and further, the statements about a bank account was untrue. Notwithstanding, the Court of Appeal (UK) stated that, *"the judge made rule that a without notice order would be discharged if it was obtained without full disclosure could not be permitted to become an instrument of injustice…"* The injunction order was allowed to continue, despite the non-disclosure and error.

22. The application, the subject of this decision, is for an order to preserve the *status quo* until trial of the claim of the Attorney General, in which he claims relief against enforcement of the foreign arbitration award made on 18.3.2009, by the LCIA. The *status quo* at the moment is that no enforcement proceedings have been commenced in courts in Belize or in courts in England or elsewhere, although an application has been filed for an order of this court for a declaration that the "award is valid and binding…"

23. I have decided that serious issues of illegality and of public policy, have been raised in the claim to resist enforcement. I must proceed to consider whether in the circumstances of the claim, including the fact that the restraining order is sought in respect of proceedings outside Belize as well, it is appropriate to exercise discretion in favour of granting an interim restraining order.

24. It is my view that, in the interest of justice, the *status quo* should obtain until the determination of the claim of the Attorney General. However, in considering whether to exercise the discretion to grant an interim restraining order, I have to pose the same question posed by

Mr. Plemming in his submission. Is a court restraining order necessary to ensure that the *status quo* is preserved while the claim proceeds to determination?

25. I accept the submission by Mr. Plemming, to the extent that it applies to Belize that, the law regulating enforcement of a foreign arbitration award in Belize renders an interim injunction order restraining BTL and Belize Social Development from enforcing the award unnecessary. Section 20 of the Arbitration Act provides as follows:

> *"20 (1) In order that a foreign award may be enforceable under the said sections it must have-*
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> *(a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;*
>
> *(b) been made by the tribunal provided for in the agreement or constituted in a manner agreed upon by the parties;*

(c) been made in conformity with the law governing the arbitration procedure;

(d) become final in the country in which it was made;

(e) been in respect of a matter which may lawfully be referred to arbitration under the law of Belize;

and the enforcement thereof must not be contrary to public policy or the law of Belize."

26. Should BTL choose to enforce the award of the LCIA in Belize, it will have to bring a claim by a fixed date claim I suppose; and it will be required to serve the claim on the Attorney General, thereby giving him notice and opportunity to oppose the claim for enforcement. The grounds of opposition would obviously be illegality and public policy already raised. BTL or Belize Social Development Limited will only proceed to enforce the award in Belize after obtaining an order in their favour from court in Belize. It follows that any attempt to set off sums in the foreign award against sums payable as taxes, fees and

others will be illegal in Belize unless there has been a court order authorizing enforcement of the award.

27. The procedure regarding enforcement of the award in the UK or in any other jurisdiction may not be the same as that in Belize. In the first place, I have not been assured that the laws about enforcement in the UK and in any other jurisdiction are exactly the same as in Belize. Secondly, from paragraph 74 to 80 of the proceedings of the LCIA, the arbitrators recounted that BTL had obtained, without notice to the Attorney General, a restraining order from court in the UK, in aid of the arbitration, and that BTL unsuccessfully sought to register the order in Belize. The possibility may still exist of attempts to set off sums of the award against receipts of income by the Government of Belize in the UK and elsewhere, making it necessary to obtain an interim restraining order in regard to enforcement in the UK and any other jurisdiction.

28. There is a further reason in favour of granting an order restraining both respondents from enforcing the award or commencing or continuing claims related to the award in the UK and in any other

jurisdiction. According to an application dated 28.4.2009, filed the same day by BTL, there are already three claims: No. 317 of 2009, No. 275 of 2009 and No. 279 of 2009, in the Supreme Court of Belize, in which both the Attorney General and BTL are parties with others. BTL has asked that the claims be consolidated with this claim. It said that the same ground of illegality concerning the same and similar agreements are in issue.

29. In my view, it would be oppressive and vexatious to have enforcement of an award in which the same ground was considered proceeded with outside Belize, while the proceedings in Belize were still pending. The Attorney General would have to contest enforcement proceedings in the UK as well as contest the other three claims in Belize on the same ground. It appears wasteful with regard to costs. I considered the case of ***Societe Nationale Industriale Aerospatiale (SINA) v Lee Kui Jak and Another [1987] 3 W.L.R.59 or [1987] 3 All ER 510.*** I am persuaded completely about the point made there by the House of Lords (UK), about injustice in circumstances similar to the circumstances in this application. I am inclined to say, adopting the reason in the case that, *"as a matter of injustice",* if BTL was allowed

to pursue the enforcement of the foreign award when the same questions of law are still pending in the courts of Belize, the injustice to the Attorney General, "would *outweigh the injustice to BTL"*.

30. In considering whether to restrain the respondent from taking any enforcement steps and commencing or continuing proceedings related to the award outside Belize, I have not overlooked the need to exercise great caution because of the danger of interfering with the jurisdiction of a foreign court. I took into consideration the judgments in: ***Aggeliki Charis Compania Maritima SA v Pagnan Spa (the Angelic Grace) [1995] 1 Lloyd's Rep. 87*** and ***National Westminster Bank v Utrecht American Finance Company [2001] 3 All E.R. 733***

31. The application of the Attorney General for an interim restraining order in this claim No. 317 of 2009, succeeds in part. Similarly, the application of BTL, or its opposition to the application of the Attorney General succeeds in part. The order that the Court makes, upon the Attorney General providing undertaking as to damages that may be occasioned are the following:

31.1 The request of the Attorney General for a restraining order restraining Belize Telemedia Limited and Belize Social Development Limited in Belize from commencing in Belize proceedings for enforcement of the award of the London Court of International Arbitration (LCIA) made on 18.3.2009 is denied.

31.2 The request of the Attorney General for a restraining order restraining Belize Telemedia Limited and Belize Social Development Limited from commencing or continuing in the UK and in any other jurisdiction, proceedings for enforcement of the award of LCIA made on 18.3.2009, is granted; and

31.3 It is ordered that Belize Telemedia Limited and Belize Social Development Limited or their successors, assigns or subsidiaries, are hereby restrained by themselves, agent, representative or

howsoever, from enforcing or commencing or continuing in the United Kingdom or any other jurisdiction, proceedings for enforcing the award of the London Court of International Arbitration (LCIA), made on 18.3.2009, or from commencing or continuing in the United Kingdom or in any other jurisdiction, any proceedings relating to the enforcement of the award.

31.4 These orders will continue until the conclusion of this claim No. 317 of 2009, or until further order.

31.5 Costs of the applications shall be in the cause.

32. Delivered this Monday 20th day of July 2009 at 3.00 pm.
At the Supreme Court,
Belize City

Sam L. Awich
Judge
Supreme Court

POST- DECISION RULING

1. Immediately after the above decision was delivered, learned counsel Mr. Aamon Courtenay SC., requested to be heard. It was an important point he raised that, at the hearing on 9.7.2009, the Attorney General did not file and make a written application for the injunction order granted on 7.4.2009, to continue, and that on the other hand, BTL made a written application for the discharge of the order; so the only application before court was that of BTL for a discharge order. Mr. Courtenay asked the court to vacate any order made restraining BTL. Learned counsel Mr. Michael Young SC., opposed the request on the ground that parties made their submissions on the basis that the Attorney General had made an application to continue the restraining order.

2. Although the point was not raised on 9.7.2009, I averted my mind to it, as reflected in my decision above. I accept the submission that ***R 17.4(7) of the Supreme Court (Civil Procedures) Rules, 2005,*** requires that an application on notice be made by an applicant who had obtained an order on an application without notice, to extend the

order. That means the application must be made in writing as a general rule – see ***R 11.6***.

3. I concluded that the manner in which parties presented their submissions did not cause me to worry that the failure of the Attorney General to file a written application under ***R17.4 (7)*** caused any prejudice to BTL or Belize Social Development Limited. Counsel for BTL, did not complain about the omission or any prejudice arising, at the hearing. I am still of that view after hearing Mr. Courtenay a short moment ago.

4. There is no direct rule under ***Part 17*** that provides for cure or waiver of non compliance with the rules in that Part of the Rules. There are general provisions in ***R 26.9***, concerning general management of cases in court. I apply the provisions, in view of the fact that I saw no prejudice that resulted from the non-compliance with ***R 17.4(7).***

5. I decline to vacate any of the orders I have just made above.

6. Read this Monday 20th day of July 2009 at 3:45pm
At the Supreme Court
Belize City

Sam L. Awich
Judge
Supreme Court