

IN THE SUPREME COURT OF BELIZE 2009

CLAIM: No. 52 of 2009

BETWEEN: 1. BB HOLDINGS LIMITED FIRST CLAIMANT/APPLICANT
 2. THE BELIZE BANK LIMITED SECOND CLAIMANT/APPLICANT

AND

THE ATTORNEY GENERAL DEFENDANT/RESPONDENT

Mr. A. Courtenay S.C., and
Ms. A. Martin, for the claimant/applicant.
Ms. L. Young-Barrow S.C., for the defendant/respondent.

AWICH J.

11.2.2009

DECISION

1. *Notes: Arbitration and interim injunction order: the order must be in aid of the arbitration; court must ensure that the order will not be an encroachment on the power of the arbitrators and that the order will aid the procedural powers of the arbitrators and enhance effectiveness of their final award; court must still find a serious case with prospects of success, and that in all the circumstances it is just and convenient for the purpose of aiding the arbitration that an interim injunction order be made.*

Foreign arbitration; local court must ensure that the interim injunction order will not be an encroachment on the power of the arbitrators and on the jurisdiction of the foreign court in the country where the arbitration is being conducted; it must be just and convenient generally, not inequitable, to grant interim injunction order.

Taxation: whether domestic court will grant interim injunction order in aid of arbitration conducted in a foreign country in a dispute concerning domestic tax concession.

2. On 22 1.2009, the two claimants-applicants, BB Holdings Limited and The Belize Bank Limited, filed in this court a claim form commencing proceedings, and an application for interim injunction order. This is the decision in the application.
3. The first claimant is a holding company formerly known as Carlisle Holdings Limited. The second claimant is one of the subsidiaries of the first. It has direct responsibility for the subject matter of the claim and the interim application. The subject matter is a deed of settlement dated 22.6.2005, between the claimants and the defendant. The defendant-respondent is the Attorney General, representing the Government of Belize, under the Crown Proceedings Act, Cap.167 Laws of Belize.
4. A summary of the claim of the claimants and the grounds for the interim application are stated in this and the paragraphs that follow. On 22.3.2005, the first claimant (then known as Carlisle Holdings Limited) and the

Government of Belize entered a settlement agreement by which all previous claims by Carlisle Group against the Government arising from contracts regarding the purchase of certain shares in a company carrying on telecommunications business in Belize, were regarded as settled. All the defences and counterclaims by the Government were also regarded as settled. The Government agreed and Carlisle Group accepted that liability of the Carlisle Group for business tax and income tax upto 31.3.2005, was regarded as settled. A specific method of calculating tax liability of the Carlisle Group from 1.4.2005, and how any tax found due would be treated were also agreed. The agreed method of calculation and treating tax credit seems to be different from those in the Income and Business Tax Act Cap. 55 Laws of Belize. The settlement agreement was amended, the amended agreement was recorded as an amended deed of settlement dated 21.6.2006. The agreement enjoined the parties to confidentiality of the deed and its terms, parties could not disclose the contents except in certain limited circumstances.

5. In the affidavit of Mr. Andrew Howard Waters for the claimants, he stated that the agreement: “operated between the parties for over two years until Government changed... following a general election on 7th February 2008...

it is clear that the new administration does not intend to comply with the settlement deed. In breach of the settlement deed, the Government has issued assessment notices for tax due from BBL since the inception of the settlement deed as amended and sought to enforce them. The only explanation given by the Government for their actions is that the: settlement deed does not supersede the Income and Business Tax Act of Belize”.

6. The claimant regarded the view and actions by the Government as repudiatory breach which they accepted on 15.10.2008. They referred the matter to the London Court of International Arbitration, (LCIA) in the United Kingdom. They sought several declarations, and damages for what they regarded as a breach. The arbitration proceedings were commenced on 16.10. 2008, under paragraph 11.2 of the settlement deed, the arbitration clause by which the parties agreed to submit dispute arising from the agreement to arbitration. Their dispute was given the numbering: LCIA Arbitration No. 81169. The proceedings at the arbitration are pending final determination. In the meantime, the arbitrators have made an interim decision in which they issued an interim injunction order restraining the parties, particularly, “the Government of Belize”, from doing acts

considered prejudicial to the outcome of the arbitration, in order to preserve the *status quo* while the arbitration proceeded.

7. The need for an interim injunction order against the defendant, to be directed to the Commissioner of Income Tax I suppose, while the claim in the arbitration proceedings in London, and now proceedings in this court are pending, arose from certain events in Belize. They are these. In August 2008, the Commissioner of Income Tax issued tax assessment notices against the Belize Bank Limited (the second claimant) for year quarters ending: 30th June 2006, 30th September 2006, 31st December 2006, 31st March 2007, 30th June 2007, 30th September 2007, 31st December 2007, 31st March 2008, 30th June 2008, and 30th September 2008. On 10.12.2008, the Commissioner obtained judgment summonses from the revenue magistrate, Belize District, requiring the claimant to appear in that court, to show cause why an order for payment of the sums assessed as tax should not be made by the magistrate against the second claimant. The assessments and costs totalled: \$4,749,013.51 for the year 2006; \$4,812,247.52 for the year 2007; and \$1,874,256.88 for the year 2008; a grand total of \$11,435,517.11.

8. Faced with the steps taken by the Commissioner to collect the tax assessed, the claimants obtained on 19.1.2009, an interim injunction order from the LCIA in London, restraining the parties in the arbitration (claimants and defendant in these proceedings), in these words: *“No party shall take any action which could prejudice the outcome of arbitration, or which could adversely affect the efficacy or enforceability of the decision of the arbitral tribunal. In particular, the arbitral tribunal orders the Government of Belize to take no further steps to progress or enforce the judgment summonses or the tax assessments which are the subjects of a hearing before the Belize Magistrate’s court on 19 January 2009, against the second claimant or any other entities specified as subject to the tax calculation mechanism set out in clause 4 of the settlement deed as amended, concerning assessment of business tax or income tax allegedly payable in respect of the period between April 2006 and 30th September 2008”*. The interim order of the LCIA was served on the Attorney General on the same day, 19.1.2009.

9. The Commissioner of Income Tax obviously ignored the interim injunction order issued by the LCIA. On 27.1.2009, the judgment summonses issued by the revenue magistrate came for hearing cause why the magistrate should

not make orders for payment of the tax sums assessed. The magistrate made two orders requiring The Belize Bank Limited to pay business tax as follows: \$5,715,776.45 on or before 3.2.2009, and a further \$5,715,776.45 on or before 12.2.2009. I shall assume that the first payment has already been made. The second payment is due by tomorrow, Thursday 12.2.2009.

10. In the application in this court the claimants ask that this court issue its own interim injunction order against the defendant, adopting the terms of the injunction order made by the LCIA in London on 19.1.2009. If this court grants the application, the terms of the restraining order made by the LCIA will become the orders of this court, and enforceable by contempt proceedings in Belize in the event parties do not comply with the terms of the order. That is the purpose of the interim application for interim injunction order before this court. For convenience, the actual wording of the application is as follows:

“The applicants BB Holdings Limited... and the Belize Bank Limited... apply to the court for an order pursuant to Rule 17.1(a) of the Supreme Court (Civil Procedure) Rules 2005, that :

The Government be restrained, whether by its servants or agents or otherwise howsoever, from taking any action which could prejudice the outcome of the London Court of International Arbitration (LCIA) arbitration No. 81169 or which could adversely affect the efficacy or enforceability of any decision rendered by the arbitral tribunal in accordance with the Rules of the LCIA. In particular, the Government shall be restrained from issuing any further judgment summonses or tax assessments against the claimants, and from taking any further steps to progress or enforce any judgment summonses or tax assessments set before the Belize Magistrate's Court, against the second claimant or any other entities specified as subject to the tax calculation mechanism set out in clause 4 of the settlement deed as amended, concerning assessment of business tax or income tax allegedly payable in respect of the period between 1 April 2006 and 30 September 2008”.

11. ***Determination.***

It was common ground that this court had jurisdiction to grant interim restraining order in aid of arbitration proceedings, be they local or foreign arbitration proceedings – see *Channel Tunnel Group Ltd v Balfour Constructions Ltd [1993] AC 344 or [1993] 1All ER 644*. This court will always be willing to aid arbitration including arbitration agreed to be conducted outside this country, when it is just and convenient in the circumstances of the particular case.

12. I accept the submission by learned counsel Mr. A. Courtenay S.C., for the applicants that, regarding disputes pending at arbitration in a foreign country, a court will exercise its jurisdiction to grant interim injunction order: (1) if it will not be an encroachment on the powers of the arbitrators; (2) if it will not be an encroachment on the powers of a foreign court, and (3) the interim order is sought to aid the procedural powers of the arbitrators and to render their final decision or award more effective.

13. However, given that the power of the court to grant injunction order is discretionary, I shall also take into consideration that the parties to this application did voluntarily remove themselves in regard to the subject

matter, which is the collection of tax, from the jurisdiction of this court, and submitted themselves irrevocably to the jurisdiction of the arbitrators in London, and to the laws of England, and therefore to the jurisdiction of court in England. The result is that in the event that an award is made in favour of the claimants they will be able to enforce it in court in England, whereas in the event an award is made in favour of the defendant, the Commissioner of Income Tax will not be able to enforce the award in his favour in court in England, because the award will be for sums to be collected or retained as tax. That is somewhat inequitable and unjust. But it is a principle of law in England and in Belize, that a court will not enforce the tax law of a foreign country. The rule of law has been clearly stated in England in two cases namely, *the Government of India v Taylor and Another [1955] AC. 491*, and *In re Visser Queen of Holland v Drukker [1928] Ch. 877*. In the former, the House of Lords in England held that claims for tax owed to the Government of India under its law by the respondent English company that also traded in India were not enforceable in English courts.

14. The next question is whether this court may simply grant an injunction order restraining the collection of tax in this country without considering the legality under the laws of this country, of the agreement, the subject of the

arbitration in London UK. Counsel for the claimants submitted that the question of the legality of the agreement was not open to this court, it was for the arbitrators. He declined to make submission about it, because he said, by making submission on the point, the claimant would be submitting themselves to the jurisdiction of this court.

15. I accept that where parties have agreed to submit dispute arising under an arbitration clause in a contract between them to arbitration, the arbitration tribunal must be allowed the first opportunity to decide questions such as its jurisdiction and the lawfulness of the agreement. The jurisdiction of court on a question of law is exercised when the point of law has been stated by the arbitrators for determination by court. That is the law in *s: 14 of Arbitration Act, Cap 125, Laws of Belize*. In some countries the point of law may be stated by the arbitrators or the parties for determination by court. The jurisdiction of court is also exercised if the court is asked to exercise its supervisory jurisdiction. An agreement that the decision of arbitrators is final does not oust jurisdiction of court on questions of law. The case of *Ford v Clarksons Holidays Ltd [1971] 1All ER 454*, is authority for that rule of law.

16. So, it is my respectful view that in deciding whether a serious question exists in the proceedings at the arbitration and in the proceedings in this court, on which the court may base its discretion to grant interim restraining order, the court is entitled to assess to a limited extent, whether a serious question of illegality has been raised in this court, and whether there is a serious question, a real dispute to cause the parties to submit to arbitration, especially if only one of the parties, as it is in this case, has submitted the dispute to arbitration.

17. In this application the court has been asked to grant a discretionary interim relief, an interim injunction order. The court is entitled to decline the application if the underlying claim is baseless either on the facts or on a point of law, and does not raise serious question with prospects of success, on which to exercise the discretion to grant an interim injunction order. Whether there is a serious question with prospects of success will be only a preliminary assessment; it should not prejudice the views that the arbitrators will reach in their determination, or the final view of the court in the claim. In my view, submission made by the applicants on the question of a serious question of illegality, for the limited purpose of assisting the court to decide whether it will grant an interim injunction order will not be regarded as

submission by the applicants to the jurisdiction of this court in regard to the dispute to be decided by arbitration.

18. I do not express a firm and final view on the agreement from which the dispute has been submitted to arbitration. My preliminary view on the papers assembled is that, the Minister of Finance and the Attorney General then, could not legally enter a contract by which they seemed to have fettered themselves and other officers from carrying out their duties in accordance with the provisions of the Income Tax Act – see *R v Secretary of State for the Home Department ex parte Venebles [1998] AC407*. I also have serious doubt that the Minister and the Attorney General had power to grant a general waiver of tax as under the settlement deed. It is doubtful that the power of the Minister under s: 95 of the Act to remit tax covers the tax concession granted in the settlement deed. Challenges based on these grounds could be raised after the conclusion of the arbitration. Usually challenges are brought in the court at the seat of the arbitration. In this case the parties are likely to be faced with the question whether the court in England will competently pass judgment in tax matters of a foreign country, Belize.

19. The point about jurisdiction of a foreign court in tax matter was made by learned counsel Ms. Lois Young Barrow S.C., representing the Attorney General, in her submission. She submitted that, the order of the court of one country, or an award of an arbitral tribunal in one country (as in this application) concerning collection of tax or restraining collection of tax, cannot be enforced in another country because tax matters are territorial. Counsel cited the recent case of, *Belize Telemedia Limited v The Attorney general, Supreme Court Civil Claim No 3127 of 2008*, for the proposition. She submitted further that, therefore an interim injunction order restraining collection of tax cannot be granted in aid of arbitration proceedings in a foreign country, concerning local tax, because the final award of the foreign arbitration, the LCIA, concerning tax will not be enforceable by court in Belize.
20. Mr. Courtenay opposed the submission. He argued that the *Belize Telemedia Limited* case is dissimilar to this case. He submitted that in this claim and application the court is not asked to enforce the order of a foreign arbitration for the collection of tax, rather to grant an interim order restraining collection in order to aid the arbitration in London, and that a court of one country may take cognizance of the tax law of another country,

short of enforcing it. He submitted further that, arbitral tribunals have consistently determined that they have jurisdiction over contracts concerned with tax matters of foreign countries. He cited, *Alcoa Minerals of Jamaica Inc. (USA) v Government of Jamaica (ICSID)*.

21. *The Alcoa* case was decided in an arbitration under a specific convention, *the Washington Convention of 1965*. Obviously the case was decided under a specific item of international public law. Moreover, the tax concession was legislated. I would not regard it as persuasive in a claim based on a private contract.

22. With due respect, I think *the Belize Telemedia Ltd* case, has much similarity with the case under consideration. It was based on an agreement under which the Government agreed to grant tax concessions to subsidiaries of Belize Telemedia Ltd. Following change of Government, the Commissioner of Income Tax obtained judgment summonses to collect tax assessed as he has done in this case. Belize Telemedia Ltd. objected and submitted the dispute to arbitration in London. It then obtained interim injunction order from the High Court in England (Commercial Court) in aid of the arbitration, restraining, “the Attorney General on behalf of the Government

of Belize”, from issuing any further judgment summonses. Belize Telemedia Ltd. then applied to the Supreme Court of Belize for an interim injunction order to “mirror” the order of the High Court in England. The Hon Chief Justice of this Supreme Court refused the application. The main reason was that tax was a territorial matter.

23. In this application the Supreme Court is asked in effect to make an interim order in aid of the arbitration proceedings in England. The order requested is the mirror image of the interim injunction order made by the arbitrators in England. That way, the interim injunction order made outside Belize concerning tax would be enforceable in Belize. The only difference between this application and the Belize Telemedia Ltd. application is that, the applicants in this application came directly to the Supreme Court of Belize after obtaining an interim injunction order from the arbitrators in London, whereas the interim injunction order in the Telemedia Ltd. application had been obtained from the High Court in England before the applicant came to the Supreme Court of Belize to have the order adopted by the Supreme Court of Belize. I am persuaded by the Belize Telemedia Case. I think there is need to maintain consistency in interpreting law.

24. I also considered *s: 20(1) (d) of the Arbitration Act, Cap. 125*, which provides:

“In order that a foreign award may be enforceable... it must have:

...

(d) 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”.

25. I have already expressed my preliminary view about the likely illegality of the agreement out of which the dispute was submitted to arbitration. It is usual that such tax concessions are granted by legislation. That way illegality is avoided. There are many examples in the Commonwealth where tax concessions have been granted by legislation to investors of large sums of money such as in mining industry and new industries. The concessions are usually effected by Acts of Parliament, to ensure legality. That of course means the concession cannot remain a confidential matter as intended in the settlement deed, the subject of this case.

26. A further important consideration together with others, in deciding whether to exercise the discretion to grant an interim injunction order to preserve the *status quo*, is whether in the end, money compensation will be an adequate relief, were the applicants to be successful in their case at the arbitration and in this court, and in the meantime they had suffered loss because interim injunction order had been denied. In this claim and application, the sum that remains unpaid as tax by the applicants is \$5,715,776.45. That is the *status quo* left to be preserved. The loss that could be suffered by the claimants would be that sum and loss of use of the sum when the claim proceeds at arbitration and in court. It has been urged on the court that the Government will be unable to pay the sum. No evidence was led to support that. The rather presumptuous statement in the affidavit of Mr. Waters was not supported by any facts. I cannot say whether the Government will not be able to pay the sum of \$5,715,776.45. As far as loss of use of money is concerned, it is usually compensated for by an award of interest on the judgment sum.

27. The final consideration before a court exercises its discretion to grant an interim injunction order is a general one that, an injunction order is a

discretionary relief, the court must be satisfied that given all the grounds raised and all the circumstances of the application, it will be *just and convenient* to grant an injunction order. There were some features of the claim and the application that tended to sway this court towards granting interim injunction order, but there were many more that tended to sway the court the other way. A simple way of expressing such a state of case is that the court may, but need not grant the interim injunction order in the totality of the circumstances presented to the Court – see, *Bucks DC v Porter [2003] 2WLR 1547* and *Nippon Yusen Kaisha v Acme Shipping Corporation [1970] 1 WLR 74*. It does not appear to the court that in all the circumstances of this claim and the application, it will be just and convenient to grant an interim injunction order in aid of the arbitration, No. 81169 at the LCIA in London, UK.

28. The final decision is that the application dated 22.1.2009, by BB Holdings Limited and the Belize Bank Limited, for an interim order restraining the Government, by its servants or agents or howsoever from issuing any further judgment summonses or tax assessments against BB Holdings Limited and the Belize Bank Limited and any other entity in the BB Holdings Limited Group, and from taking any further steps to “progress or enforce” judgments

or tax assessments against them, until the conclusion of the arbitration, is dismissed.

29. Costs of the application are reserved to the final determination of the claim.

30. Delivered this Wednesday the 11th day of February 2009

At the Supreme Court

Belize City

Sam L. Awich
Judge
Supreme Court of Belize