IN THE SUPREME COURT OF BELIZE A.D. 2009

CLAIM NO: 1042 of 2009

BETWEEN: ATTORNEY GENERAL CLAIMANT

AND

1. JOSE ALPUCHE	FIRST DEFENDANT APPLICANT
2. KEITH ARNOLD	SECOND DEFENDANT
3. LORD ASHCROFT, KCMG	THIRD DEFENDANT
4. DEAN BOYCE	FOURTH DEFENDANT
5. ALLAN FORREST	FIFTH DEFENDANT
6. PETER GAZE	SIXTH DEFENDANT
7. PHILLIP OSBORNE	SEVENTH DEFENDANT
8. EDIBERTO TESUCUM	EIGHT DEFENDANT
9. PHILIP ZUNIGA	NINTH DEFENDANT
10. DUNKELD INTERNATIONAL INVESTMENT LIMITED	TENTH DEFENDANT

Ms. Lois Young S.C., for the claimant.
Mr. Eamon Courtenay S.C., for the first, second third, fourth, seventh, eight and ninth respondents.

AWICH J.

5.2.2010. D E C I S I O N

1. Notes: *An application for an interim injunction order to restrain the respondents*

from taking further steps in an international arbitration commenced by one of them; an interim injunction order had been obtained on an urgent application without notice – now two applications are before the court - one by some of the defendants for an order discharging the interim injunction order made ex parte, the other, an application by the claimant for an order continuing the interim injunction order; the practice of court is to hear both applications simultaneously; court has discretion to discharge or continue the order made ex parte or to grant a new interim injunction order; requirements for making an application without notice to the respondents for an interim injunction order – R 17.4 (1) and (4).
The arbitration was said to have been agreed in a treaty between Belize and the United Kindgdom, for the promotion and protection of investors; the jurisdiction of the Supreme Court of Belize to grant interim injunction order restraining parties in foreign arbitration (or foreign court), s: 27 of the Supreme Court of Judicature Act, Cap. 91; the principle of 'when it appears to the court to be just or convenient', and the principle of 'when the ends of justice require'; the caution not to interfere with the subject matter of a foreign arbitration or with the sovereignty and jurisdiction of a foreign court, or sovereignty of a nation State.

2. On 23.12.2009, the claimant, the Attorney General of Belize, filed a claim dated the same day, against the ten defendants: 1. Jose Alpuche, 2. Keith Arnold, 3. Lord Ashcroft, 4. Dean Boyce, 5. Allan Forest, 6. Peter Gaze, 7. Philip Osborne, 8. Ediberto Tesucum, 9. Philip Zuniga, and 10. Dunkel International Investment Ltd (Dunkeld). Filed with the claim was an interlocutory application also dated 23.12.2009, for an interim injunction order restraining the defendants - respondents from proceeding with an international arbitration commenced by Dunkeld, the tenth defendant. The application was described as an

urgent one made without notice to the defendants-respondents, under R 17.4 (4) of the Supreme Court (Civil Procedure) Rules, 2005.

3. The court heard the application on 29.12.2009, in the absence of the defendants-respondents and their attorneys, and granted it. An interim injunction order was made restraining all the respondents from continuing or taking any further steps in the international arbitration (UNCITRAL Arbitration), notice of which had been issued by Dunkeld's attorneys in London, UK. The interim injunction order was to last until 26.1.2010, when it would be returned and the application would be made and heard *inter partes*. The respondents were granted leave to anticipate the return date, and could make an application earlier to have the interim injunction order discharged earlier than the return date.

4. On Friday 8.12.2009, seven of the respondents, namely, Jose Alpuche, Keith Arnold, Lord Ashcroft, Dean Boyce, Philip Osborn, Ediberto Tesucum and Philip Zuniga filed an application for the discharge of the interim injunction order. The application was brought to my attention on 23.12.2009. I directed that it be listed for hearing on

29.12.2009, which was the only near date that could be made available by moving a less urgent business to another date.

5. The Attorney General and the seven respondents attended by counsel on the appointed date. Learned counsel Miss Dianne Barrow, for the Attorney General, attended and applied for adjournment on the ground that Ms. Lois Young S.C., who had conduct of the case for the Attorney General, had travelled to London, UK, to attend at the Privy Council in an appeal case. The application for adjournment was opposed by learned counsel Mr. Eamon Courtenay S.C., for the seven respondents. He said that counsel for the Attorney General had informed him of her commitment at the Privy Council, but he had to oppose the application for adjournment because there was urgency about setting aside the interim order made without notice, liberty of the seven defendants was infringed, he said.

6. Given that the return date of the order made on 29.12.2009, was only one clear working day away, and no material loss or prejudice to the seven respondents was pointed out, the court granted adjournment to the return date, 26.12.2009.

7. On the adjourned date there was also on the case file, an application by the Attorney General for an order to continue the interim injunction order made on 29.12.2010. The application had been filed on 22.1.2010. So there were two applications on the case file at the time of hearing. Court reminded parties that it was the return date as well, of the interim injunction order made on 29.12.2009.

8. Mr. Courtenay S.C. requested direction as to whether he would be heard on his application for an order to set aside the interim injunction order made *ex parte* on 29.12.2009. Court directed that he may address court on that application, eventhough the interim injunction order would expire that same day, and he may address court on the application for an order to continue the interim injunction order.

9. It was my view that although the order made on 29.12.2009, would expire on that day, there was an application for the continuation of the interim injunction order, so the defendants were entitled to make an application for the discharge of the interim injunction order. The application would be more or less an opposition to the application for an order to continue the interim injunction order anyway.

10. The practice of court is to hear an application for discharge order, and an application for continuing interim injunction order together. By hearing the two applications together the court *"furthers"* the overriding objective of ***the Supreme Court (Civil Procedure) Rules, 2005,*** by *"dealing with as many aspects of the case as is practicable on the same occasion"* and thereby, *"saving expense"* – see ***RR 25.1(i)*** **and** ***1.1(2) (b)***.

11. ***The Background.***

The transactions and the disagreement which led to this claim and these applications, and to the commencement of the UNCITRAL Arbitration are the following.

12. On 25.8.2009, the National Assembly of Belize enacted the Belize Telecommunications (Amendment) Act, 2009, Act No. 9 of 2009. The Act authorized the Minister responsible to acquire, for public purpose, property to enable the Government of Belize *"to take possession of and to assume control over telecommunications"*. The acquisition was to be by an Order in the form of a Statutory Instrument published in the Government Gazette.

13. Pursuant to s:63 of the Act (No. 9 of 2009), the Minister issued two Orders– Statutory Instrument No. 104 of 2009, dated 25.8.2009, and Statutory Instrument No. 130 of 2009, dated 4.12.2009, amending Instrument No. 104 of 2009. By the two Orders, the Minister compulsorily acquired shares in a company known as Belize Telemedia Limited – (Telemedia), and other properties. Telemedia was a public limited company. Then the Financial Secretary, Ministry of Finance, acting under s: 64 of the Act, issued a notice requiring (and inviting) persons who may have claims for compensation to submit their claims by 15.10.2009.

14. Identical claims said to be material, were submitted for, "reasonable compensation within a reasonable time", by five persons through their attorney who is counsel in these proceedings. He did not quantify the claims. Each claimant made the claim in respect of the shares that each said it "held" in Telemedia as follows:

(1) BCB Holdings Limited for 1, 234, 859 shares (share certificates of BB Holdings Limited attached).

(2) E COM Limited for 15,178,488 shares;

(3) Mercury Communications Limited for 4, 786,230 shares;

(4) New Horizons Inc. for 20,581 shares; and

(5) Thiermon Limited for 12,886,959 shares.

The claimants for compensation supported their claims with copies of share certificates issued in their names.

15. In each letter of claim the attorney notified the Financial Secretary that the claim was made, "strictly without prejudice", to any claim that Hayward and Dunkeld may make under a treaty, any claim under the Constitution of Belize, and any claim to enforce the rights of the shareholders.

16. None of the ten defendants-respondents in this claim submitted any claim. Attorney General said that the defendants-respondents were cited in this claim because they were named on the website of Hayward Charitable Belize Trust (Hayward Trust), as trustees and advisors, and Hayward Trust owned Dunkeld. I suppose, another reason for citing the ten was because all the five claimants stated in their letter claiming compensation that they held the shares, "for the

benefit of Dunkeld International Limited (Dunkeld) and the Hayward Charitable Belize Trust (Hayward)".

17. In response to the claims of the five claimants, the Financial Secretary wrote on 19.10.2009, to each requesting for purposes of verification of their claims, the following items of information:

> "(1) A copy of the Trust Deed establishing the Hayward Charitable Belize Trust **("Hayward")**
>
> (2) A copy of the Certificate of Incorporation of Dunkeld International Ltd **("Dunkeld")** together with the names and addresses of its shareholders and directors.
>
> (3) The precise nature and proof of Hayward's and Dunkeld's interest in the shares formerly held by each of the above claimants in Belize Telemedia Ltd".

18. All the five claimants did not provide the information requested, instead in each letter dated 12.11.2009, written on behalf of each

defendant, their attorney questioned the need for the information, and contended that share certificates were sufficient proof, and that the items of information demanded were, "not required to verify claim". The Government contended that the items of information required were necessary because under the Companies Act, Cap. 250, it was obliged to regard only registered shareholders as persons entitled to make claims for compensation.

19. In the meantime, on 4.12.2009, Allen & Overy, attorneys for Dunkeld in London, issued notice of arbitration, and appointed one, John Beechey, as one of three arbitrators required. Allen & Overy claimed only that a dispute had arisen between Dunkeld and the Government of Belize, under a treaty, namely: "Treaty Series No. 33 (1982), Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of Belize, for the Promotion and Protection of Investments, Belmopan 30 April 1982", (the Treaty); and Dunkeld was entitled to submit the dispute to UNCITRAL Arbitration. They proposed Geneva, as the venue for the arbitration.

20. Allen and Overy then wrote to the Prime Minister of Belize informing him of the notice, and asked him to appoint the second arbitrator by the, "2 January ***2009"*** (meaning 2 January ***2010***). The Government of Belize had not appointed an arbitrator by 29.12.2009, when its application for interim injunction order against the respondents was heard without notice.

21. *The claims of Dunkeld in the arbitration.*

A summary of the claims of Dunkeld stated in the Notice of arbitration is the following:

1. The shares of Telemedia acquired by the Government included about 69% owned by Dunkeld, but held by those who submitted claims for compensation, the acquisition of the shares of Dunkeld by the Minister was in breach of Article 5 of the Treaty because, "the nationalization of Telemedia was not carried out for a public purpose related to the internal needs of Belize".

2. The provision in Act No. 9, for reasonable compensation was patently inadequate and was a breach of Article 5 (1) of the Treaty which provided for adequate, prompt and equitable compensation.

3. The Government had not paid compensation to Dunkeld at all, and that was a breach of Article 5 of the Treaty.

4. The Government failed to ensure that Dunkel's investments were treated fairly and equitably; that was a breach of Article 2 of the Treaty.

5. By acquiring shares belonging to Dunkeld, the Government of Belize failed to accord Dunkeld favourable treatment due to investors from most favoured nations under the Treaty; that was a breach of Article 3 of the Treaty.

22. *The Claim of the Attorney General in this court.*

Presumably based on the transactions outlined, the Attorney General filed this claim and his application on 23.12.2009. He claimed the following reliefs:

1. A declaration that the commencement of the UNCITRAL Arbitration by the Notice dated 4.12.2009, issued by Dunkeld was oppressive, unconscionable and an abuse of the arbitral process.

2. A declaration that the defendants had no locus (standing), to bring any arbitral proceedings arising out of Treaty Series No. 33 (1982), the treaty between the United Kingdom of Great Britain and Northern Ireland and Belize, or to bring any claim under the Constitution and other laws of Belize.

3. A declaration that under s: 28 of the Companies Act, Cap. 250, "or otherwise", the Government of Belize was entitled to disregard any trust in respect of the Telemedia shares it acquired, and to treat only the registered shareholders as the persons entitled to compensation for the shares acquired.

4. A declaration that the Supreme Court of Belize was the proper forum for the determination of all claims for compensation and other matters arising or relating to the acquisition by the Minister, of the shares and other properties of Telemedia, by Statutory Instrument No. 104 of 2009, and Statutory Instrument No. 130 of 2009.

5. An order restraining the defendants, whether by themselves or by their servants, agents, subsidiaries, assignees or other persons and bodies under their control, from taking any or any further steps in the continuation or prosecution of the

arbitral proceedings commenced by Dunkeld by Notice of Arbitration dated 4tth December, 2009.

23. *The application to set aside the order made on 29.12.2009 ex parte.*

The ten defendants-respondents have not yet filed a defence to the claim of the Attorney General, but seven of them have made a joint application for an order to set aside the interim injunction order made on 29.12.2009. The grounds of their application were:

(1) that the evidence in support of the application without notice, heard on 29.12.2009, did not disclose information to satisfy the court that the application was an urgent one, or that giving notice to the defendants was not possible, or would defeat the purpose of the application, in order for the court to hear the application without notice having been given to the defendants-respondents;

(2) that there was no risk of irreparable harm to the claimant; and

(3) that the first, second, third, fourth, seventh, eight and ninth defendants were not directors, officers or shareholders of Dunkeld, had no control over Dunkeld's operations, and would not be able to restrain Dunkeld from continuing the arbitration proceedings under the Treaty commenced by Dunkeld, should it wish to take steps to continue the arbitration proceedings.

(4) That the Attorney General failed to make disclosure of material facts.

24. Only one affidavit, that sworn on 8.1.2009, by Jose Alpuche, the first defendant-respondent, was filed as evidence supporting the application of the seven defendants. Mr. Alpuche stated that he was authorized by the other six to swear affidavit on their behalf in these proceedings.

25. ***Determination.***

Urgency for without notice application.

I accept the submission by Mr. Courtenay SC., that there was no urgency such that warranted hearing the application on 29.12.2009, without notice to the defendants. ***R 17.4 (4) of the Supreme Court (Civil Procedure) Rules 2005,*** required evidence to show: (1) that there was urgency, or (2) that giving notice would defeat the purpose of the application, or (3) that giving notice was impossible – see ***Wendy Castillo v The Attorney General, Supreme Court Civil Claim No. 480 of 2009,*** and ***National Commercial Bank of Jamaica Limited v Olint Corp. Limited, Privy Council Appeal No. 61 of 2008.*** The rule is that the urgency must be extreme urgency.

26. The purpose of the application filed on 23.12.2009, for an interim injunction order was, to immediately and as a matter of urgency, stop further steps being taken in the arbitration commenced by the Notice dated 4.12.2009, because the arbitration proceedings were vexatious, abusive and oppressive in the circumstances. The next step in the arbitration proceedings was due only by 2.1.2010. That next step would be an act of the Government of Belize; it was required to appoint the second arbitrator by 2.1.2010. The Government had long

enough time to make its application on notice before 2.1.2010, and when no steps could yet be taken by Dunkeld or the other defendants-respondents in the arbitration. There was no immediate urgency, no extreme urgency, in the application of the Attorney General on 23.12.2009, when it filed its "without notice" application.

27. Nevertheless court heard the application as an urgent one without notice. That was due to a mistake made by Allen & Overy, attorneys for Dunkeld, which mistake led to a mistake by myself. For my part I respectfully regret it. The mistake of Allen & Overy was that in the last sentence on the first page of their letter dated 4.12.2009 (exhibit GCG 22), addressed to the Prime Minister of Belize, they erroneously stated: "We draw your attention to the fact that Article 7 (2) of the UNCITRAL Rules provides that you have thirty days after receipt of this notice of Arbitration (namely until 2 January ***2009***) to appoint the second member of the arbitral tribunal". Obviously the attorneys meant 2 January ***2010***.

28. My mistake was that my eyes captured the erroneous date, and I inferred that, the time for the Government to appoint the second

arbitrator had long expired nearly twelve months before, and the next step by Allen & Overy, on behalf of Dunkeld was imminent. That mistake in the date gave rise to the probability that giving notice would lead to the defendants taking the next step in the arbitration any time, and would defeat the purpose of the application by the Attorney General, were the application to succeed.

29. Since I decided, based on the mistaken date, that giving notice would defeat the purpose of the application of the Attorney General, I did not consider the question whether giving notice of the application to the defendants was impossible.

30. In regard to the two defendants resident outside Belize, service of notice of application on them might have taken longer than 2.1.2010, the date by which the application had to be heard in court. Giving notice would be deemed impossible I suppose. That did not influence my decision though. There was no need for me to proceed to that consideration. The application made on 29.12.2009, was not one suitable to be made without notice.

31. Does it follow automatically that the interim injunction order made on 29.12.2009, on the application without notice must be discharged? Not so. That is not the law. If an application has been made for the continuation of an interim injunction order made on an application without notice, or for a new interim injunction order, of course this time on notice, the court will consider whether justice requires that the interim injunction order be continued or a new interim injunction order be made. Court has a discretion whether or not to continue an order obtained *ex parte,* and a discretion whether or not to grant a fresh injunctive relief even if there has been an application for discharge of the interim order on the ground of non-disclosure of material facts. That law was repeated in, ***Dubai Bank v Galadari and Others'[1990] 1 Lloyds Rep. 120 CA.***

32. That judgment of the Court of Appeal (UK) is recommended to counsel. The case is about a bank owned by the Galadaris in Dubai, the United Arab Emirates, taken over by the Government of the UAE, and became owned by Bank of Dubai Limited, controlled by the Government. The Galadaris had extensively traded in the UAE through a variety of companies and entities. They also owned a

financial institution, the Oriental Credit Limited, in England, at which it was said that the Galadaris owned a bank account. They denied that they owned the account, but they declined to say who owned it.

33. When OCL went into creditors voluntary liquidation, BDL issued a claim in England against OCL, the Galadaris and others, claiming an order to trace £300 million interests on deposits made into BDL and Swiss banks, diverted to the bank account at OCL in England, and an equitable interest in the money. BDL then applied to court in England without notice to the defendants, and obtained a worldwide Mareva injunction and other ancillary orders for disclosure of assets and documents, and other orders.

34. The Galadaris applied successfully for the discharge of the orders on the ground of non-disclosure of a material fact by the Government of UAE that, it had known for upto four years about the transfer of funds and did not apply for injunction order, and on the ground that, there was no longer risk of dissipation of assets to warrant continuation of the Mareva order.

35. Notwithstanding, the Court of appeal (UK), also held that the trial judge had not been wrong in overriding banker-customer confidence when it ordered disclosure so that the true owner of the bank account at OCL would be known. I cite the case for the law that where there has been non-disclosure of material fact, an injunction order obtained on an application without notice is not automatically discharged.

36. *The jurisdiction of the Supreme Court of Belize.*

The next logical question to consider is the jurisdiction of the Supreme Court of Belize to grant an injunction order restraining a foreign arbitration (or a foreign court). It was not a direct issue. Parties agreed that in an appropriate case the Supreme Court of Belize had jurisdiction. However, they did not agree that the considerations for granting an order restraining a foreign arbitration were the same as the considerations for granting an injunction order restraining proceedings in a foreign court. Learned counsel Mr. Courtenay SC, relied on the judgment of Aikens J. in the Queen's Bench Division (UK) in, ***Elektrim SA v Vivendi Universal SA & Others [200]EWHC 571(Comm),*** for the submission that the considerations were different. Against that view there was the judgment of Justice Closter, also of

Queen's Bench Division (UK) in, ***Intermet FZCO v Ansol Ltd. [2007] EWHC 226 (Comm).*** Ms. Lois Young SC, relied on ***Societe Nationale Industrialle Aerospatielle v Lee Kui Jak [1987] AC. 871,*** for her submission that the considerations were the same.

37. It is my respectful view that, the general principle is only one namely, *'when it appears to the court to be just and convenient*, also expressed as *"when the ends of justice require"*. There may be need for guidelines to suit the nature of domestic court proceedings or arbitration proceedings, or proceedings in foreign court or foreign arbitration. For instance, in granting an injunction order to restrain proceedings in a domestic arbitration, caution must be exercised so as not to interfere with the subject matter agreed to be referred to arbitration. In respect to arbitration proceedings or court proceedings in a foreign country, great caution must be exercised so as not to interfere with the agreement of the parties to refer a dispute to arbitration, and also with the sovereignty of the foreign State and the jurisdiction of the foreign court. Overstressing one aspects of a case sometimes leads to apparent difference and absurdity that only lawyers can comprehend.

38. In the ***Elektrim Case,*** s: 33 of Arbitration Act 1996 (UK) and s: 37 of the Supreme Court Act, 1981(UK) were considered. It was stated in the case rather too boldly and unnecessarily in my respectful view, that there must be a breach of a legal or equitable right. That may have been so in the particular facts of the case because that was when it would be just or convenient; it cannot be a strict guiding rule, given s: 37 of the Supreme Court of Judicature 1981 (UK), which requires simply that it should appear to the court "to be just and convenient". The same provision is in s:27 of Cap 91 (Belize). Vexation and oppression are factors to be considered in deciding injunction order, I doubt that they fit in the category of breach of a legal or equitable right.

39. Electrim's claim in court (Queen's Bench UK) was, for an injunction order restraining an arbitration in London (the LCIA) because another arbitration in Geneva (the ICC Arbitration) was proceeding at the same time. The claim was in fact decided on three main reasons. One, that continuation of the LCIA was not oppressive or vexatious because the arbitration at the LCIA was according to the arbitration

agreement, about a dispute concerning the investment agreement between the parties, whereas the LCC arbitration in Geneva was, according to its own arbitration agreement, about a dispute in a subsequent settlement agreement. The second reason was that Elektrim had fully taken part in the LCIA, and only much later unsuccessfully sought an order to stay the proceedings, in the circumstances it would be "unjust". Thirdly, the court had no power to review or overrule procedural decision of an arbitral tribunal before it had made an award.

40. Notwithstanding the statement in the ***Elektrim Case,*** courts in England have continued to repeat the principle that an injunction order to restrain proceedings at a foreign arbitration or in a foreign court will be granted *when it is just or convenient or when the ends of justice require.*

41. In the ***Attorney General v 1. The Belize Bank Ltd, Said Musa and 3. Amalia Mai, Supreme Court Claim 228 of 2008,*** the learned Chief Conteh on the first occasion granted an injunction order on an application of the Attorney General without notice, restraining the

Belize Bank Limited from proceeding with a claim between the parties in England. At the hearing on notice, the Chief Justice discharged the order made without notice. It is my view that the Chief Justice was greatly mindful that hearing had commenced in court in England, of an application of the Belize bank Limited for an injunction order restraining the Attorney General from taking further steps in his claim in court in Belize. He exercised the necessary caution required not to interfere with the jurisdiction of a foreign court.

42. The jurisdiction of the Supreme Court of Belize comes from ***S: 27 (1) of the Supreme Court of Judicature Act, Cap. 90,*** and from its common law inherent powers. ***Section 27 of the Act,*** provides as follows:

> *"Subject to the rules of court, the Court may grant mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just and convenient to do so".*

43. This provision has been interpreted in Belize, as its parent provision in the UK has been interpreted there, to authorize injunction orders restraining foreign arbitration or proceedings as well. Examples are the cases of: ***Attorney General v Carlisle Holdings Limited, Supreme Court Civil Claim No. 15 of 2005; Channel Tunnel Group Ltd and Others v Balfour Betty Construction Ltd and Others [1993] AC 334; Societe Nationale Industrialle Aerospatiale v Lee Kui Jak and Another. Donahue v Armco Inc. & Others [2002] 1 All ER. 749:*** and ***The Tunisie [1966] 1 Lloyds Rep. 477 AC.*** In the Attorney General v Carlisle, the learned Chief Justice helpfully traced the jurisdiction of the Supreme Court from the Common Law to the current statute, the Supreme Court of Judicature Act.

44. In my respectful view, the overarching principle is still that it must appear to the court from the evidence, that it is *"just or convenient",* that is that, *"the ends of justice require",* that an order be made to restrain the proceedings of a foreign arbitration, a foreign court or a domestic tribunal. The order in regard to a foreign tribunal is directed at the parties in the proceedings, not at the foreign court or foreign arbitration. Further, it remains a matter of the discretion of the court;

that is the reason why the circumstances that will lead to the conclusion that the ends of justice require that an injunction order be granted are not prescribed and closed.

45. In the present applications, I am guided first by the principle that the evidence at the stage of the applications must show that the ends of justice require that an injunction order be granted to restrain the UNCITRAL Arbitration commenced by Dunkeld. Secondly, if I am satisfied that the ends of justice so require, then I must act with great caution so as to avoid any interference with matters that parties had agreed to be the subject of arbitration, unless the referral is plainly baseless, vexatious abusive or oppressive. For arbitration generally – see ***Associated Bulk Carriers Ltd v Koch Shipping Inc. p[1978] 1 Llyd. Rep. 24,*** and also ***Fiona Trust and Holding Corporation and Others v Privalov and Others [2007] UKL 40[2008] Llyds LR.1.*** Thirdly, I would make sure that such an injunction order was directed against the parties in the UNCITRAL Arbitration proceedings, not against the arbitral tribunal; I would avoid interference with its foreign status.

46. *Is it just and convenient, (does the ends of justice require)?*

Several submissions were urged on the court for granting an injunction order restraining all ten respondents, or for setting aside or refusing the injunction order. The least persuasive submission was that the court should find that there was no arguable case in the claim of the Attorney General. I shall pose some questions so as to demonstrate that there are indeed arguable questions in all five heads of claim made by the Attorney General.

47. All the five claimants for compensation have refused to supply to the Financial Secretary the information that he said he needed for verifying their claims. On the other hand, Dunkeld claims, although it did not submit a claim to the Financial Secretary under s: 64 of Act No. 9 of 2009, payment for upto 69% of the shares held by the five claimants. Further, Hayward Trust claims that Dunkeld is its subsidiary, and further still, persons other than Hayward Trust and Dunkeld, appear on the register of shareholders of Telemedia. Is it not a tenable case, indeed a perfect set of circumstances, in which to seek a court declaration as to who are entitled to receive compensation for the shares?

48. Dunkeld has not yet been served with the interim order made on 29.12.2009, the affidavit and claim form. Further, there is no evidence yet about the view of the Government of the United Kingdom, the actual party to the Treaty, as to whether it considers that there has been a breach by the nationalization of Telemedia, and, or the intended manner of assessment of compensation. So far there has been no exchange of diplomatic notes. Is the question of espousal of claim and standing of Dunkeld not tenable?

49. Is the right of a Sovereign State to nationalize, as opposed to its duty to pay reasonable and prompt compensation justiceable in a foreign court or foreign arbitration? Further, is the claim of expropriation justiceable in a foreign tribunal? Are these Questions not tenable in the circumstances of this claim and these applications?

50. *Are the arbitral proceedings vexatious oppressive and abusive?*

Next I pose the question whether commencing the UNCITRAL Arbitration is vexatious. In these applications Dunkeld and Hayward Trust do not wish to disclose the trust deeds or other arrangements that they claimed entitled them to compensation for the shares

acquired by the Minister. They have not submitted any claim under s:64 of Act No. 9 of 2009. They have not proposed any compensation that they considered reasonable, or the time of payment which they consider reasonable time. It seems that they made up their mine to go to arbitration prematurely or regardless. It seems their real motive was to hide the identities of the beneficiaries of compensation rather than obtain reasonable compensation within reasonable time. That view may change at trial when full evidence will have been presented and tested by cross-examination. Making a claim for ulterior motive is considered vexatious. Court proceedings must be used for *bona fide* purpose and not as a means of vexation or oppression – see ***Castro v Murray (1875) 10 Ex 213.*** I think the intended arbitral proceedings are vexatious and abusive for ulterior motive.

51. It is also vexatious and frivolous to repeat claims based on the same facts and point of law. The submission for the Attorney General was that, the question of nationalization of Telemedia in regard to payment of reasonable compensation within a reasonable time has already been taken to the Supreme Court of Belize at least in claims Nos. 847/2009 and 874/2009. I am also aware of Claim No. 1018/2009, in which Mr.

Dean Boyce, the fourth defendant-respondent in this claim and these applications is the claimant. He raised the same point of reasonable compensation within a reasonable time, as a constitutional point. I would have to stress logical reasoning in order to say that the claim intended at the UNCITRAL Arbitration is not a repetition of those three claims in the Supreme Court of Belize. In my respectful view, the intended arbitral proceedings are vexatious for repetition of claim, and unjust.

52. The other aspect of the several claims is the financial costs to the parties. The three claims on the same issue in the Supreme Court of Belize must cost the parties much. If they were mindful of the overriding objective of the Rules of Court, they would agree to conclude one of the cases before proceeding to another. The arbitration proposed to sit in Geneva will require of the parties more money and professionals simultaneously. It is my view that Dunkeld has chosen to bring the arbitration at this time to overburden the Government financially and perhaps in regard to professional personnel. The commencement of the arbitration is, in my respectful view, oppressive for the costs that could be avoided.

53. The seven defendants-respondents who have filed acknowledgement of service of the order made on 29.12.2009, and supporting documents, namely: Jose Alpuche, Keith Arnold, Lord Ashcroft, Dean Boyce, Phillip Osborne, Ediberto Tesucum and Phillip Zuniga, chose to present only one affidavit; that sworn by Jose Alpuche. Mr. Alpuche did not explain why the other six preferred to rely on affidavit sworn by him other than swear their own affidavits. In the affidavit of Mr. Alpuche there were only two statements in the nature of fact that Mr. Alpuche could speak about of his own knowledge. The fact was that he was not a director or officer of Dunkeld; and he was not a director or officer of Hayward. He did not explain why his name appeared on the website of Hayward Trust, as a trustee and advisor. The second statement was the hearsay that the six others informed Mr. Alpuche that they were not directors or officers of Dunkeld. He did not explain why their names were given as trustees and advisors of Hayward Trust.

54. Mr. Alpuche seemed to know about the relationship between Hayward and Dunkeld, and about communication between Dunkeld and the Government. His affidavit did not give his source of information. It

suggested that he knew a lot more material facts that were not included in the affidavit. His affidavit contrasted sharply with that of Mr. Gian Gandhi who stated mostly facts within his own knowledge, and supported his statements with upto 24 exhibits.

55. Nevertheless, I did take into consideration that swearing affidavit was a serious and solemn matter, and that deliberate falsehood could expose the deponent to perjury. So I did not take Mr. Alpuche's affidavit lightly. However, there are too many questions arising from it. At this stage, I have great doubt about the contents of Mr. Alpuche's affidavit. Much of it was argument and submission on assumed facts and points of law.

56. There is plausible evidence at this stage although that may change at trial, that the first to the ninth defendants-respondents are trustees and advisors to Hayward Charitable Belize Trust, and that they exercise control over it and over its subsidiary, Dunkeld International Investment Limited.

57. Allen Forest, Peter Gaze and Dunkeld International Investment Limited had not yet been served when these applications were heard. Given the nature of the facts and the points of law in the applications, I had to consider their position as well, to enable me to see whether the order made *ex parte* on 29.12.2009, against them jointly with the seven respondents could be extended. If there was no arguable case against them I would not extend the order against them. There is at this stage plausible evidence that Allen Forest and Peter Gaze are trustees and advisors of Hayward Trust and may have some control in the affairs of Dunkeld, the subsidiary. The claim of the Attorney General against Allen Forest, Peter Gaze and Dunkeld and against the other seven defendants-respondents is arguable.

58. It was suggested that an injunction order against Dunkeld would be unenforceable because it was not resident within the jurisdiction. The evidence so far is that it is a beneficiary of 69% of shares of Telemedia. That is substantial property within this jurisdiction. An injunction order against Dunkeld could be enforceable to that extent.

59. The evidence at this stage shows that the Attorney General has serious and arguable questions to make the five heads of claim about which he asked for an injunction order. Further, the evidence shows that there are already a multiplicity of claims in the Supreme Court of Belize based on the issue of reasonable compensation within reasonable time, the UNCITRAL Arbitration will add to the multiplicity. Further still, the evidence shows that compensation for the acquisition of the shares is intended by the Government of Belize, but that Dunkeld has not provided the particulars of its claim or even made any direct claim. Further still, the evidence shows that the ten respondents are first and foremost concerned with not disclosing identity, other than the question of reasonable compensation within reasonable time. Compensation for shares are being processed. Lastly, the view of the United Kingdom of Great Britain and Northern Ireland, the contracting party through whom Dunkeld claims, is not known as to whether it considers that there has been a breach of Treaty Series No. 33 (1982) at this stage or at all.

60. In the above circumstances, it is my respectful view that, the ends of justice require that an injunction order issues against the ten

defendants- respondents restraining them from taking further or any step to proceed with the UNCITRAL Arbitration intended or commenced by the Notice dated 4.12.2009, issued by Dunkeld. The amended draft order spelling out the terms of the injunction is available on the case file, for perfecting.

61. Since the seven respondents: Jose Alpuche, Keith Arnold, Lord Ashcroft, Dean Boyce, Philip Osborne, Ediberto Tesucum, and Philip Zuniga presented and argued their application dated 8.1.2010, for an order to set aside the interim injunction order made on an application without notice on 29.12.2009, their application dated 8.12.2010, is formally dismissed.

62. The application dated 22.1.2010, of the Attorney General for the continuation of the interim injunction order made on 29.12.2009, is granted, but modified in that instead of continuation of the order, a new interim injunction order is made to last until the determination of this claim (No 1042 of 2009) of the Attorney General, or until further order. The draft order filed is amended to spell out the terms of the injunction granted.

63. Since Allen Forest, Peter Gaze and Dunkeld International Investment Limited were not present at the hearing of these applications, it is open to them to apply for an order to set aside the injunction order against them made today.

64. Costs of this application will be in the cause.

65. Delivered this Friday the 5th day of February 2010
At the Supreme Court
Belize City

Sam Lungole Awich
Judge
Supreme Court