

IN THE SUPREME COURT OF BELIZE, A.D. 2007

CLAIM NO. 185

BETWEEN:

**BELIZE TELECOM LTD.
JEFFREY PROSSER
BOBBY LUBANA**

Applicants/Claimants

AND

**BELIZE TELECOMMUNICATIONS
LIMITED**

Respondent/Defendant

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Lionel Welch for the claimants/applicants.

Mr. Nigel Plemming Q.C. and Mr. Rodwell Williams S.C. for the defendant/respondent.

—

DECISION

1. By the present application the applicants, Belize Telecom Ltd., Jeffrey Prosser and Bobby Lubana, seek the following orders from this Court:

- (1) *An interim injunction restraining the Defendant, including their purported directors, officers, servants, agents or others purporting to act on their behalf, from preventing in any manner, including by threatening to arrest or detain the Claimants or those purporting to act on their behalf, the holding of the special meeting of the Board of*

Directors of the Belize Telecommunications Limited (“BTL”) which originally was held on February 22nd, 2007 and has been recessed until 26th April, 2007 at 9 o’clock a.m. at the Princess Hotel conference room, sixth floor, Belize City or any other meeting that of the Board Directors that shall be called anywhere in Belize and by any method whether by teleconferences or otherwise.

(2) *An order directing that the Defendant deliver to the Claimants on or before the special meeting described in Paragraph 1 above the following:*

(i) *The share register of BTL, which, in accordance with Article 26 of the Companies Act, (sic) must include the names and addresses of the members, and the occupations, if any, and in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member, the date at which each person was entered in the register as a member, and the date at which any person ceased to be a member;*

(ii) *The annual list of members and summary as required under Article 27(sic) of the Companies Act;*

(iii) *All of BTL’s accounting and financial records for the period of February 9th, 2005 to the present (the Period), including the Consolidated Balance Sheets, Consolidated Statements of Income, Consolidated Statements of Changes in Shareholders’ Equity, Consolidated Statements of Cash Flows, Notes to Consolidated Financial Statements for each month, each quarter, and the year end, and variance analysis to any prior period and budget for each of the Statements or reports;*

(iv) *All bank statements for the Period;*

(v) *All synopsis of BTL’s vendor invoices for the Period;*

- (vi) *All of BTL's check registries for corporate and subsidiary company accounts for the Period;*
- (vii) *All of BTL's management operating reports for the Period;*
- (viii) *All synopsis of any lost revenue from BTL outages incurred during the Period;*
- (ix) *All strategic plans, prospectuses or valuation reports regarding BTL generated by management or provided to management during the Period; and*
- (x) *All other relevant properties necessary for the holding of the meetings (collectively "BTL's Books and Records").*

2. The backdrop to this application, it is fair to say, stems from two judgments of the Courts of Belize. The first one is the judgment of the Court of Appeal in Civil Appeal No. 6 of 2005. The effect of this judgment, which puts aside certain declarations of the Supreme Court, was that the second applicant continues to be, by virtue of the extant Articles of Association of the defendant company, the non-executive Chairman of the company and that the other directors of Belize Telecommunications Limited, including the 3rd claimant/applicant, Bobby Lubana, in this action, continue to be and are directors of the company's Board. The net effect of this judgment is that the directors of BTL appointed by the special shareholder, including the 2nd and 3rd applicants, continue to be and are directors of the company pursuant to its Articles of Association. This judgment arose out of an interpretation and application of some of the Articles of Association of BTL in respect to its Board of

Directors and appointment thereto by the holder of the company's special share.

3. This judgment, when I inquired of counsel in this matter, is on appeal to the Privy Council. I am however, not aware of any stay of the operation of this judgment and have not been informed of any. Therefore in law, in my respectful view, whether that judgment of the Court of Appeal is right or with respect, wrong, it is still a valid and subsisting judgment of a court of law, in this case, the Court of Appeal, and entitled to full faith and credit by all concerned.
4. The second judgment is that of the Supreme Court rendered on the 19th September 2006 in Claim No. 338 of 2006. The gist of the claim was to seek to nullify legislation by way of an Act and resulting Statutory Instruments which had attempted to negate the existence of the special share and the continuance of the directors appointed by the holder to be on the company's Board and to substitute a new set of Articles of Association for BTL.
5. Nonetheless, the judgment of the Supreme Court of 19th September 2006 was largely declaratory, as indeed was that of the judgment of the Court of Appeal in Civil Appeal No. 6 of 2006.
6. Declaratory judgments in contradistinction to executory judgments proclaim the existence of a legal position or relationship and would not contain an order which, ipso facto, may be enforced against a defendant; whereas an executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way or do a particular thing, for example, to pay damages or refrain from interfering with the successful claimant's

rights. Any such order is enforceable by execution if disobeyed by way of proceedings for contempt.

7. A declaratory judgment may, however, be the ground for subsequent proceedings in which the rights that have been declared have been violated may receive enforcement. It is therefore clear that a declaratory judgment may be the ground of subsequent proceedings in which the declared rights can receive enforcement. Until then, there is no enforcement of the rights declared. Therefore, until subsequent proceedings have been taken on the declaratory judgment following the non compliance with it or its violation or threatened violation, there may not be anything to enforce under it. (See the judgment of the Court of Appeal in Civil Appeal No. 7 of 2006 – The Attorney General, The Minister of Public Utilities, Belize Telecommunications Limited v Jeffrey J Prosser, Bobby Lubana, Belize Telecom Limited, Innovative Communication Corporation, Innovative Communication LLC and Thermon Limited, Belize Bank Limited, (unreported) and also the case of Chief R A Okoye and others v S Santilli and others S.C. 200/1989, a decision of the Supreme Court of Nigeria, helpfully mentioned with approbation by Sosa JA in C.A. No. 7 of 2006 (unreported) at paragraph 29. Also, Zamir and Woolf The Declaratory Judgment (3rd ed.) (Sweet & Maxwell)).
8. In the present application the applicants are now in effect, by subsequent proceedings, asking this court to give effect to their rights as declared by both the judgment of the Court of Appeal in Civil Appeal No. 6 of 2006 and the Supreme Court judgment in Claim No. 338 of 2006, at least, to enable them as the non-

executive Chairman of BTL and directors, to summon and hold a meeting of the company's board.

9. Against this however, the defendant/respondent BTL, has through its attorney, taken objection and argued strenuously why the court should not grant the application.

The argument on behalf of the respondent may briefly be stated thus:

- (1) That there need to be determined first the ownership of the special share before this court can pronounce upon or entertain the claimants' application. It consequently have, in this context, applied to add the Attorney General on behalf of the Government of Belize and RBTT Merchant Bank Ltd., Trinidad and Tobago, as defendants and for permission to serve Defence and Counterclaim outside the jurisdiction on the latter.
- (2) That the claimants lack standing or capacity to prosecute the present application. This is so, the company argues, because Belize Telecom Ltd. and Mr. Prosser are bankrupt and therefore the proper party to pursue the application should be their trustees in bankruptcy. They also aver that there is no evidence of the 3rd applicant Mr. Lubana being registered on the books of BTL as a director.
- (3) That the relief sought by the applicants are inappropriate in the circumstances of this case and ought not to be granted by this court.

10. I now turn to address these objections in turn. It is my candid view that the court ought not to be detained by the first objection, that is, on the ownership of the special share. This is seemingly a perennial problem that will be put to rest as there is a separate claim, Claim No. 42 of 2006.

11. Concerning the ownership of the Special Share, however this issue reared its head in Claim No. 338 of 2006, the judgment on the constitutionality of the Statutory Instrument in that case but the court however proceeded to judgment and left the issue of the ownership of the special share to be determined on the merits of the claim in the action in which the issues are properly joined with the evidence. I therefore do not think that this would be a ground to prevent this Court from entertaining this application, much as I sympathize with Mr. Plemming's Q.C. forceful written submission and Mr. Boyce's supporting affidavit in this connection. I am however, of the considered view that this matter will be determined in the appropriate proceedings, and should not preclude this Court from proceeding on the instant application.

12. As regards the application to have the Attorney General and RBTT Merchant Bank Ltd. joined in these proceedings, this no doubt is connected with the ownership of the special share. It was submitted that the special share is no longer in existence. I find this, with respect, a specious argument, especially in the light of the fact that the Articles of Association of BTL expressly provide for it in Article 11 and it has not been redeemed, retired or surrendered in light of the judgment of the Court in Claim No. 338 of 2005 wherein it was expressly held to be in existence as provided for in the extant Memorandum and Articles of Association of BTL.

13. With respect, the Hon. Attorney General and RBTT Merchant Bank Ltd. can, if they so choose, join the proceedings, even if only in the capacity of interested parties; but so far they have not chosen to do so and I do not think that on the evidence before me, it is necessary for me to order their joinder in order to determine the application.
14. Secondly, as to the standing or capacity of the applicant Mr. Lubana, it is in my view untenable as has been advanced that there is no evidence of his appointment as a director of BTL. I wonder how this argument could ever be advanced in light of the letter of the 25th April 2005 to the secretary or deputy secretary of BTL, expressly appointing Mr. Bobby Lubana with immediate effect “Government appointed director by the special shareholder Belize Telecom Ltd.”.
15. On the alleged bankruptcy of Mr. Prosser, as a reason for removing him from this application, I read with care the affidavit of Mr. Hugh McDonald, the effect of which is to say that Mr. Jeffrey Prosser the 2nd claimant here has filed Chapter 11 Bankruptcy in the United States, and is, therefore, ineligible to commence proceedings absent agreement or authority of his trustee-in-bankruptcy.
16. I have also read with care the Memorandum of Opinion dated 13th February 2007 of Judge Judith K. Fitzgerald of the United States Bankruptcy District Court of the Virgin Islands Bankruptcy Division. It is to be noted that she expressly denied the Motion to convert the Chapter 11 filing to a Chapter 7. The latter would have resulted in a trustee in bankruptcy being appointed for the affairs of Mr. Jeffrey Prosser. There is no evidence of such appointment. The upshot of the finding is that the United States Bankruptcy Court stated that: *“Appointment of an examiner is in the best interest of the creditors and the*

estate at this time and we will deny the motion to convert without prejudice in favour of appointing an examiner.” I therefore have no evidence of a categorical bankruptcy order in relation to either Mr. Prosser or ICC. However, more significantly, Mr. Welch for the applicants argued that by section 7, subsection 2 of the Reciprocal Enforcement of Judgment Act, Chapter 171 of the Laws of Belize, Revised Edition, 2000, **bankruptcy** is not deemed to be included in the enforcement of foreign judgments.

17. I bear in mind nonetheless the decision of the Privy Council in the case of Cambridge Gas Transport Corp. v Official Committee of Unsecured Creditors (of Navigator Holdings and others), judgment of the Privy Council delivered on the 16th May 2006. That case evidently was for the collective execution against the property of the debtor by creditors whose rights are admitted or established. As Lord Hoffman said at para. 16 *“the purpose of bankruptcy proceedings ... is not to determine or establish the existence or right but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established.”*
18. In the instant application the case is not one of executing against the property or assets of ICC or Jeffrey Prosser but rather to avail them the means to assert their right as adjudged by the courts of Belize. I do not therefore consider that the bankruptcy proceedings, especially in the absence of a trustee in bankruptcy who could prosecute their claim on behalf of their creditors, should deny them the opportunity to pursue and assert their rights as adjudged by the courts.

19. I now turn to the third objection, that the relief sought by the applicants is inappropriate and ought not to be granted by the court.
20. After deep reflection, I am constrained to deny this as a ground or reason for not acceding to the applicants/claimants' request, confident that it is the duty of the court, where a party has established a right, to fashion a remedy that will vindicate and advance that right.
21. I am not convinced that it would be impossible or beyond BTL to comply with the Court's orders. In the circumstances therefore, I order and direct:
 - (i) An interim injunction restraining the defendant, including their purported directors, officers, servants, agents or others purporting to act on their behalf from preventing in any manner, including the threatening to arrest or detain the claimants from holding of the meeting of the Board of Director of Belize Telecommunications Ltd.
 - (ii) I order that the Board of Directors may meet at BTL Headquarters, St. Thomas Street, Belize City, or hold any meeting of the Board of Directors, that may be called anywhere in Belize.
 - (iii) The defendant shall deliver to the claimants before the next Board Meeting of BTL the following:
 - (a) The share register of BTL, which in accordance with section 26 of the Companies Act must include the names and addresses of the members and the

occupations, if any, and a statement of the share held by each member, distinguishing each share by its number, the date on which each person was entered on the register as a member and the date at which any member ceased to be a member,

- (b) The Annual list of members and summary as required under section 27 of the Companies Act.
- (c) All of BTL's accounting and financial records for the period February 9th 2005 to the date of this order.
- (d) All bank statements of BTL for the period February 9th 2005 to date.
- (e) All of BTL's management reports for the period February 9th 2005 to date.
- (f) All prospectuses and valuation reports regarding BTL as provided to BTL from February 9th 2005 to present.

These documents shall be disclosed to the claimants solely for the purpose of facilitating the holding of the proposed Board Meeting and shall not be used for any other purpose.

I order as well that the applicants should pay One Thousand Dollars (\$1,000.00) earlier ordered by the Court to be paid to the defendant/respondent.

- 22. In conclusion, it is certainly not in doubt that BTL as a commercial concern is one of the most successful in the country and provides

vital services for the nation. But the undeniable fact is that for quite some time now BTL has been plagued with difficulties stemming largely from the battles for control of its management, and it has as a consequence been dragged into the courts of this country at every opportunity. The effect of this may no doubt be unsettling for BTL as a company but I cannot but feel that as a private, commercial entity, registered under the Companies Act, with its own Memorandum and Articles of Association, its management and shareholders can see their way through to reaching an accommodation in both their interest and that of the company, so that it can continue to provide their vital services to the country. I am convinced that the subsisting Articles of Association of the company are flexible enough to accommodate the controversies that have beset BTL.

A. O. CONTEH
Chief Justice

DATED: 31st May 2007.