IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 8 of 2010

BETWEEN:

JOSE ALPUCHE	**1st Appellant**
KEITH ARNOLD	**2nd Appellant**
LORD ASHCROFT, KCMG	**3rd Appellant**
DEAN BOYCE	**4th Appellant**
PHILIP OSBORNE	**5th Appellant**
EDIBERTO TESUCUM	**6th Appellant**
PHILIP ZUNIGA	**7th Appellant**

AND

THE ATTORNEY GENERAL	**Respondent**

BEFORE:

The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**
The Hon. Mr. Justice Alleyne	**-**	**Justice of Appeal**

Nigel Pleming QC, Eamon Courtenay SC and Mrs. Ashanti Arthurs-Martin for the appellants.
Ms Lois Young SC and Miss Deanne Barrow for the respondents.

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18, 19, 20 and 27 May, 14 June 2010.

SOSA JA

[1] On 27 May 2010 the Court allowed the appeal of the appellants and ordered that (a) paragraph 3, as it relates to the seven appellants, and paragraph 5 of the order of Awich J dated 10 February 2010 be set aside and (b) the appellants have their costs, here and in the court below, to be taxed, if not

agreed. (Written submissions have been filed by counsel for the appellants in support of their application that costs be certified fit for three counsel and written submissions in reply are expected to be filed by counsel for the respondent shortly, after which, on a date to be made known to counsel, the Court will, without hearing oral argument, give its ruling.) I concur in the reasons for judgment set out by Morrison JA in his judgment, which I have now read.

SOSA JA

MORRISON JA

Introduction

[2] On 18 May 2010 the appellant's application for an expedited hearing of this appeal was granted by the court, without opposition from the respondent. The appeal itself was heard over three days ending on 20 May 2010 and on 27 May 2010 the court announced its decision that the appeal should be allowed, with costs to the appellants to be agreed or taxed (as to which, an outstanding question whether the appellants are entitled to a certificate for three counsel will be addressed in a separate ruling by the court after considering the parties' written submissions on the matter). These are my reasons for concurring in that decision.

[3] This is an appeal from the order of Awich J made on 5 February 2010 on the respondent's application restraining the appellants and three others "from taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced by the 10th Defendant, Dunkeld International Investment Ltd, by Notice of Arbitration dated 4 December 2009, under the

Arbitration Rules of the United Nations Commission on International Trade Law 1977, and the 1982 agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize [GOB], for the Promotion and Protection of Investments, arising out of or relating to the acquisition of certain property by the [GOB]...", under legislation passed by GOB in 2009 ("the Act"). The property involved, so far as is relevant to this appeal, comprised the majority of the shares held by private shareholders in Belize Telemedia Ltd ("BTL").

[4] This litigation commenced on 29 December 2009, when the respondent filed an action in the Supreme Court against a total of 10 defendants, including the appellants. The other defendants were Messrs Allan Forrest, Peter Gaze and Dunkeld International Investment Ltd, a company registered in the Turks and Caicos Islands ("Dunkeld"). Save for Dunkeld, all of the defendants were sued in their capacity "as Trustees of the Hayward Charitable Belize Trust" ("Hayward"). In this action the respondent claimed the following reliefs:

1. A Declaration that the Supreme Court of Belize is the proper forum for the determination of all claims to compensation and other matters arising out of or relating to the acquisition of certain property by the Government of Belize under the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) order, 2009 (S.I. No. 104 of 2009), as amended by the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) (Amendment) Order, 2009 (S.I. No. 130 OF 2009) (hereinafter collectively referred to as the **"Acquisition Orders"**).

2. A Declaration that pursuant to section 28 of the Companies Act, Chapter 250 of the laws of Belize, or otherwise, the Government of Belize would be entitled to disregard any trust in respect of the acquired shares and to treat the registered holders of the shares as the only persons entitled to compensation for the acquisition of such shares.

3. A declaration that none of the defendants has any locus to bring any legal or arbitral proceedings against the

Government of Belize, whether under the Constitution and the laws of Belize or under any bilateral or multilateral treaty, in respect of the acquisition of certain property by the Government of Belize under the Acquisition Orders.

4. A declaration that the action of the Defendants, particularly of the 10th Defendant, in commencing arbitration proceedings against the Government of Belize by Notice of Arbitration dated 4 December 2009 under the Arbitration Rules of the United Nations Commission on International Trade Law 1977 and the 1982 Agreement between the Government of Belize for the Promotion and Protection of Investments is oppressive, unconscionable and an abuse of the arbitral process.

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 arbitration proceedings commenced by the 10th Defendant by Notice of Arbitration dated 4 December, 2009, in respect of or relating to the acquisition of certain property by the Government of Belize under the Acquisition Orders.

[5] On the same day on which the action was filed, the respondent obtained an ex parte order from Awich J restraining the defendants in the terms sought, returnable on 26 January 2010. On 8 January 2010, the appellants filled an application seeking the discharge of that order on the grounds that the application should not have been made on an ex parte basis and that the appellants were not trustees of Hayward and were not directors, officers or shareholders of Dunkeld and therefore had no control over the operations of either Hayward or Dunkeld. When this application came on for hearing before Awich J on 22 January 2010, it was adjourned to 26 January 2010. On that date, the learned judge took the view that his ex parte order of 29 December 2009 had now expired and he accordingly proceeded to hear the parties on the question of whether any further injunction should be granted in the terms sought by the respondent. Having heard submissions from both sides, the learned judge on 5

February 2010 made an order restraining all 10 defendants in the terms indicated in para. 2 until the trial of the action or further order. However, in relation to Messrs Forrest and Gaze and Dunkeld, who had not been served with the proceedings and had taken no part in the hearing of the applications before him, the judge by his order specifically left it open to them to apply for an order to set aside the injunction as it applied to them.

[6] In his written judgment delivered on 5 February 2010, Awich J agreed with the appellants' submission that this was not a suitable case for the grant of an ex parte interim injunction, no particular urgency having been demonstrated to justify this course. He accordingly acknowledged that he had fallen into error in granting an injunction on 29 December 2009 when the matter first came before him without notice to the defendants. Having said that however, the learned judge then went on to consider whether, having now heard counsel on both sides, a further injunction ought to be granted until the trial of the action. He took his jurisdiction to be as stated in section 27(1) of the Supreme Court of Judicature Act, that is, that the court can grant an injunction in any case in which it appears to be "just or convenient" to do so. He reminded himself that the authorities require that a court should approach with "great caution" an application to restrain foreign arbitral proceedings, but he nevertheless came to the view that this was indeed a fit case in which such an order should be made. He considered that the intended arbitral proceedings in this case were vexatious, oppressive, abusive and unjust, in that they were in effect a repetition of the claims for compensation already made on behalf of the legal owners of the acquired shares in Belize and had been commenced by Dunkeld for the ulterior purpose of overburdening GOB "financially and perhaps in regard to professional personnel". With regard to the position of the appellants, the judge was unimpressed by the evidence provided by them in support of their contention that they were not trustees of Hayward, regarding the affidavit filed by Mr Alpuche as consisting largely of hearsay and giving rise to "too many questions". He accordingly concluded that there was "plausible evidence" that the appellants,

together with Messrs Forrest and Gaze, were trustees of and advisors to Hayward and thereby exercised control over Hayward and Dunkeld.

The factual background

[7] The factual background to the matter can be stated briefly. On 25 August 2009 the Government of Belize ("GOB") compulsorily acquired 94% of the shares in Belize Telemedia Ltd ("Telemedia"), pursuant to the provisions of The Belize Telecommunications (Amendment) Act, 2009 and the Belize Telecommunications (Assumption of Control of Telemedia) Order, 2009. Immediately before the acquisition, Dunkeld was the beneficial owner of approximately 69% of the shares in Telemedia, the legal owners of which were a total of five companies incorporated in Belize.

[8] In response to a notice published by GOB inviting the submission of claims to compensation arising out of the compulsory acquisition, the legal owners of the shares all submitted claims for compensation under cover of letters from their attorneys-at-law dated 14 October 2009. In each of these letters, the legal owner indicated that the shares were held by them "for the benefit of [Dunkeld] and [Hayward]", that it "considers that the compulsory acquisition of the Shares was both unconstitutional and an abuse of power by [GOB]" and that the demand for payment of compensation for the shares acquired was being made "strictly without prejudice" to the claims by Dunkeld and Hayward arising under the UK-Belize Bilateral Investment Treaty and any constitutional or other claim that might be made as a result of the compulsory acquisition of the shares.

[9] The treaty referred to in these letters to GOB is "An Agreement for the Promotion and Protection of Investments" ("the Treaty"), made between the Government of the United Kingdom and GOB dated 30 April 1982 and which remains in force. Article 8 of the Treaty provides for the referral of disputes between the parties to international arbitration and on 4 December 2009,

Dunkeld commenced arbitration proceedings against GOB under the Treaty by serving Notice of Arbitration pursuant to that article. In that notice, Dunkeld alleges that the acquisition of the shares to which it was beneficially entitled was "in breach of [GOB's] obligations to Dunkeld which has the status of an investor under the Treaty". GOB had in fact been previously notified of Dunkeld's intention to make this claim by a letter dated 27 August 2009, written to GOB on Dunkeld's behalf by its London solicitors, Messrs Allen & Overy LLP. There had been no response to this letter, neither, it appears, had there been any formal response to the notice of arbitration up to the time of the hearing before Awich J.

The appeal

[10] Dissatisfied with the order made by Awich J, the appellants filed six grounds of appeal, which were as follows:

> 21 The Learned Judge erred in finding, contrary to the uncontradicted evidence in the First Affidavit of Jose Alpuche, that the Appellants have control over the Tenth Defendant, Dunkeld international investments Limited (**Dunkeld**);
>
> 2.2 The Learned judge erred in finding that the Arbitration commenced by Dunkeld International ltd under the UK-Belize Bilateral Investment treaty (the **UK-Belize BIT**) is vexatious, oppressive and abusive.
>
> 2.3 The Learned Judge erred in holding that the test to determine whether an injunction should be granted restraining arbitral proceedings outside of Belize, is whether the 'ends of justice require" it. Or if "it is just and convenient to do so". And in failing to hold that the proper test is that

the Court should only grant an anti-arbitration injunction with extreme reluctance and not unless satisfied that the order is not an encroachment on the power of the arbitrator. The Learned Judge erred in law by failing to hold that the well established principle of kompetenz-kompetenz applies. The issue of Dunkeld's investment in Belize Telemedia Limited is an issue of public international law and is an issue which should be properly determined by the Arbitral Tribunal.

2.4 In any event, the Learned Judge erred in holding, on the facts, that the "ends of justice require" that the injunction to be continued and that it was "just and convenient" to order so.

2.5 The Learned Judge erred by holding that the Treaty Arbitration is oppressive because the Respondent is simultaneously facing three separate claims concerning the constitutionality of the Belize Telecommunications Amendment Act, 2009 and Statutory Instrument Numbers 104 and 130 of 2009, and the Treaty Arbitration. The Learned Judge failed to take account of the fact that these three claims have not been brought by Dunkeld.

2.6 The Learned Judge erred in law by finding that if the injunction was not granted,, there would be irreparable harm cause to the Respondent.

[11] These grounds give rise, in my view, to three distinct issues, which may be summarised as follows:

(i) Whether the judge erred in finding that the appellants had control over the 10th defendant, Dunkeld, who are the claimants in the arbitration proceedings (ground 2.1);

(ii) whether an injunction ought to have been granted against the appellants in the absence of any proof of irreparable harm, actual or apprehended, to the respondent (ground 2.6); and

(ii) whether, in any event, an injunction ought to have been granted at all in the circumstances of this case, to restrain arbitration proceedings brought outside of Belize, pursuant to a treaty governed by international law, on the basis that those proceedings were vexatious, oppressive or abusive and that it was just and convenient to make such an order, bearing in mind the traditional extreme reluctance of the courts, fully established by the authorities, to grant such an injunction save in exceptional cases (grounds 2.2 – 5).

[12] At the outset of the hearing of the appeal, Ms Young SC moved a preliminary objection, by which she sought to confine the appellants' arguments on the appeal to the issue of whether there was any or any sufficient evidence to justify the grant of an injunction against them. The appellants ought not, Ms Young submitted, to be allowed to canvass the wider question of whether an injunction restraining foreign arbitral proceedings ought to have been granted in this case at all. Mr Pleming QC in reply, after pointing out that the respondent's notice of preliminary objection was out of time, went on to submit that the appellants should be at liberty to take any point on appeal to support their contention that no injunction ought to have been granted against them, particularly given their potential exposure to severe punishment for contempt of court as a result of recent amendments to the applicable legislation. After a brief adjournment to consider these submissions, the court overruled the preliminary

objection, taking the view, in agreement with Mr Pleming, that the claim against the appellants was essentially parasitic on the claim against Dunkeld and that it was therefore entirely appropriate that they should be allowed to argue that, even if they were trustees of Hayward and thereby had control over Dunkeld, this was not a proper case for the grant of an anti arbitration injunction n any event.

[13] Counsel for both the appellants and the respondent provided the court with full and admirably detailed skeleton arguments and these were supplemented by penetrating advocacy, again on both sides, at the hearing. I hope that I do them no disservice, and certainly no disrespect is intended, by recounting them in the broadest outline for the purposes of this judgment.

[13] On the first issue, Mr Courtenay SC submitted that there the respondent had failed to discharge the burden which it had to show that the appellants were trustees of or otherwise in control of Hayward or that they were either directors or officers of Dunkeld. There was therefore no evidentiary basis for an order restraining them from "taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced by [Dunkeld]". In this regard, Mr Courtenay strongly criticised Awich J's reasons for disregarding the affidavit placed before him by Mr Jose Alpuche on behalf of himself and the other appellants, as well as his finding that there was "plausible evidence at this stage...that [the appellants] exercise control over [Hayward] and that they exercise control over it and over its subsidiary, [Dunkeld]". Mr Courtenay pointed out that there had been no application by the respondent to cross examine Mr Alpuche on his affidavit and that there was therefore no reason to reject his evidence "even on a preliminary basis".

[14] On the second issue, Mr Courtenay submitted that there the respondent did not adduce any evidence to show that it would suffer irreparable – or, indeed any – damage if an injunction was not granted to prevent the arbitration from proceeding. If GOB were to take part in the proceedings and prevail, then its only loss would relate to costs, which could be adequately compensated by an

order for costs from the arbitrators. Mr Courtenay referred us on this issue to the well known decision of the House of Lords in **American Cyanamid v Ethicon [1975] 1 All ER 504**.

[15] The submissions on the third issue were made by Mr Pleming. At the outset of his submissions,, he pointed out that Awich J had failed to appreciate that there were in fact three different sets of claims that had arisen out of the nationalisation of Telemedia, viz, claims to compensation under the legislation itself, constitutional claims and Treaty claims under the bilateral Treaty between the Government of the United Kingdom and GOB. Although these claims were all clearly linked, they were nevertheless separate, involving different parties and different causes of action. A judge faced with an application for an injunction to restrain foreign arbitral proceedings was required to bear in mind the well established restrictions on the jurisdiction of the court to grant such an injunction, which required the judge to approach such an application with extreme caution. It was submitted by Mr Pleming that it was a basic principle of international arbitration that local courts should not interfere with international proceedings save in exceptional circumstances, none of which was applicable in the instant case.

[16] In support of these submissions, Mr Pleming referred us to a number of decisions, including the decision of Conteh CJ in **Attorney General v Carlisle Holdings Ltd** (Claim no. 15 of 2005, judgment delivered 21 February 2005). In that case, after referring to **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd and others [1993] AC 334**, and to Mustill & Boyd on Commercial Arbitration, 2nd edn, 2001, (to both of which we were also referred by Mr Pleming), the learned Chief Justice concluded (at para. 22) that "the power of the court in the exercise of its jurisdiction in this context [is] to ensure that the arbitral process freely chosen by the parties is not stopped dead in its tracks or subverted or its outcome rendered nugatory by one side or the other before the outcome of the process itself". In addition to these authorities, Mr Pleming also

referred us to a number of others in support of his argument that the learned judge had fallen into error in granting an anti arbitration injunction in this case.

[17] Ms Young in response submitted firstly that Awich J had correctly exercised his discretion based on the information that was available to him and his undoubted jurisdiction to grant an anti arbitration injunction. In these circumstances, she submitted, **Hadmor Productions Ltd v Hamilton [1983] 1 AC 191** applied, with the result that this court should only interfere with the trial judge's decision if it was shown that the judge had misunderstood the law or the evidence that was before him, had drawn a legitimate inference from assumed facts later shown to be false or had made a decision so aberrant that no reasonable judge mindful of his duty to act judicially could have reached it. In the instant case, Ms Young submitted, it had not been demonstrated that Awich J had fallen into any such error and there was therefore no basis for the court to interfere with his decision.

[18] On the first issue, Ms Young submitted that the affidavit of Mr Alpuche amounted to no more than a bare denial, which was in fact contradicted by the affidavit evidence of the respondent, which had come from Mr Gian Ghandi, that the Hayward website listed the appellants as being "Trustees and Advisors" of the Hayward Charitable Belize Trust. The material before the judge had revealed, Ms Young submitted further, "an extensive layering of ownership of the companies whose shares were acquired", which, in addition to the fact that six of the seven appellants had chosen "not to speak directly to the Court", but to allow their position to be represented by Mr Alpuche alone, entitled the judge to view the evidence with "skepticism". In these circumstances, Ms Young submitted, there was evidence before the judge which could reasonably have led to the view that that the appellants exercised control over both Hayward and Dunkeld.

[19] On the second issue, Ms Young pointed out that given the nature of the injunction applied for by the respondent and granted by the judge, which was an

injunction to restrain the continuation of arbitral proceedings on the ground that to allow them to proceed would be oppressive, the question of the adequacy of damages or otherwise did not arise and had been rightly left out of account by Awich J.

[20] On the third issue, Ms Young submitted that the judge had clearly had in mind all the relevant principles with regard to anti arbitration injunctions, specifically referring in his judgment to the need to exercise caution in addressing the question of whether or not an injunction should be granted in the instant case. She further submitted that Awich J had formed the clear view that the issues to be determined in the Supreme Court of Belize were the same as the issues to be determined in the arbitration and that in these circumstances he was fully entitled to conclude that to allow Dunkeld to pursue arbitration proceedings against the respondent on the same issues was expensive, repetitive and oppressive.

Issue (i) – was there evidence to support the judge's finding that the appellants had control over Dunkeld?

[21] The question posed by this issue goes to the status of the appellants who, as I have already pointed out, were sued in their capacity as "Trustees of the Hayward Charitable Belize Trust". It is therefore primarily a question of fact. The only evidence put before the judge on this aspect of the matter is to be found in para. 6 of the single affidavit filed on behalf of the respondent by Mr Gian Ghandi, legal advisor to the Ministry of Finance, where he says this:

> "The first nine Defendants are "Trustees and Advisors of the Hayward Charitable Belize Trust...as shown on Hayward's website, www.the haywardcharitablebelizetrust.com/trustees_advisors".

[22] In support of this allegation, Mr Ghandi exhibited to his affidavit a copy of a page from the Hayward website, listing in one column, under the heading

"Trustees and Advisors", the names of the appellants and two others, and in the other column the name of the well known London firm of solicitors, Allen & Overy LLP.

[23] In para. 10 of an affidavit sworn to on 8 January 2010, Mr Jose Alpuche, who was the first named defendant in the action (and who is the first named appellant in this court), after stating that he was duly authorised by the Second, Third, Fourth, Seventh, Eighth and Ninth Defendants (that is, all the other appellants) to swear this affidavit on their behalf, stated the following (among several other things):

> "It appears that I, along with the Second, Third, Fourth, Seventh, Eight [sic] and Ninth defendants have been named as defendants in these proceedings because we are allegedly Trustees of Hayward. I am not a not a trustee of Hayward and have no control over the trust which operates a charitable trust for the benefit of Belizeans across the world. I have been informed by each of the applicants and verily believe that the Second, Third, Fourth, Seventh, Eighth and Ninth defendants are not Trustees of Hayward, and have no control over the trust".

[24] In the paragraph following this, Mr Alpuche went on to state that "Although Dunkeld is owned by Hayward, the directors of that company have an independent obligation to act in the best interests of that company". Further, neither he nor any of the other appellants was "a director or officer of Dunkeld and have no involvement in Dunkeld's business". This affidavit, and in particular para. 10, was not challenged by the respondent in any way, either by affidavit evidence to the contrary, or by way of cross examination at the inter partes hearing of the application for the injunction before Awich J, which commenced on 29 January 2010.

[25] Mr Ghandi then went on in his affidavit to attempt to demonstrate the connection between Hayward and Dunkeld by a process in two steps. Firstly, he pointed to the fact that, pursuant to the acquiring legislation, the Financial Secretary issued a 'Notice of Acquisition' on 27 August 2009 requiring all interested persons with claims to compensation in respect of GOB's acquisition of their property by the Act to submit their claims by 15 October 2009. Notice of claims was accordingly given to the Financial Secretary as requested under cover of letters dated 14 October 2009 by attorneys-at-law on their behalf by five companies holding in aggregate close to 70% of the acquired shares in BTL. Each of these letters, after setting out details of the shares formerly held in BTL by the respective companies, challenged the constitutionality of their compulsory acquisition by GOB, then went on to state that the shares acquired by GOB "were held for the benefit of [Dunkeld] and [Hayward]", and finally asserted that the claim for compensation then being advanced was without prejudice to any claims by Dunkeld and Hayward under the U.K.-Belize Bilateral Investment Treaty, to the constitutionality of the Act and to assert and enforce "any other rights in connection with ownership of the shares".

[26] Mr Ghandi's second step was to point out that, Notice of Arbitration having been given on 4 December 2009 to GOB on behalf of Dunkeld for alleged breaches of the treaty, a press release was issued by Hayward on 13 December 2009 informing the public that "on 4 December 2009 **its subsidiary, [Dunkeld]** commenced arbitration proceedings against [GOB]" (the emphasis, which appears in the original, is obviously Mr Ghandi's).

[27] It is on the strength of this evidence that Awich J concluded that there was "plausible evidence at this stage although that may change at trial", that the appellants were "trustees and advisors to [Hayward], and that they exercise control over it and over its subsidiary, [Dunkeld]" (para. 56), and accordingly made the order sought granting an interlocutory injunction against them in the terms already stated.

[28] In the context of his judgment as a whole, the judge did not dwell too much on the issue of the status of the appellants and the basis of his conclusion that the appellants were trustees and advisors of Hayward and, as such, exercised control over both Hayward and Dunkeld, is set out at paras. 53 – 55 of his judgment. In the first place, he questioned why the other appellants had chosen to rely on the single affidavit sworn to by Mr Alpuche rather than to swear their own affidavits. But in any event, the affidavit did not explain why the names of all seven appellants should have appeared on the Hayward website as advisors and trustees of Hayward. Further, the judge observed that Mr Alpuche "seemed to know about the relationship between Hayward and Dunkeld, and about communication between Dunkeld and [GOB]", without having given his source of information, thus suggesting that he knew "a lot more material facts that were not included in the affidavit" (para. 54). Ultimately, the judge concluded, there were too many questions arising from it, leaving him with "great doubt about the contents of Mr Alpuche's affidavit" (para. 55).

[29] It seems to me that there are two aspects to the question posed by this issue, firstly, whether the evidence before the judge supported the conclusion that the appellants were in fact what Mr Ghandi alleged them to be, that is, trustees of Hayward (which is the capacity in which they have been sued), and, secondly, whether, even if they were, they in that capacity exercised control over Dunkeld in relation to that company's decision to commence arbitration proceedings against GOB by the notice of 4 December 2009. In considering this issue, I take as the appropriate threshold question (as the parties now appear to agree that we should) that famously set out by Lord Diplock in **American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504**, that is, whether there appears to be a serious question to be tried on the merits of the claim.

[30] In approaching this question, it is also necessary to bear in mind, as Ms Young quite properly reminded us, that this is an appeal from the exercise of a discretion by the judge and that the function of this court is limited in the manner

described in the oft cited judgment of Lord Diplock in **Hadmor Productions Ltd v Hamilton [1983] 1 AC 191, 220** (see para. 17 above). However, that salutary cautionary note notwithstanding, I have nevertheless come to the clear view that Awich J's conclusion on this issue cannot be sustained, for a number of reasons.

[31] Firstly, as regards the fact that Mr Alpuche swore a single affidavit on his own behalf and on behalf of the six other appellants, there is no prohibition in the rules against this. While it is the general rule that an affidavit should contain "only such facts as the deponent is able to prove from his own knowledge" (Supreme Court (Civil Procedure Rules) Rules, rule 30.3(1)), an affidavit for use in any interlocutory application may nevertheless contain statements on information and belief. However, such an affidavit is required to indicate which statements are made from the deponent's own knowledge and which are made from information and belief and, in the latter case, the source of the information (rule 30.3(2)). Whenever an affidavit is to be used in evidence, any party may apply to the court for an order requiring the deponent to attend at the hearing for cross examination. That application is to be made, in the case of a trial, within 21 days, or in any other case within seven days of the hearing (rule 30.1(3) –(5)).

[32] In the instant case, it seems to me that Mr Alpuche's affidavit conformed to the rules in every respect. It was filed on 8 January 2010, thus giving the respondent ample time within which to make an application for an order that he attend for cross examination if it was intended to challenge him on the contents of the affidavit. This not having been done, it appears to me that Awich J's strictures against Mr Alpuche's affidavit on this ground flew in the face of the clear provisions of the rules permitting him to do precisely what he did, and were therefore unfair in the circumstances. With regard to the judge's further criticism of the affidavit, that is, that it did not explain how the names of the appellants came to be listed on the Hayward website as trustees and advisors of the trust, it is not immediately clear to me why this was necessarily a factor which in some way compromised or reduced the weight to be attached to the affidavit. But in

any event, I do not consider that here was any onus on the appellants in this regard, since the document listing them as Trustees and Advisors was not their document.

[33] Awich J's other adverse comment on the affidavit was that Mr Alpuche "seemed to know about the relationship between Hayward and Dunkeld, and about communication between Dunkeld and the Government", without having given the source of his information. Again, I regard this criticism as misplaced and unfair for at least two reasons. The first is that all the information referred to by Mr Alpuche in his affidavit was contained in the press release issued by Hayward on 13 December 2009 (which appeared in, perhaps among other places, the Belize Times newspaper published on that date) and also exhibited to Mr Ghandi's affidavit, which was filed on 22 December 2009. The second reason is that there is no denial by Mr Alpuche that he is (or was) an advisor to Hayward, in which capacity he might well be expected, unexceptionably, to know something of the affairs of the trust.

[34] The appellants having been sued as trustees of Hayward, it was of critical importance to the respondent's case that that status be established, albeit on an entirely preliminary basis, on the evidence. The terms of the order actually made by the judge (enjoining the appellants "as Trustees and or Advisors" of Hayward), clearly suggests to me that he failed to appreciate that it was the appellants' status as trustees that was important, as this was the only capacity in which, as Ms Young accepted, it could even be argued that they had control over the trust. It seems to me that in this regard the copy of the page from the Hayward website was in fact equivocal (in that the persons listed could be either trustees or advisors, or both) and that, Mr Alpuche having on affidavit (which was not contradicted in any way) challenged the meaning contended for by the respondent, there was no or no sufficient evidence to show that there was a serious issue to be tried against these appellants.

[35] This conclusion suffices to dispose of this issue in the appellants' favour. But the appellants are also entitled to succeed, in my view, on the second aspect of the matter identified at para. 29 above. That is, that even if I am wrong in thinking that the evidence has not shown that there is a serious issue to be tried on the question whether the appellants were trustees of Hayward, there is absolutely nothing on the evidence to suggest even remotely that in that capacity they exercised control over Dunkeld, the corporate entity that is in fact the claimant in the arbitration proceedings which it was sought to enjoin. It is not even alleged by Mr Ghandi in his affidavit that all or any of them are directors or officers of Dunkeld, which they in any event deny.

[36] In her skeleton argument in this court, Ms Young makes the point that, in order "to conclusively determine the factual relationship between Hayward and Dunkeld, the court would be entitled and indeed required, to construe the Memorandum and Articles of Association of Dunkeld, ascertain the directors of Dunkeld, and construe the Hayward trust document" (para. 29). I entirely agree, save that I would also add that, even for the purpose of an application for an interlocutory injunction, I would expect the respondent, as the applicant to whose case it is critical to demonstrate that the appellants did exercise some degree of control over Dunkeld, to put the necessary material before the court to enable it to make an informed decision on the issue.

[37] I would therefore conclude that the appellants have made good their contention on ground 2.1 and this is a case falling within the exceptional circumstances described by Lord Diplock in **Hadmor Productions**, in that the judge's decision to grant an injunction against the appellants on the evidence which was before him was "so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it" (page 220). I consider further that, on this ground alone, the appeal must be allowed.

[38] Despite the considerable, and very interesting, learning deployed by both sides on the other two issues identified by me in para. 11 above, I do not think it necessary to consider them any further in the light of my conclusion on the first issue. Awich J was careful, in my view correctly, to leave it open to those defendants (who include Dunkeld) who had not been served up to the time when he made his order and who were not therefore before the court, to come forward to apply for an order to set aside the injunction order made against them if they choose to do so. In the context of any such application, I would expect that issue (iii), in particular, that is, the wider question whether this was a suitable case for the grant of an injunction to restrain foreign arbitration proceedings, will inevitably arise and will no doubt assume central importance.

Conclusion

[39] In the result, I would allow the appeal and set aside the orders made by Awich J in so far as they relate to these appellants. The appellants must have their costs of the appeal, to be taxed, if not agreed.

MORRISON JA

ALLEYNE JA

[40] I too have read the judgment of Morrison JA in draft. I agree with it and have nothing to add.

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ALLEYNE JA