IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CIVIL APPEAL NO. 18 OF 2008

BETWEEN:

THE BELIZE BANK LIMITED	**Appellant**
AND	
THE ATTORNEY GENERAL **THE MINISTER OF FINANCE** **THE HON. MR. JUSTICE AWICH** **JAIME ALPUCHE** **JEFFREY LOCKE** **THE CENTRAL BANK OF BELIZE**	**Respondents**

BEFORE:

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

16, 18 March & 19 June 2009

Vincent Nelson, Q.C. and E. Andrew Marshalleck for the appellant.
Ms. Lois Young, S.C for 1st & 2nd respondents.
Michael Young, S.C. for 3rd, 4th & 5th respondents.
Sixth respondent not represented

SOSA JA

1. On 4 June 2009, the Court announced that, for reasons which it proposed to give in writing on the last day of its current sitting, the appeal of The Belize Bank Limited would be dismissed, with costs to all of the respondents, except for the sixth, such costs to be taxed, if not agreed, and that the orders of the court below would be affirmed. I concur in the

reasons for judgment given by Carey JA and Morrison JA, in their respective judgments, both of which I have read in draft.

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SOSA JA

CAREY, JA

PREFACE

2. The Government of the Bolivarian Republic of Venezuela was minded in 2008 to provide financial assistance to the Government and people of Belize. To that end, the authorities in that country made available twenty million U.S. dollars which found its way into the Belize Bank Limited, the present appellant. These funds, the former Prime Minister Mr. Said Musa, explained in a public statement on 5 March 2008, were transferred to assist in housing, home improvements and a sports facility as to ten million dollars and the other moiety was used to settle an obligation of the government, by which it had guaranteed a loan made by Universal Health Services, a private company which ran a hospital. This event provoked a storm of criticism. In the event, there was a change of government. The new Prime Minister at a press conference in March 2008, stated that his predecessor was guilty of improperly diverting funds intended for the Belizean people. He also warned the appellant that he was putting it on notice that he would be seeking legal advice as to its liability to repay the ten million dollars. This act of generosity on the part of the Venezuelan government, apart from the political turmoil, generated a spate of litigation.

3. The Central Bank of Belize entered the fray. It launched an investigation pursuant to powers conferred on it under the Banks and Financial Institutions Act, Cap. 263, as a result of which it issued two directives to the appellant, only one of which is relevant to these proceedings, viz:

> "BBL should forthwith credit GOB's account with the Central Bank of Belize with US $10 Million as per "Payment Details" stated on wire transfer instruction sent by Bandes-Fidei Comisos De Venezuela on the "Cash Payment Confirmation" dated 26 December 2007".

The appellant wrote disputing, the Central Bank's power under section 36(5) of the Banks and Financial Institutions Act, to issue directives and complained of inadequate time in which to respond. The Central Bank allowed an extra ten days to respond to the concerns in the Central Bank's letter of 14 March 2008. On 20 March 2008, the appellant started proceedings in the Supreme Court challenging the authority of the Central Bank to issue the directives (claim No 180 of 2008). It also applied for an interlocutory injunction in relation to the directives. On 25 March 2008, the appellant signified its intention to appeal the directives to the Chief Justice as Chairman of the Appeal Board which, at that time, had not been constituted, and used the opportunity to inform the Chief Justice of that fact.

THE APPEAL BOARD

4. On 1 April 2008, the Banks and Financial Institutions Appeal Board (the Board) was constituted. The Minister of Finance (the Minister) appointed two Board members, Mr. Jaime Alpuche and Mr. Jeffrey Locke, the fourth and fifth respondents, while the Chief Justice nominated Awich J to be the Chairman in his stead. The Banks and Financial Institutions Act,

stipulates that the Chief Justice or other judge of the Supreme Court nominated by the Chief Justice shall be Chairman of the Board. The Minister has the responsibility under the Act, to appoint two persons with knowledge of banking, finance or other related disciplines. It is the appointment of these two persons, among other matters, which has provoked the suit at the instance of the appellant against the respondents. The sixth respondent, it is right to point out, was joined as a party on the application of the appellant.

THE SUIT

5. The appellant sought the following relief:

(a) a Declaration that the Banks and Financial Institutions Appeal Board cannot lawfully be seised of the claimant's appeal and does not have, and cannot be granted any jurisdiction in this matter;
(b) a Declaration that the powers granted to the Minister of Finance in Part X of The Bank and Financial Institutions Act, Cap. 263, 2000 are inconsistent with section 6 of the Constitution of Belize and therefore are unlawful and void;
(c) a Declaration and Order that the Banks and Financial Institutions Board as so constituted for the purposes of determining any appeal by the claimant from the decision of the Central Bank to issue directives on 14 March 2008 is not independent and impartial within the meaning of section 6 of the Constitution of Belize;
(d) a Declaration that any decisions taken, order made or awards issued by the Banks and Financial Institutions Appeal Board constituted on 5 April 2008 under the Act are unlawful and void;
(e) a Declaration that the issue of the Directives against the Claimant by the Central Bank of Belize in circumstances where an Appeal Board cannot lawfully be seised of the Claimant's appeal and/or where an independent and impartial Appeal Board cannot lawfully

be appointed is inconsistent with provisions in section 6 of the Constitution of Belize guaranteeing the Claimant equal protection of the law and the Directives are therefore unlawful and void; and

(f) a final injunction restraining the Appeal Board as constituted on 5 April 2008 from taking any steps in relation to any dispute or appeal conducted pursuant to the Act arising from the directives issued by the Central Bank to the Bank on 14 March 2008 pursuant to section 36(5) of the Act."

After a three day hearing between 16 and 18 July 2008 before him the Chief Justice reserved judgment until 1 August 2008,when he refused all the declarations and discharged the interlocutory injunction granted against the Central Bank on 18 June 2008. The Belize Bank Limited now appeals to this court.

6. THE GROUNDS OF APPEAL

There were four grounds of appeal by which the appellant sought to challenge the findings of the Chief Justice and impugn his judgment. I set them out hereunder:

GROUND 1

The Honourable Chief Justice erred in law and misdirected himself when considering whether the membership and appointment of the Appeal Board was independent and impartial in accordance with section 6(7) of the Constitution in finding that:

(a) the facts of Claim No. 338 of 2008 and the statutory framework as set out in Part X of the Banks and Financial Institutions Act, 2000 were such that a fair-minded and informed observer would not conclude that there was any apparent bias in an

Appeal Board of which two of the three members were appointed by the Minister of Finance;

(b) as the Appellant did not harbour any suspicion of bias against the Chairman of the Appeal Board as constituted, the Appeal Board was independent and impartial because any majority decision of the Appeal Board must include the decision of the Chairman; and

(c) The Appeal Board is consistent with section 6 of the Constitution because, pursuant to section 77 of the Act which allows any person aggrieved by a decision of The Appeal Board is not the terminus for an aggrieved person and the Appeal Board is subject to the subsequent control of a judicial body.

GROUND 2

The Honourable Chief Justice erred in law and misdirected himself when considering whether the Appeal Board had (1) jurisdiction to hear and determine the Appellant's appeal and (ii) the legal authority to extend the time limit within which the Appellant may appeal to the Appeal Board in determining that:

(a) Section 36(6) of the Act is not a jurisdiction conferring provision so that any appeal to the Appeal Board in relation to directives issued by the Central Bank pursuant to section 36(6) of the Act should only correctly be engaged after representations have been made to the Central Bank in respect of the directives pursuant to section 36(5) of the Act;

(b) There was nothing objectionable in The Appeal Board extending time for the lodging of an appeal pursuant to section 36(6) of the Act after The Appeal Board's constitution on 1st April, 2008; and

(c) A person against whom directives have been issued by the Central Bank should refer any serious reservations they may have in relation to the Appeal Board constituted to hear and determine its (sic) appeal pursuant to section 36(6) of the Act to the Appeal Board itself by way of an application for recusal or to the Court of Appeal of Belize under section 77 of the Act but otherwise should taken the Appeal Board as they (sic) find it without seeking details about its members.

GROUND 3

The Honourable Chief Justice erred in law and misdirected himself when considering whether the powers granted to the Minister of Finance pursuant to Part X of the Act were inconsistent with the Act (sic) and therefore unlawful and void in determining that:-

(g) the fact that the Minister of Finance was given the power to appoint two persons of a three person Appeal Board did not negate the appearance of bias and independence and impartiality of the Appeal Board without having due regard to the evidence put before the Supreme Court in relation to the position the Prime Minister of Belize (who is also the Minister of Finance) had adopted in relation to Appellant; and

(h) the powers granted to the Minister of Finance pursuant to Part X of the Act are not inconsistent with section 6 of the Constitution in the circumstances of this case.

This ground was not pursued.

GROUND 4

In light of (grounds 1 – 3) The Honourable Chief Justice erred in law and misdirected himself in finding that (i) the appointment and membership of the Appeal Board was an independent and impartial authority which did not offend the Appellant's rights to the equal protection of the law and the right to a fair hearing pursuant to sections 6(1) and 6(7) respectively of the Constitution and (ii) the Appeal Board was seised of and had jurisdiction to determine the Appellant (sic) appeal so that as a consequence, the interlocutory injunction granted by Mr. Justice Conteh on 18 June 2008 restraining The Central Bank from acting upon, in consequence or seeking the enforcement of the Directives should be lifted".

7. THE ARGUMENTS

GROUND 1

The issue raised in this ground is whether the membership and appointment of the Appeal Board was "independent and impartial" in accordance with section 6(7) of the Constitution of Belize. This provision ordains that:-

> *"Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such determination are instituted by any person before such court or other authority, the case shall be given a fair hearing within a reasonable time".*

The European Court in *Findlay v. United Kingdom (1997) 24 EWRR 221* defined the litmus test for the terms "independent" and "impartial" which appear in article 6(1) of the Convention for The Protection of Human

Rights and Fundamental Freedoms which is not altogether different from section 6 of the Constitution of Belize. Article 6, in the interest of completion, provides:

> *"(1) In the determination of his civil rights and obligations or of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"*

The Court said:

> "The court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had inter alia to the manner of appointment of its members and their term of office. The existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. As to the question of "impartiality", there are two aspects of this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.
>
> The concepts of independence and objective impartiality are closely linked…"

This consideration applies to the tribunal charged with the responsibility of hearing appeals against rulings of the Central Bank. Section 71 of the Banks and Financial Institutions Act. Mr. Nelson, Q.C. begins his submissions therefore, by questioning the manner of the appointment of the Board. He says that the Minister of Finance was a directly interested party in the outcome of the appeal. This was so because of the numerous statements made by him to the press about the matter of the diversion of

the funds both before and after his appointment as Prime Minister. Further, he pointed to the civil proceedings being filed by the government almost simultaneously with the issuance of the Central Bank's directives, both seeking the same relief and added, that the special examination was instigated by the Minister.

8. I do not think that the evidence as disclosed in the affidavit of the Governor of the Bank is susceptible to such an interpretation. The paragraph in his affidavit to which we were referred (paragraph 34 of his second affidavit) states as follows:

> "…I also told the Prime Minister that the Central Bank need to do a special examination to get to the bottom of this matter The Prime Minister agreed with me that this was needed".

It should also be noted in the interest of accuracy, that while the directives were issued on 14 March 2008, the action on behalf of the government against the appellant was filed on 10 April 2008, hardly simultaneously. Something should also be said with regard to the press statements made by the Minister. Copies of two statements made by the Minister at two press conferences were included in the Record of Appeal – see Supplemental Record of Appeal at tabs 6 and 8. The first press conference occurred on 1 March 2008 when he stated that he had a meeting with the leader of the opposition, Mr. Said Musa, and the former Minister of Housing who confirmed that U.S. twenty million dollars had been diverted to the Belize Bank. He used that occasion to chastise these gentlemen. I have not been astute to discover any reference to the appellant which is capable of imputing wrongdoing or indeed, any conduct to the appellant. At the press conference held on 12 March 2008, in referring to the appellant, he said this (Tab 8, Supplemental Record of Appeal, exhibited in affidavit of the Governor of The Central Bank)

> "Apart from that, there is the question of U.S. $10 Million wired to the Belizean Bank from Venezuela with the note on the confirmation notice that "this was a disbursement for the Government of Belize for its use in the construction of new homes". I've indicated to the Belize Bank that I wish to put them on notice, that the Government will also be taking legal advice as to whether they are not obliged to credit that money (return that money if you will), to the Government for the People of this country (applause). I must say that as far as I can understand, the Bank has been co-operating up to this point in time, and ah – I don't know if he is the Director of the Bank, but certainly, Mr. Phillip Johnson, with whom I met this morning, has indicated that he will take that position to his principals, that I am putting them on notice that (and I put it no higher than this), that we will be seeking legal advice as to whether they were no liable for the return of the U.S. $10 Million" [Emphasis supplied]

From the appellant's perspective, the Prime Minister had stated his intention to advise himself of the appellant's liability to make restitution of funds for the building of houses for Belizean citizens. It would seem to the fair-minded and informed observer that this was an altogether appropriate and justifiable statement to make. As was stated in *Porter v. Magill [2002] 2 AC 357 at 359*, the appropriate test in determining an issue of apparent bias is whether the fair-minded and informed observer having considered the relevant facts, would conclude that there was a real possibility that the Minister was biased when he came to appoint two members to the Appeal Board pursuant to powers under the Banks and Financial Institutions Act, (section 70(1). It is no part of the appellant's case that the persons nominated by the Governor of the Central Bank, namely Mr. Jaime Alpuche or Mr. Jeffrey Locke, the third and fourth respondents are not persons of undoubted integrity nor possessing the necessary expertise in matters of banking and finance. Nor is it part of its case that the Minister

was guilty of cronyism. Once the suggestions regarding tone, content and effect of press statements, and the alleged coincidence of the filing of civil proceedings by government and the issuance of directives by the Central Bank, as well as the suggestion that the Governor of the Bank and the Minister were acting in concert to 'get' the appellant are shown to be without foundation, there is no basis for the assertion that the Minister had a vested interest in the outcome of any appeal which might be brought by the appellant. In my opinion, that contention has not been supported and must accordingly be rejected.

9. It would be disingenuous not to suppose that a Minister of Finance would have no interest in matters that fall within his portfolio. There is no cogent evidence to suggest that the Minister's interest went further than that of any responsible minister of government. The fair-minded and informed observer must be credited with common sense and more than a nodding acquaintance with the realities of life in this country. As regards the delegating of the Minister's responsibilities which, it is suggested, is possible under section 59(1) of the Interpretation Act, Cap. 1, the fair-minded and informed observer is more likely than not to think that a responsible Minister would hardly consider abdicating his powers of appointment. If he, in fact exercised his powers, to depute some other person, to perform his powers, it cannot be doubted that this fair-minded and informed observer would say, "It is the hand of Esau but the voice of Jacob." I am unable to agree, therefore, that the fair-minded and informed observer would have expected the Minister to delegate his powers.

10. GROUND 2

In this ground, counsel questions the jurisdiction of the Appeal Board to entertain the appeal filed by the appellant, and express doubts whether the Appeal Board had any power to extend the time for appealing. It was contended on behalf of the appellant that when the Central Bank issued

the directives to the appellant on 14 March 2008, no Appeal Board had been constituted. Consequently it was said, the Appeal Board could not have been seised of the appellant's appeal and the appellant had no effective right of appeal which breached their right to the equal protection of the law as enshrined in section 6(1) of the Constitution. I have difficulty in appreciating how the fact that at the time the directives were issued, the members of the Board had not been appointed, could have affected the Belize Bank's ability to appeal, which it did on 25 March 2008. The Appeal Board, it is not challenged, was constituted by 1 April 2008. There is no suggestion that the appellant suffered or stood to suffer any prejudice because when it submitted its notice of appeal, it was unaware of the composition of the Appeal Board. I would have thought that what is of importance is that a duly constituted Board would be in existence to hear the appeal whenever the time came. With respect, this must be a *fulmen brutum*. The question naturally arises, in what way has it been demonstrated that the appellant's right to equal protection enshrined in the Constitution was breached? With all respect, there is not a scintilla of evidence produced to show even the likelihood of its being denied a hearing. I must confess that I have the greatest difficulty in appreciating the rationale of the submission that there was no statutory power in the Appeal Board to unilaterally extend the time limit for any appeal, for the fact is, that the appellant appealed <u>within</u> the prescribed period. In those circumstances, I am inclined to think that engaging in a debate on that issue, is tantamount to tilting at windmills. The appellant makes no complaint that his appeal is out of time. So far as it is concerned, there is no need to seek an extension. If the Appeal Board chooses to allow an extension, I must confess, I can see no reason for complaint and the need for any court to make a ruling.

11. In his skeleton arguments, Mr. Nelson submits that it is an impossible reading of sections 36(5) and 36(6) of The Banks and Financial Institutions Act to hold that any appeal to the Appeal Board pursuant to

section 36(6) of the Act should only correctly be engaged after representations have been made to the Central Bank pursuant to section 36(5) of the Act. We were referred to these provisions. Section 36(5) of the Act (so far as material) states:

> "The Central Bank may issue a … directive which shall take effect promptly upon delivery to the subject person affected, who shall be afforded the opportunity to present his views to the Central Bank within ten days after the delivery of the … directive on whether or not the directive in question should be removed or varied".

Section 36(6):-

> "Within ten days of the issuance of a … directive under this section, the person who is the subject of the … directive may appeal such order or directive to the Appeal Board".

As I observed earlier, the appellant filed his appeal within ten days of the directive. The appellant exercised this right to appeal decisions of the Central Bank made under section 36, pursuant to section 71 of the Act. The need therefore, to embark upon a construction of sections 36(5) and 36(6) with a view to reconciling the seeming anomaly as to the time limits prescribed for the different exercises, appears to me to be a non-issue. A discussion on whether the ten day period prescribed in those provisions should be construed to run concurrently as the appellant contends or consecutively as the Chief Justice held and the respondent agrees, does not touch or concern the essential question in this appeal, namely, whether the Appeal Board was an independent and impartial tribunal. I am not therefore minded to enter such a debate.

12. It was also the submission on behalf of the appellant, that it is not the case that a person against whom directives have been issued by the Central Bank should refer any challenge to the Appeal Board itself by way of an

application for recusal and failing that should otherwise take the Appeal Board as he or she finds it. Mr. Nelson was critical of the Chief Justice's view as stated in his judgment that if the appellant had serious qualms about the independence and impartiality of the Appeal Board, this should have been made known to the Appeal Board itself by an application for recusal (or, if the Appeal Board's decision was unfavourable, taken up as a point of law on appeal to the Court of Appeal as provided for by section 77 of the Act). The Chief Justice, he said, had erred in law when he found that an aggrieved person should take the Appeal Board as constituted, "as one finds it".

13. Mr. Nelson complains that the appellant had on numerous occasions, voiced its concerns to the Minister with respect to the independence and impartiality of the Minister appointed members of the Appeal Board. He lamented the lack of reaction on the part of the Minister, the Appeal Board or the Central Bank. Never-the-less, it was submitted that any application for recusal would have been an inefficient use of time and resources because it was not the credentials of Mr. Alpuche and Mr. Locke which would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased. Instead, it was submitted that it would simply be that in light of the underlying factors surrounding the issuance of the directives by the Central Bank and the parallel and inter-connected litigation commenced by the Government, any person appointed a member of the Appeal Board would have been tainted with the appearance of bias vis-à-vis the fair-minded and informed observer, It was submitted finally, that due to circumstances which the Chief Justice failed to consider, there could be no independent and impartial Appeal Board.

14. I now turn to consider these submissions, which seem somewhat circular in nature. I put forward no heresy in saying that applications for recusal, no matter the ground, are usually made to or before the tribunal whose

recusal is sought. It is hardly orthodox for the aggrieved party to constitute itself into prosecutor and judge who determines that as recusal is proven, it will not itself make any application to the tribunal, since that would be, as counsel put it, an inefficient use of time and resources. The appellant sought to obtain the curriculum vitae of the Minister appointees, which were provided – see letter dated 11 April 2008 to Barrow & Co. (the appellant's lawyers). If this material was being sought to provide material for a case of bias, it did not. There does not seem to be any basis for complaint after the material was in fact supplied. Unless the appellant is possessed of the unusual power to foretell future events, it or rather those acting on its behalf, could not know the result if an application for recusal had been made. At all events, the procedure suggested by the Chief Justice is, in my opinion, unexceptionable and, with respect, I entirely agree with him. The appellant choose not to make any application to the Appeal Board, which it was at liberty to do, but sought redress in the action which has given rise to the appeal. The appellant has had an opportunity to ventilate its grievances. It has not been denied any right to which it is entitled. I am satisfied for the reasons given that a fair-minded and impartial observer would consider that the Appeal Board with the Minister appointed members was an independent and impartial tribunal and the Minister was without taint so as to infect his appointees. Ground 4 assumes that there is merit in grounds 1 - 3 and that assumption proving to be unsound, does not need to be considered. I would accordingly dismiss the appeal with costs to the respondents except to the sixth respondent and affirm the orders made in the court below.

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CAREY JA

MORRISON JA

Introduction

15. This is an appeal from a judgment of the Chief Justice given on 1 August 2008 whereby he dismissed the claim of the appellant ("BBL") for constitutional and administrative reliefs by way of declarations and injunction that (i) the powers granted to the second respondent ("the Minister") under the Banks and Financial Institutions Act ("the Act") to appoint the Appeal Board constituted under the Act were inconsistent with section 6 of the Constitution of Belize ("the Constitution") and therefore unlawful and void, (ii) the Appeal Board appointed by the Minister is not an independent and impartial authority within the meaning of section 6 of the Constitution, (iii) the issue of directives to the BBL by the sixth respondent ("the Central Bank") is in the circumstances unlawful and void, (iv) any decisions, orders made or awards issued by the Appeal Board under the Act are unlawful and void, and (v) there be a final injunction restraining the Appeal Board from taking any further steps in relation to an appeal from the issue of the directives (an interim injunction in these terms was in fact granted by the Chief Justice on 16 June 2008, but was discharged by his final order disposing of the matter).

16. BBL is the largest full service commercial bank in Belize and provides a range of banking and financial services to both domestic and international customers.

17. The first respondent is a party to these proceedings in his capacity as the representative of the Government of Belize ("GOB").

18. The Minister is the Minister in the GOB with responsibility for finance and who, pursuant to section 70(1) of the Act, is given the power to cause to be appointed an Appeal Board to hear and determine all appeals in

respect of matters referred to it under the Act. The Minister is also the Prime Minister of Belize.

19. The third respondent ("the Chairman"), is a judge of the Supreme Court of Belize, nominated by the Chief Justice of Belize (pursuant to section 70(2)(a) of the Act) to be chairman of the Appeal Board.

20. The fourth and fifth respondents ("Messrs Alpuche and Locke") are members of the Appeal Board appointed by the Minister pursuant to section 70(2)(b) of the Act.

21. The Central Bank has responsibility under the Act for the licensing and supervision of banks and financial institutions and was joined in the proceedings (on the application of BBL) by an order of the Chief Justice made on 16 June 2008. Although what the Chief Justice described as the "fons et origo" of these proceedings are two directives ("the directives") issued by the Central Bank to BBL in a letter dated 14 March 2008, the Central Bank was not represented by counsel in the appeal.

The background to the proceedings

22. The learned Chief Justice had before him a significant amount of material, obviously assembled by the parties at very short notice. This material included two affidavits sworn on behalf of BBL by Mr Phillip Johnson, in his capacity as chairman of the bank, two affidavits sworn to on behalf of GOB by the Financial Secretary, two affidavits sworn to by the Governor of the Central Bank ('the Governor") and an affidavit sworn to on behalf of the Appeal Board by the Chairman. What follows is a summary of this material, bearing in mind, as the Chief Justice observed (correctly, in my view), that in these proceedings "this court is not concerned with the validity or otherwise of the Central Bank's directives of 14th March 2008 to the Belize Bank."

23. On 5 March 2008, the Governor received certain information from the Minister by telephone, concerning a gift of certain funds by the Government of Venezuela to GOB in late December 2007. At a meeting with Mr Johnson the following morning (6 March 2008) the Governor was given the following information:

(i) The BBL had in fact received US$10 million from Bandes Bank in Venezuela;

(ii) That the written wiring instructions from Bandes Bank did not indicate who these funds were for;

(iii) That the US$10 million was credited to "an account" with BBL at its branch located in the Turks and Caicos Islands.

(iv) That in addition to the US$10 million from Venezuela, there was another US$10 million from Taiwan, which BBL had used along with the Venezuelan US$10 million to settle a debt owed to BBL by the Universal Health Services Ltd ("UHS"), a private company.

24. The Governor immediately formed the view "that something was very wrong with the way [BBL] handled the money from Venezuela and Taiwan and the whole matter warranted a special investigation", a view he then and there conveyed to Mr Johnson.

25. The issue of the UHS debt, repayment of which was guaranteed by GOB, had been, as Mr Johnson described it, "the subject of intense media and political debate" in Belize for some time, both before and after the general elections of February 2008, which had resulted in a change of government. At a press conference on 7 March 2008, the Minister made a public statement on the matter, complaining of what he described as "an

improper diversion by the previous government of these funds, intended as a gift to the people of Belize, to the repayment of the UHS debt."

26. At a subsequent press conference on 12 March 2008, the Minister again expressed himself strongly on the issue, commenting forcefully on "the enormity of what was done" and indicating that GOB would be taking legal advice as to whether BBL was not liable to return to it the amount of US$10 million. The Governor was present at both press conferences, from his account, at the Minister's invitation.

27. The Central Bank conducted a special examination of BBL on 7 March 2008, during the course of which various documents were produced and handed over to the officers conducting the examination.

28. As a result of this investigation, the Central Bank on 14 March 2008 wrote a letter to BBL detailing a number of what it described as "omissions and irregularities." The letter concluded as follows:

> "In view of the omissions and irregularities pointed out above, it is our view that BBL acted in gross violation of prudent banking practices and the implied conditions of its licence. Accordingly, by virtue of the powers vested in the Central Bank by section 36(5) of the Banks and Financial Institutions Act and all other powers thereunto it enabling, the CB hereby issues the following directives to BBL:-
>
> 1. BBL should forthwith credit GOB's account with the Central Bank with US$10.0 Million as per "Payment Details" stated on the transfer instructions sent by Bandes – Fideicomisos De Venezuela on the "Cash Payment Confirmation" dated 28 December 2007, and

2. BBL should forthwith provide to the CB, written documentation regarding the authority to deposit funds to the account of UIH regarding the US$10 million received from the Embassy of The Republic of China (Taiwan).

Please note that these directives take effect immediately, but BBL will have ten (10) days to present its views to the Central Bank on whether the said directives should be removed or varied.

Please note that failure to comply with a directive issued by the CB under this section is a criminal offence apart from civil and other liabilities and sanctions which may be incurred or imposed in that behalf."

29. There followed a hectic period of activity, including what the Chief Justice described as "a lengthy, argumentative correspondence" (paragraph 47) between BBL (through its attorneys-at-law) and the Central Bank, the commencement of litigation (including an action claiming restitution of the US$10 million filed by GOB against BBL on 10 April 2008), the appointment of the Appeal Board, two applications to the court for interim relief , the hearing of the substantive matter in respect of which this appeal has been brought and the judgment of the Chief Justice on 1 August 2008. A detailed chronology of these events is set out in the Chief Justice's judgment (at pages 5 to 9), but for the purposes of this judgment I will attempt no more than a brief summary of the events that are relevant to the appeal.

30. On 18 March 2008 BBL responded to Central Bank's letter of 14 March 2008 challenging its powers under section 36(5) of the Act to issue the directives and complaining of inadequate time in which to make a proper

response. By letter dated 20 March 2008, the Central Bank afforded BBL an additional 10 days from 24 March 2008 to respond to the itemized list of irregularities set out in its 14 March 2008 letter.

31. On 25 March 2008, BBL wrote to the Chief Justice in his capacity as Chairman of the Appeal Board, pursuant to section 70(2) (b) of the Act, giving notice of appeal to the Appeal Board in respect of the directives, pursuant to section 36(6) of the Act. However, BBL's letter noted that its enquiries had revealed that the Appeal Board was not yet in existence and that there were no procedural rules to regulate its conduct. The letter made suggestions as to how the Appeal Board might conduct its business once appointed, though it concluded by recording its "fundamental concerns that the provisions of the [Act] relating to the constitution of the Appeal Board contravene the Constitution of Belize." This letter was copied to the Governor and to the Attorney General.

32. In fact, although there was provision in the Act for the appointment of the Appeal Board (section 70(1)), no appointments had yet been made at that time. On 26 March 2008 the Governor raised the matter with Mr Joseph Waight, the Financial Secretary in the Ministry of Finance. Mr Waight's account of his next steps is set out below:

> "3. In my experience, whenever the Minister of Finance is required to appoint members to an administrative appeal board, as for example the Income Tax Appeal Board, or the General Sales Tax Appeal Board, the Minister receives names from the Financial Secretary and makes the appointment from amongst the names given to him, unless he has some fundamental objection.
>
> 4. Therefore in my mind I began to review the cadre of persons who I considered had expertise in the areas required by

section 70. I came up with the names of Mr. Jaime Alpuche and Mr. Jeffrey Locke. I knew both gentlemen from past working experience.

5. Mr. Jaime Alpuche is a former Financial Secretary. I served under him as Deputy Financial Secretary. Mr. Jeffrey Locke is a former employee of the Central Bank before he went to work for SOL. I knew Mr. Locke from his time at the Central Bank. I telephoned them and asked them if they would accept such appointment and they had no objection.

6. I suggested the names of Mr. Jaime Alpuche and Mr. Jeffrey Locke to the Minister of Finance and he accepted them and made the appointments on 26th March 2008.

7. On 26th March 2008 I wrote to the Registrar of the Supreme Court to inform him of the appointments and to ask for the Chief Justice to appoint the Chairman...

8. On 1st April 2008 the Registrar wrote to say that the Chief Justice had nominated the Honourable Mr. Justice Awich as Chairman of the Banks and Financial Institutions Appeal Board...

9. On 2nd April 2008 the Registrar notified legal counsel for the Belize Bank that the Appeal Board was in process of being constituted. The fact though, the Appeal Board had already been constituted on 1st April 2008 with the appointment of Mr. Justice Awich as Chairman."

33. On 5 April 2008, the appointment of the Appeal Board was duly recorded in the Belize Gazette. After a further exchange of correspondence

between BBL and the Central Bank, on 13 May 2008 the Chairman of the Appeal Board wrote to BBL inviting the filing of an appeal by 23 May 2008, on which date BBL in fact forwarded a second notice of appeal to the Chairman.

34. As already indicated, BBL commenced proceedings challenging the appointment of the Appeal Board and, after a hearing on 16 July 2009, the Chief Justice, in a reserved judgment delivered on 1 August 2009, just over two weeks after the completion of the hearing, concluded as follows:

(i) That the appointment and membership of the Appeal Board were compliant with section 6(7) of the Constitution.

(ii) That there was no merit in BBL's complaint that, there having been no Appeal Board in existence at the time the directives were issued, there was no legal authority in either the Central Bank or the Appeal Board to extend time for the filing of an appeal and that as a result BBL had been deprived of its right to equal protection of the laws as guaranteed by section 6(1) of the Constitution.

(iii) That the powers granted to the Minister to appoint two members of the Appeal Board are not inconsistent with section 6 of the Constitution.

The appeal

The grounds

35. I hope that I do no injustice to BBL's detailed grounds of appeal, by paraphrasing them as follows:

1) The Honourable Chief Justice erred in law and misdirected himself when considering whether the membership and appointment of the Appeal Board was independent and impartial in accordance with section 6(7) of the Constitution.

2) The Honourable Chief Justice erred in law and misdirected himself when considering whether the Appeal Board had (i) jurisdiction to hear and determine the appellant's appeal and (ii) the legal authority to extend the time limit within which the appellant may appeal to the Appeal Board.

3) The Honourable Chief Justice erred in law and misdirected himself when considering whether the powers granted to the Minister of Finance pursuant to Part X of the Act were inconsistent with the Constitution and therefore unlawful and void.

4) In light of paragraphs 1 to 3 above, the Honourable Chief Justice erred in law and misdirected himself in finding that (i) the appointment and membership of the Appeal Board was an independent and impartial authority which did not offend the appellant's right to the equal protection of the law and the right to a fair hearing pursuant to sections 6(1) and 6(7) respectively of the Constitution and (ii) the Appeal Board was seized of and had jurisdiction to determine the appellant's appeal.

The submissions

36. Mr Nelson QC for BBL very helpfully summarised the questions arising on the appeal as being (i) whether the Appeal Board could be said to be independent and impartial within the meaning of section 6(7) of the

Constitution in a case in which GOB was a party ("issue (i)") and (ii) whether on a true construction of sections 35 and 36 of the Act the Appeal Board can be said to be lawfully seised of the appellant's appeal from the directives issued by the Central Bank ("issue (ii)"). A third issue raised by the grounds of appeal, that is, whether the power given to the Minister by the Act to appoint the Appeal Board is inconsistent with the Constitution, was not pursued on the hearing of the appeal.

37. On issue (i), Mr Nelson submitted that the role of the Minister who was an interested party with a vested interest in the outcome, in the appointment of two of three members of the Appeal Board was such as to give rise to the appearance of bias in that body. Mr Nelson pointed to the affidavit evidence which demonstrated, he submitted, "how strident a position" the Minister had taken against BBL and that it was in fact the Minister who had instigated the special examination which led to the directives. Given his interest in the outcome of the appeal, the Minister ought to have delegated his statutory powers, and his failure to do so tainted the Board with bias. Mr Nelson challenged the various factors identified by the Chief Justice as effective to secure the independence and impartiality of the Board, contending in particular that the appearance of bias in even one member of a tribunal (and in this case there were two) would suffice to taint its independence and impartiality. And finally, on this issue, Mr Nelson challenged the efficacy of the right of appeal to this court given by section 77 of the Act to guarantee the independence and impartiality of the Appeal Board, which is not a body being asked to carry out "administrative actions", but rather one required to make "a quasi-judicial/regulatory determination" on the appeal from the Central Bank's directives. In these circumstances, Mr Nelson submitted it was not possible on the authorities for any deficiencies in the process to be cured by an appellate body without full jurisdiction.

38. On issue (ii), Mr Nelson contended that in the light of the fact that, as at 14 March 2008, the date on which the directives were issued, there was no Appeal Board in existence, the appellant had been denied any effective right of appeal, which was a breach of section 6(1) of the Constitution. In support of this submission, Mr Nelson maintained that on a plain reading of section 36((c) of the Act, the appellant's right of appeal to the Appeal Board was lost if not effectively exercised within 10 days of the issue of the directives. In this regard, the Chief Justice erred in reading that 10 day period as commencing after the expiration of the 10 day window for the making of representations under section 36(5). Once the original 10 day period had expired, it was thereafter not competent of either the Central Bank or the Appeal Board to extend the statutory time. In those circumstances, Mr Nelson concluded, the Chief Justice's view that the appellant's concerns about the independence and impartiality of the Appeal Board should have been made known to the Board itself in the first place, by way of an application for recusal, would have been "an inefficient use of time and resources."

39. In support of these submissions, Mr Nelson referred us to a number of authorities, including the well known decisions of the House of Lords in **Porter v Magill** [2002] 2 AC 357 and **Runa Begum v Tower Hamlets London Borough Council** [2002) 2 A.C. 430. He sought to attract our attention in particular to **Scanfuture (UK) Limited v Secretary of State for Trade and Industry and others** [2001] ICR 1096, a decision of the Employments Appeal Tribunal. I will return to the authorities in due course.

40. On issue (i) Ms Young SC for the Attorney General and the Minister, pointed out that the Minister in his two press conferences had been careful to put forward BBL's position on the factual issues surrounding the receipt of the Venezuelan gift. There was nothing in the language used by the Minister, she contended, that would lead a fair-minded observer to

conclude that he was biased. Ms Young submitted further that there was no evidence that the Minister had directed or participated in the Central Bank's investigation or decision-making process in any way. There were, in any event, sufficient safeguards in place for maintaining the independence and impartiality of the Appeal Board and even if, which was not the case, there was any appearance of partiality or bias in the Appeal Board, this was cured by the right of appeal given by section 77 of the Act.

41. On issue (ii), Ms Young submitted that BBL's appeal, notice of which was given on 25 March 2008, was in time, and that this was unaffected by what was the true construction of sections 35(5) and (6). But even if this were not so, the Chief Justice was correct in interpreting the provisions to mean that the 10 day period for appealing did not begin to run until after the 10 day period within which to make representations to the Central Bank. In other words, sections 35(5) and (6) should be read as providing for two consecutive, rather than concurrent, 10 day periods.

The constitutional provisions

42. The relevant provisions are to be found in sections 6(1) and 6(7) of the Constitution:

> 6(1).- "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.
>
> 6(7)- Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

The relevant provisions of the Act

43. Section 36(1) empowers the Central Bank, where it has reasonable grounds to believe that a regulated entity is conducting its business in a manner "that is detrimental to the interests of its depositors or customers or a violation of this Act, or any regulation, circular, order, directive, notice or condition imposed by the Central Bank" to issue directives to that entity. Section 36(5) and (6) provides as follows:

> "(5) If the Central Bank determines that the acts or course of conduct in question may pose a serious risk to the condition of a licensee, cause a significant financial loss to a licensee or personal gain arising from the foregoing to the person which is the subject of the order or directive, or otherwise seriously prejudice the interest of a licensee's depositors or customers, the Central Bank may issue a summary order or directive which shall take effect promptly on delivery to the subject person affected, who shall be afforded the opportunity to present his views to the Central Bank within ten days after the delivery of the order or directive on whether the order or directive in question should be removed or varied.
>
> (6) Within ten days of the issuance of an order or directive under this section, the person who is the subject of the order or directive may appeal such order or directive to the Appeal Board."

44. Section 70 provides for the appointment of an Appeal Board as follows:

> "70.-(1) The Minister shall cause to be appointed a Banks and Financial Institutions Appeal Board (referred to in this Act as "the

Appeal Board") to hear and determine all appeals in respect of matters which may be referred under this Act to the Appeal Board.

(2) An Appeal Board for the purpose of this Act shall be constituted of:

(a) The Chief Justice or other judge of the Supreme Court nominated by the Chief Justice, who shall be the Chairman of the Board;

(b) two other members appointed by the Minister from among persons who have knowledge of banking, finance or other related disciplines:

Provided that no serving member of the Central Bank or of any other bank or financial institution in Belize shall be appointed a member of the Board."

45. Section 71(e) provides that a person aggrieved by a decision of the Central Bank made under section 36 may appeal against that decision to the Appeal Board and section 72(1) empowers the Appeal Board, with the approval of the Minister, to make rules to regulate the procedure for the hearing of appeals in conformity with the rules of natural justice. Doubts or disputes regarding questions of practice and procedure are to be settled by the Chairman (section 72(2)), and the quorum at any sitting of the Appeal Board is two members, one of which must be the Chairman (section 73). Decisions of the Appeal Board may be taken by a majority of members, provided that the majority must include the Chairman (section 74) and the Appeal Board is empowered to "affirm or set aside the decision appealed against or may make any other decision which the Central Bank will have made" (section 75(1)). Any party aggrieved by a

decision of the Appeal Board may appeal to the Court of Appeal "on the ground that the decision was erroneous on a point of law" (section 77(1)).

Issue (i)

46. The first question is whether the Appeal Board can be said to be an independent and impartial tribunal within the meaning of section 6(7) of the Constitution. As the Chief Justice pointed out in his judgment, "section 6(7) is a linear descendant of the European Convention for the Protection of Human Rights and Fundamental Freedoms", thus enabling us to derive useful guidance where appropriate from decisions of the European Court and Commission on Human Rights in interpreting the not dissimilar provisions of Article 6(1) of the Convention.

47. The Chief Justice accordingly referred to **Findlay v United Kingdom** [1997] 24 EHHR 221, 244 – 245, para. 73, in which the European Court said this:

> "The court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.
>
> As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.
>
> The concepts of independence and objective impartiality are closely linked …"

48. Commenting on this statement in **Porter v Magill** (supra, at page 489), Lord Hope observed that "in both cases the concept requires not only that the tribunal must be truly independent and free from actual bias, but also that it must not appear in the objective sense to lack these essential qualities" (see page 489).

49. At the very outset of his submissions in the appeal, Mr Nelson was careful to state that there was no allegation of actual bias in any of the members of the Appeal Board appointed by the Minister. It is therefore common ground that what falls for consideration in this case are the principles relating to apparent bias. In this regard, both Mr Nelson and Ms Young were content to treat Lord Hope's well known formulation in **Porter v Magill** (at page 494) as the starting point on this question:

> "The question if whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

Independence and impartiality

50. The constitution of the Appeal Board is prescribed by section 70 of the Act, which sets out the qualifications of its members. No question arises as to the appointment of the Chairman, who is the judge of the Supreme Court duly nominated by the Chief Justice, pursuant to section 70(2) of the Act. Neither does any question arise as to whether the other members of the Appeal Board, Messrs Alpuche and Locke, satisfy the statutory criterion of being persons "who have knowledge of banking, finance or other related disciplines" (section 70(2)(b). Mr Alpuche is a former Financial Secretary, while Mr Locke is himself a former member of the staff of the Central Bank. Neither gentleman is currently a serving member of staff of the Central Bank or any other bank or financial institution in Belize.

51. Mr Waight's affidavit provided detailed evidence of how the appointment of Messrs. Alpuche and Locke came to be made and it is quite clear from his account, which has not been challenged, that the Minister had no involvement in their appointment beyond that which was required to fulfil his statutory obligation to "cause to be appointed" the members of the Board.

52. In **Campbell and Fell v United Kingdom** (1985) 7 EHRR 168, The European Court of Human Rights held that the fact that members of a prison board of visitors were appointed by the Home Secretary, who was the person responsible for the administration of prisons in England and Wales, did not establish that they were not independent of the executive: to hold otherwise would mean that judges appointed by or on the advice of a minister having responsibilities in the field of administration of the courts were also not 'independent'. Moreover, although it was true that the Home Office may issue boards with guidelines as to the performance of their functions, they were not subject to its instructions in their adjudicating roles (see paragraph 79). **Campbell and Fell** was recently applied in England in the Administrative Court in **R (on the application of Brooke) v The Parole Board and others** [2007] EWHC 2036, Admin. Court, a case to which we were referred by Ms Young. In that case, Hughes LJ observed (at paragraph 31) that "The appointment by Ministers of judges of differing tribunals and courts…[alone]…need not detract from the independence of the judge when once appointed".

53. In the instant case, as the Chief Justice put it, "the Minister has to make the appointments" (at paragraph 2), and, in my view, that fact by itself does not establish that the persons so appointed will not be independent of the executive. On this point, I have not lost sight of Mr Nelson's submission that the Minister ought in the circumstances of this case to have considered delegation of his statutory powers, pursuant to section 59(1) of the Interpretation Act, but I consider it, with respect, to be wholly

unrealistic. The fact is that the Minister's delegate would be duty bound to act entirely within whatever mandate he was given by the Minister and I doubt very much that resort to such a device could suffice to dispel an appearance of a lack of independence in the resultant appointments, if such existed.

54. As to the term of office of the two other members of the Appeal Board, the unchallenged evidence coming from Mr Waight is that theirs is a permanent appointment to a statutory board. In these circumstances, I am also of the view that the Chief Justice was justified in his conclusion that they would serve "not with an eye to reappointment" (paragraph 31).

55. In considering whether the Appeal Board presented the appearance of independence, the Chief Justice also highlighted the fact that the "decision-making provision of the Appeal Board ensures that the majority … should always include the chairperson, the Judge of the Supreme Court". I accept that in certain circumstances, as Mr Nelson submitted (relying on **In re Medicaments and Related Classes of Goods** (No 2) [2002] 1 WLR 700), the appearance of bias on the part of a single member of a tribunal might have the effect of tainting the independence and impartiality of the entire body. However, it seems to me that, in the absence of any apparent bias on the part of Messrs Alpuche and Locke, the role of the Chairman, defined as it is by the Act itself, is also a factor which must on the face of it conduce to the overall appearance of independence of the Appeal Board.

56. In this regard Ms Young emphasised, and in this I think she was also correct, the fact that it is a judge of the Supreme Court who is by statute the chairman of the Appeal Board. As Baptiste J observed of a similar statutory scheme in the Anguillan case of **Lake et al v Attorney General of Anguilla et al** (Claim No. AHCU 2003/0074, judgment delivered 5 April 2004), "…as Chairman, a judge is both independent and impartial. His

presence provides a safeguard for the independence and impartiality of the Board". The claimants' cross-appeal from Baptiste J's judgment to the Eastern Caribbean Court of Appeal (Civil Appeal No. 4 of 2004, **Attorney General of Anguilla et al v Lake et al**, judgment delivered 4 April 2005) was dismissed, Saunders CJ (Ag) observing (at paragraph 18) that the judge as chairman was a person "about whose institutional independence no one can seriously quarrel".

57. Subject therefore to further consideration of the role of the Minister in respect of appellant's complaint as to the appearance of bias, to which I shall shortly come, I would have thought that there was nothing in the manner of appointment or any of the other relevant factors in relation to the constitution of the Appeal Board to suggest any threat to its independence and impartiality. In my view, therefore, the Chief Justice was correct in his conclusion that the independence and impartiality of the Appeal Board were adequately secured in the instant case.

Appearance of bias – some special factors?

58. In addition to the factors to which reference has already been made, Mr Nelson complained that the Chief Justice failed to have sufficient regard to the evidence which was before him. That evidence showed, he submitted, that the Minister had (i) taken a "strident position" against BBL in relation to the matters leading up to the issuance of the directives, (ii) had 'instigated" the special examination conducted by the Central Bank and had expressed an interest in its outcome, (iii) a "vested interest" in the outcome of the appeal (even if he was not a party to the proceedings before the Appeal Board), taking into account the Minister's press statements, the civil proceedings filed by GOB against BBL to recover the US$10 million and the evidence of the Governor that he had discussed the matter with the Minister.

59. All of these factors, Mr Nelson concluded, would lead the fair minded and informed observer to conclude that there was a real possibility that the Minister's appointees to the Appeal Board would be tainted with bias.

60. It is clear that, as Ms Young accepted, the Minister did indeed desire to have the US$10 million returned to GOB and that to this end he had instructed the commencement of proceedings for restitution against BBL. In the light of GOB's obvious conviction, as articulated by the Minister, not only in his capacity as Minister of Finance, but also as Prime Minister, that the gift of the Government of Venezuela had been misapplied, this is, it seems to me, hardly surprising. To that extent, I would certainly expect the Minister to be interested in the outcome of the proceedings before the Appeal Board.

61. But beyond this, it has not been demonstrated on the evidence that the Minister has displayed such bias towards BBL so as to infect the Appeal Board and thereby taint its members with the appearance of bias. To the contrary, as Ms. Young also pointed out, the Minister on more than one occasion at his press conference not only made it clear that GOB was taking "objective legal opinion" on the matter, but was also careful to state BBL's position as he understood it:

> "The Belize Bank is saying that (both in relation to US $10 million from Taiwan and the US$10 million from Venezuela), the then Government of Belize gave them to understand that these monies were specifically for the repayment of the UHS debt."
>
> "The Belize Bank again says it was not aware of this in the same way it was not aware that the US$10 million by way of the two checks from Taiwan, two cheques made out in the Belize Bank's name from Taiwan, that it was nor aware that the monies were in

fact for the purpose of healthcare and not specifically for the payment to them towards the UHS debt".

"I don't know that the Belize Bank was privy to the correspondence moving back and forth between the then Prime Minister and the Ambassador of Taiwan so as to have known that in fact, the Taiwanese Government was not gifting the Belize Government this US$10 million for the repayment of the UHS loan, and for use generally in solving the needs of the healthcare system of the country."

"…there is a cover note to [the Taiwan] cheques in which Mr. Johnson makes it quite clear to Mike Coye and Andrew Ashcroft that he has been informed that this money is to assist with the restructuring and reduction of Government of Belize's obligation under the UHS guarantee. So it appears that certain was his understanding and I don't have anything to suggest that the Government ever made him any wiser."

62. At his second press conference, the Minister also said this:

"I've indicated to the Belize Bank that I wish to put them on notice, that the Government will also be taking legal advice as to whether they are not obliged to credit that money (return that money if you will), to the Government for the people of this country (applause). I must say that, as far as I can understand, the Bank has been cooperating up to this point in time, and, ah – I don't know if he is the Director of the Bank, but certainly, Mr. Phillip Johnson, with whom I met this morning, has indicated that he will take that position to his principals, that I am putting them on notice that (and I put it no higher than this), we will be seeking legal advice as to whether they are not liable for the return of the US$10 million."

63. In my view, none of the above suggests bias on the part of the Minister in respect of BBL. Although it is clear that GOB had a clear position on the matter, which the Minister articulated without equivocation, it also seems equally clear that, in relation to BBL at any rate, he did not go beyond that. There is certainly nothing in this, it seems to me, which would lead a fair minded and informed observer, having considered the facts, to the view that, by virtue of the Minister's (and GOB's) public stance on the matter, there was a real possibility that the members of the Appeal Board would be biased against BBL.

64. BBL does not challenge the Chief Justice's conclusion that the Minister is not a party to any appeal that may come before the Appeal Board. And, beyond its assertion that the Minister instigated the Central Bank's investigation, no basis has been shown on appeal, in my view, to disturb the Chief Justice's acceptance of the Governor's account of the circumstances leading up to the decision to conduct that investigation. That account, it seems to me, is entirely consistent with the Central Bank's responsibilities under the Act and I would also agree with the Chief Justice's finding that he was "unable to conclude from this account that it was the Minister of Finance who orchestrated (the) investigation that resulted in the directives…".

65. I cannot leave this aspect of the matter without mentioning the **Scanfuture** case, which was the high water mark of Mr Nelson's submissions. That was a case in which the Secretary of State, who was a party to the proceedings, played a substantial role in the appointment of two of the three members of an employment tribunal, in fixing the length of their appointment, which at that time was for an unusually short term, in their possible reappointment and renewal and in their remuneration. It was held by the Employment Appeal Tribunal that in these circumstances a fair-minded and informed observer would have harboured an objectively justifiable fear that the tribunal lacked impartiality and independence within

the meaning of article 6. Further, although the presence of an appellate body with the ability to control an impugned tribunal could negate a breach of article 6, the Employment Appeal Tribunal did not have the necessary full jurisdiction in relation to employment tribunals and there had accordingly been a breach of article 6.

66. **Scanfuture** is, in my view, clearly distinguishable on its facts. In the first place, the Secretary of State was treated as a party to the proceedings before the tribunal (which BBL accepts that the Minister is not in the instant case) and, secondly, there were several unsatisfactory features relating to the manner and terms of appointment of the members which are also absent from the instant case.

The right of appeal from the Appeal Board

67. But the Chief Justice also considered that the right of appeal from decisions of the Appeal Board provided for in section 77(2) of the Act "help ensure [that] the procedure and decisions of that Appeal Board are compliant with section 6(1) and (7) of the Belize Constitution" (paragraph 33), citing in support of this conclusion **Runa Begum** (supra),

68. Mr Nelson submitted that the Chief Justice was "misdirected" in this conclusion. As I understood the argument, Mr Nelson's point was that the principle to be derived from **Runa Begum** (and the earlier decision of the Court of Appeal in **Adan v Newham London Borough Council** [2002] 1 WLR 2120) relates to bodies engaged in "administrative actions." In such cases, the fact that a decision making tribunal does not possess the necessary independence may nevertheless be cured if its decisions are subject to judicial control by a court "with jurisdiction to deal with the case as the nature of the decision requires" (per Lord Hoffman in **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions** [2003] 2 AC 293, 330, paragraph 87). In the

instant case, the Appeal Board would not be engaged in merely "administrative actions", thus a lack of independence cannot be cured by an appellate court, even one with full jurisdiction.

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69. In **Runa Begum** it was held by the House of Lords that (applying the earlier decisions of the European Court in **Bryan v United Kingdom** (1995) 21 EHHR 342 and **Kingsley v United Kingdom** (2002) 35 EHRR 177), having regard to the scope of article 6(1) as extended to administrative decisions which were determinative of civil rights, such a decision might properly be made by a tribunal which did not itself possess the necessary independence to satisfy the requirements of article 6(1) so long as measures were in place to safeguard the fairness of the proceedings and the decision was subject to ultimate judicial control by a court with jurisdiction to deal with the case as its nature required.

70. It is a fact that **Runa Begum** was concerned, as the above statement of what it decided taken from the headnote puts it, with "administrative decisions which were determinative of civil rights." The history of the development of this matter in convention jurisprudence is, as the judgment of Lord Hoffman demonstrates, important. The phrase 'civil rights and obligations' in article 6(1) was originally intended to cover only those rights and obligations which, in continental European systems of law, were adjudicated upon by the civil courts:

> "These were, essentially, rights and obligations in private law. The term was not intended to cover administrative decisions which were conventionally subject to review (if at all) by administrative courts. It was not that the draftsmen of the Convention did not think it desirable that administrative decisions should be subject to the rule of law. But administrative decision-making raised special problems which meant that it could not be lumped in with the adjudication of private law rights and made subject to the same judicial

requirements of independence, publicity and so forth. So the judicial control of administrative action was left for future consideration" (per Lord Hoffman, at paragraph 28).

71. But while there has been no addition to the Convention to deal with administrative decisions, the European Court ("the Strasbourg court") has itself developed the law, firstly, "by treating 'civil rights and obligations' as an autonomous concept, not dependent upon the domestic law classification of the right or obligation which a citizen should have access to a court to determine" (per Lord Hoffman in **Runa Begum**, paragraph 29). Secondly, article 6 has been extended by judicial decision "to cover a wide range of administrative decision-making …" (paragraph 30). The result of all of this is in the Strasbourg jurisprudence was summarised by Lord Hoffman in this way (at paragraph 33):

> "The Strasbourg court, however, has preferred to approach the matter in a different way. It has said, first, that an administrative decision within the extended scope of article 6 is a determination of civil rights and obligations and therefore prima facie has to be made by an independent tribunal. But, secondly, if the administrator is not independent (as will virtually by definition be the case) it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient. Thirdly, it will be sufficient if the appellate (or reviewing) court has 'full jurisdiction' over the administrative decision. And 'fourthly, as established in the landmark case of Bryan v United Kingdom (1995) 21 EHRR 342, 'full jurisdiction' does not necessarily mean jurisdiction to re-examine the merits of the case but, as I said in the Alconbury case [2003] 2 AC 295, 330, para 87, 'jurisdiction to deal with the case as the nature of the decision requires'".

72. Despite the historical significance of appellate procedures as a critical backstop to independence and impartiality in relation to administrative decisions which were determinative of civil rights, I have, however, seen no basis to think that the efficacy of appellate procedures cannot play a similar role in relation to quasi-judicial bodies, such as the Appeal Board. In **Bryan v United Kingdom** (supra), for instance, the landmark decision of the Strasbourg court which was applied in **Runa Begum**, the principle is stated in the headnote in general terms:

> "Even where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6(1) in some respect, there is no violation of the Convention if the proceedings before that body are subject to control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1).

(see also **Kingsley v United Kingdom** (supra) and **Porter v Magill**, per Lord Hope at paragraph 93).

73. It therefore seems to me that, to the extent that the Appeal Board, which is a body falling outside of the established "judicial branch of government" (per Lord Hoffman in **Runa Begum** at paragraph 42), nevertheless exercises quasi-judicial powers, it is possible for suitable appellate procedures to compensate for any perceived lack of independence or impartiality.

74. For the Court of Appeal to have 'full jurisdiction' for these purposes, it need not necessarily have full jurisdiction on fact or law, so long as it has "jurisdiction to deal with the case as the nature of the decision requires" (per Lord Hoffman in **Alconbury**, supra, paragraph 87; see also per Lord Millett in **Runa Begum**, at para. 101).

75. Under the Act, the Court of Appeal on an appeal from the Appeal Board "may affirm or set aside the decision appealed against and may remit the matter to the Appeal Board for rehearing and determination by it" (section 77(2)). With regard to the scope of an appeal on a point of law only, the leading authority is still **Edwards v Bairstow** [1956] AC 14, the effect of which was summarised by Lord Millett in **Runa Begum** as follows (at paragraph 99):

> "A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error or law; if the decision cannot be supported the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law. The court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-making authority and not the court. But these are the only significant limitations on the court's jurisdiction, and they are not very different from the limitations which practical considerations impose on an appellate court with full jurisdiction to entertain appeals on fact or law but which deals with them on the papers only and without hearing oral evidence."

76. I would accordingly conclude that the powers of the Court of Appeal on an appeal from the Appeal Board are sufficiently generous in scope to satisfy the requirement of jurisdiction sufficient to deal with the case as the nature of the decision may require. I would also conclude that the Chief Justice was correct to treat the availability of an appeal as an additional factor strengthening the independence and impartiality of the Appeal Board.

Issue (ii)

77. The Chief Justice discerned an ambiguity in subsections (5) and (6) of section 36, when read together. On the one hand subsection (5) allows 10 days after delivery of the Central Bank's directive or order within which the bank or financial institution may make representations, while subsection (6) permits an appeal, again within 10 days of issuance of the directive or order. He resolved it in this way (paragraph 46):

> "I think it is only logical that it is after the representation stage to the Central Bank in subsection (5) that the appeal process, if any, could be engaged. Surely the appeal may be otiose if the subject person gets satisfaction at the representation stage."

78. While I have great sympathy for the Chief Justice's approach, which certainly has logic on its side, I can also see the force of Mr Nelson's complaint that that interpretation does do some violence to the clear words of section 36(6). Given that the time limits specified in the two subsections appear on their face to run concurrently, and not consecutively (as the Chief Justice held and as Ms Young also submitted that they do), it may well be that the prudent thing for a bank or financial institution, in respect of which a directive has been issued, to do is to give notice of appeal within 10 days, while at the same time pursuing the matter by way of representations under subsection (5). I also accept, however, that this approach may result in considerable duplication of effort and waste of resources. Whatever is the true view, it is certainly a matter that cries out for clarification by the legislature.

79. But what BBL did in this case was to act in accordance with its interpretation of section 35(6) by sending notice of appeal to the Chief Justice, in his capacity as the chairman of the Appeal Board, on 25 March 2008. This notice has subsequently been treated by BBL as ineffective,

on the ground that the Appeal Board had not been constituted as at that date. Notwithstanding the fact that the Appeal Board was in fact fully constituted a week later (on 3 April 2008), that BBL on 23 May 2008, at the Appeal Board's invitation, filed its appeal anew with the Appeal Board and that the Central Bank has offered no objection whatsoever to any of this (and has indeed participated in the process by lodging a full response to BBL's appeal with the Appeal Board), BBL nevertheless maintains that the fact that there was no duly constituted Appeal Board in existence on 14 March 2008 means that it had no effective right of appeal and that its right to equal protection of the law under section 6(1) of the Constitution has been breached.

80. The Chief Justice's comment on all of this was as follows:

> "I however listened with great care to the argument and submissions advanced on behalf of the Belize Bank on this aspect of the case. I must confess that I was left with some bewilderment. Rare indeed it must be to come across a litigant who will volubly cavil at an extension of time granted him by the body which is to review his complaint against a decision with which he is dissatisfied. But in the life of the law, strange things do happen. For this in effect, in my respectful view, is the position of the Belize Bank on the question of the application and effect of section 36(5) and (6) of the Act."

67. I share the Chief Justice's bewilderment. In the first place, it is not clear to me (and no authority was cited in support) why, in the absence of any point being taken by anyone about this, BBL's 25 March 2008 notice of appeal should be treated as completely ineffective on the basis that the members of the Appeal Board had not been appointed as at that date. But even if Mr Nelson is correct in this, I entirely agree with the Chief Justice's conclusion that there is "nothing objectionable in the Appeal

Board extending the time for the Belize Bank to lodge its appeal with it, after its constitution on 1st April 2008" (paragraph 46). In my view, even if the Act is to be construed as imposing the inflexible procedural regime for which BBL contends, the effect of non-compliance must surely be a matter for the Appeal Board to consider. In this regard, the observations of Lord Woolf MR in **R v Secretary of State for the Home Department, Ex parte Jeyeanthan** [2000] 1 WLR 354, 359, to which we were referred by Ms Young, strike me as entirely apposite:

> "Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances".

68. In this case, the Appeal Board has determined, without objection from the Central Bank, that, despite some obvious missteps in the process, the appeal can proceed and BBL has not, in my view, demonstrated that it has suffered any prejudice whatsoever as a result of, if I may say so, the very sensible approach taken by the Appeal Board. In **Ex parte Jeyeanthan**, Lord Woolf also made the point (at page 359) that "procedural requirements are designed to further the interests of justice". I am bound to say that I am quite unable to see how those interests could possibly be served in this case by BBL's unilateral insistence that, to borrow Ms

Young's telling phrase, it be "disenfranchised from its right of appeal" by a failure to comply with such a requirement.

Conclusion

69. For all of these reasons, I would therefore dismiss this appeal and affirm the judgment of the Chief Justice. The first, second, third, fourth and fifth respondents are to have their costs of the appeal, to be taxed, if not agreed.

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MORRISON JA