IN THE SUPREME COURT OF BELIZE A.D. 2009

CLAIM NO. 942 OF 2009

BETWEEN:

BRITISH CARIBBEAN BANK LIMITED

Applicant/Claimant

And

BELIZE TELEMEDIA LIMITED

Respondent/Defendant

CLAIM NO. 986 of 2009

BETWEEN:

BELIZE TELEMEDIA LIMITED Claimant

And

BRITISH CARIBBEAN BANK LIMITED Defendant

Before: Hon. Justice Sir John Muria

10 March 2010

Counsel

Mrs. A. Arthurs-Martin for the British Caribbean Bank Limited
Ms Lois Young SC for Belize Telemedia Limited

J U D G M E N T

CLAIM – discontinuance of claim – CPR, Rule 37.6 – general rule on payment of costs – whether good reason to depart from general rule –

burden on claimant – test to be applied – whether claimant should be relieved from payment of costs – basis for claimant's claim removed by operation of law even before commencement of proceedings – no change in the legal position – claimant knew or ought to have known – no good reason and no justification for departing from general rule

MURIA J: The applicant/claimant, British Caribbean Bank Limited, whom I shall call "the Bank" in Claim No. 942 of 2009, having filed Notice of Discontinuance of its claim, now applies for an order that it be relieved from the liability to pay costs occasioned by the discontinuance of its claim against the respondent/defendant, Belize Telemedia Limited, whom I shall call "Belize Telemedia". The order now sought is among the relief sought in the Bank's Notice of Application dated 16th February, 2010 and filed on the same date.

The respondent/defendant Belize Telemedia objected to the Bank's application and seeks an order that the Bank pays Belize Telemedia's costs occasioned by the discontinuance. Belize Telemedia's application seeking costs against the Bank is contained in the Notice of Application filed by Belize Telemedia as applicant/claimant in Claim No. 986 of 2009 with the Bank as respondent/defendant in that claim. The two claims are consolidated.

In view of the fact that the parties have argued and made submissions on the issue of costs relating to the discontinuance of claim No. 942 of 2009, the court will now consider the issue of costs jointly raised and argued in the two consolidated claim. Two other orders sought in the applications, namely an order for interim injunction and striking out between the same parties will be dealt with later.

In support of her application on behalf of the Bank to be relieved from payment of costs, Mrs. Arthurs-Martin relied on Rule 37.6 of the ***Supreme Court (Civil Procedure) Rules, 2005*** which provides:

> "37.6 (1) Unless –
>
> (a) the parties agree; or
>
> (b) the court orders otherwise,
>
> a claimant who discontinues is liable for the costs incurred by the defendant against whom the claim is discontinued incurred on or before the date on which notice of discontinuance was served."

Counsel also relied on the first affidavit of Philip Johnson, a director and shareholder of the Bank. The affidavit of Mr. Johnson was filed to support the Bank's application to discharge the ex-parte injunction granted by the

Court on 14th December, 2009 and continued by an order dated 11th January, 2010, and to strike out the Telemedia's Claim No. 986 of 2009. Counsel for the Bank, however, seeks to support the Bank's application to be relieved of paying the costs occasioned by its discontinuance of its Claim No. 942 of 2009 by referring to a number of factors deposed to by Mr. Johnson in his affidavit.

Principally, Mrs. Arthurs-Martin referred to the two Statutory Instruments made by the Minister responsible for Telecommunications, namely, ***Statutory Instrument No. 104 of 2009*** made on 25 August 2009 and ***Statutory Instrument No. 130 of 2009*** made on 4 December 2009. These Statutory Instruments, made pursuant to the ***Belize Telecommunications (Amendment) Act No 9 of 2009***, clearly established that the Government of Belize acquired "all proprietary and other rights and interest whatsoever" held by the Bank in Belize Telemedia under the Mortgage Debenture, as well as under the Facility Agreement.

The former Statutory Instrument provides, inter alia, as follows:

> "All proprietary and other interest held by

THE BELIZE BANK (Turks and Caicos) Limited
in Belize Telemedia Limited and its subsidiaries under a Mortgage Debenture dated 31st December, 2007 (including any amendments thereto) executed between Belize Telemedia Limited as the Mortgagor and The Belize Bank (Turks and Caicos) Limited as the Mortgagee, and registered in the Companies and Corporate Affairs Registry, Belmopan, on or about the 8th February 2008.

The latter Statutory Instrument, which was made to avoid any doubt as to the scope of property of the Bank acquired by the Government of Belize, provides, inter alia, as follows:

> "All proprietary and other rights and interests whatsoever held by **The Belize Bank (Turks and Caicos) Limited (**renamed British Caribbean Bank Limited), under a Facility Agreement dated the 6th July, 2007 executed between The Belize Bank (Turks and Caicos) Limited and Belize Telemedia Limited et al;
>
> All proprietary and other rights and interests whatsoever held by The Belize Bank (Turks and Caicos) Limited (renamed British Caribbean Bank Limited), The Belize Bank Limited and CAEDMAN Limited under a Syndicated loan Agreement dated September 19, 2005 executed between The Belize Bank

(Turks and Caicos) Limited, The Belize Bank Limited, CAEDMAN Limited and Sunshine Holdings Limited;

All proprietary and other rights and interests whatsoever held by The Belize Bank (Turks and Caicos) Limited (renamed British Caribbean Bank Limited), under a Security Agreement dated September 19, 2005 executed between The Belize Bank (Turks and Caicos) Limited and Sunshine Holdings Limited;

All proprietary and other rights and interests whatsoever held by The Belize Bank (Turks and Caicos) Limited (renamed British Caribbean Bank Limited), under a Facility Agreement dated the 19th May 2006 executed between The Belize bank (Turks and Caicos) Limited, Sunshine Holdings Limited and the Trustees of the Belize Telecommunications Ltd Employees Trust."

Between the passage of the Amendment Act (No. 9 of 2009) and certainly, between the making of the two Statutory Instruments, and commencement of Claim No. 942 of 2009, series of correspondence and communication had been flowing between the Bank, Belize Telemedia and Government of Belize as shown by the first affidavit of Mr. Johnson and Fourth affidavit of Nestor Vasquez. These include letters, meetings and discussions with Board of Belize Telemedia and the Prime Minister.

Subsequently, the government's position on the matter was succinctly put by the Hon. Prime Minister on 25th November, 2009 in an interview on KREM Radio, *Wake Up Belize* show. This is set out in paragraph 36(b) of Mr. Johnson's first affidavit where it stated:

> "*The Government acquired the debt* [i.e. the debt owed to the Bank] *In the sense of acquiring the rights of the creditor* [the Bank's rights]. *The government did not assume the obligation of the debtor… what the government has done is to step into the shoes of the creditor not the debtor. The government has taken away from the creditor the creditor's right to go against the debtor."* (transcript, page 1).

On the facts as revealed by both, the affidavits of Mr. Johnson and Mr. Vasquez, there is one fact that rings clear in the Court's mind, namely, that following the passage of the Amendment Act No. 9 of 2009 and Statutory Instrument No. 104 of 2009, the Government of Belize had taken over "all proprietary and other interest" held by the Bank in Belize Telemedia. That include all rights and interest of the Bank as Mortgagee under the Mortgage Debenture executed between the Belize Telemedia and the Bank.

Paragraph 14 of Mr. Johnson's first affidavit, shows that as far back as October 2009, the Bank acknowledged the difficulty it faced in enforcing its security against Belize Telemedia, since "the assets over which security had been taken were compulsorily acquired by the government pursuant the order." That order is the one made on 25 August 2009.

I feel even more notable, is the fact that the Bank acknowledged its position, as well as that of the Government of Belize, on the effect of Part II of the Schedule to the Statutory Instrument No. 104 of 2009 when its Attorneys-At-Law wrote to the Government, on 15th October 2009 in a letter addressed to Mr. Joseph Waight, Financial Secretary in the Ministry of Finance claiming compensation "in respect of the compulsory acquisition of the Mortgage Debenture, the shares and the Sunshine Shares." That was more than one month before the Bank filed its Claim No. 942 of 2009. Interestingly, the letter dated 15th October, 2009 from the Bank's Attorney's is not referred to in Mr. Johnson's first affidavit.

It is, therefore, plain to the Court, on any construction of Part II of the Order under Statutory Instrument. No. 104 of 2009 that, as from 25th August 2009

only the Government of Belize, having taken over as Mortgagee can insist on repayment of the loan by the Mortgagor, Belize Telemedia, pursuant to the "*Covenant to Pay*" provision in the Mortgage Debenture. Any default by the mortgagor as of 25th August, 2009, is no longer in the hands of the Bank to enforce. That is now in the hands of the Government of Belize to deal with.

Thus, I accept the submission by Ms Lois Young SC, and supported by the fourth affidavit of Mr. Vasquez, in particular paragraphs 13 and 14, that the Bank knew even before it filed its claim the legal obstacles standing in its way, in successfully prosecuting its claim.

Faced with the factual situation as described above, Counsel for the Bank sought to rely on the Statutory Instrument No. 130 of 2009, to the effect that it was the passage of the Order under that Statutory Instrument that forced the Bank to decide to discontinue its claim No. 942 of 2009 since the Order acquired "the Bank's rights in the Facility and Mortgage" and so removing its *locus standi* to maintain its claim against Belize Telemedia. There are three reasons why that argument cannot stand.

First, the Bank has all along been legally advised, and I have no reason to doubt that the ***Statutory Instrument No. 104 of 2009***, and its effect had been put to the Bank. Secondly, on 15th October 2009 before it filed its claim 942 of 2009, the Bank through its legal advisors, acknowledged that its rights and interest in the Mortgage Debenture had been compulsorily acquired by the Government of Belize, and thirdly, it smacks of "*the austerity of tabulated legalism*" (the term used by Lord Wilberforce in ***Minister for Home Affairs v Fisher*** [1980] AC 319), for the Bank to say that it was the Amendment Order (***Statutory Instrument 130 of 2009***) which clarified the scope of the property acquired and therefore had the effect of nullifying the Bank's Claim against Belize Telemedia, when it had in fact acknowledged that its rights and interest in Mortgage Debenture had been compulsorily acquired by the Government of Belize. The Facility Letter of Agreement and Mortgage Debenture stand and fall together in view of the Statutory Instrument No. 104 of 2009. The Statutory Instrument No. 130 of 2009 simply puts matters beyond doubt.

Again, the Bank's position secured by the loan Facility was depended on the undertakings by Belize Telemedia and covenants in the Mortgage Debenture. The Mortgage Debenture having been compulsorily acquired by

the Government of Belize, it would seem to me to be an unmeritorious exercise on the part of the Bank to ground any claim for debt owing against Belize Telemedia based on the Mortgage Debenture or the Facility Letter. That path, in my respectful view, is no longer feasible for the Bank to travel along while the laws recently passed and made are still in force.

I have gone through these scenarios of factual occurrences to show that the Bank knew before it issued its Claim 942 of 2009, the legal hurdles it faced in its claim in respect of the loan secured by the Mortgage Debenture. This is a similar position faced by the liquidators in ***Walker V Walker*** [2005] EWCA Civ 247, the case relied on by Mrs. Arthurs-Martin, and in ***RBG Resources Plc (In liquidation) v Rastogi*** [2005] All ER (D) 360 (May); [2005] EWHC 994 (Ch) .

In ***Walker – v – Walker*** the claim was for compensation in excess of £200,000 with allegations of fraud against the defendant. The case was complex and had become protracted. Both parties had incurred costs well over £100,000. Mrs. Walker committed suicide and the liquidator continued the claim against Mr. Walker whose assets were unlikely to meet his own costs as well as those of the claimant if the matter continued to trial,

something which the claimant knew from the beginning. The claimant sought to discontinue with no order as to costs. The Court of Appeal found that the claimant was aware since the commencement of his claim that the claim was likely to be commercially not worth pursuing. That position of the parties had not changed up to the time the claimant decided to discontinue his claim. The liquidator knew all along the value of the assets of Mr. and Mrs. Walker.

The Court of Appeal found no good reason for departing from the general rule and ordered the liquidator to pay costs of the defendant for discontinuing the claim against him pursuant to Rule 38.6 (English Rules). Lord Justice Chadwick had this to say at paragraphs 36 of his judgment:

> "Plainly, under the new rule, the court has to be persuaded that it is just to depart from the normal rule. The rule recognizes that justice will normally lead to the conclusion that a defendant who defends himself at substantial expense against a plaintiff who changes his mind in the middle of the action for no good reason – other than that he has re-evaluated the factors that have remained unchanged – should be compensated for his costs."

The case of ***Walker–v–Walker*** has been subsequently followed in a number of cases, two of which are ***RBG Resources Plc (In liquidation) v Rastogi*** (above) and ***Far Out Production Inc – v – Unilever UK & CN Holdings Ltd*** [2009] EWHC 3484 (Ch) (16 December 2009). The cases show that the burden is on the claimant to show good reason for departing from the general rule under Rule 38.6 (English Rules), the equivalent to our Rule 37.6.

In addition, the salutary caution stated by Lord Justice Chadwick in ***Walker – V- Walker*** must be noted, namely that it cannot be a good reason for departing from the general rule under Civil Procedure Rule 38.6 (equivalent to our Civil Procedure Rule 37.6) merely because the plaintiff has become alive at a late stage to the commercial effect of factors which have been there from the outset and, which if properly evaluated could have led to a decision that the proceedings were not worth pursuing.

Two other cases referred to by Counsel for bank are ***Amoco (UK) Exploration Company et al – V – British America Offshore Limited*** [2000] EWHC 212 (Comm) and ***Dover Harbour Board – v- ISS and Others*** [2007] EWHC 2015 (TCC). Both cases are also concerned with the application of

CPR 38.6 (English Rules), the equivalent to our ***CPR 37.6***. In the former case, the factual situations are quite different from the present case. The Claimant was allowed to discontinuing the claim with no objection from the other parties. ***Amoco*** succeeded against the other defendant. So on order for costs for discontinuance was made. In ***Dover Harbour Board***, this claim had been discontinued with no order as to costs. The Claimant had substantially settled its claim against two of the three defendants for conspiracy to defraud. The case against Mr. Dobson (one of the defendants) was a strong case, and the Claimant would have succeeded if it proceeded against Mr. Dobson. However, the Claimant opted not to proceed against Mr. Dobson because, if (the Claimant) had already recovered substantial sum through the settlement with the other defendants, and secondly, Mr. Dobson had very little financial means to meet any order, including costs, if the Claimant succeeded at the trial.

In the present case, even before 20th November, 2009 the Bank knew or ought to have known that its rights and interest in Mortgage Debenture (the foundation of its claim) have been compulsory acquired from it by law. That fact has not changed, even up to the time the Bank decided to discontinue the claim.

I accept the submission by Ms. Lois Young SC that one of the consequences of the Bank's insistence on its claim is that Belize Telemedia had to prepare its defence and had done so. The costs put into the preparation of that defence, must surely be compensated as well.

On the question whether there is good reason to depart from the general rule in CPR 37.6, I am firmly of the view that, on the facts of this case and for the reasons stated above, there is no such good reason shown to justify departing from the general rule. It would, in my view also, be unjust to leave the defendant to bear its own costs of these proceedings simply because the Bank has decided late in the day to discontinue its claim, a decision which it should have taken at the time it commenced these proceedings on 20th November, 2009.

For the reasons given, the usual order under Rule 37.6 requiring the Bank to pay Belize Telemedia's costs occasioned by the discontinuance of its claim must be made.

The claimant is to pay the defendant's prescribed costs up to the date of the notice of discontinuance of its Claim No. 942 of 2009.

Order accordingly

Hon. Justice Sir John Muria
Justice of Supreme Court

Courtenay Coye LLP, Attorneys-at-Law for the Applicant/Claimant Bank
Mesdames Lois Young-Barrow & Co., Attorneys-at-Law for the Respondent/Defendant Belize Telemedia