

IN THE SUPREME COURT OF BELIZE, A.D. 2011

CLAIM NO. 145 of 2011

**BETWEEN**

**BELIZE TELEMEDIA LIMITED**

**Claimant**

**AND**

<b>1. KEITH ARNOLD</b>	<b>First Defendant</b>
<b>2. PHILIP ZUNIGA</b>	<b>Second Defendant</b>
<b>3. SHIRE HOLDINGS LIMITED</b>	<b>Third Defendant</b>
<b>4. ROCKY REEF VENTURES LIMITED</b>	<b>Fourth Defendant</b>
<b>5. IBIS INVESTMENTS LIMITED</b>	<b>Fifth Defendant</b>
<b>6. SCARLET VENTURES LIMITED</b>	<b>Sixth Defendant</b>
<b>7. SEASCAPE HOLDINGS LIMITED</b>	<b>Seventh Defendant</b>
<b>8. CHANNEL OVERSEAS INVESTMENTS LIMITED</b>	<b>Eighth Defendant</b>
<b>9. THAMES VENTURES LIMITED</b>	<b>Ninth Defendant</b>
<b>10. GREAT BELIZE PRODUCTIONS LIMITED</b>	<b>Tenth Defendant</b>
<b>11. KATALYST DEVELOPMENTS LIMITED</b>	<b>Eleventh Defendant</b>

**AND**

**THE BELIZE BANK LIMITED**

**Interested Party**

Mr. Michael Young SC and Mrs. Pamela Watson for the claimant/applicant.

Mr. Godfrey Smith SC and Mr. Jose Alpuche, for the eighth, ninth, tenth and eleventh defendants/respondents.

Mrs. Magali Marin Young for the Interested Party.

**AWICH      Chief Justice (Ag)**

16.6.2011

**DECISION**

1. *Notes:*                      *Civil Procedure and practice; an application for extension of interim injunction order granted on an application without notice; interim injunction order is granted only when it is just and convenient – s:27 of Supreme Court of Judicature Act and R.17.1; the usual approach is to first*

*determine whether there is a serious question to go to trial; if so, then whether loss would be adequately compensated for with payment of money and the respondent will be able to pay; if so, then generally interim injunction is not granted; the mortgage interest of a third party in properties the subjects of the application for injunction; no general rule that an interim injunction order will not be made where there is interest of a third party, but an interim injunction order must not substantially affect the right of a mortgagee.*

2. This is the second written interlocutory decision in this claim. There will certainly be a third; there are on the case file, two other applications for orders to strike out the claim. A tendency by the more experienced attorneys has recently developed to bring up several interlocutory applications in large cases. The result has been in most cases, to prolong the time for bringing the cases to conclusion. It is advisable to balance the need for an interlocutory application with the time that will be lost in the event the application is not successful, and incidental costs.
  
3. This decision is in the application dated 27.4. 2011, for an order continuing three interim injunctions ordered in an interim order of this court made on 30.3.2011, on an application by Belize Telemedia Limited – BTL. The application was made without notice to the ten defendants, the last four of them are respondents in the present application. The application is now being made on notice under R. 17.1(1)(a) of the Supreme Court (Civil Procedure) Rules, 2005. The interim injunctions granted and sought to be continued were:

(i) an injunction restraining Channel Overseas Investments Limited and Thames Ventures Limited from transferring, charging, pledging or otherwise dealing with their shares in Great Belize Productions Limited or their legal or equitable interest in those shares until the trial of the claims herein or further order of the Court;

(ii) an injunction restraining Katalyst Developments Limited from transferring, charging, pledging or otherwise dealing with its shares in Channel Overseas Investments Limited and Thames Ventures Limited or its legal or equitable interest in those shares until the trial of the claims herein or further order of the Court;

and

(iii) an injunction restraining the tenth defendant, Great Belize Productions Limited, from approving and/or registering any transfer of shares held in the company until the trial and complete determination of this claim or further order of the Court.

4. The application also asks for, “costs of the application, and such further or other orders or directions as the court deems fit and just.”

5. ***The Facts***

On 25.8.2009 and 14.12.2009, the Government of Belize compulsorily acquired shares in BTL, and its board of directors changed. On 11.3.2011, BTL filed a claim against the eleven defendants cited above, two of whom are natural persons, the rest are corporate persons. The claim was amended, the amended claim was filed on 14.4.2011. Some of the defendants were directors of BTL before 25.8.2009, when its shares were compulsorily acquired and its management changed. Other defendants were corporations in the same group of companies, and some have shares in one another.

6. The claim of BTL is that while the defendants who were directors of BTL were the board, they took several wrongful decisions and carried out several wrongful actions in the period June 2008 and September 2009, particularly on 23<sup>rd</sup> of August, 2009, in regard to money and other assets, and businesses of BTL, which caused losses to BTL. It claimed that some of the decisions and actions were wrongful because they were in regard to matters outside the company objects of BTL, and not for its purpose, some were in breach of fiduciary duty of a director or directors, and others were in breach of the general duty of care in negligence. Affidavits filed seem to suggest also that some of the decisions were fraudulent. I need not decide for the purpose of this application, whether or not that suggestion is clearly one of the grounds of the claim.

7. The defendants who were not directors were joined on the grounds that they participated in the wrongful acts, and some of them wrongfully benefited from the wrongful acts.

8. The Belize Bank Limited was joined as an interested party by an order of this court made on 20.5.2011, on the Belize Bank's own application. The four respondents supported the application. BTL did not oppose it. The Belize Bank said that it entered into several loan agreements with Great Belize Productions Limited, the tenth defendant, and has secured the loans with a mortgage charge to assets of Great Belize Productions Ltd.

9. ***Submissions by Counsel***

In his submission, learned counsel Mr. Young SC, for BTL informed court that, he had informed counsel for the four respondents that if they offered undertaking not to deal with shares in Great Belize Productions Ltd. and with its other assets, BTL would accept the undertaking and would not pursue the application. Mr. Young further informed the court that, he had informed counsel for the Belize Bank that BTL did not include the bank in the application, and did not wish to enjoin the bank to do or refrain from doing anything in regard to its right under the mortgage security it held over assets of Great Belize Productions Ltd.

10. There was no immediate response in court to the information given by Mr. Young from learned counsel Mr. Godfrey Smith SC, for the four

respondents, and from learned counsel, Mrs. Magali Young, for the Belize Bank.

11. During submission by Mr. Smith I inquired as to whether it was intended by the four respondents to pledge, transfer or otherwise deal with shares in Great Belize Productions Ltd., and whether the company intended to register any such transfer of the shares; and further, whether it was intended to deal with land, Parcel 2882, Block 16, Caribbean Shores Registration section, Belize, an asset referred to in affidavits and in submissions, and which has been charged with loan sums.
12. Mr. Smith responded that it was not intended to deal with the shares and property, but added that Great Belize Productions Ltd. was bound under the loan agreements and mortgage charge and could not deal with the shares and property; and that counsel had no instruction to give an undertaking.
13. It appeared to me from the response that it was not intended to deal with the shares and property, that the way to save costs and advance the case quicker to trial was to give the undertaking. I still hold that view, however, undertaking cannot be forced on a party in these circumstances.
14. In their submissions counsel for the applicant argued that: there was need to preserve the status quo, their claim was a strong claim with

very good prospects of success; the claim was not just about money, in the alternative, Great Belize Productions Ltd. by its own affidavit, would not be able to pay the sums claimed as damages; and overall, the circumstances showed that it would be just and convenient to grant and continue the interim injunctions until determination of the claim or until further order of the court.

15. On the other hand, Mr. Smith submitted that: the evidence did not prove any risk that the shares in Great Belize Productions Ltd. will be transferred if the injunctions were not continued; the claim of BTL against the respondents did not present an arguable question with prospects of success; an award of damages would be adequate remedy were the claim to succeed, there will be no irremediable prejudice to BTL; and delay to bring the application should defeat the application.
  
16. Mrs. Young submitted that the interim injunction order made on 30.3.2011, had already caused Great Belize Productions Ltd. to breach a term of the loan agreements and the mortgage deed; and grant of an order for continuation of the injunctions would continue breach of the loan agreements and the mortgage deed. She argued that the Belize Bank had already suffered prejudice because it was unable to exercise its right of a mortgagee, it could not cause any sale and transfer of shares in Great Belize Productions Ltd. to be registered.

17. Mrs. Young's submission was based on the argument that paragraph 10 of the debenture deed made on 24.6.2010, and paragraph 7 of the letter dated 14 February 2011, which letter was one of the loan agreements, provided for deeming the making of a court order of injunction a breach of the terms of the loan agreements, and of the debenture deed.

18. ***Determination***

The power of the Supreme Court to grant an interim injunction order is given in **s:27 of the Supreme Court of Judicature Act, Cap. 91, Laws of Belize**. *"The court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient to do so."* The power is repeated in **R. 17.1 of the Supreme Court (Civil Procedure) Rules, 2005**, which enumerates the powers to grant an interim injunction order and several other interim orders which ensure maintenance of the status quo in a case and preservation of the subject matter of a case, and authorise necessary interim dealing with the subject matter of a case.

19. To date, defence of the four respondents to the claim has not been filed; BTL has agreed to extension of time. However, an affidavit of Amalia Mai, chief executive officer of Great Belize Productions Ltd., has been filed on behalf of the company, and an affidavit of Lyndon Guissepi has been filed on behalf of the Belize Bank, in response to the



application of BTL. I have used the contents of the affidavits as evidence to support the opposition to the application of BTL.

20. The principles and guidelines by which court determines in the usual claims whether a claim is one in which it is just and convenient to grant an interim injunction order remains that established in the **American Cyanamid Co v Ethicon [1975] A.C. 396**. But the guidelines are not meant to be regarded as statutory. In practice they are applied with some degree of flexibility. First and foremost, the court determines whether there is substance in the claim, that is, whether there is a serious question in the claim with prospects of success, to go to trial.
21. Second in the guidelines is that, court will, after having ascertained that there is a serious question to go to trial, consider whether the evidence discloses that in the event the claimant is successful, an award of damages, that is, a sum of money, will be adequate remedy for the wrong complained about and the defendant will be able to pay. If an award of damages will be an adequate remedy and the defendant will be able to pay, then usually an interim injunction order will be refused, even if there is a good arguable case in the claim on the merit – see **Ali v Southwark London Borough Council [1988] ICR 567**, and **Watson v Durham University [2008] EWCA Civ. 1266**.
22. Third, if after applying the guideline as to whether award of damages will be adequate remedy court is still not sure whether it will be just and convenient to grant an interim injunction order, court will apply the

guideline of a balance of convenience. Court will weigh the various material factors in the case so as to decide whether the risk of injustice lies with granting or refusing to grant interim injunction order. Sometimes this is referred to as the balance of justice – see **Cayne v Global Natural Resources plc [1984] 1 All ER 225**.

23. Fourth in the guidelines, court will almost always insist on the applicant for an interim injunction order providing an undertaking in damages, should it later be decided that the interim injunction order was wrongly granted, and the respondent suffered loss as a consequence. The purpose of an undertaking in damages is to provide security for a respondent who may be unjustifiably prevented by the interim injunction order, from doing something it was entitled to do, or forced to do something it was entitled not to do – see **RBG Resources PLC V Rastogi [2002] LTR 31/5/2002**, **Wakefield v Duke of Buccleugh (1865) 12 LT 628**, and **Bunn v British Broadcasting Corporation [1998] 3 All ER 552**.

24. Regarding establishing an arguable case with prospects of success, it is not necessary that the case be established to a standard of prima facie case. The hearing of an application for an interim injunction order is not the stage at which to decide highly contentious facts raised in the affidavits, or to get bogged down with a difficult question of law. Court is required to examine the merit of the claim and defence to a limited extent in order to decide whether the claim has substance and reality about it. Examples are in the cases of: **Mothercare Ltd. v Robson**

**Books Ltd. [1979] FSR 337, and Porter v National Union of Journalist [1980] IRLR 404.**

25. In this application, affidavits for BTL set out details of the decisions and actions that BTL said were wrongful; and also set out the consequences which included transfer of Great Belize Productions Ltd's shares to some of the defendants, and dilution of the value of the issued shares. The affidavits also set out sums of monies which BTL said were wrongfully paid out of its funds to buy property for Great Belize Productions Ltd., pay off its liabilities and to buy shares of Great Belize Productions Ltd. for some named persons. Further, the affidavits stated that debt owed to BTL in excess of \$5 million was wrongfully written off. These matters have not been controverted by the respondents, and at this stage are credible.

26. In response to the submission that an arguable case with prospects of success has been established, Mr. Smith advanced one argument that, all the decisions were taken, and all the actions were carried out within the objects of BTL, set out in paragraphs 4(w), (jj) and (pp) of the Memorandum of Association of BTL. Those sub-paragraphs state as follows:

“4.(w) To advance, lend or deposit money, and to give credit or financial accommodation to any person with or without taking any security therefor and upon such other terms as may be thought fit by the Company.

(jj) From time to time to subscribe or contribute (in cash or in kind) to, or to promote, any charitable, benevolent or useful object of a public character or any object which may in the opinion of the Company be likely directly or indirectly to further the interests of the Company, its employees or its members.

(pp) Generally to do all such other things as in the opinion of the Company are or may be incidental or conducive to the attainment of the above objects or any of them.”

27. At this stage, I do not think that object clause 4(w) authorises advancing, lending or giving money belonging to BTL for no direct or indirect gain to BTL or for no purpose of BTL. From the affidavits, I am unable to conclude that any of the monies of BTL said to have been paid out, advanced or written off were dealt with for the benefit or purpose of BTL. That view may change at the final hearing. There is an arguable case in the claim of BTL, for wrongful paying out or lending monies of BTL, fit to go to trial.

28. I also do not accept at this stage that object clause 4(jj) authorises subscription or contribution for charitable or benevolent purposes without the purpose of BTL in mind, or to a scale that is detrimental to BTL’s business.

29. Object clause 4 (pp) merely provides for doing things that are incidental to the main objects. The clause does not provide for payment of BTL's monies; there must be evidence in the first place, to prove that the purpose for which money was paid was within the object of BTL, in order to rely on clause 4 (pp).
30. Mr. Smith did not address the court on fiduciary duty of a director, negligence and fraud. The affidavits for BTL raised those questions to the level of serious questions with prospects of success. There has been no rebuttal. It is my conclusion that the claim of BTL, supported by affidavits raised serious questions with prospects of success.
31. Regarding adequacy of award of damages as a remedy, I accept that the substantive claim of BTL can, to a very large extent, be satisfied with an award of a sum of money. Most of the claim was about monies paid out of BTL's funds and debt written off. Shares claimed can also be valued in money. However, the sums claimed add to a very large sum, over \$10 million. In her affidavit, Ms. Mai stated that, Great Belize Productions Ltd. would not be able to pay \$1.6 million loan to the Belize Bank were the loan to be called up. From that, it is reasonable to conclude that the company will not be able to pay \$10 million in the event the claim is successful in the end. That favours a decision to make an interlocutory injunction order.
32. Besides the majority of the claim sounding in money, one part of the claim cannot satisfactorily be satisfied with an award of damages. It

has been claimed that the decision and action which altered the shareholding in Great Belize Productions Ltd. resulted in BTL losing control of Great Belize Productions Ltd. If that is true then it would result in BTL losing control of the intended direction the business of that company would take and opportunity to make profit which cannot be quantified. Where it is difficult to quantify profit, damages will not be adequate remedy; interim injunction order may be made – see **Foseco International Ltd. v Fordath Ltd. [1975] FSR 507** and **Evans Marshall and Co. Ltd. v Bartola SA [1973] 1 WLR 349**. The evidence regarding the part of the claim based on transactions regarding shares of Great Belize Productions Ltd. warrants the granting of an interim injunction order.

33. Apart from considering adequacy of damages and whether the respondent will be able to pay, there is a ground outside the guidelines, which in my respectful view makes it just and convenient for the court to grant an interim injunction order to maintain the status quo in this claim. It is this: An important part of BTL's claim is about regaining control of Great Belize Productions Ltd., it will complicate the determination of the claim if further transfer of shares of the company is not suspended during the trial and determination of the claim. It will be just, and especially convenient, to make an interim injunction order to preserve the status quo.
34. Given that the guideline regarding adequacy of damages and the nature of part of the claim, point to the need to grant an interim

injunction order, it is unnecessary to consider the balance of convenience. The question of delay in bringing the application for interim injunction order is without merit, given that BTL was compulsorily acquired and management changed. As between BTL and the four respondents, making an interim injunction order restraining the respondents would be just and convenient.

35. Regarding the right of the Belize Bank, a mortgagee of the shares and Parcel 2882, Block 16 Caribbean Shores, it is not the law that no interim injunction order can be made where a third party has interest in property intended to be the subject of an injunction. Court is merely required not to grant an injunction order which will have the effect of substantially interfering with the business of a third party – see **Galaxia Maritime S.A. v Mineralimportexport [1981] 1 WLR 539**, a case cited by Mrs. Young.
  
36. Mrs. Young argued that it would be impossible to grant an interim injunction order against Great Belize Productions Ltd. without interfering with the rights of the Belize Bank. I do not accept that submission. First, BTL does not apply to restrain the Belize Bank from exercising its right of a mortgagee. That was the correct view to take because the right *in personam* conferred by an injunction order is subordinate to the right *in rem* of a mortgagee – see **Capital Cameras Ltd v Harold Lines Ltd. and Others [1991] 1 WLR 54**.

37. Secondly, the interim injunction order seeks to stop transfer of shares and land, not trading assets, and does not seek to stop carrying on business. There should be no disruption in business activities of Great Belize Productions Ltd. through which money is earned to pay loan instalments due to the Belize Bank.
38. Thirdly, I do not think that the provisions in the loan agreements and mortgage deed relied on by Mrs. Young unequivocally mean that the making of an interim order such as the interim injunction order made on 30.3.2011, and any extension are deemed breach of the loan agreements and the mortgage deed. That is my preliminary view, and that is good enough for an arguable question to go to trial.
39. Another way of looking at the issue is this. If I assume for the purposes of this application that, the order made on 30.3.2010, caused default on the part of Great Belize Productions Ltd. in its obligations under the loan agreements and the mortgage deed, then the following would be the consequences. The total loan sum, said to be \$1.6 million would become payable. The Belize Bank would then be entitled from 30.3.2011, to demand payment of the full sum; it did not. Had demand for payment been made and Great Belize Productions Ltd. failed to pay, the Belize Bank would have to exercise the right to sell the shares and property charged so as to raise the loan sum, or it would have to exercise the right to appoint a receiver.



40. The evidence shows that although the Belize Bank believed that Great Belize Productions Ltd. breached the loan agreements and the mortgage deed, it did not seek to exercise what would be its rights. It was argued that it did not because of the court interim injunctions. I do not accept that argument; the interim injunctions did not enjoin the payment of loan instalments to the Belize Bank in any way; nor did the injunctions enjoin the Belize Bank in any way. The affidavit of Ms. Mai suggested that there had been no default in payment of the loan instalments. The probable reason for the Belize Bank not exercising its rights would be that Great Belize Productions Ltd. had been paying the loan instalments and the Belize Bank has suffered no loss. Given that state of affairs, the Belize Bank has not and will not suffer prejudice as the result of an order continuing the interim injunctions made on 30.3.2011. Any prejudice will result only from the Belize Bank insisting erroneously in my view, that the injunctions have caused default, and moving to exercise the rights of a mortgagee when there would be no need since Great Belize Productions Ltd. is paying the loan instalments. Any prejudice to the Belize Bank would be of its making.

41. The application of BTL dated 27.4.2011, for the continuation of the interim injunction order made the 30<sup>th</sup> day of March 2011, is granted to the extent that the order is continued in the terms set out in the application in paragraphs 1(i), (ii) and (iii). The order shall not apply to transactions of Great Belize Productions Ltd. resulting from the Belize Bank exercising the rights of a mortgagee under the loan agreements and mortgage deed the subjects of this application. Further, Great

Belize Productions Ltd. is restrained from dealing with its title and interest in Land Parcel 2882, Block 16, Caribbean Shores Registration Section, Belize District. This item of the order is made under the prayer for “such further or other orders or directions as the court deems fit and just”; and by authority of **s:28 of the Supreme Court of Judicature Act**. The rights of the Belize Bank Ltd. as a mortgagee are not restrained by this order. This order will last until the determination of the claim or until further order of court. It is a condition of issuing this order that an undertaking as to damages by BTL shall be included in the order.

42. Costs shall be in the cause.

43. **Delivered Thursday the 16<sup>th</sup> day of June 2011**

**At the Supreme Court**

**Belize City**

**SAM LUNGOLE AWICH  
Acting Chief Justice  
Supreme Court**