IN THE COURT OF APPEAL OF BELIZE, A.D. 2005

CIVIL APPEAL NO. 2

BETWEEN

BELIZE WATER SERVICES LIMITED **Appellant**

and

ATTORNEY GENERAL OF BELIZE **Respondent**

—

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Nigel Plemming, QC, and Mr. Michael Young, S.C. for the appellant.
Mr. Fred Lumor, S.C. for the respondent.

—

June 13 and October 18, 2005.

MOTTLEY, P

1. On February 7, 2005 Awich J granted the Attorney General an interlocutory injunction restraining, until the hearing of this action or further order, Belize Water Services Limited ("BWS"), from taking

any steps in the arbitration proceedings which were initiated by the Notice of Demand for Arbitration. This Notice, dated November 19, 2004, was addressed to the International Centre for Dispute in New York under the Commercial Arbitration Rules of the American Arbitration Association.

2. In 2000, the Government of Belize ("GOB") decided that it would privatize the supply of water and the provision of sewage. Pursuant to this decision, the Water and Sewage Act was repealed and replaced by the Water Industry Act. In 2001, Belize Water Services Limited ("BWS") was incorporated under the Companies Act. The assets, liabilities and business and undertaking of the Water and Sewage Authority were vested in BWS.

3. Cascal B.V. (Cascal) is a company incorporated in the Netherlands. Pursuant to a Share Purchase Agreement dated March 23, 2004 between GOB and Cascal, GOB transferred 82.7% of the ordinary shares in BWS to Cascal for US$24,804.412.50. 10% of the ordinary shares were acquired by Belize Social Security Board, while 7.3% were sold to the employees of BWS and the public.

4. GOB, Cascal and BWS also signed an Investment Agreement which contained provisions relating to certain investments to be made in the development of the infrastructure by Cascal through BWS.

5. After the acquisition of the shares, disputes arose between Cascal and GOB which led to a warranty claim by Cascal. The disputes, were settled by the parties pursuant to a Supplemental Agreement ("SA") dated March 2002. The SA provided inter alia that Cascal would assume the role as a Strategic Investor. It was also agreed that BWS would assume all the assets and liabilities under the Vesting Agreement. The SA guaranteed a 12% rate of return per annum. This rate of return was to be achieved by tariff increases for the service of BWS over the 25 year period of the license issued to BWS. The SA also set out various remedies to which Cascal is entitled upon the happening of certain events. Provisions was made that in certain circumstances, the GOB was required to repurchase Cascal's share holding in BWS at the original purchase price plus the amount of any additional equity investment.

6. The Public Utility Commission ("PUC") is a regulatory body established under the provisions of the Public Utilities Commission Act Cap. 233 ("PUCA"). Its functions are set out under the Act and include setting the tariffs to be charged by BWS for its services.

7. Notwithstanding that PUC is an independent regulator, the SA incorporated provisions for the enactment of byelaws and the adoption of business plans and regulators bases as guidelines

which were intended to assist the PUC in setting tariffs for BWS for each of the five successive tariffs of the licence of BWS – 25 years.

8. On May 31, 2002 the PUC made the Water Industry (Tariffs) Byelaws in which it sets out in detail the process for determining the tariffs to be charged by BWS. In accordance with the tariff review process, BWS submitted a business plan on October 30, 2003. The initial decision of the PUC was made on December 15, 2003. However decision was challenged by the BWS. An independent expert was subsequently appointed to review the tariffs and business plan of BWS. The PUC issued its Final Decision setting new tariffs for BWS on April 2004.

9. On July 12, 2004, BWS applied to the Court for judicial review of the Final Decision of the PUC and the new Byelaws. BWS alleged, inter alia, that the PUC had ignored a number of statutory requirements and had applied a flawed and unfair procedure. The judicial review was heard by Awich J who dismissed the application on April 4, 2005.

10. On August 13, 2004 Cascal and BWS gave notice of a dispute under the SA which triggered a mandatory conciliation period of 3 months before arbitration could be started under the American Arbitration Association in accordance with Clause 11 of the SA. This was subsequently followed on November 20, 2004 with a

Formal Demand For Arbitration. GOB did not respond to the demand within the time limited by the Commercial Arbitration Rules of the American Arbitration Association.

11. On December 20, 2004, GOB issued a Writ of Summons against BWS and Cascal claiming declaration that the arbitration commenced by Cascal and BWS under the Rules was unconscionable, vexations and oppressive. It also sought a declaration that, by commencing and prosecuting the judicial review proceedings in the Supreme Court, Cascal and BWS had repudiated the Arbitration Agreement made March 2, 2000 between GOB and Cascal and BWS.

12. At the time of filing the Writ of Summons, GOB filed a Summons seeking the grant of an interlocutory injunction against both BWS and Cascal. At the time of the hearing of the Summons, Cascal had not been served so that the application for the interim injunction proceeded against BWS alone. It is from the grant of that interim injunction that BWS has appealed.

13. In its appeal, BWS is seeking an Order setting aside the grant of the interim injunction. The appellant alleged that the judge erred in law in granting the interim injunction and that he wrongfully exercised his discretion in granting the interim injunction. The appellant took issue with the findings by the judge that the issues

and parties in the judicial review proceedings and the arbitration proceedings may be regarded as the same. Issue was also taken with the finding of the judge that there is an arguable case that the arbitration proceedings are vexatious unconscionable and oppressive. It is the appellant's contentious that there was no arguable case that the Agreement to arbitrate had been repudiated and that the judge had no jurisdiction to grant the order sought.

14. The Court is being asked to interfere with exercise of the judge's discretion. We are invited to say that the discretion was wrongly exercised on the ground that it was based upon a misunderstanding of the law and that the decision was not one that any reasonable judge, who had full regard for his duty to act judicially, could have reached.

15. The role of the Court of Appeal on an appeal from the grant of an interlocutory injunction was stated by Lord Diplock in **Hadmor Productions v. Hamilton [1983] 1AC 191 at page 220**:

> *"An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise*

an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of he law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it."

16. The first ground of appeal alleged that the judge erred in holding that there was an arguable issue that the parties to the judicial review proceedings and the arbitration proceedings may be regarded as the same. In particular, it is alleged the judge erred in holding that, on the one hand, the independent regulator, the Public Utilities Commission and the GOB may be regarded as the same and, on the other, that BWS and Cascal could also be regarded as the same.

17. In his judgment Awich J held:

> *"In my view, I think an arguable issue has been established that for the purposes of the judicial review proceedings and the arbitration proceedings in this case, the parties may be regarded as the same because when the Government of the one part, and Cascal and BWS of the other, entered the Investment Agreement and the Supplemental Agreement, they understood that the duties of the Government in so far as regulating the water industry and fixing tariffs were concerned would be carried out by PUC, a functionary, acting on behalf of the Government. On the other hand, Cascal has a duty under the agreements to require BWS to carry out the duties to invest according to the agreements and to meet the necessary standards of service, and other duties which are directly relevant to the issues of the Final Decision and the Byelaws challenged. So in effect the duties of BWS concerning the subjects of the review proceedings and the arbitration are owned by BWS and Cascal jointly and severally."*

18. BWS has submitted that the judge's conclusion that GOB and the PUC on the one hand and BWS and Cascal on the other hand may be regarded as the same is wrong in law. In his written submission

counsel for the respondent submitted that the appellant failed to take full account of the agreement between the parties. In short the respondent did not agree with the submission of the appellant.

19. Cascal and BWS commenced arbitration proceedings against the GOB pursuant to the term of the SA. PUC is not a party to the arbitration proceedings and as such, was not a party to the agreement to submit any dispute to arbitration. BWS applied for judicial review proceedings against PUC. The GOB was not a party to the judicial review proceedings. Those proceedings were served on GOB as an interested party in view of its role in approving the Byelaws which were the subject of the challenge.

20. As stated earlier, the judge held that for the purposes of the judicial review proceedings and the arbitration proceeding the parties could be regarded as being the same. He reasoned that the parties appreciated that, while the Government may have the ultimate responsibility for regulating the water industry and the fixing of tariffs to be charged for water, it had ceded that responsibility to the PUC which was a “functionary” acting on behalf of the Government.

21. The GOB considered that PUC was a statutory commission separate and distinct from the Government. By letter dated September 2004 to Allen & Overy, Solicitors for Cascal and BWS,

the Solicitor General writing on behalf of the Government in response to the Notice of Dispute stated:

> *"The purported breach[es]…..are….events outside the control of the GOB since the PUC is an independent regulatory body established by the Public Utilities Commission Act Cap. 223 which does not act under the direction or control of the GOB."*

In a further letter to Allen & Overy LLP, the Solicitor General reiterated the position of GOB when he wrote on 23 September 2004:

> *"If you now accept that the PUC is an independent regulatory body (as you seem to now do) then there can be no breach by GOB if the Supplemental Agreement as set out in your letter of 13th August 2004, since the PUC is independent of GOB control."*

In these two letters the Solicitor General was advocating that the PUC was in fact independent of any control by GOB.

22. The representation that the PUC was independent of GOB may also be seen in clause 5.2 of the SA. There it is stated that:

"For the avoidance of doubt, nothing in this Agreement shall, nor shall it purport to, fetter the discretion of the Government or the Public Utilities Commission to approve or publish Byelaws or Business Plan or to act in anyway as required by law."

23. PUC is a statutory commission established by GOB under the PUCA, section 3 (1) (2) of the PUCA provide:

> "3(1) There shall be and is hereby established a body to be known as the Public Utilities Commission which shall be a body corporate with perpetual succession and a common seal.
>
> (2) The Commission shall be an autonomous institution governed by the provisions of this Act and any other law, and maybe exercise and powers and functions entrusted to or conferred upon it by or in accordance with the provisions of this Act or any other law."

24. In my view, the parties to the judicial review proceedings and the arbitration proceedings are different. In coming to this conclusion, I adopt what was said by Cooke J in the London proceedings brought by Cascal B.V. v. Government of Belize. In his judgment Cooke J said:

"It is clear that Cascal is a substantial investor in BWS, but it is also clear that it is a distinct company from BWS. It is clear that it was only BWS which applied for judicial review of the decision of the Public Utilities Commission, and in relation to the new by-laws which were promulgated under it. Cascal was not involved in that application at all. Furthermore, the nature of the relief sought in the arbitration by Cascal is entirely distinct from the relief sought in the judicial review proceedings by BWS.

…..

…I am entirely satisfied that the contentions put forward by Cascal, have substance and present a good arguable case, at the very least, in that regard. Furthermore, as one looks at the relief sought, one sees that Cascal, in its arbitration application, seeks an order that the Government of Belize should re-purchase Cascal's shareholding in BWS for the original purchase price, plus further equity investments, on the basis that the two(?) events, set out in the Supplemental Agreement, have already occurred. The separate corporate personalities of Cascal and BWS could not be highlighted in a more significant way."

25. The second part of ground 1, dealt with the inter-relationship of the arbitration proceedings and the judicial review proceedings. The

appellant alleged that the judge erred in holding that issues in both the judicial review and the arbitration proceedings were the same, although the parties involved, the legal issues and the relief sought are fundamentally different.

26. The judge held:

> *"There were long submissions on both sides as to whether the issues in both sets of proceedings were the same. From the above comparison one must say that only the question of the loans and leases were not common to both proceedings. There were only raised in the arbitration. The loan has not been fully disbursed. That leaves only the question of the leases. One cannot fail to notice from the comparison of the issues that they are, with the exception of the question of the leases, about an increase of tariffs to a level that BWS considers will generate enough revenue to enable it to carry out capital expenditure and pay operating costs to a level that will ensure that BWS meets its obligations under the agreements, and will ensure that BWS pays at least 12% return on the investments of its shareholders. The remedies in both proceedings are also about, and aim at, those issues although the remedies are technically different."*

27. The appellant submitted that parties to the arbitration proceedings were BWS, Cascal and GOB, while in the judicial review proceedings the parties were BWS and the PUC. The GOB was not a party to the judicial review proceedings and consequently the rights of BWS, as against the GOB under the S.A. cannot be affected by those proceedings. The legal issues in the judicial review proceedings include issues whether PUC had acted ultra vires, whether it had observed natural justice in arriving at its Final Decision and whether that decision was irrational. In relation to the arbitration proceedings, the legal issue was whether certain 'events' had occurred which may have a "material and adverse effect" on the operations of BWS in the manner specified in paragraph 24 and 25 of the Demand for Arbitration. In these paragraphs the relevant events under the SA are:

> "5.1 i)(a) Byelaws in accordance with the Regulatory Bases have not been published in the Gazette in accordance with the Act, or are otherwise not unconditionally legally effective and enforceable, by 31 May 2002, or the Transitional Business Plan as set out in Schedule 5 is not unconditionally legally effective and enforceable by the said letter date; or

(b) by 1st April 2004, the First Full Business Plan does not us those inputs, calculations and assumptions contained in the model set out in Schedule 3 and only use those inputs, calculations and assumptions has not been established in accordance with the Byelaws, or it's not unconditionally legally effective and enforceable; or

(c) the loans to (BWS) to be arranged in accordance with Clause 6 have not become unconditional, binding obligations of the lender by 1 April 2002 or such other date as may be mutually agreed; or

(d) the completion of the property transfer and the provision of all of the formal leases as set out in Clause 7 has not occurred by 30 April 2002, or such extended period as may be mutually agreed;….; or

iv) there is a change in the Act or the Byelaws as promulgated or the Transitional Business Plan as set out in Schedule 5 is not implemented from time to time or the First Full Business Plan does not implement from time to time the inputs, calculations and assumptions

contained in the financial model set out in Schedule 3 and only those inputs, calculations and assumptions."

Clause 5.1 goes on the provide that if any of these events occur "which may materially and adversely affect the operation of (BWS) in the water industry sector of Belize or the ability of (BWS) to generate the revenues in accordance with the Transitional Business Plan or the relevant Full Business Plan or to generate the Regulated Rate of Return as defined in the Regulatory Bases" then Cascal would be entitled to exercise the remedies that are discussed below, including termination of the SPA, the IA and the SA.

28. No review of the authorities submitted is necessary to conclude that judicial review proceedings and arbitration proceedings in this case are entirely different. In the judicial review proceedings BWS sought to identify and correct any wrongs committed by the PUC and as such was an action in public law. The arbitration proceedings were concerned with enforcing the right of Cascal against GOB pursuant to the Agreement signed by them. I agree with the submission of counsel for the appellant that BWS that if the judicial review proceedings are not successful and the Final Decision and New Byelaws remain in force, the contractual right of BWS and Cascal under the S.A. would not have been effected.

BWS could not have sought and, did not seek, damages for breach of contract or payment of compensation in the judicial review proceedings against PUC.

29. The appellant also took issue with the decision of the judge that the Attorney General had an arguable case that the arbitration proceedings which were commenced by the appellant were vexatious, unconscionable and oppressive “because the issues in the arbitration are the same as those in the judicial review proceedings”. The Attorney General, in the application for the injunction had as good that the arbitration proceedings were vexatious.

30. Counsel for the appellant asserted that the judge erred in law in accepting the contention of counsel for the Attorney General who had submitted that, due to the principle that foreign proceeding can be regarded as vexatious, unconscionable and oppressive only if there is nothing to be gained by them over and above what maybe gained in local proceedings and (ii) there is completed correspondence between the two proceedings. The counsel for the appellant reiterated the earlier submission that judicial review proceedings constituted a challenge in public law while the arbitration proceedings are a claim in private law to enforce rights under the Agreement. He also relied on the earlier submission that

the cause of action, including the relief sought in judicial review proceedings, and the arbitration proceedings are different and mutually exclusive. Further, the appellant pointed out that parties of course are also different.

31. As stated earlier, the judge erred in law in holding that, for the purpose of the judicial review proceedings and the arbitration proceedings, the parties may be regarded as the same. The judge reasoned that GOB on the one hand and Cascal and BWS on the other when they entered the Investment Agreement and the Supplemental Agreement, understood that the duties of the GOB in regulating the water industry including the fixing of tariffs would have been duty of the PUC which was entrusted with the responsibility. The judge further reasoned that Cascal had a duty under the agreement to require BWS to carry out the duties, to invest and to meet the standard of service required which were directly relevant to the challenge of the Final Decisions and Byelaws. The judge concluded that duties of BWS in relation to the judicial review proceedings and the arbitration were owned jointly by BWS and Cascal. For the reasons already stated the judge, in my view, was wrong to conclude as he did.

32. For the reasons stated above, I consider that the judge erred in law in holding that there was an arguable case that, for the purposes of

the judicial review proceedings and the arbitration proceeding, the parties may be regarded as the same and that that the arbitration proceedings are vexatious, unconscionable and oppressive. In my view, the errors of law by the judge fall within the statement of law enunciated by Lord Diplock in **Hadmor Productions v. Hamilton** (above). Counsel for the respondent in his written submission submitted that the finding of the judge should not be categorized as a patent error of law which should enable this Court to reverse the judge's discretion. The respondent however did not persist with this submission and, in my view, correctly conceded that the submission of the appellant was correct.

33. For these reasons I agreed that the appeal should be allowed with costs to the appellant.

34. While other grounds were argued, I do not consider it necessary to deal with them in order to dispose of this appeal.

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MOTTLEY P.

CAREY, JA

This was an appeal against a judgment of Awich J by which he granted an interim injunction restraining the appellant from proceeding with an arbitration it commenced against the Government of Belize. We heard submissions on 13 June and at their conclusion allowed the appeal, set aside the restraining order and allowed costs to the appellant both here and below. We intimated that our reasons would be delivered at a later date. My contribution follows:-

2. I should state at once that concessions sensibly made by Mr. Fred Lumor S.C. for the respondent, a counsel of no little experience, make it unnecessary to deal with the grounds at all or at length. Indeed, but for the fact that we are disagreeing with the learned judge, I would have been content merely to concur in the result and say no more.

3. The principles on which an appellate court is at liberty to interfere with the exercise of a judge's discretion were articulated by Lord Diplock in Hadmor *Productions v. Hamilton [1983] 1 A.C. 191:-*

"It may set aside the exercise of the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him …

or the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it…"

4. Some background information would be helpful in order to fully appreciate the issues which arise in the matter. The appellant, Belize Water Services Ltd. (BWS), is a Belizean company which manages the country's water and sewerage system. Cascal B.V., a Dutch company is a major investor in BWS, having acquired 82.7% of the shares of BWS from the Government of Belize (GOB) under a Share Purchase Agreement of 23 March 2001. Because of disputes which came about after the acquisition of shares in BWS, a settlement was arrived at and recorded in a Supplemental Agreement, (SA), the parties to which were Cascal, BWS and GOB. It provided various remedies to which Cascal would be entitled if material and adverse effects were caused to BWS, including an obligation of GOB to buy back Cascal's shareholding. The SA also provided for final settlement by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association in case a dispute arose under the agreements between the parties. Cascal and BWS gave notice of a dispute under the SA which triggered a mandatory conciliation period of three months before arbitration could be started. Cascal and BWS eventually

served a Demand for Arbitration upon the GOB which failed to respond within the time limit. Thereafter GOB filed a writ seeking declarations that:

(a) the arbitration commenced by Cascal and BWS under the Rules was unconscionable, vexatious and oppressive;

(b) by commencing and prosecuting the Judicial Review proceedings, Cascal and BWS had repudiated the Arbitration Agreement.

By way of explanation, after the Public Utilities Commission published its final decision on tariff increases, BWS made an application for judicial review alleging illegality and procedural impropriety, which was heard by Awich J and dismissed. That outcome however, is not material in so far as this appeal is concerned.

5. The learned judge held that an arguable issue has been established, that for the purposes of the judicial review proceedings and the arbitration proceedings in this case, the parties may be regarded as the same because, when the Government of the one part, and Cascal and BWS of the other, entered the Investment Agreement and the Supplemental Agreement, they understood that

the duties of the Government in so far as regulating the water industry and fixing tariffs were concerned would be carried out by PUC, a functionary acting on behalf of the Government. He further held that there was an arguable case that the arbitration proceedings are vexatious, unconscionable and oppressive because the issues in the arbitration are the same as those in the judicial proceedings. Finally, he held that the question of repudiation by BWS and Cascal of the right to arbitration had been established to an arguable level.

6. Any examination or discussion of this appeal must start with the fact that there was an agreement between Cascal BV and the Government for submission to arbitration in case of a dispute arising under the agreement. The grounds on which the government sought the injunction was that the arbitration commenced by Cascal BV was unconscionable, vexatious and oppressive and that by commencing and prosecuting the Judicial Review proceedings, the defendants viz. BWS and Cascal BV (who was not served) had repudiated the SA.

7. In order to demonstrate that the arbitration proceedings was unconscionable, vexatious and oppressive, it was argued on behalf of the government that the judicial review proceeding and the arbitration proceeding addressed the same issues and facts, and

the parties were the same in these proceedings. This argument most certainly found favour with the judge. He regarded the Public Utilities Commission, as "a functionary acting on behalf of the government". This startling statement is, in point of law and fact, altogether incorrect and would be a severe indictment of the government. The PUC is an autonomous institution governed by the provisions of the Public Commissions Act 2000. It is an independent regulatory body and can only act in accordance with and subject to the Act which established it. The Solicitor General in the course of correspondence with Allen & Overy LLP, the solicitors acting for Cascal B.V. and BWS, acknowledged that was the true position. Mr. Lumor had the good sense to concede that the PUC was not a functionary of government. Whether Mr. Lumor had chosen to concede the point, or not, it was plainly wrong in law and the judge fell into error in so holding.

8. The judge also treated Cascal BV and BWS as one and the same party. He reasoned that Cascal has a duty under the agreements to require BWS to carry out the duties to invest according to the agreements and to meet the necessary standards of service and other duties which are directly relevant to the issues of the Final Decision and Bye-laws challenged. So in effect, the duties of BWS concerning the subjects of the review proceedings and the arbitration proceedings are owed by BWS and Cascal jointly and

severally. With all respect to the learned judge, this interesting approach does not convert Cascal BV and BWS into one party. They remain separate and distinct corporate entities. The agreements were signed between Cascal BV and the government. Cascal BV is a shareholder in BWS. Mr. Lumor not wishing to concede said that the controlling mind of BWS is Cascal. This is perhaps sophistry but it is not the law.

9. It is also plain that the judge fell into error when he said that "the remedies in both proceedings are also about, and aim at those issues, although the remedies are technically different. As Mr. Lumor conceded the point, it is not necessary to dilate on this matter. The legal issues in arbitration and judicial review are altogether different. In general, arbitration relates to private law, the law of contract while judicial review operates in the area of public law. In the instant case, the arbitration proceedings which were between BWS, Cascal BV and the Government concerned the question whether certain "events" have occurred which affected the operations of BWS in a number of ways and entitled Cascal either to terminate the agreements and require the government to repurchase Cascal's shareholding or for Cascal to require the government to pay fair and reasonable compensation. So far as judicial review was concerned, the legal issues as was correctly stated in Mr. Plemming's skeleton arguments were whether the

PUC had acted within the relevant statutory parameters when setting the tariffs, whether the PUC had adopted a fair procedure when making the Final Decision and whether the Final Decision was irrational.

10. Mr. Lumor, S.C. accepted that the judge also fell into error when he held that it had been proved to an arguable level that by filing proceedings for judicial review, BWS and Cascal BV had repudiated the arbitration agreement. The evidence to which he adverted in this regard was the fact that the reliefs sought in the judicial review manifest an intention to proceed with the duties and benefits under the agreements. With respect, this is unconvincing. Judicial review is a discrete remedy which addresses issues as to the conduct of some public authority. Seeing that the judge had conflated the remedies of arbitration and judicial review, regarding them as the same, it is not perhaps surprising that he arrived at this conclusion. But this rationalization, I fear, shows a fundamental misunderstanding of the principle of repudiation. There must have been a breach of contract by BWS and Cascal BV. The launching of arbitration proceedings was within the terms of the agreement in circumstances where there was a dispute under the agreement. It is not possible to conceive how an application for judicial review could qualify as a dispute.

11. In the course of his judgment, Awich J rejected the submission that a repudiation must be accepted by the other party. He said that repudiation did not always have to be accepted but he did not explain in what circumstances, that was so, nor did he cite any authority which supports his point of view. The law in this regard is correctly stated in Chitty on Contracts (29th Edition, para. 24 – 013):

> "…where there is an anticipatory breach or the breach of an executory contract, and the innocent party wishes to treat himself as discharged, he must "accept the repudiation"
>
> …unless and until the repudiation is accepted the contract continues in existence for "an unaccepted repudiation is a thing writ in water…"

This principle so far as I am aware has never been doubted. With respect, I believe the judge got the law all wrong.

12. Mr. Lumor did not concede ground 4 which stated as follows:

> (c) the learned trial judge failed to consider the Respondent's waiver of its right to raise questions about the arbitrability of the claim under the American Arbitration Association rules in relation to its application in the Courts of Belize; and

(d) The learned trial judge wrongly concluded that he had jurisdiction over the subjection matters, the agreements and over the parties.

I mean no disrespect to Mr. Lumor's submissions in response to this ground but I was not able to appreciate them. He did say that the issue raised in this ground should be governed by the substantive law by which must be understood Belizean Law. There can be no doubt that the agreement that is, the Supplemental Agreement, is governed by Belizean Law. But that does not address the issue of forum. The Agreement provided that the dispute shall be settled in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Rule 7 of those rules reads:-

> (a) the arbitration shall have power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

This makes it plain that the proper forum in regard to matters dealing with the arbitration is the arbitration tribunal. The learned judge, it is plain, could not have had this rule in mind when he stated – "…the Court has jurisdiction over the subject matters, the agreements and over the parties…" . Rule 7(c) should also be

mentioned. It provides:- (c) A party must object to the jurisdiction of the arbitration or to the arbitrability of a claim or counterclaim not later than the filing of the answering statement to the claim or counterclaim that gives rise to the objections. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

The government has not denied that it failed to meet the deadline to serve an answering statement. I agree with the appellant's submission that the government has waived its rights to raise objections about jurisdiction. Mr. Lumor provided no cogent response to the submission that the court does not have jurisdiction. That lay with the arbitral tribunal by reason of the agreement between the parties to submit to arbitration. Nor did he have a response to the argument that the court had no jurisdiction over the agreements because the agreement provided that disputes under the agreement were to be settled by arbitration.

13. I do not doubt that the judge having wrongly found that BWS had repudiated the right to arbitration, was led into the further error of holding that he had jurisdiction over "subject matter and agreements". But Mr. Lumor having conceded, a concession with which I agree, that the judge erred in respect of the repudiation

point, could have no real basis for resisting this last ground of appeal.

14. I conclude therefore that the learned judge misunderstood the law and the facts which allows this court to interfere with His decision in the manner stated in paragraph 1 of this judgment.

MORRISON, JA

1. This is an appeal from an order made by Awich J on 7 February 2005 granting an interlocutory injunction restraining the appellant from proceeding with arbitration proceedings commenced against the Government of Belize (GOB), until the determination of the action, or further order.

2. The appeal was heard by this court on 13 June 2005, with the result that the appeal was allowed, the order of Awich J was set aside, with costs to the appellant in this court and in the court below, to be taxed if not agreed. The court promised to put its reasons in writing at a later date.

3. I have had the great advantage of reading in draft the judgments prepared by Mottley P and Carey JA and, because I am in full agreement with their reasoning and conclusions, I do not think any useful purpose is to be served by my going over the ground that they have so fully covered. In this brief offering, I will therefore confine myself to a few general observations on some aspects of the matter.

APPELLATE INTERFERENCE WITH THE EXERCISE OF A JUDICIAL DISCRETION

4. Both Mottley P and Carey JA have cited the case of **Hadmor Productions v Hamilton [1983] 1 AC 191** and the now well know statement by Lord Diplock of the basis on which an appellate court may be at liberty to interfere with a judge's exercise of his discretion to grant an interlocutory injunction. It is made clear that the appellate court is not permitted to substitute its own view of the facts for those of the judge who made the order: indeed, the appellate court is required to defer to the judge's exercise of his discretion and to interfere only where it can be demonstrated that he proceeded on "a misunderstanding of the law or the evidence before him" or where his decision to grant or refuse the injunction was "so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached" the conclusion that he did.

5. An appellant upon the grant of an interlocutory injunction therefore bears a potentially onerous burden, bearing in mind that the threshold for the making of such an order is no higher than that the applicant must show that there is a serious issue to be tried (see **American Cyanamid Company v Ethicon Ltd [1975] A.C. 396**, the leading authority which was referred to by Awich J at paragraph 7 of his judgment in this case). However, onerous as that burden

might be, I am clearly of the view that the appellants have easily discharged it in a number of respects in the instant case.

THE ROLE AND FUNCTION OF THE PUBLIC UTILITIES COMMISSION (PUC)

6. The Supplemental Agreement (SA) between the Government of Belize (GOB), Cascal BV (Cascal) and the appellant clearly contemplated a role, if I may call it that, for the PUC in their arrangements. This was hardly surprising, given that the appellant operates one of the most important public utilities in the country and that the PUC is the independent regulatory body created by Act of Parliament to oversee rates, tariffs, fees and charges in the interests of the public. Section 3 of the Public Utilities Commission Act 2000 provides as follows:

> *"(i) There shall be and is hereby established a body to be known as the Public Utilities Commission (hereinafter "the Commission") which shall be a body corporate with perpetual succession and a common seal.*
>
> *(ii) The Commission shall be an autonomous institution governed by the provisions of this Act and any other law, and may exercise any powers and functions entrusted to or conferred upon it by or in accordance with the provisions of this Act or any other law."*

7. The SA itself recognized the independence of the PUC in clause 5:2:

> "*For the avoidance of doubt, nothing in this Agreement shall, nor shall it purport to, fetter the discretion of the Government or the Public Utilities Commission to approve or publish byelaws or Business Plans or to act in any way as required by law, and the discretion of the Government and the Public Utilities Commission to so act shall not limit or relieve the subsequent consequences, or the remedies available to Cascal or the Company, under this Agreement."*

8. So that when, as was obviously contemplated by the parties to be a possibility, given the independence of the PUC, the Final Decision of that body did not fulfill Cascal's expectations under the SA, it is hardly surprising that it should seek to pursue its remedies under that agreement by reference to the dispute resolution mechanism provided by it. Neither was it surprising that the appellant should have sought to exercise its undoubted right as an affected corporate citizen of the country to apply to the courts for judicial review of the PUC's decision.

9. It is against this background that the legitimacy of the characterization by Awich J of the PUC at paragraph 10 of his

judgment as “a functionary of the Government” and his subsequent statement at paragraph 30 that the parties to the SA all “understood that the duties of the Government in so far as regulating the water industry and fixing tariffs were concerned would be carried out by PUC, a functionary, acting on behalf of the Government”, must be assessed. Applying any test, whether by reference to the PUC Act, or to the internal evidence to be found within the SA itself, it becomes patently clear that Awich J proceeded on the basis of a fundamental misconception of law in this regard, clearly sufficient to attract the intervention of this court within the **Hadmor** formulation.

10. Despite the fact that the Skeleton Arguments submitted on behalf of the respondent asserts that the conclusion of the learned judge on this point “cannot be categorized as a patent error of law which should ground a reversal of the trial judge’s discretion” (paragraph 7.7), it was entirely to his credit that Mr. Lumor S.C. felt obliged to concede that the PUC was not a functionary of the GOB. It is indeed difficult to see how he could have done otherwise in the face of the evidence which showed that the Solicitor General himself had been at pains in correspondence to Cascal’s UK solicitors dated 7 and 23 September 2004 to point out that “the PUC is an independent regulatory body … which does not act under the discretion or control of the GOB” and that “the PUC is independent of GOB control.”

THE RELATIONSHIP OF THE ARBITRATION PROCEEDINGS TO THE JUDICIAL REVIEW APPLICATION

11. Awich J had concluded that "an arguable issue has been established that for the purposes of the judicial review proceedings and the arbitration proceedings in this case, the parties may be regarded as the same …". In so far as the issues in both proceedings are concerned, he found that, with one exception, they were "about an increase of tariffs to a level that BWS considers will generate enough revenue to enable it to carry out capital expenditure and pay operating costs to a level that will ensure that BWS pays at least 12% return on the investments of its shareholders." As to the remedies sought in both proceedings, the learned judge concluded that they "are also about, and aim at, those issues although the remedies are technically different" (paragraph 31).

12. While I have serious reservations about the validity of the comparative exercise that the learned judge undertook, as well as a number of his conclusions, I am more concerned at the moment at the complete disregard that the exercise itself demonstrates for the fundamental difference between judicial review and a private law action, whether commenced in court or by arbitration. As counsel for the appellant submitted, "one is a public law matter, and the other is a private law matter" (paragraph 5.6 of the respondent's

Skeleton Arguments) and, given that the parties to each may be different (as is plainly the situation in this case) and that the available remedies may be different, the genesis of both sets of proceedings from a similar – or even identical - factual matrix may not necessarily be of any particular significance. On this point, we were very helpfully referred by counsel for the appellant to the following extract from Fordham's "Judicial Review Handbook" (4th ed., paragraph 2.1), which makes the point well:

> *"Judicial review is a central control mechanism of administrative law (public law), by which the judiciary take the historic constitutional responsibility of protecting against abuses of power by public authorities. Such a safeguard promotes the public interest, ensuring that public bodies are not 'above the law', and protecting the rights of those affected by governmental action. This special supervisory jurisdiction is different from both (1) ordinary (adversarial) litigation between private parties, and (2) an appeal (re-hearing) on the merits. The question on supervisory review is not whether the judge disagrees with what the public body has done, but whether there is some recognizable public law wrong."*

13. Again, in my view, interference within the **Hadmor** formulation is amply justified in this case by the misapprehension by the learned judge of this important distinction.

ARBITRATION PROCEEDINGS VEXATIOUS, UNCONSCIONABLE AND OPPRESSIVE

14. Awich J concluded that there was "an arguable case that the arbitration proceedings are vexatious, unconscionable and oppressive because the issues in the arbitration are the same as those in the judicial review proceedings" (paragraph 34). Much of what I have already stated in the foregoing paragraphs obviously has a bearing on this issue as well. I would only add that once it is accepted (even more so in a case such a this, where there is not an identity of parties in both sets of proceedings) that the proceedings in public and private law can and do have differing objects, processes, applicable legal principles and remedies, it would seem to me to be only in unusual cases that the private law proceedings will achieve the flavour of unconscionability that is required to provoke the equitable jurisdiction to restrain those proceedings by injunction (see the comments of Brennan CJ in **CSR Limited v Cigna Insurance Australia Ltd & others [1997] HCA 33**). A not dissimilar point was made in the context of proceedings commenced in a foreign court by Leggatt LJ in **Barclays Bank PLC v Homan [1993] BCLC 680**, where he observed that "the very fact

that the foreign court constitutes a natural forum usually means that the institution of proceedings in it is not unconscionable."

15. In the instant case, I am satisfied that the appellant's attempt to resolve, by the contractually agreed route of arbitration, a contractual dispute with GOB cannot be said, in all the circumstances, to be unconscionable in any relevant sense of the word.

CONCLUSION

16. These, therefore, are my reasons, in addition to those set out in the judgments of Mottley P and Carey JA., for concurring in the result announced at the conclusion of the hearing of this appeal.

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MORRISON JA