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

CIVIL APPEAL NO. 6 OF 2005

BETWEEN

BELIZE TELECOM LTD.
INNOVATIVE COMMUNICATION CO. LLC **Appellants**

v.

ATTORNEY GENERAL
ECOM LTD
BELIZE TELECOMMUNICATIONS LTD **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**

Mr. Richard Mahfood Q.C., Dr. Lloyd Barnett and Mr. Lionel Welch for appellants.
Mr. Elson Kaseke, Solicitor General for Attorney General.
Ms. Lois Young, S.C. for Ecom Ltd.
Mr. Michael Young, S.C., for Belize Communications Ltd.

15, 16 June, 22 August & 18 October 2005.

SOSA JA

1. At the conclusion of oral argument on 16 June 2005, we reserved our judgment in this appeal. On 22 August 2005, a sitting of this Court held under Order II, rule 27, paragraph (a) of the Court of

Appeal Rules in order to give that judgment, I announced that the appeal was being allowed and that the following declarations of the court below were being set aside, namely:

> "On a true construction of Article 90(D)(i) and (ii) any 'C' director of BTL appointed pursuant to Article 90(D)(ii) ceases to be a 'C' director from the time the party who appointed the said 'C' director ceases to hold either the Special Share or the requisite amount of 'C' shares, that is, representing 37.5% or more of the issued shares of the company, I further declare that the majority of the 'C' shareholders need not vote to remove such 'C' director but that that director ceases to qualify to be a 'C' director for the purposes of Articles 90(D)(ii)."
>
> " … a 'C' director appointed pursuant to Article 90(D)(ii) shall cease to be a 'C' director when his appointer no longer possesses the Special Share and the requisite percentage (37.5%) of the company's issued 'C' shares."
>
> " … that on a true construction of Article 88(C) the non-executive Chairman appointed by the holder of the Special Share, who holds as well 'C' shares amount (sic) to 37.5% or more of the issued share capital of the company, whether form either (sic) the Government Appointed Directors or 'C'

directors appointed pursuant to Article 90(D)(ii), is not entitled to continue as a non-executive Chairman of the company if the Special Shareholder no longer holds 37.5% or more of the issued share capital of the company."

I further announced that the order of the court below as to costs was also being set aside; that both appellants were to have their costs here and in the court below, to be taxed if not agreed, such costs to be borne by the first and second respondents in equal parts; that we were making no order as to the costs of BTL; and that reasons for judgment would be given in writing at a later date.

2. Having since read the reasons for judgment of Carey and Morrison JJA, I wish to say that I concur in those reasons and do not desire to add anything to them.

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SOSA JA

CAREY, JA

1. Belize Telecommunications Ltd. (BTL) is the principal provider of telecommunications in Belize but all is not well with the company; there are ensuing fights for control and management of the company. There is much litigation, not only before the court in Belize but also in Miami, Florida, USA. The question which agitated the Chief Justice related to the construction of the Articles of Association with respect to the appointment and removal of directors of the company. There is now an appeal from his determination by one set of shareholders, viz., the appellants, who are unhappy with that result.

2. For the purposes of this appeal and to provide some helpful background information, the shareholding statistics may be mentioned. The total issued share capital of BTL is 38,806,719 shares divided into 8 million 'B' ordinary shares of $1 each, 28,869,718 'C' ordinary shares of $1 each, and 1 special rights redeemable preference share of $1. The allotment of shares is as follows:

(i) 1 special rights redeemable share - Belize Telecom Ltd.

(ii) 10,292,173 'C' ordinary shares - Government of Belize

(iii) 1,531,278 'C' ordinary shares - Ecom Ltd.

(iv) 10,902,997 'C' ordinary shares - Belize Telecom Ltd.

(v) 6,143,270 'C' ordinary shares - Other Shareholders

(vi) 3,520,000 'B' ordinary shares - Government of Belize

(vii) 4,000,000 'B' ordinary shares - Ecom Ltd.

So far as the litigation in Miami, Florida was concerned, these appellants brought proceedings against the Government of Belize alleging breach of contract under a share pledge agreement and fraudulent inducement. They also claimed a temporary injunction ordering (inter alia) that the Government of Belize rescind the appointment of six new directors by them. In the event, the court granted that order. As the Chief Justice observed in his judgment, the pronouncement of the United States District Court prompted applications by the Government of Belize and Ecom Ltd. for the construction of certain provisions of the Articles of Association of BTL.

THE ARTICLES OF ASSOCIATION

3. The relevant Articles of Association upon which the Chief Justice was asked to pass were 90(D)(i) and (ii) and 90(E).

"(D)(i):- The holders of a majority of the 'C' Ordinary Shares apart from the holder of the special share or any Associate of such holder for the time being issued may from time to time appoint any person to be a Director but so that the number of 'C' Directors (including any Director appointed pursuant to subparagraph (ii) hereof if any), shall not at any time exceed one half of the maximum number of Directors for the time being authorized. Each person holding office pursuant to this Article is herein called a 'C' Director.

(ii) The holder of the Special Share shall so long as it is the holder of 'C' Ordinary Shares amounting to 37.5% or more of the issued share capital of the company be entitled at any time by written notice served upon the company to appoint two of the Directors designated 'C' Directors and by like notice to remove any Director so appointed and appoint another in his or her place. Any Director so appointed shall be excluded from voting in relation to any matter relating to the setting or amendment of tariff policies.

(E):- Each 'C' Director shall hold office subject only to Article 112 of Table A as extended hereunder, but (except as regards any Director appointed pursuant to paragraph D(ii)

above) may at any time be removed from office by the holders of a majority of the 'C' Ordinary Shares."

4. The Chief Justice, having construed these articles made the following declarations as prayed:-

> "(1) On a true construction of Article 90 D(i) and (ii) any 'C' director of BTL appointed pursuant to Article 90D(ii) ceases to be a 'C' director from time the time. The party who appointed the said 'C' director ceases to hold either the Special Share or the requisite amount of 'C' shares, that is, representing 37.5% of or more of the issued shares of the company. I further declare that the majority of the 'C' shareholders need not vote to remove such 'C' director but that the director ceases to qualify to be a 'C' director for the purposes of Article 90D(ii)"

"I further hold and declare that the holders of the majority of 'C' shares of the company may pursuant to Article 90(E) remove any 'C' director other than a 'C' director appointed pursuant to Article 90D(ii) but such a 'C' director appointed pursuant to Article 90D(ii) shall cease to be a 'C' director when his appointer no longer possesses the Special Share and the requisite percentage (37.5%) of the company's issued 'C' shares.

I also find and declare that on a true construction of Article 90D(i) the holders of the majority of 'C' shares are entitled, absent the holder of the special shareholding as well sufficient or more of the 'C' shares of the company amounting to 37.5% of the company's issued share capital, to appoint 'C' directors whose number shall not exceed four.

I further find and declare that on a true construction of Article 88(C) the non-executive Chairman appointed by the holder of the Special Share, who holds as well 'C' shares amount (sic) to 37.5% or more of the issued share capital of the company, whether from either the Government appointed directors or 'C' directors appointed pursuant to Article 90(D)(ii), is not entitled to continue as a non-executive chairman of the company if the Special Shareholder no longer holds 37.5% or more of the issued share capital of the company."

THE GROUNDS OF APPEAL

5. Some nine grounds of appeal were filed and argued before us on behalf of the appellants. They may be divided into three groups which raised points of procedure, of jurisdiction and construction. Shortly put, it was said that the form used , that is, an Originating Summons was not the appropriate form for initiating the proceedings, that the Chief Justice should have declined

jurisdiction because the same matter was being heard by the District Court in Miami, Florida, and finally, that the judge had fallen into error in his construction of the articles. In my view, the last point is the matter of substance and the others may be dealt with quite shortly.

THE POINT OF CONSTRUCTION

6. The Articles have been recited at paragraph 3. They deal with the qualification or more precisely conditions for the appointment of the 'C' Directors of the company. They do not, I suggest, govern the tenure in office of these Directors. Article 90(D)(i) makes it plain that a majority of the holders of 'C' Ordinary Shares are entitled to appoint 'C' Directors. Article 90(D)(ii) entitles the holder of the Special Share who holds 37.5% or more of the 'C' Ordinary Shares to appoint two 'C' Directors and likewise to revoke the appointment of those Directors it has appointed. It is the qualification expressly and clearly set out in these Articles which allows the holder to appoint or to revoke the appointment. When appointed the 'C' Directors remain in office until they retire by revocation or rotation. This rule does not however apply to 'C' Directors appointed by the holder of the Special Share and 37.5% or more of the 'C' Ordinary Shares. (see Article 94).

7. For the governance of the company, there are Articles which expressly deal with the retirement of directors and the revocation of their appointment as such directors. See Articles 91, 92 and 94. Accordingly, it follows that there is, in my opinion, no room for reading words into these Articles nor is there any necessity to do so. There is moreover no ambiguity. The words employed are ordinary English words. Giving those words their ordinary meaning, leads to no absurdity nor are any words needed to give the Articles business efficacy.

8. But, essentially, the respondents argued very strongly that to give the words other than the interpretation arrived at by the Chief Justice leads to absurdity or is the only way to achieve business efficacy. They come to this conclusion not as a result of interpreting the Articles by invoking the canons of construction but by applying the Articles to a particular set of circumstances and arriving at what they consider a doomsday scenario. They submit that because the special share is owned by a corporate body, with the required percentage of shares, that body could conceivably appoint a Director for life. The Solicitor General contended that that does not make any business sense. That would amount, he urged, to foisting the management of the company with people who are not really involved in the share holding of the company. With respect, this last point, I suggest, is disingenuous. The qualification

of the holder of the solitary special share to appoint, is only triggered if he holds not less than 37.5% of 'C' shares. It cannot be correct to dismiss a shareholding of that significance, as not really involved in the shareholding of the company.

9. It is fair to say that BTL was intended to be a marriage of the public and private sector and it was intended that the special shareholder would be a Government appointed Director, see Article 88. A correct interpretation of the Articles can only be achieved in the context of a recognition of that fact. Indeed this view is reinforced by Article 11(A) which provides that the special share "may be transferred only to a Minister of the Government of Belize or any person acting on the written authority of the Government of Belize".

10. The effect of Article 90(D)(ii) is that the holder of the special share, a Minister of Government or his nominee if he satisfies the percentage holding threshold, is entitled to appoint two or remove the two 'C' Directors, he appointed. The power is to appoint or the power to remove. That power to appoint or to revoke is exercisable provided or if, and only if, or while he holds the required shareholding. This Article does not address the tenure in office of the Director so appointed. It follows that he remains in office until it is revoked by the holder of the special share in possession at the time of revocation, of the necessary shareholding qualification. Ms.

Lois Young said that Article 90(D)(ii) stands on its own for appointment and removal and she placed great emphasis on the words “shall so long as”. She contends that these words in effect govern the tenure of the appointment of the Directors. I would suggest that the words highlighted can only govern the words which follow, namely “it is the holder of …”. Put another way, the phrase defines the qualification or entitlement to appoint a director. The qualification or condition prescribed entitles the shareholder to do an act, that is to appoint or to revoke an appointment. It requires remarkable mental gymnastics to conclude that the phrase governs the tenure in office of the director appointed in accordance with this Article. I would hold that the words in the Article are not apt to reach that conclusion. If that were intended, that could be easily and clearly stated.

11. In the result, I would allow the appeal and set aside the orders made by the Chief Justice save for Declaration 3 (p. 306) which is a rehearsal of Article 90D)(i). That is, in my view, sufficient to dispose of the appeal.

12. For the remainder of the grounds, I do not consider that they call for any detailed analysis. I mention them out of deference to the time and care spent in putting them forward.

13. Dr. Barnett took a technical objection to the process used in seeking the declarations sought by the respondents. In my view, as it was not being suggested by counsel that this departure from the Rules, assuming there was a departure, rendered the proceedings a nullity, there was little, if any substance, in the ground. Lord Templeman delivering the opinion of the Board in *Eldermire v. Eldermire (1990) 36 WIR 234* said this (at p. 238) in a case from Jamaica where a not dissimilar objection was made:-

> *"…In general, the modern practise is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification…".*

Dr. Barnett did not suggest that this was not so.

14. Although it was contended that the trial judge did not give the appellant's a fair hearing, in that he denied their counsel an opportunity to consult his clients, this complaint did not accord with the facts. The judge did on more than one occasion offer the grant of adjournment to counsel but he declined the offer. They can hardly be heard to complain and taken seriously. It was also urged upon us that the Chief Justice should have declined to hear the matter, the proper court was the court in Miami. The short answer to this submission on forum is as stated by the Solicitor General –

the parties were not the same nor were the issues. I would hold that these grounds fail.

15. Seeing that the appellants have succeeded on this ground of substance, they are entitled to their costs as announced by Sosa JA in our decision of 22 August 2005. I also agree that the declarations as set out in that decision should be set aside.

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CAREY JA

MORRISON, JA

INTRODUCTION

1. This appeal was heard on 15 and 16 June 2005, when the court reserved its judgment. On 22 August 2005, Sosa JA, at a sitting of the court under Order II, rule 27 paragraph (a) of the Court of Appeal Rules, announced the unanimous decision of the court to allow the appeal and to set aside three of the four declarations that had been made by Conteh CJ in the court below. This court also ordered that the order of the court below as to costs should be set aside, that the appellants should have their costs of the appeal here and in the court below to be taxed if not agreed, such costs to be borne by the first and second respondents in equal parts. No order was made as to the costs of Belize Telecommunications Ltd. which, although named as a respondent in the appeal, had taken no part in the appeal beyond the making of a brief general statement through its counsel, Mr. Michael Young S.C. At the sitting on 22 August 2005, Sosa JA indicated that the court's reasons for that decision would be put in writing at a later date and this judgment has been prepared in fulfillment of that promise.

THE BACKGROUND TO THE APPEAL

2. The proceedings which resulted in the decision of the learned Chief Justice from which this appeal was brought have their root in a long and complicated history relating to the shareholding and control of the third named respondent (to which I shall refer hereafter as "BTL"). In addition to this litigation, various aspects of the matter are also the subject matter of an action in the United States District Court, Southern District of Florida (Belize Telecom Ltd. and Innovative Communication Company, LLC v The Government of Belize), in which judgment at first instance was handed down after the completion of the hearing of this appeal, on 16 August 2005.

3. But despite Conteh CJ's memorable description of the proceedings as being "about the heart and soul of BTL", the matters placed before him for decision by the parties were in point of form purely questions of the interpretation of the Articles of Association of BTL, as they relate to the powers of appointment and removal of members of the Board of Directors of the company by the different classes of shareholders which constitute the company.

4. I gratefully adopt the following statement by the learned Chief Justice of what was before him:

"11. The applications were, as I have said, consolidated for the purposes of the hearing. The Attorney General seeks, in the main, the following:

"1. That it may be determined on the true construction of the said Article 90D (ii) of the Articles of Association of Belize Telecommunications Limited ("the Company"), whether the "C" Directors appointed by the holder of the Special Share under that Article during the time and for so long as such holder of the Special Share was the holder of "C" Ordinary shares amounting to 37.5% or more of the issued share capital of the Company continued to hold office after the holder of the Special Share no longer and had ceased to hold "C" Ordinary shares amounting to 37.5% or more of the issued share capital in the Company, or whether such Directors automatically cease to hold office after the holder of the Special Share no longer held "C" Ordinary shares amounting to 37.5% or more of the issued share capital of the Company.

2. The procedure to be followed to appoint two new Directors in place of the Directors referred to in paragraph 1."

The Solicitor General in the course of his arguments and submissions on behalf of the Attorney General also sought two further declarations as follows:

"(i) A Declaration that on a true construction of Article 88(C), the non-executive chairman appointed by the holder of the Special Share is not entitled, in the event that the holder of the Special Share ceased to be the holder of 37.5% or more of the issued share capital of BTL, to continue to be non-executive chairman.

(ii) A Declaration that on a true construction of Article 11(A), any person holding the Special Share on the written authority of the Government can only do so in the capacity of Government Agent."

ECOM Ltd's application seeks principally the following:

"1. Whether on a true construction of Articles 90(E), 90(D)(i) and 90 D(ii), any "C" directors appointed under Article 90 D(ii) cease to be "C" directors from such time as the party who has appointed the said "C" directors under Article 90(D)(ii) ceases to hold either the Special Share or the requisite number of "C" Ordinary Shares required to appoint or remove the said "C" directors under Article 90 (D) (ii).

2. Alternatively, whether on a true construction of Article 90(E) of the Articles of Association of Belize Telecommunications Limited ("the Company"), the holders of a majority of the "C" ordinary shares may remove any "C" directors appointed under Article 90 (D) (ii) from such time as the party who has appointed the said "C" directors under Article 90 (D) (ii) ceases to hold either the Special Share of the requisite number of "C" ordinary shares required to appoint or remove the said "C" directors under Article (D) (ii). (sic)

3. A Declaration that on a true construction of Articles 90 E, 90 (D) (i) and 90 (D) (ii) the holders of the majority of the "C" ordinary shares apart from the holder of the Special Share or any Associate of such holder for the time being issued, are entitled, in the event that the holder of the Special Share ceases to be the holder of 37.5 per cent or more of the issued share capital of the company, to appoint any four persons to be "C" directors."

12. It is clear and manifest therefore that these applications before me raise quintessentially issues relating to the

constitution (the Articles of Association) of BTL concerning in particular, the appointment of certain class of its directors: the issues raised relate to the interpretation and application of the provisions of the Articles of Association of BTL concerning in particular the appointment and removal of the directors of certain class of its shareholders."

5. After an expedited hearing of the matter (explicitly in response to "the swirling controversy as to who constitute the board of BTL given the changing shareholding in it" – see paragraph 42 of the judgment) Conteh CJ on 6 April 2005 made the following findings and declarations:

*"Accordingly, in conclusion, I find and **declare** as follows:*

1) On a true construction of Article 90 (D) (i) and (ii) any 'C' director of BTL appointed pursuant to Article 90 (D) (ii) ceases to be a 'C' director from the time the party who appointed the said 'C' director ceases to hold either the Special Share or the requisite amount of 'C' shares, that is, representing 37.5% of or more of the issued shares of the company. I further declare that the majority of the 'C' shareholders need not vote to remove such 'C' director but that that director

ceases to qualify to be a 'C' director for the purposes of Article 90 (D) (ii).

2) *I further hold and **declare** that the holders of the majority of 'C' shares of the company may pursuant to Article 90 (E) remove any 'C' director other than a 'C' director appointed pursuant to Article 90 (D) (ii) but such a 'C' director appointed pursuant to Article 90 (D) (ii) shall cease to be a 'C' director when his appointer no longer possesses the Special Share and the requisite percentage (37.5%) of the company's issued 'C' shares.*

3) *I also find and **declare** that on a true construction of Article 90 (D) (i) the holders of the majority of 'C' shares are entitled, absent the holder of the Special Shareholding as well sufficient or more of the 'C' shares of the company amounting to 37.5% of the company's issued hare capital, to appoint 'C' directors whose number shall not exceed four.*

4) *I further find and **declare** that on a true construction of Article 88 (C) the non-executive Chairman appointed by the holder of the Special Share, who holds as well 'C' shares amounting to 37.5% or more*

of the issued share capital of the company, whether from either the Government Appointed directors or 'C' directors appointed pursuant to Article 90 (D) (ii), is not entitled to continue as a non-executive Chairman of the company if the Special Shareholder no longer holds 37.5% or more of the issued share capital of the company.

Costs follow the event to be agreed or taxed against the 1st and 2nd Defendants."

6. Before leaving this very brief – though, I hope, not inadequate for the purposes of this judgment – account of the background to the appeal, it is right I think to record that Conteh CJ, having himself raised the matter during the argument, did consider in his judgment the question of the impact of the overseas dimension, that is, the Florida proceedings, on the exercise upon which he was engaged. This is how he put it (at paragraphs 7, 8 and 9 of the judgment):

"7. The applications in these proceedings and their attendant circumstances raise, in my view, in a stark form, some of the difficulties and problems that may arise from the submission to the jurisdiction of a foreign country separate and apart from the jurisdiction of the courts of Belize, especially in a

contract. They raise as well the issues of forum non-convenience and the law of the domicile of a corporation for the purposes of its management.

8. *By way of a general background, I think it is fair to say that these applications have been prompted by the pronouncement of the United States District Court of the Southern District of Florida sitting in Miami, U.S.A., of 24th March 2005 (The Miami Court). The learned Attorney General in his affidavit of 29 March 2005, in support of the applications says, for example, there have been conflicting interpretations of these pronouncements regarding the shareholding and the right to appoint directors of BTL (see para. 8).*

9. *For the avoidance of doubt, let me say right away that I do not sit or regard it as part of my function, to interpret or apply, with respect, the pronouncement of the Miami Court. But however, judicial comity would require me to give it due regard. But it does not bind me. I am nonetheless grateful to the parties for providing me with copies which they annexed to their affidavits in the proceedings. I should also say that I find the judgment of the Miami Court, with respect,*

instructive and helpful. But again, it does not bind me in my determination of the several issues canvassed by the parties in these proceedings relating as they do to the Articles of Association of BTL, a Belizean company."

7. Conteh CJ's conclusion on this aspect of the matter was "that all matters concerning the constitution of a corporation are governed by the law of the place of incorporation of the corporation" (see paragraph 10 of the judgment).

THE APPEAL

8. Dissatisfied with the declarations granted by the Chief Justice, the appellants filed several grounds of appeal (dated 6 June 2005), as follows:

GROUNDS OF APPEAL

"(1) In view of the nature of the subject-matter and the issues which arose for consideration, the hearing of the Originating Summonses was defective and invalid by virtue of the failure to give the Appellants the prescribed notice or to conform with the prescribed procedures laid down by Order 59, Rules 4-7 of the Supreme Court Rules.

(2) In view of the factual questions raised with respect to the Share Pledge Agreement and the actions of the Government of Belize, the learned Chief Justice erred in law and/or exercised his discretion wrongly by:

(a) proceeding to deal with the matter on Originating Summonses particularly at short notice;

(b) failure to grant to the Appellant an adjournment of the hearing when justice required it; and

(c) failure to give the Appellant a fair hearing in that there was inadequate opportunity for the Appellant's counsel to consult with his client to prepare its case on the several issues which were relevant to a proper determination of the matter and in particular to respond to the first affidavit of Jose Alpuche sworn to on April 1, 2005 which was only handed to the Appellant's attorney at the commencement of the substantive hearing.

(3) The learned Chief Justice erred and misdirected himself in law by proceeding on the basis that the issues raised could legally or properly be determined solely on the basis that all matters concerning the constitution of a corporation or company are governed by the law of the place of incorporation of that corporation or company.

(4) The learned Chief Justice erred and misdirected himself in law in holding that since the substance of the claims made by Belize Telecom Ltd. and ICC against the Government of Belize before the Miami Court, relates to breach of contract, rescission of the Share Pledge Agreement and alleged fraudulent inducement by the Government of Belize with respect to the Share Pledge and Share Purchase Agreements, these claims are quite unrelated to the shareholding and the right to appoint directors of BTL in accordance with its Articles of Association.

(5) The learned Chief Justice erred and misdirected himself in law by failing to appreciate or take into

account the fact that the issues could only be resolved by a determination of the question whether the action taken by the Government of Belize with respect to the shares covered by the Share Pledge Agreement could only be legally valid if:

(a) it had the contractual right to appropriate the shares covered by the Share Pledge and Share Purchase Agreements;

(b) in altering the composition of the Board of Directors, the GOB had not contravened the provisions of the said Agreements as well as had conformed with the Articles of Association.

(6) The learned Chief Justice erred in law and in failing to appreciate or to act on the basis that while the law of Belize is the proper law for determining the constitution of the company, the law of Florida was the proper law for determining the rights and obligations of the Government of Belize and the Appellant with respect to how and in what circumstances they could exercise their rights under the Articles of Association of the company.

(7) The learned Chief Justice erred and misdirected himself in law, in proceeding to exercise jurisdiction in the matter although -

(a) the Judge of the United States District Court, Southern District of Florida Case no. 05-2047, Ciu-Ungaro Benages, issued an order on March 11, 2005, affirmed on March 25, 2005 based on her interpretation of Article 90 of its Articles of Association; and

(b) the Miami Court under and by virtue of the Share Pledge Agreement was the forum of choice and was already seised of the matter.

(8) The learned Chief Justice erred and misdirected himself in law in holding that whenever the holder of the Special Share ceased to hold 37.5% of the issued share capital the directors appointed by such a person under Article 90(D)(ii) of the Company's Articles of Association become disqualified from membership of the Board and cease to be directors with the consequence that the majority holder of the "C" shares may then appoint up to four "C" directors pursuant to 90(D)(i) and remove such directors.

(9) The learned Chief Justice erred in failing to hold that if the holder of the special share ceases to hold 37.5% of the issued share capital the two "C" directors appointed by him do not cease to be directors without his consent in writing.

(10) The learned Chief Justice misdirected himself and erred in law holding that where a "C" director had been appointed by a person who no longer holds the Special Share or 37.5% or more of the issued shares of the company, the non-Executive Chairman automatically ceased to hold that position."

9. The appellants also sought the following reliefs:

(1) that the judgment given and orders made herein by the Chief Justice be set aside.

(2) that it be declared that the United States District Court of Florida is legally and properly seised of the matters submitted to it in the action case no. 05-20470-Civ. Ungaro-Benages.

(3) that costs be awarded to the appellants.

PRELIMINARY OBJECTIONS

10. At the outset of the appeal, the first respondent took two preliminary objections, the first to the effect that the appellants had on 6 June 2005 amended the Notice of Appeal originally filed on 21 April 2005, without the leave of this court, and/or had filed a fresh appeal out of time without any enlargement or extension of time having been granted. The second preliminary objection was to the effect that the appellants had "wrongly cited" BTL "as a Respondent in this Appeal."

11. The first of these objections was effectively dealt with by Dr. Barnett, on behalf of the appellants, who pointed out that what had been filed on 6 June 2005 were in fact Grounds of Appeal and that the procedure that had been adopted on this appeal was in fact faithful to the requirements of the applicable rules. The second was not pursued after an indication from Mr. Michael Young S.C. on behalf of BTL that he intended to play no more than a minimal part in the appeal, a promise which he in due course fulfilled by a brief – and very helpful - statement to the court of his client's concerns.

GROUNDS 1, 2, 3, 4, 5, 6, AND 7

12. Grounds 8, 9 and 10 of this appeal address the issues that had been argued before Conteh CJ and were substantially the subject

of his decision. Notwithstanding this, the appellants' Grounds 1, 2, 3, 4, 5, 6 and 7 ranged widely over a number of other matters in respect of which the appellants complained that the proceedings before the Chief Justice "were defective and invalid", (the form of the Originating Summonses used); that the proceedings were unfair to the appellants because they had not received a fair hearing (in that they had not had sufficient time to consult and to prepare their case on several relevant issues: at the heart of this complaint was the contention that the Chief Justice ought to have granted the appellants' counsel an adjournment for this purpose); that the Chief Justice ought not to have proceeded on the basis of the principle that "all matters concerning the constitution of … a company are governed by the law of the place of incorporation…"; that it was not possible for the Chief Justice to determine the issues of construction raised by the Originating Summonses without reference to the wider issues which fell to be resolved in the Florida litigation; that the law of the State of Florida was the proper law for determining "the rights and obligations of the Government of Belize and the Appellant with respect to how and in which circumstances they could exercise their rights under the Articles of Association of the company"; and that the Florida court was "the forum of choice and was already seised of the matter."

13. I hope that I do no disservice - and I certainly intend no disrespect – to the expert way in which the arguments in support of these grounds were deployed by Mr. Mahfood Q.C. and Dr. Barnett, if I confine myself for the purposes of this judgment to saying that in respect of all of them I find that they were convincingly answered by the submissions made by the learned Solicitor General and Ms. Young S.C. for the respondents.

14. With regard to the form of the Originating Summonses, both actions numbers 179 and 190 of 2005 utilized the form provided for by Order 61 of the Rules of the Supreme Court of Judicature (Chapter 82) which provides at Rule 1 that "Any person claiming to be interested under a deed, will or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested." Rule 2 leaves the question of the appropriate parties to be served at the discretion of the court, while Rule 3 provides that the summons "shall be supported by such evidence as the Court may require." In any event, Order 76 provides that non-compliance with any of the Rules "shall not render any proceedings void unless the Court or a judge shall so direct", which is in keeping, incidentally, as Carey JA points out in his judgment in this matter, with what the Privy Council has described as "the modern practice … to save expense without

taking technical objection" in **Eldemire v Eldemire (1990) 36 WIR 234, 238**. Finally, on this ground, none of the points made on behalf of the appellants on this appeal as to the originating summons procedure was taken before the Chief Justice, notwithstanding the fact that the appellants were represented in that forum by counsel, including Senior Counsel. To the contrary, they participated fully in the proceedings.

15. A similar conclusion is inescapable in respect of Ground 2 and the complaint of an "unfair hearing." At paragraph 36 of his judgment, the Chief Justice observed as follows:

> **"***Substantively, there are only two affidavits before me in these proceedings. One is by the learned Attorney General and the other by Mr. Jose Alpuche. Both affidavits are in support of the claimants. That is, the Attorney General and ECOM Ltd who is the holder of both 'B' and 'C' shares in BTL. There is no affidavit by or on behalf of any of the defendants. Therefore the several averments in the two affidavits in support of the claimants remain unrebutted or unchallenged. I should also point out that in the course of the hearing I offered several opportunities to the learned attorney Mr. Welch for the defendants, to have an adjournment to seek further instructions and if necessary, to*

file affidavits in support of the respondents. But this was to no avail."

That comment appears to me to be fully justified by a reading of the record of the proceedings in the court below.

16. The essence of the complaint in grounds 3, 4, 5, 6 and 7 is that the Chief Justice "erred in law in proceeding on the basis that the issues between the parties could be determined by divorcing their contractual rights and obligations under the Share Pledge and Share Purchase Agreements from their contractual rights and obligations under the Articles of Association." The record shows that the appellants submitted without reservation to the jurisdiction of the Supreme Court in this matter and, on that basis alone, it is difficult to see why this court should accede to an invitation made for the first time on appeal to decline jurisdiction on the ground of *forum non conveniens*.

17. In my view, the Chief Justice was plainly correct in his conclusion that "the questions raised by the applications before me concerning the construction and application of certain provisions of the Articles of Association of BTL are properly for the Courts of Belize" (paragraph 19 of the judgment).

18. I also think that it is pertinent to observe, as the Solicitor General pointed out in his written submissions on behalf of the first respondent, that both BTL and the second respondent, parties to the Belizean proceedings, are not parties to the Florida litigation, making it difficult to see why they should be precluded on account of the existence of that litigation from seeking declarations in the Supreme Court of Belize as to the proper interpretation of the Articles of Association of BTL, a Belizean company. In this regard, the principle that all matters concerning the constitution of a corporation are governed by the law of the place of incorporation, which is restated with approval by the learned Chief Justice at paragraph 10 of his judgment, is amply supported by the authorities referred to him (see, for example, Dicey and Morris on Conflicts of Law, 13th ed. at Rule 154(2)). It is also supported by the very recent decision of the Court of Appeal of England in **Base Metal Trading Ltd v Shamurin [2005] 1 WLR 1157**, very helpfully cited by Ms. Young S.C., in which Arden LJ considered the rule "to be justified by the generally accepted principles of conflicts of laws, and precedent" (see paragraph 74, page 1178).

19. For my part, therefore, there is no merit in the complaints made in grounds 1, 2, 3, 4, 5, 6 and 7 of the Grounds of Appeal.

GROUNDS 8, 9 AND 10

20. These grounds are fully set out at paragraph 8 above and go, if I may be permitted a very loose borrowing from Conteh CJ's far more felicitous formulation (see paragraph 3 above), to the heart of the matter. The appellants contend that "on the substantive question of construction the learned Chief Justice misdirected himself in law and his decision should be set aside" (see paragraph 54 of the appellants' Skeleton Arguments). Before going to consider the rival contentions as to the correct (or appropriate) construction of the Articles on this appeal, it may be helpful at this stage to set out in full the actual terms of the articles under consideration:

> *"85. Subject to Article 86 and 88 and to the provisions hereof with regard to the rotation of directors, the number of directors shall be eight and shall be appointed by the members of the company at each Annual General Meeting.*
> *88.(A) The Special Shareholder shall have the right from time to time:*
>
> *(i) to appoint any person; or*
>
> *(ii) to nominate any existing director (with the consent of the director concerned)*
>
> *to be a Government Appointed Director ("Government Appointed Director") but so that there shall not be more than two Government Appointed Directors at any time and he may remove the same (in the case of a director appointed pursuant to the provisions of this Article) or terminate the nomination (in the case of a director nominated pursuant to*

the provisions of this Article) and appoint or nominate another or others in their place. Any such appointment, nomination, removal or termination shall be in writing served on the Secretary together with, where appropriate, the consent of the person concerned to act, and shall be signed by or on behalf of the Special Shareholder.

(B) Save as provided in this Article, the provisions of the Articles shall apply to the Government Appointed Directors as they apply to other directors.

(C) At any time at which the Special Shareholder is the holder of 'C' Ordinary shares amounting to 37.5 % or more of the issued share capital of the Company it may appoint any Government Appointed Director or any 'C' Director appointed pursuant to Article 90 (D) (ii) as non-executive Chairman of the Board of Directors and at any time thereafter terminate such appointment by like notice in writing.

90.(A) No person, other than a director retiring at the meeting or appointed pursuant to paragraph (D) (ii) below shall, unless recommended by the Board, be eligible for election to the office of 'C' Director at any General Meeting unless not less than seven nor more than forty-two days before the date appointed for the meeting there shall have been left at the Office notice in writing, signed by a Member duly qualified to attend and vote at such meeting, of his intention to propose such person for election, and also notice in writing signed by that person of his willingness to be elected.

(B) The holders of a majority of the 'B' Ordinary shares for the time being issued may from time to time appoint any person to be a Director but so that the number of 'B' Directors shall not at any time exceed one quarter of the maximum number of Directors for the time being authorised. Each person holding office pursuant to this Article is herein called a 'B' Director.

(C) Each 'B' Director shall hold office subject only to Article 112 as extended hereunder, but may at any time be removed from office by the holders of a majority of the 'B' Ordinary shares. Any such appointment or removal of a 'B' Director shall be in writing served on the Company and signed by the holders of a majority of the issued 'B' Ordinary shares or being corporations by their duly authorised representatives and shall take effect on lodgment at the Registered Office of the Company.

(D)(i) The holders of a majority of the 'C' Ordinary shares apart from the holder of the Special Share or any Associate of such holder for the time being issued may from time to time appoint any person to be a Director but so that the number of 'C' Directors (including any Director appointed pursuant to sub-paragraph (ii) hereof if any) shall not at any time exceed one half of the maximum number of Directors for the time being authorised. Each person holding office pursuant to this Article is herein called a 'C' Director.

(ii) The holder of the Special Share shall so long as it is the holder of 'C' Ordinary shares amounting to 37.5% or more of the issued share capital of the Company) be entitled at any time by written notice served upon the Company to appoint two of the Directors designated 'C' Directors and by like notice to remove any director so appointed and appoint another in his or her place. Any director so appointed shall be excluded from voting in relation to any matter relating to the setting or amendment or tariff policies.

(E) Each 'C' Director shall hold office subject only to Article 112 of Table A as extended hereunder, but (except as regards any Director appointed pursuant to paragraph D (ii) above) may at any time be removed from office by the holders of a majority of the 'C' Ordinary shares.

92.(A) The Company may by Extraordinary Resolution remove any director other than a 'B' Director or a Government Appointed Director or a 'C' Director appointed pursuant to Article 90 paragraph (D) (ii) before the expiration

of his period of office notwithstanding anything in the Articles or in any agreement between the Company and such director, but without prejudice to any claim he may have for damages for breach of any such agreement, and may appoint another person in the place of such director. In default of such appointment the vacancy arising upon removal of a director from office may be filled as a casual vacancy.

94. At every Annual General Meeting of the company one third of the 'C' Directors apart from those appointed pursuant to Article 90 paragraph (D) (ii) for the time being (or, if their number is not a multiple of three, the lowest number nearest to one third being not less than one) shall retire from office by rotation."

21. The problem that arose in the instant case, however, had to do not so much with the power to appoint as with the power to remove directors appointed by these provisions, the main question being what is the status of the non-executive Chairman appointed under Article 88(c) and the two directors appointed under Article 90 (D) (ii) when, as appears to have happened in this case, the holder of the Special Share, ceases to hold simultaneously 37.5% or more of the issued share capital of the company. Conteh CJ observed, correctly, that "the Articles of Association are silent as regards the situation where the holder of the Special Share who held 37.5% or more of the issued share capital of the company and appointed 'C' director pursuant to Article D(ii) loses that holding or the percentage of his holding is reduced below 37.5% of the issued share capital of the company" (paragraph 26). In the face of this silence, which he

described as “ominous”, the learned Chief Justice concluded as follows:

> *“27. In my view, it would seem to follow that in such a case, the ‘C’ directors so appointed by the holder of the Special Share would not qualify to be on BTL’s board as ‘C’ directors, for the basis of their appointment, that is, that the holder of the Special Share possessing simultaneously 37.5% of the issued share capital of the company would no longer be present. Therefore, such ‘C’ directors, absent, the holding of 37.5% or more of the issued share capital of the company by their appointer, are not entitled to sit on the Board of BTL.*
>
> *28. In such a case, it is quite in conformity with the Articles of Association for the majority of the holders of the ‘C’ shares to then appoint ‘C’ directors to the maximum of four pursuant to article 90 (D) (i).”*

22. From this conclusion, the declarations which are set out at paragraph 5 of this judgment naturally followed. The substantial question on this appeal, therefore, is whether the Chief Justice’s interpretation of the Articles of Association of BTL is correct.

THE RIVAL CONTENTIONS

23. For the appellants, it was contended that it is not. It was submitted that the Articles deal with the removal and retirement of directors in express terms and that there is no provision which "automatically terminates" the appointment of the directors appointed under Article 90 (D) (ii) upon the party who appointed them ceasing to be the holder of the Special Share or at least 37.5% of the issued share capital of the company. Accordingly, the submissions concluded, "the learned Chief Justice erroneously construed the Articles in attributing such a consequence to the meaning of the Articles "(see paragraph 49 of the appellants' Skeleton Arguments). The practical consequence of the construction of the Articles contended for by the appellants would be that, as the Government of Belize held neither the Special Share nor 37.5% or more of the issued share capital of BTL at the material date (as the Chief Justice found on the evidence before him), it had no power under the Articles to remove those directors who had previously been validly appointed under Article 90 (D) (ii).

24. In addition to relying on the words of the Articles themselves, the appellants also submitted that "there is good authority that a court should be very cautious indeed in seeking to imply words into a company's articles of association (which form a public document on

the faith of which people invest in the company) other than words simply needed to make sense of the articles express terms", citing in support the cases of **Bratton Seymour Service Co Ltd v Oxborough [1992] BCLC 693** and **Towcester Racecourse Co Ltd v Racecourse Association Ltd [2003] 1 BCLC 26**.

25. The Respondents disagreed. The Solicitor General for the first respondent adopted the reasoning of the Chief Justice (at paragraphs 20 to 29 and 37 to 42 of his judgment) and submitted that he had interpreted the Articles of BTL "to achieve business efficacy and to prevent absurd unworkable results" (see paragraph 5.2 of the Written Submission of the first respondent). Support for this approach the Solicitor General submitted, was to be found in the case of **Holmes and Another v Keyes (Lord) and others [1958] 2 ALL ER 129, 138F**, in which Jenkins LJ had observed that "the articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable." (The emphasis is mine).

26. Ms. Young S.C., for the second respondent, supported the Solicitor General, submitting that the learned Chief Justice's interpretation of

the Articles "was the only interpretation which could give them business efficacy." The construction of the Chief Justice, she submitted, brings fairness to the shareholders of BTL (see paragraph 56 of the second respondent's Skeleton Arguments). Ms. Young S.C. also relied on the dictum of Jenkins LJ and, finally, cautioned this court against interfering with the Chief Justice's exercise of a discretion, which is how she characterized his ruling in this case. Finally, she referred us to section 75 of the Companies Act, describing the provisions in that section relating to the share qualifications of directors as representing the "true analogy."

THE RESOLUTION OF THE ISSUE

27. In my view, the appellants are correct in their contention that the interpretation of the Articles which found favour with the learned Chief Justice cannot be supported by the wording of the Articles. Article 90 (D)(ii) makes express provision for the appointment and removal of directors, but not for their tenure of office. That article does not provide, as the Honourable Attorney General stated to be the case in his affidavit sworn to in action no. 179 of 2005, that directors appointed pursuant thereto hold office "for so long as the holder of the Special Share is the holder of "C" ordinary shares amounting to 37.5% or more of the issued share capital of the Company." The words "so long as it is the holder" in the Article

plainly refer, in my view, to the entitlement of the holder of the Special Share to appoint two “C” directors and do not operate to limit or define the tenure of the directors so appointed. The entitlement to remove such directors is also expressly given by the plain words of the Article to the holder of the Special Share “so long as it is the holder of ‘C’ ordinary shares amounting to 37.5% or more of the issued share capital of the company.”

28. Provisions which potentially or actually limit the tenure of directors are to be found in Articles 90(E), 92(A) and 94, all of which exempt from the ambit of their operation directors appointed pursuant to Article 90(D)(ii). Article 90(E), which permits the removal of ‘C’ directors at any time by the holders of a majority of the ‘C’ ordinary shares is, expressly not applicable to “any Director appointed pursuant to paragraph (D) (ii)” of Article 90. Similarly, Article 92(A) permits the removal by extraordinary resolution of “any director other than a ‘B’ Director or a Government Appointed Director or a ‘C’ Director appointed pursuant to Article 90 paragraph (D)(ii) before the expiration of his period of office …”. And Article 94 provides for the retirement by rotation at every Annual General Meeting of “one third of the ‘C’ Directors apart from those appointed pursuant to Article 90 paragraph (D)(ii)…”. These, and other provisions in the Articles, strengthen me, in my view that the intention of the framers of the Articles was to put the appointment,

removal and tenure of directors appointed pursuant to Article 90 (D)(ii) on a special footing.

29. In my view, Article 88(C) falls to be read in the same manner, thus putting the appointment, removal and tenure of the non-executive Chairman appointed pursuant to that Article on the same special footing.

30. While I accept that, as Jenkins LJ observed in the **Holmes v Keyes** case, the articles "should be construed so as to give them reasonable business efficacy", it is in my view significant to observe that that learned judge himself qualifies that statement by the words "where a construction tending to that result is admissible on the language of the articles." In any event, the perhaps more fundamental reservation expressed by Dillon LJ in **Bratton Seymour Service Co Ltd v Oxborough** needs always to be borne in mind:

> *"I see insuperable difficulties in the way of any such implication into the articles of association of the company. It is said, "Oh, the articles constitute a contract between the company and its members, and so you can imply any term into such a contract as you can imply any term into any other contract in order to give business efficacy". But the articles of association of a company differ vary considerably from a normal contract. They are a document which has statutory force. If a company, limited by shares, chooses to have articles of association instead of merely relying on Table A, then those articles have to be registered. These articles were registered when the company was incorporated. The articles thus registered are one of the statutory documents of*

> *the company open for inspection by anyone minded to deal with the company or to take shares in the company. It is thus a consequence, as was held by this court in Scott v Frank F Scott (London) Ltd [1940] Ch 794, that the court has no jurisdiction to rectify the articles of association of a company, even if those articles do not accord with what is proved to have been the concurrent intention of the signatories of the memorandum at the moment of the signature."*

31. In the same case, Steyn LJ sounded a similar cautionary note:

> *"Turning now to the present case, the question is whether the implied term of requiring members to contribute to maintenance of the amenities can be implied not on the basis of any language to be found in the articles, but on the basis of extrinsic circumstances. The question is, is it notionally ever possible to imply a term in such circumstances? I will readily accept that the law should not adopt a black-letter approach. It is possible to imply a term purely from the language of the document itself; a purely constructional implication is not precluded. But it is quite another matter to seek to imply a term into articles of association from extrinsic circumstances."*

32. If, given the passage of time, greater experience and shifting commercial realities, it is thought that the Articles of Association of a company no longer accord with the intention of the shareholders, then that is a matter to be addressed by the company by reference to the provisions of the Companies Act (see sections 13 and 17) relating to amendment of the Articles, not by the court. In that way the "statutory contract" (the phrase is Steyn LJ's – see page 475 of the **Bratton Seymour** case), which those Articles represent will continue to represent the will of the members of the company,

rather than the views of the court as to what is or is not an "unworkable" result in a particular set of circumstances.

33. With the greatest of respect to the learned Chief Justice, it appears to me that what he has effectively done in this case is to imply words into Article 90 (D) (ii) to secure the result that the tenure of directors appointed under that provision is coterminous with the entitlement to make the appointment of the person who appointed them. Such an implication, in my view, cannot be derived from the language of the Articles and is therefore a departure from the "purely constructional implication" that the authorities cited suggest to me to be permissible in these circumstances.

CONCLUSION

34. It is for the reasons that I have attempted to set out at paragraphs 20 to 33 above that I concurred in the result announced by Sosa JA on August 22, 2005, that is to say that the appeal should be allowed in the following respects:

(i) Declarations (1), (2) and (4) made by the learned Chief Justice (set out at paragraph 7 above) are set aside.

(ii) The order of Conteh CJ as to costs is set aside and the appellants are to have the costs of this appeal and

in the court below to be taxed, if not agreed, such costs to be borne by the first and second respondents in equal parts.

(iii) No order as to the costs of the third named respondent, Belize Telecommunications Ltd.

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MORRISON JA