IN THE COURT OF APPEAL OF BELIZE AD 2012
CIVIL APPEAL NO 18 OF 2012

(1) **THE ATTORNEY GENERAL OF BELIZE**
(2) **THE MINISTER OF PUBLIC UTILITIES** Appellants

v

THE BRITISH CARIBBEAN BANK LIMITED Respondent

and

CIVIL APPEAL NO 19 OF 2012

(1) **THE ATTORNEY GENERAL OF BELIZE**
(2) **THE MINISTER OF PUBLIC UTILITIES** Appellants

v

(1) **DEAN BOYCE**
(2) **TRUSTEES OF THE BTL EMPLOYEES TRUST** Respondents

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BEFORE

The Hon Mr Justice Sosa	President
The Hon Mr Justice Mendes	Justice of Appeal
The Hon Mr Justice Awich	Justice of Appeal

E H Courtenay SC and A Arthurs Martin for the applicant, The British Caribbean Bank Limited.

Lord Goldsmith QC, G Smith SC and M Marin Young for the applicants, Dean Boyce and the Trustees of the BTL Employees Trust.

D A Barrow SC and I Swift, Crown Counsel, for the respondents, the Attorney General and the Minister of Public Utilities.

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Filing of applications: 3 October 2012

Filing of submissions in writing: From 17 October 2012 to 9 November 2012

Handing-down of decision: 13 December 2012

Handing-down of reasons for decision: 20 December 2012

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Introduction

[1] These were two separate applications for interim relief filed, in the one case, by the British Caribbean Bank Limited ('BCB') in Civil Appeal No 18 of 2012 and, in the other, by Dean Boyce ('Mr Boyce') and the Trustees of the BTL Employees Trust ('the Trustees') in Civil Appeal No 19 of 2012.

The interim relief sought by BCB

[2] The interim relief sought by BCB, as set out in its notice of motion filed on 3 October 2012, was similar to that sought by Mr Boyce and the Trustees and fell, in its preferred form, into four parts.

[3] The first part, like the second, was mandatory injunctive relief against the Attorney General and the Minister of Public Utilities ('the respondents') 'whether by their servants, agents, employees or otherwise howsoever including the Belize Social Security Board (*sic*) and the Central Bank of Belize'. What was sought was an order as to the way in which votes relating to the shares in Belize Telemedia Limited ('Telemedia') which are registered in the names of the respondents, as well as of the Social Security Board ('SSB') and the Central Bank of Belize ('CBB'), are to be cast in relation to:

> 'any resolution seeking the approval of a declaration of dividends for the period ended 31 March 2012 or any later period'

at any meeting of shareholders of Telemedia. And the particular way in which it was sought that those votes should be so ordered to be cast was against any such resolution.

[4] The second part of the interim relief sought by BCB was in the form of an order that the respondents, together with SSB and CBB, as I understood it, do all in their respective powers to ensure that all directors appointed on their behalf to the

Board of Directors of Telemedia cast all their votes against a particular kind of resolution, viz:

> 'any resolution seeking the approval of an interim dividend pursuant to Article 129 of the Articles of Association of Telemedia …'

at, presumably, any meeting of the shareholders of Telemedia.

[5] The third part of the injunctive relief sought consisted of an order for the taking by the respondents, alone, of all necessary steps to prevent the declaration and payment of a dividend to shareholders of Telemedia.

[6] The fourth and final part of the preferred relief sought by BCB consisted of such further relief as might be appropriate.

[7] BCB stated in its notice of motion an alternative to the preferred form of interim relief just described. That alternative was in the form of an order against the respondents for the deposit into an escrow account held at a commercial bank in Belize of all proceeds of dividends declared and paid on the shares already referred to above. It was required by BCB that such deposit be made within 24 hours of receipt and, further, that the respondents should:

> '(i) ensure that the monies deposited in [the escrow bank account] shall be held separate and intact from any other monies for the Government and either of [SSB] and [CBB];
>
> (ii) ensure that no monies deposited in [the escrow bank account] shall be withdrawn without further order of [the] Court or the written consent of the parties to [the] Appeal; and
>
> (iii) on a monthly basis cause to be delivered to [BCB's] counsel written proof that all the monies paid into [the escrow bank account] remain in [it]'.

The application of BCB was for such order as might be made to remain in force pending the determination of the appeal and any further appeal.

The interim relief sought by Mr Boyce and the Trustees

[8] The interim relief sought by Mr Boyce and the Trustees was set out in their notice of motion filed on the same day as BCB's, ie 3 October 2012, and like that sought by BCB, was divided into preferred and alternative forms of mandatory injunctive relief.

[9] The preferred form of interim relief of Mr Boyce and the Trustees was set out in five parts. The first of these parts was, in all material respects, similar to the first part of the interim relief sought by BCB, even as regards the attempt to affect the votes pertaining to the shares of SSB and CBB, but did not go so far as to purport to cover SSB and CBB by the expression 'servants, agents, employees or otherwise'.

[10] There was also similarity in all material respects between the respective second parts of the interim relief sought by, on the one hand, Mr Boyce and the Trustees and, on the other, BCB. Once again, however, there was no attempt by Mr Boyce and the Trustees to include SSB and CBB in the expression 'servants, agents, employees or otherwise'.

[11] Similarity in all material respects also existed between the third part of the interim relief sought by Mr Boyce and the Trustees and the third part of that sought by BCB.

[12] Whereas the fourth part of the interim relief sought by BCB comprised, as has already been noted above, such further relief as might be appropriate, that of the interim relief sought by Mr Boyce and the Trustees did not. (Such relief was, however, sought later in the notice of motion, after the setting out of the alternative form of interim relief regarded as proper by Mr Boyce and the Trustees.) Instead, the fourth part of the interim relief applied for by Mr Boyce and the Trustees comprised the restraining of Telemedia's Board from recommending, declaring or

paying any dividend. And the fifth part consisted of the similar restraining of Telemedia itself from declaring or paying any dividend.

[13] As has been adumbrated above, the injunctive relief applied for by Mr Boyce and the Trustees included, like that sought by BCB, alternative relief. There was similarity in all material respects between such alternative relief and that prayed for by BCB.

[14] In addition to their request for the preferred form of relief, or the stated alternative to it, and for unspecified further appropriate relief, Mr. Boyce and the Trustees specifically applied, unlike BCB, for an order that the respondents exercise all their powers as controlling shareholders of Telemedia to ensure that such company should not 'dissipate any of [its] assets other than in the normal and ordinary course of business, including but without limitation by early repayment of any loans'. (It may be noted that BCB claimed to have made a substantial loan to Telemedia upon which both principal and accrued interest are outstanding.)

The history of the litigation

[15] In 2009, following the acquisition by the Minister of Public Utilities, on behalf of the Government of Belize ('GOB'), of certain shares in Telemedia said to be owned by Mr Boyce and the Trustees through Sunshine Holdings Limited, as well as of the loan facilities of BCB with Telemedia, separate claims were filed against the respondents in the court below, in the one case, by Mr Boyce and the Trustees, and, in the other, by BCB. Those claims were dismissed in the court below; but appeals to this Court, viz Civil Appeals Nos 30 and 31 of 2011, followed. Both such appeals were allowed on 24 June 2011. In its judgment in those appeals, this Court held that the Act and orders under and by which the acquisition had been purportedly effected were unconstitutional, null and void. This Court did not, however, grant any consequential relief to BCB, Mr Boyce or the Trustees.

[16] On 16 August 2011 BCB, Mr Boyce and the Trustees, obtained leave to appeal to the Caribbean Court of Justice ('CCJ') from the decision of this Court. On 22 September 2011, BCB filed Claim No 597 of 2011 in the court below and on 13

October 2011 Mr Boyce and the Trustees filed Claim No 646 of 2011 in the same court. The appeals to the CCJ which were filed pursuant to the leave obtained on 16 August 2011 have not been heard to date. They have, instead, been stayed as of 26 January 2012, pending the final determination of Claims Nos 597 of 2011 and 646 of 2011. The respondents did not appeal from the decision of this Court in Civil Appeals Nos 30 and 31 of 2011.

[17] Claims Nos 597 of 2011 and 646 of 2011 were filed following the passage on 4 July 2011 in the National Assembly of, and the assent of the Governor-General to, the Belize Telecommunications (Amendment) Act 2011 ('the 2011 Act') and the Minister of Public Utilities' purported acquisition, on behalf of the GOB, by the Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order 2011 ('the 2011 Order'), of the shares and loan facilities already referred to above. On 11 June 2012, the court below, having heard those Claims, held that some parts of the 2011 Act and the whole of the 2011 Order were unlawful and void. That court further held that several provisions of the Belize Constitution (Eighth Amendment) Act were also unlawful and void. The court below did not, however, grant any consequential relief to BCB, Mr Boyce or the Trustees. Civil Appeals Nos 18 and 19 of 2012, which are now before this Court, are appeals by the respondents from the decision of the court below. There is a cross-appeal by BCB in the former appeal and one by Mr Boyce and the Trustees in the latter.

The developments precipitating the applications for interim relief

[18] In an affidavit filed in support of the application for interim relief of Mr Boyce and the Trustees, Mr Boyce himself made the claim that the facts stated in it are within his personal knowledge 'save where it is otherwise stated or appears from the context'. Mr Stewart Howard made the like claim in his affidavit filed in support of the application for similar relief of BCB. As material for purposes of this part of the present judgment, both Mr Boyce and Mr Howard deposed later in their respective affidavits as to the calling on 3 September 2012 of the Sixth Annual General Meeting of Telemedia (to be held on 28 September 2012 according to the affidavit of Mr Howard). An item on the agenda for that annual general meeting ('AGM') was, they both deposed, the declaration of a dividend for the year ended 31 March 2012. Mr

Boyce and Mr Howard both further deposed (the former quite explicitly and the latter somewhat implicitly) that the GOB has control of the Board of Telemedia and can therefore determine, inter alia, when an AGM shall be held and what resolutions shall be passed by the Board. They went on respectively to depose that it was, in the case of Mr Boyce, surprising, and, in the case of Mr Howard, cause for concern, that the AGM was being called for September rather than for December; and Mr Boyce noted suggestively that the meeting was being called for a date a little more than a week ahead of the October 2012 Session of this Court, at which Civil Appeals Nos 18 and 19 were, at the time of deposing, scheduled to be heard. It was further deposed by Mr Boyce and Mr Howard that the GOB is majority shareholder in Telemedia, the former deponent going on to add that the GOB, as such, has the power and ability to determine whether or not an ordinary resolution is passed pursuant to para 128A of Telemedia's articles of association ('the articles'). Mr Boyce deposed also that, as Special Shareholder, the GOB can, under para 128B of the articles, act to prevent any deemed declaration of a final dividend. Mr Boyce concluded that the AGM was called for 28 September 2012 for no other purpose than to dissipate the assets of Telemedia before the Court could have a chance to determine the lawfulness (or otherwise) of the re-nationalisation of Telemedia. Mr Howard limited himself to deposing that he was concerned that the calling of the meeting was an attempt to procure the dissipation by Telemedia of its assets before the Court could hear the two appeals in question.

[19] On 13 September 2012 BCB and Mr Boyce filed applications for interim relief in the CCJ and on 26 September that court ordered as follows:

> 'That [the Attorney General and the Minister of Public Utilities] exercise whether directly or indirectly all their powers as controlling shareholders of Telemedia to ensure that the issue of the declaration of dividends, currently listed on the Agenda for the Annual General Meeting of the Company scheduled for Friday the 28th day of September 2012, be adjourned to a date not before the 14th day of December 2012 being one year since the previous Annual General Meeting.'

On the next day, ie 27 September 2012, the legal counsel to the Ministry of Finance of the GOB wrote a letter to the Executive Chairman of Telemedia stating, inter alia, that the issue of declaration of dividends must be adjourned to a date not before 14 December 2012 in compliance with the order of the CCJ.

[20] Mr Howard deposed that, while the AGM was held on 28 September 2012, media reports indicated that the issue of declaration of dividends was adjourned.

[21] According to Mr Howard, however, BCB expected the GOB to procure Telemedia to pay out a substantial dividend after 14 December 2012 and he cited in support of that belief certain statements said to have been made by the Prime Minister in an interview aired on Channel 5 television on 2 October 2012.

[22] It was clear at all material times that this Court, while it was able to hear Civil Appeals Nos 18 and 19 of 2012 at its October 2012 Session, would not be able to hand down judgment in them before 14 December 2012.

The grounds of the applications

[23] As it was on the application to the CCJ in September 2012, the financial position of the GOB, variously described by BCB as 'dire', 'extremely precarious' and 'very uncertain', was, before this Court, in the words of Mr Howard, 'a fundamental consideration for [BCB's] application'. In seeking to make its case for purposes of the application, BCB referred through Mr Howard to a number of published sources of information on the financial position of the GOB. Some of these sources were said by Mr Howard to be publications of the GOB itself. Included among them were 'Belize 2012: Economic & Financial Update', which was quoted as stating at p 4 that the GOB's 'overall obligations look certain to exceed the country's capacity to pay, even when conservative assumptions are used'. To this publication was attributed the further statement that the total public debt of Belize is estimated to be US$1.5 billion. Also referred to was a purported Press Release dated 14 August 2012 of the GOB announcing that the GOB was unable to meet its obligation to make a payment on its US Dollar Step-up Bond on 20 August 2012. There was reference also to a news report aired on a local television station on 15 August 2012 to the effect that

Standard and Poor's had downgraded Belize's credit rating. Mr Howard adverted further to the text of a purported press statement of the Prime Minister confirming that the GOB was unable to meet its obligation of 20 August 2012, of which mention has already been made above. Purported news reports of September 2012 from the Financial Times and Reuters were then alluded to in order to show that there was a further failure on the part of the GOB to meet its obligation to pay US$23.5 million on 19 September 2012 and that only a portion of that, ie US$11.7 million, was paid on the next day, when a further grace period was agreed upon. Mr Howard went on to swear on oath that Reuters had quoted the leader of the team negotiating on behalf of Belize with a committee of bondholders in relation to the Step-up Bond as having said, 'Belize does not have the capacity to repay on the current terms – it did not have this capacity on August 20 so that condition can only change with debt relief.'

[24] Mr Howard also referred in his affidavit evidence to other affidavit evidence as to the GOB's financial position in mid-2011 – given by a senior official of the GOB, viz the Financial Secretary, albeit in entirely separate proceedings. To this affidavit evidence I propose to advert in greater detail later in this judgment. Suffice it to say for now that this evidence seems to have been adduced to show the expected far-reaching effect on the finances of Belize of the enforcement against it of an arbitration award to the tune of BZ$43 million+.

[25] Having referred to the several sources of information just mentioned above, Mr Howard set forth his own conclusion that 'it is unlikely that [the GOB] would be in a position to pay compensation to [BCB]', pointing out at the same time that the amount owed to BCB by Telemedia as at 10 September 2012 was US $35,513,466.00. Having identified that supposed danger, Mr Howard went on later in his affidavit to refer to a second danger which would arise, in his view, if a dividend were to be paid by Telemedia to the GOB after 14 December 2012, viz that, should BCB succeed in its appeal, Telemedia would not be in a position to repay [BCB] its loan facilities'. Mr Howard claimed that, if a further dividend (estimated by him to be likely to be in the region of BZ$12 million) were to be paid out, the total dividends paid out by Telemedia since its acquisition by the GOB would increase to nearly BZ $49 million. Of that sum, he added, approximately BZ$44 million would have been paid to the GOB and two bodies which have purchased Telemedia shares since the

acquisition, viz SSB and CBB. Moreover, so deposed Mr Howard, it is likely that proceeds of such a further dividend would be used by the GOB 'to meet its debt burden and other expenditures'. For support for his belief in this regard, he referred to an affidavit sworn by the Financial Secretary in the instant matter in which that senior official of the GOB said that 'any order preventing' these dividends from being declared or paid to the Government of Belize for use of the public service would seriously affect the delivery of services and adversely affect the Government administration'. In fact, the Financial Secretary left it in no doubt that the proceeds of such dividends will 'enable the [GOB] to provide the necessary services and run the administration of the country'.

[26] Mr Howard gave an undertaking on behalf of BCB to pay for any damage that might be caused to the respondents 'by the grant of this undertaking (*sic*)', adding that BCB was in possession of sufficient funds for such purpose.

[27] For his part, Mr Boyce, in his affidavit in support of the application for interim relief of himself and the Trustees, referred to all of the sources of information relied upon by Mr Howard and already mentioned above, save for the material from the affidavits of the Financial Secretary. He reached a conclusion analogous to that of Mr Howard, viz that '[t]here is no guarantee that [GOB] would be able to obtain the further financing necessary to pay the full amount of any compensation this Honourable Court may order'.

[28] But Mr Boyce went further than this in his affidavit under consideration. Payment of dividends to (a) third parties to whom shares have been transferred by the GOB, (b) bodies such as SSB and CBB (regarded as government-controlled by Mr Boyce) and (c) the GOB itself would create, he deposed, the risk of irremediable harm because recovery of proceeds was likely to prove extremely difficult. Although the CCJ made an order on 26 January 2011 for the GOB to keep the proceeds of sale of any shares in Telemedia in separate accounts, it was not clear, deposed Mr Boyce, that such proceeds would necessarily provide sufficient compensation.

[29] Mr Boyce, like Mr Howard, proffered an undertaking to pay, in his capacity of Trustee of the BTL Employees Trust and on its behalf, any damages that might be

occasioned by a later finding that the injunction being applied for was improperly granted.

[30] In an affidavit sworn and filed on 17 October 2012 on behalf of the respondents, Mr Joseph Waight, the Financial Secretary of Belize ('the Financial Secretary') and, as such, the most senior official in matters of finance in the service of the GOB, deposed that he has held that office for a total of eight years. He said, like the other deponents already mentioned above, that the facts in his affidavit were within his knowledge save where the contrary is stated or appears from the context. He went on to make it clear that he had read the affidavits of Mr Boyce and Mr Howard already referred to above and that they contained certain misconceptions and misstatements which it was the object of his affidavit to correct.

[31] With respect to the present status of public finances in Belize, the Financial Secretary outlined recent developments in regard to the negotiations relating to the restructuring of Belize's debt and stated that it was expected that the restructuring would be completed in the course of the year. As regards the policy of the GOB on dividends, the Financial Secretary expressed the view that action to withhold the declaration or payment of a dividend could constitute a breach of the terms of the prospectus issued to prospective investors in Telemedia. He pointed out that the GOB had lived up to its undertaking to the CCJ to keep the proceeds of sale of any of the acquired shares in Telemedia separate and intact in accounts held by or for the benefit of the GOB in commercial banks. He said further that offers of compensation were made to former shareholders of Telemedia in October 2011 but had not been accepted. As regards the dividends payable by Telemedia to the GOB, he deposed that the General Revenue Appropriation Act No 14 of 2012 (the budget as enacted into law) includes dividends from Telemedia estimated at about BZ$10 million, as revenue for the financial year 1 April 2012 to 31 March 2013. The Financial Secretary then (as has been indicated above) stated:

> 'It follows that any order preventing these dividends from being declared or paid to the [GOB] for use of the public service would seriously affect the delivery of services and adversely affect the Government administration.'

The Financial Secretary proceeded thereafter to deal with the relationship between the GOB and SSB on the one hand, and CBB, on the other, by asserting that it was a misstatement to say that the GOB has full control of them. In a brief concluding paragraph, he stated that:

> '[The GOB] is fully capable of paying any damages which may be awarded by the Court …'

Pertinent legal requirements

[32] I come now to the identification of the pertinent legal requirements for the grant of an interlocutory injunction in general, in preparation for the analysis which needs must follow in order to reach a determination as to whether or not an interlocutory injunction should issue in the instant case. At this stage, I would pause respectfully to commend as worthy of emulation the direct and to-the-point approach of Strayer J and Noël J, respectively, of the Federal Court of Canada, Trial Division, as exemplified in the cases of *Canadian Fracmaster Ltd v Trojan Wellhead Services Ltd* 1992 CarswellNat 1071 and *Fednav Limited v Fortunair Canada Inc* 1994 FTR LEXIS 2438, which were cited by counsel for Mr Boyce and the Trustees.

[33] In my respectful view, the relevant legal requirements are concisely and accurately set out by Noël J at para [8] of his judgment in *Fednav* as follows:

> 'Interlocutory injunctions are granted in circumstances of compelling urgency. An applicant must establish that:
>
> (A) there is a serious question to be tried;
>
> (B) the applicant will suffer irreparable injury not compensable in damages if the injunction is not granted;
>
> (C) where doubt exists as to the adequacy of these remedies in damages available to either party, regard should be had to where the balance of convenience lies.'

Analysis

A Is there a serious question to be tried?

[34] In *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, Lord Diplock, in a speech in which all the other Law Lords concurred, said at p 407, letter G:

> 'The court … must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.'

[35] Mr Boyce and the Trustees stated in their notice of motion that they have a strong case that the GOB, SSB and CBB are not the rightful owners of Telemedia and that they are therefore not entitled to any dividends on Telemedia shares. At para 84 of the judgment of Legall J which is under appeal in Civil Appeals Nos 18 and 19 of 2012, it was held that the 2011 Order was void. It follows that, unless and until this Court decides otherwise, the purported acquisition by the Minister of Public Utilities of the shares in Telemedia held by Mr Boyce and the Trustees through Sunshine Holdings Limited is also void. This Court may well disagree later on with Legall J as to the validity or otherwise of the 2011 Order; but, on 13 December 2012, there was, in my view, no doubt that the question whether the 2011 Order was void was a serious one which was fit to be tried. If this Court should later agree with Legall J that the 2011 Order was void, it by no means follows that it will also agree with him that Mr Boyce and the Trustees have no valid claim for consequential reliefs. It is conceivable, at first glance, (I say no more) that if the acquisition of someone's shares in a company is declared null and void that person shall be entitled to relief in the form of an order for the return of those shares and for the resumption of his enjoyment of all rights appertaining to the same, including the right to receive all dividends declared and paid by the relevant company since the purported acquisition. There was thus, in my view, a serious question to be tried as to whether the GOB, SSB and CBB are entitled to dividends in the shares of Telemedia. I proceeded thence on the assumption, perhaps overly generous, that this state of affairs was favourable not only to the application of Mr Boyce and the Trustees but also to that of BCB.

B Irreparable injury not compensable in damages

[36] In *American Cyanamid*, Lord Diplock said, at p 408, letters B – C:

> '… the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.'

[37] I was not impressed by the manner in which BCB, Mr Boyce and the Trustees marshalled much of the information upon which they relied. I agreed with Mr Barrow SC, for the respondents, that there was much reliance on hearsay in the affidavits of Mr Howard and Mr Boyce already examined above. But, since the applications were interlocutory in nature, I did not regard the criticism on that basis as particularly strong. My fundamental problem with the material was twofold. First, the deponents did not adopt the approach of unambiguously stating that they believed in the truth of such matters as were deposed to although not within their personal knowledge. The published material sought to be relied upon was not, as Mr Barrow put it, given to the Court by either Mr Boyce or Mr Howard as a matter of information and belief. What seemed, rather, to be said by these deponents and, indeed, even by the Financial Secretary, was that they believed what was (rather than what was not) within their personal knowledge to be true. (What was said, in its entirety, was: 'The facts in this Affidavit are, save where it is otherwise stated or appears from the context, within my personal knowledge and are true to the best of my belief.') This, of course, was of scant significance in the case of the Financial Secretary, since he relied on his own personal knowledge. Secondly, with regard to information relied upon by BCB, Mr Boyce and the Trustees as coming from the GOB itself, this was all controverted by the Financial Secretary in the affidavit filed on behalf of the GOB which I have

already examined above. As has already been noted, the post of Financial Secretary is the highest office in matters of finance in Belize's public service and the current holder of that office, Mr Waight, deposed that he has held it for a total of eight years. Moreover, when application was made to this Court for leave to cross-examine him, he promptly presented himself in court and there was no objection to the application. (The application was withdrawn after a corresponding application to cross-examine Mr Boyce (contested) was withdrawn by the respondents.) His assurance that the GOB is fully capable of paying any damages which may be awarded was one undoubtedly based on personal knowledge and had to carry the greatest weight, as far as I was concerned; and it outweighed any suggestion to the contrary contained in the affidavits of Mr Howard and Mr Boyce. I was therefore unable to accept that the instant case had been demonstrated to be one in which the applicants for an injunction, if they were to succeed on the appeal, would not be adequately compensated by an award of damages for the loss they would have sustained as a result of the respondent continuing to do what was sought to be enjoined between the time of the application and the time of the trial.

[38] There having been no suggestion that damages would not, in principle, be an adequate remedy – only that the GOB would not be able to pay them – then, on the basis of what Lord Diplock has already been quoted above as having said in *American Cyanamid*, I concluded that no interlocutory injunction should be granted in the present case, since, in my view, it was an entirely normal one, as far as factors operating in favour of the applicants were concerned.

[39] In case, however, I was in error in reaching the conclusion that the GOB is to be regarded as fully capable of paying any such award of damages as has been referred to above, I went on to follow the guidance given by the learned Law Lords in *American Cyanamid*, in the following passage at p 408, letters C - D:

> 'If on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately

compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial.'

[40] On considering that question, I was able to reach no conclusion other than that the GOB would not be adequately compensated under the admittedly strong undertakings in damages that had been proferred on behalf of BCB, Mr Boyce and the Trustees in the affidavits of Mr Howard and Mr Boyce already examined above. The difficulty for me here was not with the ability of BCB and Mr Boyce, as trustee, to pay an award of damages but with the adequacy, in principle, of such an award to compensate for losses of the kind likely to be suffered by the GOB in the event of the grant of the injunction being sought against them (regardless of which of the two alternative forms might be preferred). As had been made abundantly clear by the Financial Secretary, in the excerpts from his affidavit evidence, on the applications as well as in previous litigation, which excerpts have been alluded to above, what was in jeopardy here was the continuous provision of important services to the people of Belize by the GOB. A government unable to deliver necessary services to its people will inevitably cause them inconvenience, hardship and suffering on, at the very least, a considerable scale. A loss by the GOB of confidence and goodwill among the people subjected to such inconvenience, hardship and suffering will naturally follow. For such a loss, no amount of money will ever compensate. The applicants turned a blind eye to this type of loss, it seems to me, when they suggested that their financial resources are vast and that the Court could make an adequate award to compensate the GOB for any losses suffered by the erroneous grant of either form of an injunction they sought. (Mr Boyce actually stated in his affidavit that any 'prejudice to the [GOB] (or indeed any third parties)' would be 'minor'.) But the applicants were not, to my mind, free so to do, for the leading authorities in this area of the law demonstrate a clear awareness of the importance of considering the effect of an interlocutory injunction on persons other than the respondent to the relevant application in assessing his/her potential loss for purposes of the balance of convenience determination. Thus, in *American Cyanamid*, Lord Diplock referred at p 409, letters F – G, to the fact that the first-instance judge had, before deciding to injunct Ethicon Ltd, taken account, properly in his Lordship's view, of the fact that that company 'had no business which would be

brought to a stop by the injunction; no factories would be closed and no work-people would be thrown out of work'. And, many years later, in *National Commercial Bank Jamaica Limited v Olint Corp Limited* [2009] UKPC 16, Lord Hoffmann, delivering the advice of the Board, referred to the importance of just this type of consequence of an interlocutory injunction when he said, at para 16:

> 'The Court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account.'

C Balance of convenience

[41] In my view, then, there was doubt in the instant case as to the adequacy of the remedy in damages available to the GOB. I would repeat, however, that I conducted this exercise as to balance of convenience entirely on the assumption (strictly for the sake of argument) that I was wrong in concluding that damages was an adequate remedy for BCB, Mr Boyce and the Trustees and that the GOB was in a position to pay any award of such damages; for the arrival at that conclusion rendered it unnecessary to go on to consider the balance of convenience as I have already stated above, relying on the authority of the House of Lords in *American Cyanamid*. Once I put my above conclusion aside for the sake of argument, I had to deal with a situation in which the doubt as to the adequacy of damages as a remedy for the GOB was matched by a doubt as to the adequacy of damages as a remedy for BCB, Mr Boyce and the Trustees. This gave rise to the question of balance of convenience; and guidance had again to be sought from *American Cyanamid*, in which it was stated at p 408, letters E – F:

> 'It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to

> suggest the relative weight to be attached to them. These will vary from case to case.'

[42] This was an unusual case. As such, it called for consideration of unusual matters. None of the decided cases to which the Court had been referred involved an application for an injunction against a government, let alone an injunction calculated to cause deprivation to the people of a nation through the discontinuation of public services. And it was important to understand that for the Financial Secretary to give the assurance as to the ability of the GOB to pay any relevant award of damages was not for him to deny that the grant of the interim injunction then being sought, in either of its alternative forms, might occasion the stoppage of certain services to the public. In my respectful view, this stoppage had to be the weightiest determining factor in the instant applications. It arose not only from the affidavit of the Financial Secretary filed on behalf of the respondents, in which it was deposed that:

> '… any order preventing these dividends from being declared or paid to [GOB] for use of the public service would seriously affect the delivery of services and adversely affect the Government administration'

but also from the extracts from two of his affidavits in other unrelated proceedings, which extracts were relied upon by Mr Howard in his own first affidavit and include one in which it was deposed by the Financial Secretary (in relation to an arbitration award of BZ 43 million+) that:

> '[n]ot only would the need to pay the Award adversely affect critical programs and undertakings which gravely impair the [GOB's] ability to deliver Health Care, Education and other essential services to the society but special measures also would have to be taken by [GOB] to raise or generate the necessary revenues or funds.'

In another such extract relied upon by BCB, through Mr Howard, the Financial Secretary spoke of the award there under consideration as being certain to have, if executed, 'a crippling and ruinous effect on the economy'. Again, if I may digress

briefly, I did not see any necessary inconsistency between these statements and the subsequent assertion as to the ability of the GOB to pay any damages award. What was to be gathered, as I saw it, from all these statements, taken together, was that payment can be effected but is certain to take a heavy toll, in terms of human deprivation and suffering across the length and breadth of the nation. These extracts from earlier affidavits of the Financial Secretary lent credence to his prediction of very unpleasant consequences if the injunction was to be granted and the nation thus deprived of the immediate benefit of the dividends in question. In my view, it bordered on callous cynicism to take the position, in these circumstances, that the GOB included these dividends in its budget fully aware of the risk of an injunction restraining their declaration and payment. And nothing in the material placed before this Court indicated that the refusal of the injunction being sought would have consequences on third parties of this peculiar nature and on this scale.

[43] It is also worthy of mention in support of the determination that the balance of convenience favoured the GOB that, in speaking of prohibitory injunctions in *American Cyanamid*, the House of Lords considered it to be of importance that 'to interrupt [a party] in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start over again to establish it in the event of his succeeding at the trial': p 408, letter G. Their Lordships contrasted the conduct by a party of such an enterprise with the doing by him of 'something that he has not done before', which would not ordinarily cause as much inconvenience. The evidence in the instant applications, however, was that this would not be the first time that dividends were being declared and paid to the GOB and other Telemedia shareholders since the purported acquisition. In my view, Lord Diplock was not confining his relevant remarks to cases of prohibitory injunctions. As Lord Hoffmann, in declaring 'barren' any debate as to whether an injunction should be labelled 'prohibitory' or 'mandatory', pointed out in *National Commercial Bank*, at para 20: 'What matters is what the practical consequences of the actual injunction are likely to be.'

The order sought against dissipation of assets

[44] The application of Mr Boyce and the Trustees for the relief mentioned at para [14] above admitted of relatively summary treatment. What was sought was an order that the respondents exercise all powers held by them as controlling shareholders of Telemedia to ensure that that company should not 'dissipate any of [its] assets other than in the normal and ordinary course of business, including but without limitation by early payment of loans. Section 27(1) of the Supreme Court of Judicature Act provides that, subject to rules of court, the court below may grant an injunction in all cases in which it appears to that court to be just or convenient to do so. This Court is conferred with a like power under section 19(1) of the Court of Appeal Act, which provides that, on the hearing of an appeal under Part III (headed 'Civil Appeals'), the Court shall have power to make any such order as the court below might have made, or to make any order which ought to have been made, and to make such further or other order as the case may require. What the requirement of section 27(1) for the court below (and, by extension, this court) to grant an injunction only where it appears just or convenient to do so translates into in cases where this particular object of preventing the dissipation of assets is involved was considered in *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] 2 All ER (Comm) 1034, to which the attention of this Court was directed by counsel for Mr Boyce and the Trustees. That was a case in which Teare J had granted a freezing order in favour of Mobil Cerro Negro Ltd ('Mobil') on 24 January 2008 under section 44 of the Arbitration Act 1996 (UK). Petroleos de Venezuela SA ('PDV') then made application to set the order aside. Mobil cross-applied to continue it. Walker J granted PDV's application on 18 March 2008 and gave his reasons for decision on 20 March 2008. The learned judge conveniently dealt with the issues before him in numbered stages. At Stage 2A: Dissipation of Assets – The Law, he said:

> 'The expression 'dissipation of assets' focuses on the conduct of the defendant as regards the defendant's assets, and the question is whether a particular course of conduct in relation to assets by the defendant, actual or feared, is conduct which should or may lead the court to conclude that the grant of a freezing order is just and convenient.'

[45] Walker J proceeded then to set out the 'principles which have been established over the course to time' whence he had derived guidance. In this regard, he said, at p 1045, letter f:

> 'A fundamental principle is that freezing orders are not granted in order to provide security for a claim … The mere fact that a defendant's creditworthiness is in doubt does not justify the making of a freezing order.'

But more importantly, for present purposes, he further said, at page 1046, letters c – d:

> '… the mere fact that the actual or feared conduct would risk impairing the claimant's ability to enforce a judgment or award does not in every case mean that a freezing order should be granted: see Gee [Commercial Injunctions (5th edn)] pp 351 – 353 (paras 12-037, 12-038). The conduct in question must be unjustifiable. This statement of principle is found in the judgment of Stuart-Smith LJ in *Ketchum International plc v Group Public Relations Holdings Ltd* [1996] 4 All ER 374 at 380 – 381, [1997] 1 WLR 4 at 10. The principle was put in a similar way by the Court of Appeal in *Mediterranean Feeders LP v Bernd Meyering Schiffahrts* [1997] CA Transcript 99/096: 'there must be a risk that it [the asset] will be used otherwise than for normal and proper commercial purposes.' '

Applying the above two, as well as other, principles, Walker J was able to say at p 1054, letters c – d:

> 'Accordingly I conclude that Mobil cannot surmount the first hurdle (s 37 of the 1981 Act) because it has no good arguable case that PDV's conduct in relation to its assets is unjustified.'

Section 37 of the Act cited by Walker J (the Supreme Court Act 1981) contains a provision similar to the 'just or convenient' one found in section 27(1) of the Supreme Court of Judicature Act of Belize.

[46] It was unnecessary, in my respectful view, for this Court in considering the application for an order to prevent the dissipation of assets of Telemedia in the instant appeal (making the huge assumption that the applicants were on solid ground despite not having made Telemedia a party to the proceedings) to venture beyond the reach of the second of these two principles. The declaration and payment by Telemedia of dividends in the same manner in which it has been doing in recent years is not, to my mind, unjustifiable conduct. For the applicants to say in this regard that the purported acquisition has been declared null and void by the order of Legall J is to tell the Court that it ought to consider the outcome of the appeals which the applicants consider likely. But the guidance on this aspect of the instant case which is to be found in both *American Cyanamid* (at p 409, letters A – C) and *National Commercial Bank* (at para 18) does not, as I understand it, compel the Court to consider such outcome. For this reason, I opined that even this part of the application of Mr Boyce and the Trustees was devoid of merit.

Conclusion

[47] I, therefore, concluded that the applications of BCB, Mr Boyce and the Trustees should be refused; that it should be ordered that the respondents have their costs, certified fit for two counsel (a senior and a junior), such costs to be taxed, if not agreed; and that the order as to costs should be provisional in the first instance, but become final and absolute on a date seven full days after the delivery of reasons for judgment, unless application for a contrary order be filed before that date. I further concluded that it should also be ordered that, in such an event, the matter of costs be decided by the Court on written submissions to be filed and exchanged within 15 working days from the date of the filing of such application.

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SOSA P

MENDES JA

[48] Before us are two separate applications, one by the British Caribbean Bank Limited ("the Bank") and the other by Dean Boyce and the Trustee of the BTL Employees Trust (referred to together as the "Trust"), for almost identical injunctive relief pending the determination of these appeals. It would not be inaccurate to summarise the relief sought as comprising, in the first place, an order directing the Government of Belize to ensure that dividends on shares held in Belize Telemedia Limited are not declared for the period ending 31 March 2012 and, alternatively, an order that such dividends in respect of shares held by the Government of Belize, the Central Bank of Belize and the Belize Social Security Board ("BSSD"), when received, be held in an escrow account to abide the outcome of these appeals.

[49] It is not necessary to set out in any detail the facts which form the backdrop to these appeals. They have been explored fully in the judgment of this court in CA No. 30 and 31 of 2010, dated 24 June 2011, in the judgment of the Caribbean Court of Justice in CCJ Appeal Nos. CV 4 & 6 of 2011, dated 26th January 2012, and in the judgment of Legall J. in the court below, dated 11 June 2012, against which these appeals and cross-appeals are brought. Suffice it to say that the Government of Belize purported to acquire, compulsorily, the 11,092,844 shares which the Trust, through Sunshine Holdings Limited ("the Sunshine shares"), held in Belize Telemedia. It also purported to acquire the Bank's loan facilities with Belize Telemedia, the balance of which, inclusive of interest, stood at US$35,513,466.00 as at 10 September 2012. The legality of these acquisitions is under challenge in these proceedings. The trial judge found that the legislation and orders authorising the acquisitions were invalid, but he declined to grant any relief because of an amendment to the constitution which vested majority ownership and control over British Telemedia in the Government of Belize. Both the legality of the acquisition legislation and orders and the constitutionality and effect of the amendment to the constitution are before us for determination. In this regard, we have had the benefit of full written and oral submissions but have stayed our final judgment pending an appeal to the CCJ against an order by this court dismissing an application that Awich JA should not sit to hear the appeals.

[50] As regard the feared declaration of dividends, there is presently an agenda item before the annual general meeting of Belize Telemedia inviting the meeting to consider and approve the declaration of a dividend for the year ended 31 March 2012. That meeting was originally due to be held on 28 September 2012 but, by order dated 26 September 2012, the CCJ directed the Government of Belize to ensure that consideration of the declaration of dividends be adjourned to a date not before 14 December 2012. That order was made, apparently, to facilitate consideration of these applications for injunctive relief by this court, given that the appeals concerning the validity of the acquisitions were due to be heard in October 2012.

[51] If this court were persuaded that the acquisition of the Bank's loan facility was unconstitutional, and that the constitutional amendment vesting control over Belize Telemedia in the Government was invalid, or if valid, did not preclude relief, the Bank would, on one view, be entitled to the return of its loan facility with Belize Telemedia, which would once again be liable to the Bank for any balance then outstanding. The Bank claims that it would also be entitled to compensation from the Government for any damage suffered in the interim. I am prepared to assume that this is correct, but it seems to me that the Bank would not be entitled to any final relief which might affect the declaration of dividends on shares in Belize Telemedia. It is therefore difficult to appreciate on what basis interim relief prohibiting the declaration of a dividend can be claimed.

[52] The Bank has suggested that the declaration of dividends would deplete Belize Telemedia's resources and thereby make it difficult for Belize Telemedia to repay the Bank's loan. No doubt, the payment of dividends would reduce the funds available to Belize Telemedia to satisfy its obligations generally but nothing has been put before us which suggests that the Bank would enjoy priority over the funds which Belize Telemedia might otherwise use to pay dividends. In addition, nothing has been put before us to suggest that the payment of dividends would so impair Belize Telemedia's operations as to affect its ability to meet its obligations under the loan.

The Bank has put in question the Government's ability to pay, not Belize Telemedia's.

[53] Moreover, Article 128 of Belize Telemedia's Articles of Association deems Telemedia in General Meeting to have declared a final dividend equivalent to 45% of Telemedia's profit available for distribution divided by the total ordinary shares, unless otherwise agreed in writing by the holder of the Special Share in Belize Telemedia. The declaration of a dividend is accordingly an event occurring in the ordinary course of Belize Telemedia's affairs and indeed is mandated to take place, unless the Special Shareholder agrees otherwise.

[54] The Trust is in a slightly different position to the extent that the return of the Sunshine shareholding upon a declaration of invalidity of the acquisition, if granted, would give them locus standi at any general meeting of Telemedia and accordingly some say in the way their shares are to be voted. But they are not the only shareholders whose shares have been expropriated and there are other shareholders who acquired their shares after the compulsory acquisition. The attitude of these shareholders to the proposed declaration of dividends is not known. In the circumstances, I can see no basis for interfering with the rights of third parties to have a dividend on their shares declared, moreso since they have not been heard on this application. For this, and for the other reasons set out in the last paragraph, I am not persuaded that there is any legal justification for restraining the declaration of dividends.

[55] The claim that any dividends received by the Central Bank and BSSD should be paid into an escrow account is a non-starter given that neither the Central Bank nor the BSSD were served with the application for injunctive relief and accordingly have not been given any opportunity to be heard. I do not accept that the presumed fact that the Government of Belize may have influence over decisions made by these bodies justifies making an order which affects their interests in their absence.

[56] The claim by the Bank that the dividends received by the Government on the shares held in its name be placed in an escrow account can be properly characterised as an attempt to create a fund out of which any damages awarded to the Bank can be recouped. Indeed, it is the Government's alleged inability to pay on which this relief is founded. It is therefore analogous to a claim for a Mareva injunction and in my view ought only to be granted if the refusal of the order would create "a risk that a judgment or award in favour of the (Bank) would remain unsatisfied" – ***Ninemia Maritime Corporation v Trave Schiffahrtgesellschaft GmbH*** [1983] 1 WLR 1412, 1422.

[57] Whereas, on the evidence presented to us, the Government of Belize is experiencing grave financial difficulties, there is nothing to suggest that it will never be in a position to satisfy any judgment for damages which this court might award. The Government of Belize will continue to generate income on an annual basis and no doubt to borrow monies to meet capital and recurrent expenditure. There is nothing to suggest that the Government of Belize will be financially incapable of satisfying court orders, even if it may not be in a position to do so immediately, in full, and even though it may take some time before full satisfaction is achieved. It is a matter of prioritising its expenditure. There is accordingly no basis in my judgment to, in effect, freeze a portion of the Government's revenue to meet a potential judgment for damages in favour of the Bank. If this were permissible, any Government creditor could cite the Government's difficult financial circumstances as the basis for a court order freezing its income to satisfy a judgment to be obtained in the future, and thereby worsen the Government's financial position and its ability to meet its other, maybe more pressing, debt obligations.

[58] The claim by the Trust that the dividends received by the Government be put in an escrow account is on an entirely different footing and requires more traditional analysis. If successful on this appeal, one of the consequential orders to which it is entitled, on one view, is the re-vesting of ownership in 11,092,844 shares to Sunshine Holdings. This is arguably one of the consequences of declaring the acquisition to be null and void and of no effect. I refrain from deciding this point since

the Appellants claim that the only relief to which the Trust would be entitled is the value of its shares and we have stayed our judgment as previously indicated. However, in the event that the Trust's shareholding is restored, it would also be prima facie entitled to any dividends on those shares which the Government may have received in the interim. In a real sense, therefore, the dispute on this application concerns the rightful ownership of the dividends and whether the Government should be permitted to dispose of it pending the determination of the appeal.

[59] I should point out straightway that having framed the issue in this way, the Trust can have no claim in respect of dividends payable on any shares other than the 11,092,844 which was expropriated from Sunshine Holdings. It is only the dividends on its own erstwhile shares which can properly be considered for ring-fencing. A claim that dividends payable on shares expropriated from other persons be placed in an escrow account must accordingly be rejected. For the reasons already given, an order which would in effect establish a fund, made up of dividends payable on shares expropriated from persons who have not joined in this application, to be used to satisfy any award of damages made by this court in the Trust's favour, is not justifiable.

[60] There is no doubt that, ordinarily, damages would be an adequate remedy to compensate for the appropriation by the Government of the dividends declared on the expropriated Sunshine shares. The amount of such damages is easily quantifiable and interest may be awarded to compensate for any delay in payment. Ordinarily, therefore, this fact alone would militate against the grant of any injunction – ***National Commercial Bank Jamaica Ltd v Olint Corporation Ltd*** [2009] 1 WLR 1405, para 16. The complication in this case is that, given the dire financial straits in which the Government finds itself, the actual date on which damages might be paid is not known. In this regard, I recall the reference in Mr Stewart Howard's affidavit to evidence given on oath by the Financial Secretary in June 2011, that the payment of an award of BZ$43 million would "adversely affect critical programs and undertakings and gravely impair the Government's ability to deliver Health Care,

Education and other essential services" and would require "special measures ... to raise or generate the necessary revenue and funds." By my estimation, based upon the evidence presented to us of the total dividend which is expected to be paid (BZ$12 million), and having regard to the evidence that the 10 million shares transferred to BSSD translates to 20% of the shareholding in Telemedia, the dividend payable on the expropriated Sunshine shares would amount to approximately BZ$2.6 million. The evidence is, as well, however, that the total dividends which the Government and related public entities would have received since the expropriation would amount to BZ$44 million, a large part of which, on one view, would have to be repaid to their rightful owners if the acquisition is held to be unconstitutional. It is therefore reasonable to assume that the Government would not be in a position to satisfy any order which this court might make as to damages with any promptness.

[61] The Trust relies on ***American Cyanamid Co. v Ethion Ltd*** [1975] AC 390, 408, where Lord Diplock said that an interlocutory injunction should not normally be granted if damages would be an adequate remedy "***and*** the defendant would be in a financial position to pay them." Thus, damages have been thought not to be an adequate remedy where "the chances of a judgment ... being satisfied ... cannot be rated as other than questionable" - ***Evans Marshall v Bertola*** [1973] 1 WLR 349, 380 – and where there was "serious doubt" as to whether, if the plaintiffs were to succeed at the trial, the defendant "would be good for any substantial damages recoverable against him in respect of what has occurred pending the trial" - ***Standex International Ltd v C.B. Blades and C.B. Blades Ltd*** [1976] F.S.R. 114, 122. As I have already noted, however, the evidence raises concerns not as to ***whether*** the Government with be "good" for any damages awarded, but rather, ***when***. Nevertheless, in my view, it would be wrong to categorise an award of damages as being adequate, and on that basis alone deny an injunction which might otherwise be justifiable, where there is no guarantee that a defendant would be in a financial position to satisfy the award within a reasonable time. I can easily conceive of a situation, for example, where a Claimant's case for the return of its property is strong. In such circumstances, it would be wrong in my view to deny injunctive relief which would preserve the property until final determination of the case, and to

confine the Claimant to the recovery of the value of its property at some unknown point in time in the future after judgment, especially where injunctive relief would not cause irremediable harm to the defendant.

[62] In this case, at the very least, it can be said with some justification that the Trust would be prejudiced if the Government is permitted to dispose of the dividends attributable to the expropriated Sunshine shares, and they are forced to rely on an award of damages to recover it, given that they will be required to wait an undetermined period of time before the money which this court will have presumptuously determined to be theirs, is returned to them. Even though on traditional principles, therefore, damages would be an adequate remedy in the sense that the Government will be ultimately 'good' for the dividends, I am not prepared to deny the relief sought on this ground alone without considering the harm which might be caused to the Government and other third parties if the relief sought is granted.

[63] In ***Olint***, Lord Hoffman presented the flipside of the undesirability of injunctive relief where damages will be an adequate remedy. He said (at para 16):

> "... if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."

Although we have agreed to stay delivery of our judgment on the appeal, I am satisfied, after having already read the comprehensive written submissions of the parties and having heard their oral submissions, that there is a serious issue to be tried on this appeal. In addition, if it is ultimately determined that the Trust has been unconstitutionally deprived of the Sunshine shares, the further receipt and disposal by the Government of dividends to which the Trust would ordinarily be entitled would compound the breach of its rights.

[64] On the question of the cross-undertaking in damages, if the Government is required to put the dividends received in respect of the expropriated Sunshine shares in an escrow account to await the judgment of this court, it would be deprived of the use of approximately BZ$2.6 million which it has budgeted to spend, an amount which is just .003% of its total estimated recurrent revenue for 2012/2013 of BZ$819,369,434. This may result in it incurring finance charges on funds borrowed to meet the shortfall in expected revenue, which the Trust would be required to meet under its cross-undertaking in damages. I have no doubt that this can be satisfied given that, if this court determines that the acquisition was lawful, the Government would yet be indebted to the Trust for the value of the expropriated Sunshine shares and this fund could be used to recoup by way of set off any damages which the Government might suffer as a result of any order which this court might make.

[65] On the other hand, there is the chance that, given the parlous state of the Government's finances, it may not be able to raise any further funds this financial year to make up for the shortfall in expected revenue which might result from an order requiring dividends to be put in an escrow account. It may therefore become necessary for the Government to delay some aspect of its expenditure programme this financial year or to defer the payment of some outstanding invoices. Depriving the Government of access to the sum of approximately BZ$2.6 million may accordingly result in some prejudice to third parties who may have benefited from the timely delivery of Government services now forgone or who may now have to wait longer for satisfaction of their just debts.

[66] If the Government is ordered to put the dividends in an escrow account, therefore, no irremediable financial damage will be caused to it, if it is eventually successful on this appeal. The dividends in the escrow account would then be immediately available for its use and any financial damage incurred would be satisfied out of the sums owing to the Trust for the expropriation of the Sunshine shares. But there is yet the possibility that some unidentified third party might be inconvenienced by denying the Government full and immediate access to the

dividends declared on the Telemedia shares. There is no remedy for such inconvenience.

[67] Likewise, no irremediable damage would be caused to the Trust if the order is refused since, if ultimately successful on the appeal, the Government would presumptively be ordered to repay the dividends, and as already found, there is no evidence that the Government will be incapable of compliance. There will admittedly be prejudice caused to the Trust by the delay in satisfying any such order having regard to the Government's difficult financial circumstances, but such delay would attract the normal statutory interest payments.

[68] The case is therefore finely balanced and is one in which recourse to the relative strength of the parties' respective cases would assist in breaking the deadlock. As it is, however, I find myself somewhat reticent in expressing any view in this regard at this stage given that we have agreed to stay our judgment on the merits of the appeal. But it is clear that the Trust's case for the return of its shares and to be awarded damages for the dividends that it would have received but for the expropriation, is contingent in large part upon this court finding that the Belize legislature's power to amend the constitution by special majority is limited either by what is called the "basic structure doctrine", which thus far has neither been rejected nor adopted by an appellate court in the region, or on the basis that the power of amendment must be exercised genuinely with the aim of effecting an amendment of the constitution and not as a colourable device designed to achieve an aim which is otherwise constitutionally impermissible. In no small measure, a finding by this court that the legislature's power of amendment is limited in this way would constitute a significant development in constitutional jurisprudence. In this light, and having had full written and oral submissions, it would be fair to say that the parties' respective cases are also evenly balanced. In all of the circumstances, therefore, and bearing in mind that it is the Trust's burden to establish its case for injunctive relief, I would conclude, though not without some difficulty, that it is the denial of injunctive relief which "is more likely to produce a just result" – per Lord Hoffman in ***Olint***, para 16. I hasten to add that if I felt comfortable at this point to say that the Trust's case for the

return of its shares was strong, I would have ordered that the dividends payable on its shares be placed in an escrow account.

[69] In the circumstances, I would dismiss the Bank's and the Trust's applications for injunctive relief, with costs in the terms proposed by the President.

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MENDES JA

AWICH JA

[70] I have had the advantage of reading in draft form, the reasons given by Sosa P. and Mendez JA., for the decision of this Court delivered last Thursday December 13, 2012, dismissing the two interlocutory applications by, the British Caribbean Bank Ltd. – BCB, and Dean Boyce and Trustees of BTL Employees Trust, respectively, against the respondents, the Attorney General of Belize and the Minister of Public Utilities. I concur in the reasons. I would like to add the following in brief form only.

[71] The fact that Belize Telemedia Ltd. – BTL, the Social Security Board – SSB and the Central Bank of Belize – CBB, were not made parties to the applications for interlocutory injunction orders that would affect them, or served with the applications, is not just a matter of procedure and form. The three are corporate persons who have legal rights and obligations of their own separate and apart from those of the Attorney General and the Minister. Moreover, the last two are statutory corporations. Their functions, rights, assets, obligations are matters of statutory law. This court was not informed at the hearing as to whether or not the orders requested would affect their statutory rights and obligations. The three corporations were not afforded

opportunity to be heard on those matters, and of course did not attend. The applications were not urgent applications to be made without notice to them

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[72] The matter of denial of the opportunity to be heard is a fundamental question of a fair trial. It is a matter that is at the core of the principle of protection of the law which courts must provide, although the courts themselves cannot be guilty of breach of it. Although I do concur in the reasons given by Sosa P. and Mendes JA., I would, on the denial of hearing to the three corporations alone, dismiss the applications against the two respondents because the orders against the respondents if made, would affect the interests and rights of all the three corporations and perhaps the statutory duties of the last two.

[73] The application of BCB was misconceived *ab initio*. BCB's assets that were compulsorily acquired were loan facilities and interests thereon owed by BTL. BCB has no right to any profit that would be made by BTL and declared dividends. The request for an order restraining early payment of the loans acquired cannot be for any purpose of preserving any asset or *status quo*. Early payment simply converts the receivable to cash, a tangible current asset. In the event BCB is successful in the appeal, it will be entitled to damages which may include the loan sums and interests received by the Government wrongfully. Is it not good business practice to pay off debts when profits are good, and have better capacity to obtain loan if the need arises?

[74] I preferred to take evidence from the affidavits of Mr. Joseph Waight where there was conflict in the contents of his affidavits and the contents of the affidavits of Mr. Dean Boyce. The former was readily agreeable to be cross-examined. The latter was not, he opposed an application for his cross-examination. Inability of a government to pay judgment debt or debts generally cannot, in my view, be resolved on conflicting affidavits where the applicant has resisted cross-examination. Negotiation by government or even an ordinary bank debtor is not good evidence that the government or the debtor is unable to make payments. It may even be a sign of the debtor's confidence in his future income. I would be slow to draw a conclusion which verges on the scandalous, on conflicting affidavits. There are such

things as economic indicators. Had CBB been made a party, it might have provided some good expert evidence. I dismiss the two applications.

[75] The orders made were read out in court on 13 December, 2012.

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AWICH JA