

IN THE SUPREME COURT OF BELIZE, A.D. 2008

CLAIM NO. 338 OF 2008

	THE BELIZE BANK LIMITED	Applicant/Claimant
BETWEEN	AND	
	THE ATTORNEY GENERAL OF BELIZE (on behalf of the Government of Belize)	First Defendant
	THE MINISTER OF FINANCE	Second Defendant
	THE HONOURABLE JUSTICE AWICH	Third Defendant
	MR. JAIME ALPUCHE	Fourth Defendant
	MR. JEFFREY LOCKE	Fifth Defendant
	THE CENTRAL BANK OF BELIZE	Sixth Defendant

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BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Nigel Plemming QC, with Mr. E. Andrew Marshalleck, for the applicant/claimant.

Mrs. Tanya Longworth Herwanger, Solicitor General, for the first and second defendants.

Mr. Michael Young SC for the third, fourth and fifth defendants.

Ms. Lois Young SC for the sixth defendant.

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DECISION

The underpinning claim in the instant proceedings before me relates to a fixed date claim by the claimant, the Belize Bank, in which it is seeking constitutional and administrative relief from the court. The claim itself seeks several declarations relating to the Banks and Financial Institutions Appeal Board (the Appeal Board).

2. The Board itself is provided for in section 70 of the Banks and Financial Institutions Act – Chapter 263 of the Laws of Belize, Revised Edition, 2003 – the Act hereafter.
3. Under this Act, a right of appeal is granted by section 71 to any person aggrieved by a decision of the Central Bank, among other things, made pursuant to section 36 of the Act.
4. The Central Bank issued certain directives to the claimant on 14 March 2008, following an examination it had conducted of the claimant regarding its handling of funds transferred to it by the Government of Venezuela and the Embassy of the Republic of China, Taiwan.
5. On 9th April 2008, the claimant/applicant was informed by letter of the formal appointment of the Appeals Board.

After some skirmishes through letters from the attorney for the claimant, the Financial Secretary and the Chairman himself of the Appeals Board, the claimant eventually filed a Notice of Appeal against the Central Bank's directives on 23rd May 2008.

6. On the same day, the claimant/applicant filed the present claim challenging, in effect, the composition of the Appeals Board and its constitutionality.
7. Monday, 16th June 2008, was the first hearing of the claimant's fixed date claim in these proceedings. At this hearing, I gave directions intended to expedite the hearing of this matter in a timely and orderly fashion, and I ordered disclosure by the parties of any pertinent documents in their possession relating to the claim.

8. I finally set the 16th and 17th of July 2008 as the dates for the hearing of the substantive claim.
9. However, at about 3:00 p.m. the same day, the Registrar brought in to my chambers, an **ex parte** application. The application was said to be urgent and it was supported by the affidavit of Mr. Philip Johnson, the Chairman of the claimant/applicant, seeking two orders from the Court.
10. The two orders sought were i) that the Central Bank be added to the proceedings as the 6th defendant and ii) that it be restrained whether by itself, its servants or agents or otherwise howsoever until further order of this court or full trial of these proceedings from acting upon, in consequence of or seeking to enforce the directives it had issued dated 14 March 2008 to the claimant/applicant.

After I had perused the application and read the second affidavit of Mr. Johnson filed in support of it and after having heard Mr. Nigel Plemming QC of counsel for the claimant/applicant, I granted the two orders sought, convinced and satisfied that nothing should in the interval be done on the Central Bank's directives until after the determination of the claimant's/applicant's challenge to the Appeals Board already seized of the appeal in relation to the directives.

11. I however also ordered that the Central Bank should be immediately served with the orders and I set yesterday to have all the parties, including the Central Bank, appear before me for an inter-partes hearing.
12. At the hearing yesterday, all the parties appeared as well as the Central Bank which was represented by Ms. Lois Young SC as its counsel.

13. I then took the opportunity before the substance of the application could be heard, to inform all the parties that given the fact that the substantive claim was challenging the constitutionality of the Appeals Board, whose Chairperson I had designated (as the law allowed me to do), I was prepared to recuse myself from any further hearing of the case.
14. However, all the parties through their respective counsel expressly stated that they had no problem with me continuing to hear the case and that I should not recuse myself.
15. Mr. Plemming QC then asked if the Central Bank would abide by the injunction ordered against it late on Monday afternoon.
16. Ms. Lois Young SC however, stated that she was opposed to the joinder of the Central Bank as the sixth defendant and that she was in fact objecting to the interim injunction granted against it **ex parte** on Monday afternoon.
17. Mr. Plemming QC then renewed his application to have the interim injunction against the Central Bank as the sixth defendant, continue in place until the determination of the instant claim. He emphasized that all that the claimant/applicant was asking for is for the Central Bank to stay its hands until the constitutional challenge to the Appeals Board is determined and that it was reasonable in the circumstances to ask for this until that challenge was disposed of. He urged and submitted that the balance of convenience favours the grant and continuation of the interim injunction in this case.

He also invited the Central Bank as a responsible regulator to give an undertaking to stay its hands or in the alternative, for this Court to grant the interim injunction until the instant proceedings are determined.

18. Ms. Young SC for the Central Bank on the other hand characterized the application as an abuse of process, in her view, under the Act, once there is an appeal, it does not operate as a stay or suspension of the directives of the Central Bank. She relied on section 76 of the Act for this.

She further submitted that it was not in dispute that on 23rd May 2008, the claimant/applicant filed an appeal to the Appeals Board and that the latter had, on 4th April 2008 been constituted, pursuant to section 70 of the Act. She further stated that the Chairman of the Appeals Board had set the dates 1st and 4th August 2008 by Notice of Hearing, sent out on 11th June 2008, for first hearing of the claimant's/applicant's appeal to it. Therefore she submitted, the interim injunction granted should be vacated as the Appeals Board is now seized of the claimant's/applicant's appeal against the Central Bank's directives.

19. Just before lunch yesterday, I adjourned in order to facilitate the Central Bank to put before the Court any evidence by way of affidavit it might want to urge on the Court to vacate the interim injunction granted against it.

20. I have now had the benefit of an affidavit of the Governor of the Central Bank dated 17 June 2008. I find this evidence cogent and helpful and I am grateful that it has put before me so I was able to read the orders of Muria J made in Claim No. 196 of 2008, between the present claimant/applicant, as claimant, and the Central Bank, as the defendant, especially the Ruling he made on 11th June 2008.

21. At first blush, a perusal of the application in that case and the Orders and Ruling of Muria J would tend to lend some colour to Ms. Young's argument that the present application before me smacks of an abuse of process and an attempt through the back door to obtain what the claimant/applicant could not obtain in Muria J's court. The gist, if I may, with respect, so try to encapsulate Muria J's Orders and Ruling, was to the

effect, that an appeal having been lodged with the Appeals Board, he was **functus** and that the Board should deal with any application relating to the Central Bank's directives.

However, on a closer examination of the claim in that case and the Ruling thereon, the seeming resemblance with the instant case evaporates. That case was solely between the present claimant/applicant and the Central Bank. The claim also frontally challenged the legality of section 36(5) of the Act and the directives of the Central Bank to the claimant. An injunction was also sought against the Central Bank from enforcing the directives. Muria J, in effect, opened the door to both the claimant/applicant and the Central Bank, to proceed to the Appeals Board and he ordered that nothing be done to shut that door by any pre-emptive enforcement of the Central Bank's directives to the claimant until the Board is seized of the Appeal. These proceedings before me I therefore conceive not as a back door, but rather a legitimate attempt to keep that door open which Muria J had opened for the parties.

22. Fundamentally however, the instant claim was initially joined between the Attorney General, the Minister of Finance and the Chairman and the other two members of the Appeal Board.
23. It was however, the spectre of enforcement of its directives against the claimant as I have recounted above at paras. 9 and 10, that prompted the application before me **ex parte** to join the Central Bank as the sixth defendant and to grant an interim injunction against it
24. I have listened carefully to the arguments and submissions of both Mr. Plemming QC for the claimant/applicant and Ms. Lois Young SC for the Central Bank.

25. I am not however persuaded that I should resile from or vacate the orders I made when the application was first made to me ex parte. Having had the benefit of the two learned counsel's submissions, I am fortified that it was necessary, correct and fair in the circumstances that I granted the orders I did on Monday afternoon. I have arrived at this conclusion for the following reasons:

26. First, the joinder of the Central Bank was not, in my view, an abuse of process. Rule 19 of the Supreme Court (Civil Procedure) Rules deals generally with the addition and substitution of parties after proceedings have been commenced. Rule 19, Order 2 sub-rule (3) allows the Court to add a new party to the proceedings without an application if:

(a) it is desirable to add the new party so that the Court can resolve all the matters in dispute in the proceedings, or

b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the Court can resolve the issue.

Rule 19, Order 3 sub-rule (1) provides that the Court may add, substitute or remove a party on or without an application.

27. The Central Bank was added on an application by the claimant/applicant, as the sixth defendant.

28. Clearly, on either limb, of Rule 19, Order 3, it cannot be doubted that the application to join the Central Bank was in place. The matter in dispute in the instant case before me involves the constitutionality and composition of the Appeals Board set up to hear and determine the appeal of the

claimant/applicant against directives issued by the Central Bank. It was therefore, in my view, logical and desirable to add the Central Bank as a party, a party whose directives are being challenged on appeal to the Appeals Board, whose constitutionality is being challenged by the claimant/applicant in the instant claim before me.

29. Therefore although I agree with Ms. Young SC that the claimant/applicant should have, from the outset, joined the Central Bank, I do not however accept as she contended, that this was belatedly done only as a back door route to obtain the injunction against it.
30. The claimant/applicant is however not blameless for making the application when it did to have the Central Bank made a party. The claimant/applicant was in my view, if I may use the analogy, trying to stage **Hamlet** without the Prince! But it recovered its poise albeit, at the prompting or rather the provocation or threat of the spectre of enforcement against it by letter from the Central Bank dated 16 June 2008, addressed to it.
31. I therefore think that the Central Bank was properly joined as a party, for it is, in my view desirable to add it. This was not an abuse of process. It was perfectly within the Rules of Court and desirable.
32. Secondly, I am satisfied that in the circumstances of this case, the balance of convenience is on the side of the grant of the interim injunction I ordered on Monday.
33. The claimant/applicant is, in these proceedings, challenging the constitutional validity of the Appeals Board and the independence of some of its members. Surely if the Central Bank does not stay its hands now until this challenge is disposed of one way or the other, the Appeals

Board's proceedings touching and concerning the very directives of the Central Bank may be rendered nugatory, superfluous or prejudiced. Yes, by section 76 of the Act, an appeal to the Appeals Board as Ms. Young SC corrected observed, does not operate in an of itself as a stay or suspension of the Central Bank's directive. But where the very existence of the Appeals Board itself is challenged, it is, I think, reasonable, fair and proper, to await a decision on that challenge before any moves on the directives which are on appeal before that Appeals Board.

34. Still on the balance of convenience, I think it is reasonable and fair, to say that, having regard to the date set for the hearing of the substantive claim in these proceedings, the 16th and 17th July 2008, just some four weeks away, that hardly any prejudice or loss would result to the Central Bank, if nothing is done on enforcing its directives between now and then. Of course, as a regulator, its directives must be seen to be obeyed or carried out as Mr. Sydney Campbell, the Central Bank's governor testified yesterday. But the small interval between staying action now until the determination of the challenge to the Appeals Board would not in my view result in any diminution of its role as a firm and determined regulator whose directives must be obeyed. I had hoped therefore that Ms. Young SC could have obtained or advised that, an undertaking not to act on the directives would be given. Alas, this was not to be. In the balance on the claimant's/applicant's favour is the consideration that without a stay it would have at inconsiderable costs have to give effect to the Central Bank's directives.
35. For the avoidance of doubt let me make it clear, that this consideration is without prejudice to the Central Bank's directives, only that for now, I think it is proper and fair that these be held in abeyance until the determination of the challenge to the Appeals Board.

36. I cannot however help but note that the claimant/applicant was less than candid with this court when it made its urgent application ex parte to me late on Monday afternoon. Nowhere in the support affidavit was it mentioned that in Claim No. 196 of 2008 before Muria J and his Orders and Ruling therein. No satisfactory explanation has been given for this. Full disclosure and candour by applicants of all material facts are vital to enable the Court to exercise appropriately, its discretion. This was not done in this case. I however hasten to add that the interim injunction I granted ex parte does not sit at cross purposes with those of Muria J made in Claim No. 196 of 2008.

But for the weight of the balance of convenience falling on the claimant's/applicant's side, I would have declined the application.

However, and thirdly, I am satisfied that the claimant/applicant has raised serious issues that ought to proceed to trial and this process would be aided by not taking any action for now on the Central Bank's directives, on appeal by the claimant.

37. Fourthly and finally, it would in my view, be unrealistic to say that the claimant/applicant should apply to the Appeals Board for a stay, when, even though that body has been constituted and has indeed given notice of its first hearing, its very existence is under challenge in these proceedings before me.

38. It is for all these reasons that I conclude that having had the benefit of full arguments by both Mr. Plemming QC and Ms. Young SC, my orders made on Monday last, should stand.

39. Accordingly, I order as follows:

1. The Central Bank of Belize is added as the sixth defendant to these proceedings.

2. The Central Bank is hereby restrained whether by itself, its servants or agents or otherwise howsoever, until further order of this Court or until the trial and determination of these proceedings, from acting upon, in consequence of or seeking to enforce the directives set out in a letter to the claimant/applicant dated 14th March 2008, namely that:
 - i) the claimant should forthwith credit the Government of Belize's account with the Central Bank of Belize with US \$10.0 million as per "Payment Details" stated on wire transfer instructions sent by Bandes – Fideicomisos De Venezuela on the "Cash Payment Confirmation" dated 28 December 2007;

 - ii) the Claimant should forthwith provide the Central Bank, written documentation regarding the authority to deposit funds to the account of UIH regarding the US \$10.0 Million received from the Embassy of The Republic of China (Taiwan).

Costs are reserved to await outcome of substantive case.

A. O. CONTEH
Chief Justice

DATED: 18th June 2008.