IN THE COURT OF APPEAL OF BELIZE AD 2014
CIVIL APPEAL NO 24 OF 2011

DUNKELD INTERNATIONAL INVESTMENT LIMITED Appellant

v

THE ATTORNEY GENERAL Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Douglas Mendes	Justice of Appeal

Mrs Ashanti Arthurs-Martin for the appellant.

Nigel Hawke, Solicitor-General (Ag), and Miss Iliana Swift for the respondent.

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14 March 2014

SOSA P

[1] I concur in the reasons for decision, and the variation of order proposed, in the judgment of Morrison JA, which I have read in draft.

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SOSA P

MORRISON JA

[2] By its judgment delivered on 1 November 2013, the court allowed the appeal in this matter and set aside the principal findings of the learned trial judge. On the subject of costs, the court made the following order:

> "Dunkeld is to have its costs here and in the court below, certified fit for Senior Counsel, to be taxed, if not sooner agreed. This order as to costs will stand unless an application is made for a contrary order within seven days of the delivery of this judgment."

[3] On 14 March 2014, the court granted an application by the appellant to extend the time for the filing of an application to vary the provisional order as to costs to 25 February 2014. By its application of that date, the appellant seeks a variation of the provisional order as to costs, to include a certificate fit for Queen's Counsel, Senior Counsel and one junior, in this court and in the court below.

[4] The appellant prays in aid a number of factors as relevant to the request for a variation of the order, including (a) the implications for its position if the finding of contempt made against it by the trial judge had been allowed to stand; (b) the fact that the appeal covered "three discrete areas of significant complexity – the contempt point, the service point and the anti-arbitration injunction point" ;(c) the fact that it was prudent and reasonable, given the volume of material covered and the complexity of the matter, for counsel to have divided the issues between Queen's Counsel and Senior Counsel; (d) the fact that, in the related case of **Alpuche et al v The Attorney General of Belize**, **Civil Appeal No 8 of 2010, judgment delivered 4 October 2010**, the court had awarded costs to the appellant certified fit for Senior Counsel and a junior, but not for Queen's Counsel; and (e) the fact that, in the proceedings in the court below, the respondent had also found it necessary to engage the services of two Senior Counsel

and a junior (although there had been no certificate for costs, which were awarded to the respondent, to be assessed on this basis).

[5] The respondent relies on its written submissions dated 21 November 2013, in which it maintains that the appellant has failed to show why the court should vary the provisional order. The respondent submits that it was not reasonable and proportionate for more than one counsel to have been instructed for the appellant, because the appeal was not one of extraordinary complication or difficulty.

[6] In support of this submission, the respondent directs our attention to a trio of nineteenth century English cases. The first is **Smith and Buller (1870) L.R. 19 Eq 473**, in which Sir R Malins V.C. said this (at page 475):

> "I adhere to the rule which has already been laid down, that the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them."

[7] As regards the number of counsel for whom fees are allowable on taxation, the learned Vice-Chancellor stated it to be the "ordinary rule that the fees of only two counsel are allowed in taxation as between party and party". Further, that in deciding whether the ordinary rule may be departed from, regard must be had to "the nature of the case, the length of the evidence and the subject matter of the suit". The Vice-Chancellor accordingly went on to conclude (at page 482) that "it requires a very strong case to induce the Court to sanction the fees of more than two counsel in taxation as between party and party".

[8] The second of the respondent's cases, **Kirkwood v Webster (1876) 9 Ch. D. 239**, in which Fry J considered (at page 242) "that it was essentially necessary for the purpose of doing justice that three counsel should be employed", may be taken as an example of such a case:

> "I do not speak of physical or a mathematical necessity, but I think that the case was one in which a reasonable and prudent man, acting with ordinary prudence, would not have ventured to come into Court without three counsel. There were no less than eight distinct charges of fraud and misrepresentation made by the Plaintiff against the Defendant. No less than three contracts, relating to no less than five patents, were in question, and other patents entered into the history of the case. The questions of fact and the questions of character involved were of a very complicated nature."

[9] Finally, in **Glamorgan County Council v Great Western Railway Company [1895] 1 QB 21**, Collins J observed, having been referred to both **Smith v Buller** and **Kirkwood v Webster**, that, "in order to justify the employment of three counsel the case must involve extraordinary complications and difficulty, and judged by this standard this case fails".

[10] These cases clearly indicate that the general rule on party and party taxation is to allow no more than two counsel. In order to justify a variation from the general rule, it must be shown by the party seeking it that the nature of the case; the volume of evidence involved in it; and the subject matter of the suit, or the appeal, were such as to make it essentially necessary to employ three counsel in order to do justice. In general, it will require a very strong case to justify a variation from the ordinary principle on which party and party costs are assessed and awarded.

[11] In my view, this exacting standard has not been met in this case. For while it is a fact that the papers in the case were voluminous, the level of complexity and difficulty involved in preparation and presentation of the argument on the three main issues in the appeal do not, in my view, suffice to take it over the high bar set by the authorities. On the questions whether the appellant was in contempt of court (which did not arise in the court below) and whether the court should set aside the service of the claim form on the

appellant, the material deployed by the appellant was in fact in keeping with well settled principles. In relation to the third matter of complexity relied on by the appellant, while it is true that the jurisdiction of the court to grant anti-arbitration injunctions has traditionally been a contentious one, this is an area of the law that has been extensively canvassed in the courts of Belize over the last few years and in which, in my view, a clear consensus as to the true legal position had already begun to emerge, even before the important decision the Caribbean Court of Justice in **British Caribbean Bank Ltd v The Attorney General of Belize [2013] CCJ AJ 6**. While this appeal was undoubtedly of great importance to the appellant itself ((as matters of litigation generally are to most litigants), I do not consider that its subject matter was, on an objective assessment, of the path-breaking variety.

[12] In coming to this conclusion, I naturally make – or imply – no criticism of the appellant's decision to employ three counsel in the matter. I fully accept that it must have been considered to be the most convenient approach to the presentation of the appeal. However, I do not think that the expense of a second leader in the matter can be justified on a party to party basis. This court had come to a similar conclusion on the identical application in **Alpuche et al v The Attorney General of Belize**. In that case, in a judgment covering much of the ground discussed above (with which Sosa JA, as he then was, and Alleyne JA) concurred, I had observed (at para [9]) that -

> "While it was no doubt convenient and helpful, not only to [counsel], but to the court as well, for the submissions on appeal to have been divided up between counsel in the way in which they were for the purposes of the presentation of the appeal, I do not consider that there was anything in the subject matter of this interlocutory appeal that rendered it imperative for three counsel to have been retained.

Consequently, in that case, the court made an order that the appellants should have their costs certified fit for Senior Counsel and a junior.

[13] I would therefore conclude that the appellant has not made good its case for a certificate for costs fit for three counsel, viz, Queen's Counsel, Senior Counsel and a junior. However, upon reflection, it appears to me that my proposal in my judgment in

the substantive appeal (at para [156]) that the court should certify costs fit for Senior Counsel only was plainly a lapse and should be varied to add a junior. Accordingly, I would propose a variation of the provisional order for costs to read as follows:

> "Dunkeld is to have its costs here and in the court below, certified fit for Senior Counsel and one junior, to be taxed, if not sooner agreed."

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MORRISON JA

MENDES JA

[14] I have read in draft the judgment of Morrison JA. I entirely agree and have nothing useful to add.

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MENDES JA