

IN THE COURT OF APPEAL OF BELIZE AD 2013
CIVIL APPEAL NO 24 OF 2011

DUNKELD INTERNATIONAL INVESTMENT LIMITED Appellant

v

THE ATTORNEY GENERAL Respondent

BEFORE

The Hon Mr Justice Manuel Sosa
The Hon Mr Justice Dennis Morrison
The Hon Mr Justice Douglas Mendes

President
Justice of Appeal
Justice of Appeal

Nigel Fleming QC, Eamon Courtenay SC and Mrs Ashanti Arthurs-Martin for the
appellant
Denys Barrow SC and Miss Magali Perdomo for the respondent

25 October 2012 and 1 November 2013

SOSA P

[1] I have read, in draft, the judgment of Morrison JA and I concur in the reasons
for judgment, and the orders proposed, in it.

SOSA P

MORRISON JA

Introduction

[2] This is an appeal from an order made by Awich CJ (Ag) (as he then was) on 10 May 2011. The main effect of the order was to restrain the appellant ('Dunkeld'), until further order, from taking any or any further steps in the continuation or prosecution of arbitral proceedings commenced by it against the Government of Belize ('GOB').

[3] The arbitral proceedings were initiated by Dunkeld by Notices of Arbitration dated 4 December 2009 ('the first arbitration notice') and 26 July 2010 ('the second arbitration notice'). The notices were issued under the Arbitration Rules of the United Nations Commission on International Trade Law 1977 ('the UNCITRAL rules'), and Article 8(1) of the 1982 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments ('the Treaty'). Both notices relate to the compulsory acquisition by GOB on 25 August 2009 of certain shares in Belize Telemedia Ltd ('Telemedia') to which Dunkeld claims to be beneficially entitled.

[4] By his order made on 10 May 2011, Awich CJ (Ag) also dismissed, with costs to GOB, two applications made by Dunkeld. The first, which was dated 20 December 2010, was an application to (i) set aside the service of the claim form dated 23 December 2009 on Dunkeld; and (ii) to discharge an interim injunction previously granted by the judge on 5 February 2010 (and perfected on 10 February 2010), in terms similar to those in which one was granted on 10 May 2011. And the second, which was dated 28 February 2011, was an application for an order, pursuant to rule 26.1(2)(e) of the Supreme Court (Civil Procedure) Rules, 2005 ('the CPR') and section 26(1) of the Arbitration Act, staying the claim brought by the fixed date claim form filed by GOB on 23 December 2009.

[5] When the appeal came on for hearing before this court on 25 October 2012, it was agreed between the parties that written submissions would be submitted to the court on the basis of the timetable which was then established and that the appeal would thereafter be determined by the court on paper, without any further hearing. In accordance with this agreement, written submissions were in due course received from the parties, starting with Dunkeld's amended written submissions filed on 5 November 2012, and ending with Dunkeld's rejoinder to GOB's response on 7 December 2012.

[6] While the appeal was under consideration in early 2013, it came to the court's attention that the hearing of an appeal from the decision of this court in **British Caribbean Bank Limited v The Attorney General of Belize (Civil Appeal No. 6 of 2011**, judgment delivered 3 August 2012) by the Caribbean Court of Justice ('the CCJ') was imminent. That decision, which was concerned with the circumstances in which a court might exercise its jurisdiction to restrain arbitral proceedings, featured heavily in the submissions made by both Dunkeld and the respondent in this appeal. The court therefore took the view that it might be best to await the decision of the CCJ before coming to its decision on this appeal.

[7] On 25 June 2013, the CCJ handed down its decision in **The British Caribbean Bank Limited v The Attorney General [2013] CCJ 4 (AJ)** ('the **BCB case**'). By letter dated 10 July 2013, the parties were asked to provide brief further submissions on the impact of the CCJ's decision on this appeal and, on 24 July 2013, both parties complied with this request.

[8] The parties are agreed that the main issue that arises for decision in this appeal is whether Awich CJ (Ag) was right to grant injunctions restraining the arbitral proceedings. In addition to submitting that the erred in doing so, Dunkeld contends that the judge also erred in (i) failing to set aside service of the claim form and to discharge the first injunction; and (ii) refusing its application for a stay of GOB's claim.

Background

[9] It may be helpful to start with the Treaty, which was concluded on 30 April 1982 between GOB and the Government of the United Kingdom. It was subsequently extended by Exchange of Notes to the Turks and Caicos Islands on 10 December 1985. Its general effect is admirably summarised in the judgment of the CCJ in the BCB case as follows (at para. [16]):

“In brief, [the Treaty] states that its objectives are to promote and protect investment of the nationals or companies of the other in their respective territories. It contains promises not to subject the nationals and companies of the other to less favourable treatment than their own nationals or nationals of a third state. It agreed on a regime for dealing with losses occurring in war and armed conflict and the like causes. Article 5, which is particularly relevant to the dispute between the parties to this appeal, contained promises not to take action having the effect of expropriation of investments of nationals or companies of either contracting parties except for a public purpose related to the internal needs of that party and against just and equitable compensation. Such compensation shall amount to the fair market value before the expropriation became public knowledge and shall include interest at the rate prescribed by law until the date of payment. The compensation shall be made without undue delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the contracting party making the expropriation, to prompt review by a judicial or other independent authority of that party of his, her or its case and of the evaluation of the investment. The other articles made provisions for the unrestricted right to repatriate investments.”

[10] Article 8 of the Treaty provides for the referral of disputes between GOB and a foreign investor to international arbitration:

“(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this agreement in relation to an investment of the former which have not been amicably settled, shall after a period of three months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.

- (2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to –
- (a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes, between States and Nationals of other States, opened for signature at Washington D.C. on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding proceedings); or
 - (b) the Court of Arbitration of the International Chamber of Commerce; or
 - (c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to an alternative procedure, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.”

[11] In the **BCB case**, the CCJ observed of the Treaty (at para [18]) that “(i)t is now common ground that [it] became binding under international law when it was signed in 1982 and remains in force”.

[12] Dunkeld was incorporated in the British Virgin Islands on 1 June 2004. However, on 8 June 2009, it transferred its domicile to the Turks & Caicos Islands, where it is registered as “a foreign company being continued in the Turks & Caicos Islands as if it had been incorporated as an exempted company”. The evidence proffered on behalf of Dunkeld indicates that it is ultimately owned by Hayward.

[13] On 25 August 2009, GOB compulsorily acquired 94% of the issued shares of Telemedia. The acquisition was effected under the provisions of the Belize Telecommunications (Amendment) Act, 2009 ('the 2009 Act') and the Belize Telecommunications (Assumption of Control of Telemedia) Order, 2009 ('the 2009 Order'). The 2009 Act effected amendments to the Belize Telecommunications Act ('the principal Act') "to provide for assumption and control over telecommunications by [GOB] in the public interest".

[14] Included in the property acquired by GOB under the 2009 Act were shares owned by Thiermon Limited, BCB Holdings Limited, New Horizons Inc, Ecom Limited and Mercury Communications Limited ('the five companies'). Each of those companies has acknowledged holding the Telemedia shares (approximately 69% of the shares of Telemedia) for the benefit of Dunkeld and Hayward Charitable Belize Trust ('Hayward').

[15] The nature of the interest which Dunkeld, through the five companies, claims in Telemedia immediately before the compulsory acquisition is set out in the first arbitration notice (at para. 7.26) as follows:

- “(a) Thiermon Limited (Thiermon) owned 26.01% of the shares in Telemedia. Dunkeld is the sole shareholder of Thiermon. Therefore, Dunkeld indirectly held legal title to 26.01% of the shares in Telemedia;
- (b) BCB Holdings Limited (BCB Holdings) owned 2.49% of the shares in Telemedia. BCB Holdings held these shares on trust for Dunkeld. Therefore, Dunkeld owned the beneficial interest in 2.49% of the shares in Telemedia; and
- (c) Ecom Limited (Ecom), Mercury Communications Limited (Mercury) and New Horizons Inc. (New Horizons) owned 30.63%, 9.66% and 0.04% respectively of the shares in Telemedia. Ecom, Mercury and New Horizons are each jointly owned by Northtown Limited and Southtown Limited. Northtown and Southtown held these shares in Ecom, Mercury and New Horizons on trust for Dunkeld. Therefore, Dunkeld owned the beneficial interest in 100% of the shares in Ecom,

Mercury and New Horizons which in turn held the legal title to 40.33% of the shares in Telemidia.” (See also the second arbitration notice dated 26 July 2010, where the same information is set out at para 7.19.)

[16] By letter dated 27 August 2009, Allen & Overy LLP, Dunkeld’s London solicitors, wrote to GOB asserting that the compulsory acquisition of the Telemidia shares, of which Hayward and Dunkeld were the “ultimate owners”, was “in flagrant breach of [GOB’s] obligations to qualified investors under [the Treaty]”. The solicitors also complained that the provisions in the 2009 Act “which purport to allow for ‘reasonable compensation’...are patently inadequate and a clear breach of our clients’ rights under [the Treaty]”. After itemising a number of respects in which it alleged that GOB had acted in breach of its obligations under the Treaty, Allen & Overy LLP advised GOB to “treat this letter as formal notification of a claim pursuant to Article 8(1) of [the Treaty]”. GOB was also invited to indicate which of the three means (set out in Article 8(2) of the Treaty) of international arbitration it proposed for the dispute and was further advised that, failing agreement between the parties, Article 8 of the Treaty “provides that the dispute shall be referred to international arbitration under the Arbitration Rules of [UNCITRAL]”.

[17] Also on 27 August 2009, the Financial Secretary issued a formal Notice of Acquisition of the Telemidia shares, requiring and inviting persons with claims for compensation arising out of the compulsory acquisition to submit their claims by 15 October 2009. As a result, on 14 October 2009, Courtenay Coye LLP (‘the attorneys’), acting as attorneys-at-law for the five companies, wrote separate but virtually identical letters on behalf of each of them to the Financial Secretary. Each company formally submitted a claim for “reasonable compensation within a reasonable time” in respect of the compulsory acquisition of the shares. As already noted, the letter written on behalf of each company stated that the shares formerly held by it “were held for the benefit of [Dunkeld] and [Hayward]” and asserted that the claim for compensation was being made “strictly without

prejudice” to, among other things, any claims that either Dunkeld or Hayward might have under the Treaty.

[18] The Financial Secretary responded by letters dated 19 October 2009, in which he requested further information and documents from each of the companies “to facilitate the verification of the Claim”, viz, copies of (i) the claimant’s certificate of incorporation; (ii) the trust deed establishing Hayward; and (iii) Dunkeld’s certificate of incorporation, “together with the names and addresses of its shareholders and directors”. In addition, the Financial Secretary asked for “[t]he precise nature and proof of Hayward’s and Dunkeld’s interest in the shares formerly held by [the company] in [Telemedia]”.

[19] In their responses dated 12 November 2009, the attorneys referred to section 65(1) of the principal Act, as amended by the 2009 Act, and queried the necessity for the information and documents requested by the Financial Secretary. Moreover, the attorneys continued, the Financial Secretary’s notice of acquisition dated 27 August 2009 “merely required that an interested person submit ‘proof of ownership and other supporting documents’”. The attorneys pointed out that they had already provided copies of the relevant share certificates establishing legal ownership by each of the five companies of the Telemedia shares and asserted that “there are no ‘other supporting documents’ to prove or verify [the company’s] ownership of the shares”. Finally, despite pointing out that this information “is publicly available in Belize”, the attorneys enclosed copies of the each company’s certificate of incorporation.

The first arbitration notice

[20] On 4 December 2009, Allen & Overy LLP, acting on behalf of Dunkeld, gave Notice of Arbitration to GOB, pursuant to Article 8(1) of the Treaty. In its covering letter to GOB (of the same date) enclosing the notice, the solicitors referred to their earlier letter dated 27 August 2009. They also pointed out that, despite

having, on 24 September 2009, supplied the further information requested by GOB in its letter dated 17 September 2009, no reply had been received from GOB to either letter. GOB was advised that, three months having passed since it had been notified of a claim by Dunkeld under the Treaty, Notice of Arbitration was therefore being served in accordance with Article 8 and the UNCITRAL Rules.

[21] In the accompanying notice, Dunkeld asserted that its dispute with GOB concerned the latter's disregard of its vested rights as a foreign investor entitled to the protection of the Treaty. Dunkeld accordingly claimed as the beneficial owner of approximately 69% of the shares in Telemedia which had been acquired by GOB in breach of the Treaty. Paragraph 3.3 of the notice posited the basis upon which it was served:

“By the terms of Article 8(1), [GOB] expresses in writing in advance its generic and unequivocal consent to submit disputes to international arbitration. By serving this Notice, Dunkeld accepts [GOB's] offer to submit this dispute to international arbitration in accordance with Article 9 of the Treaty.”

[22] Dunkeld claimed that GOB was in breach of Article 2 of the Treaty (guaranteeing favourable conditions, fair and equitable treatment and full protection and security”); Article 3 (guaranteeing treatment to foreign investors “no less favourable than that accorded to other investors of third States”); and Article 5 (guaranteeing “adequate, prompt and equitable compensation” for expropriation).

[23] At paragraph 4.2 of the notice, Dunkeld notified GOB that it had appointed Mr John Beechey to act as a member of the arbitral panel. Further, Allen & Overy, in its covering letter, reminded GOB that, under Article 7(2) of the UNCITRAL Rules, it had 30 days after receipt of the notice to appoint the second member of the tribunal. As Awich CJ (Ag) noted in his judgment in the court below (at para.

24), GOB did not name an arbitrator, “and generally has not participated in the arbitration”.

GOB files action

[24] By a fixed date claim form filed on 23 December 2009, GOB commenced action against Dunkeld and nine others (sued as “Trustees of the Hayward Charitable Belize Trust”). The reliefs sought by GOB were as follows:

- “1. A declaration that the Supreme Court of Belize is the proper forum for the determination of all claims to compensation and other matters arising out of or relating to the acquisition of certain property by the Government of Belize under the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Order, 2009 (S.I. No. 104 of 2009), as amended by the Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) (Amendment) Order, 2009 (S.I. No. 130 of 2009) (hereinafter collectively referred to as the “**Acquisition Orders**”).
2. A declaration that pursuant to section 28 of the Companies Act, Chapter 250 of the Laws of Belize, or otherwise, the Government of Belize would be entitled to disregard any trust in respect of the acquired shares and to treat the registered holders of the shares as the only persons entitled to compensation for the acquisition of such shares.
3. A declaration that none of the Defendants has any locus to bring any legal or arbitral proceedings against the Government of Belize, whether under the Constitution and the laws of Belize or under any bilateral or multilateral treaty, in respect of the acquisition of certain property by the Government of Belize under the Acquisition Orders.
4. A declaration that the action of the defendants, particularly of the 10th Defendant [Dunkeld], in commencing arbitration proceedings against the Government of Belize by Notice of Arbitration dated 4 December 2009 under the Arbitration Rules of the United Nations Commission on International Trade Law 1977 and the 1982 Agreement between the Government of Belize for the Promotion and Protection of Investments is

oppressive, unconscionable and an abuse of the arbitral process.

5. An order restraining the Defendants, whether by themselves or by their servants, agents, subsidiaries, assignees, or other persons and bodies under their control, from taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced by the 10th Defendant by Notice of Arbitration dated 4 December, 2009, in respect of or relating to the acquisition of certain property by the Government of Belize under the Acquisition Order.
6. Further or other relief.
7. Costs.”

[25] The fixed date claim form was supported by the first affidavit of Gian C Gandhi, sworn to on 22 December 2009. As regards the claim that the commencement of arbitral proceedings by Dunkeld was oppressive, unconscionable and an abuse of the arbitral process, Mr Gandhi invoked a number of grounds, as follows:

- “(1) Neither Hayward nor Dunkeld has any locus to claim compensation from the Government or to invoke the Treaty. Hayward and Dunkeld claim that they were the ‘beneficial owners’ of the shares held in Telemidia by BCB Holdings Ltd, ECom Ltd, Mercury Communications Ltd, New Horizons Inc. and Thiermon Limited. However, section 28 of the Companies Act (Chapter 250) states that ‘no notice of any trust, expressed, implied or constructive, shall be entered on the register or be receivable by the Registrar’. Accordingly, any trust on the shares must be disregarded for the purpose of compensation and the Government of Belize would be entitled to treat the registered holders of the acquired shares as the only persons entitled to compensation for the acquisition of such shares. In fact, as set out in para 14 above, the registered holders of the shares in question, namely, BCB Holdings Ltd., ECom Ltd, Mercury Communications Ltd, New Horizons Inc and Thiermon Ltd have already made their claims for compensation which are presently under consideration.

- (2) According to Regulations 8 and 9 of the Exchange Control Regulations (CAP. 52, Subsidiary Laws, Revised Edition 2003, p. 13), no person resident outside Belize can hold any securities registered in Belize (which include shares in a company registered in Belize) without the permission of the Central Bank of Belize. I have made diligent enquiries from the Central Bank but there is no record of either Hayward or Dunkeld (both of which are non-residents) ever obtaining the permission of the Central Bank to hold any interest in the shares of Telemedia. Any purported 'beneficial interest' of Hayward or Dunkeld in the shares of Telemedia would not only be invalid but also constitute a criminal offence under section 6 of the Exchange Control Regulations Act (CAP. 52), as amended by Act No. 44 of 2001.
- (3) In addition to the above points, there are two other reasons why Dunkeld has no locus to invoke the Treaty, and its action in commencing arbitration is a flagrant abuse of the Treaty. **First**, Dunkeld's alleged investment in Telemedia shares was so indirect and secretive that it does not fall within the definition of "investment" in Article 1 of the Treaty which contemplates **direct investment** in shares, stock and other property. **Secondly**, Dunkeld's alleged investment in Telemedia shares was made in **2005** when Dunkeld was resident in British Virgin Islands (BVI), having been incorporated in that jurisdiction in 2004. At that time, Dunkeld did not enjoy the protection of the Treaty, as the Treaty has never been extended to BVI. **In June 2009**, when the nationalization of Telemedia was in the air, Dunkeld hurriedly transferred itself from BVI to Turks & Caicos Islands obviously to avail itself of the Treaty, as the Treaty has been extended to Turks & Caicos Islands. It was a sinister and disingenuous attempt on the part of Dunkeld to bring itself within the ambit of the Treaty. However, the attempt must fail as, on a true construction of the Treaty, it would apply only to those investments which were made **while** the investor was resident, or incorporated, in the territory to which the Territory applied. There is no evidence that Dunkeld made any investment in Telemedia shares after it transferred itself to Turks & Caicos Islands in June 2009. Its alleged investment in 2005 or at any time before June 2009 when Dunkeld was a BVI Company would not be protected by the Treaty. Hence, Dunkeld has no locus to invoke the Treaty and its action in doing so is oppressive and unconscionable.

- (4) The Supreme Court of Belize is the proper forum for the determination of all claims and other related matters. The subject property is in Belize and the **registered holders** of the shares in question are resident in Belize. The registered holders of the shares have already submitted their claims to the Financial Secretary which are presently under consideration. In the event no agreement is reached by negotiations, the compensation will be determined by the Supreme Court as provided in the Act.
- (5) I verily believe that the action of Hayward/Dunkeld to commence arbitration proceedings under the Treaty is no more than a device to embarrass the Government of Belize and to damage the reputation of Belize internationally.”

[26] On 29 December 2009, GOB sought and obtained ex parte an interim injunction restraining Dunkeld and the other defendants from taking any or any further steps in continuation or prosecution of the arbitral proceedings commenced on 4 December 2009, until further order. This order was stated to be returnable on 26 January 2010. GOB was also granted permission to serve the claim form, supporting affidavit and all other associated documents on Dunkeld and one other defendant outside the jurisdiction at an address in the Turks and Caicos Islands. The latter order was purportedly made under rules 7.3(2)(c)(ii) and 7.10(1)(d) of the CPR.

[27] By notice of application dated 8 January 2010, seven of the named defendants to the action, not including Dunkeld, applied for an order discharging the interim injunction granted on 29 December 2009. The grounds of this application were that the interim injunction ought not to have been granted ex parte and that, in any event, the applicants were not directors, officers or shareholders of Dunkeld, nor were they trustees of Hayward, and therefore had no control over the operations of either Dunkeld or Hayward. GOB for its part, by an application dated 22 January 2010, applied for an order that the interim injunction granted on 29 December 2009 should be continued until trial or further order.

[28] On 27 January 2010, Allen & Overy LLP wrote to the Permanent Court of Arbitration at the Hague ('PCA') requesting that it designate an appointing authority to appoint the second arbitrator, in default of GOB having failed to do so. Dunkeld's position, for which there appears to be some support in the documentation, was that up to this time it had not yet been served with a copy of the 29 December 2009 ex parte order granting the interim injunction against it. (In a letter dated 19 February 2010 to the PCA, which was exhibited to Mr Gandhi's fourth affidavit, Allen & Overy LLP indicated that the order was delivered to Dunkeld's registered address on 8 February 2010.)

[29] The seven defendants' application to discharge the ex parte injunction and GOB's application to continue it were heard together. In his written judgment delivered on 5 February 2010 (although the order was not perfected until 10 February 2010), Awich J acknowledged that he ought not to have dealt with the matter in the absence of the defendants on 29 December 2009. But he then proceeded to consider the matter afresh and granted a new interim injunction in the same terms as that which he had earlier granted on the ex parte application, until the determination of GOB's claim or further order. The learned judge took the view that the arbitral proceedings instituted by Dunkeld were vexatious, abusive and unjust, in that they were in effect a repetition of the claims for compensation already made on behalf of the five companies, the legal owners of the Telemedia shares. In those circumstances, he considered that the arbitral proceedings had been commenced by Dunkeld for the ulterior purpose of overburdening GOB "financially and perhaps in regard to professional personnel".

[30] The application by the seven defendants sued as trustees of Hayward was dismissed by the judge. However, it was subsequently granted by this court on appeal on 27 May 2010 (**Jose Alpuche et al v Attorney General, Civil Appeal No. 8 of 2010**, judgment delivered 14 June 2010) and in due course, on 29 September 2010, GOB discontinued the action against the seven. The position of Dunkeld

remained unaffected by these developments and the injunction granted by Awich J on 5 February 2010 remained in force against the company.

[31] On 11 February 2010, Mr Gandhi on behalf of GOB wrote to the PCA requesting it to stay the arbitral proceedings in the light of Awich J's order of 5 February 2010. There followed further exchanges of correspondence between Allen & Overy LLP, Mr Gandhi and the PCA. In this correspondence, Allen & Overy LLP urged upon the PCA the view that the judge's order was directed at Dunkeld, and not at the PCA or the arbitral tribunal, which were therefore free to proceed with the arrangements for the hearing of the arbitration in accordance with the first arbitration notice. In any event, it was also contended, the PCA was free to disregard the 5 February 2010 order, on the ground that the PCA was not amenable to the jurisdiction of the Belize courts in respect of the matter which was before it. Allen & Overy LLP derived some support for this position from Awich J's judgment of 5 February 2010, at paragraph 45 of which he had observed that –

“I would make sure that such an injunction order was directed against the parties in the UNCITRAL Arbitration proceedings, not against the arbitral tribunal. I would avoid interference with its foreign status.”

[32] In the result, after further exchanges of correspondence, the PCA proceeded to designate an appointing authority for the appointment of the second arbitrator, who in turn appointed a second arbitrator. In due course, against the urgings of Mr Gandhi on behalf of GOB, the two arbitrators appointed a third – presiding - arbitrator.

A legislative step

[33] On 31 March 2010, the Governor General signed into law the Supreme Court of Judicature (Amendment) Act, 2010 ('the SCJA Act 2010'). This Act amended the Supreme Court of Judicature Act ('the SCJ Act') by adding a new

section 106A. Section 106A(1) makes it a criminal offence for any person, whether in Belize or elsewhere, to disobey or fail to comply with an injunction issued by the Supreme Court (before or after the commencement of the Act).

[34] Section 106A(3)(i) provides that, in the case of a natural person, conviction for this offence is punishable by a fine of not less than \$50,000.00, up to a maximum of \$250,000.00; or by imprisonment for not less than five years up to a maximum of 10 years; or by both such fine and imprisonment; a continuing offence attracts an additional fine of \$100,000.00 for each day it continues.

Section 106A(3)(ii), which deals with the case of a legal person, provides for fines ranging from a minimum of \$100,000.00 to a maximum of \$500,000.00, with an additional fine of \$300,000.00 for each day that the offence continues. Section 106A(4) also imposes criminal liability on every person, whether in Belize or elsewhere, who “directly or indirectly, instigates, commands, counsels, procures, solicits, advises or in any manner whatsoever aids, facilitates, or encourages the commission of the substantive offence.

[35] Section 106A(8) gives to the court an express power to issue an anti-arbitration injunction as follows:

- “(8) Without prejudice to the generality of the foregoing provisions, the Court shall have jurisdiction –
 - (i) to issue an injunction against a party or arbitrators (or both) restraining them from commencing or continuing any arbitral proceedings (whether sited in Belize or abroad), or an injunction against a party restraining it from commencing or continuing any proceedings for enforcement of an arbitral award (whether in Belize or abroad), where it is shown (in either case) that such proceedings are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process;

- (ii) to void and vacate an award made by an arbitral tribunal (whether in Belize or abroad), in disregard of or contrary to any such injunction.”

[36] By sections 106A(6) and (7) respectively, the court is given extra-territorial jurisdiction in relation to offences created by section 106A and section 106A is given retrospective effect.

[37] After the passage of the SCJA Act 2010, Dunkeld took the view that it would not be prudent for it to have anything further to do with the arbitration. Accordingly, the arbitrators, who had by that time scheduled a preparatory conference for 26 August 2010, were advised by letter dated 27 July 2010 from Allen & Overy LLP that, based on “the combined effect of the injunction against it issued by the Supreme Court of Belize on 10 February 2010...and [the Act]”, Dunkeld would be unable to attend the conference or to take any steps in the arbitral proceedings.

[38] (Before leaving this aspect of the matter, I should add that, in **Zuniga et al v Attorney General of Belize, Civil Appeal Nos 7, 9 and 10 of 2011**, judgment delivered 3 August 2012), the constitutionality of section 106A(8) was upheld by this court. However, that decision has been appealed against and is currently under review by the CCJ – see the **BCB case**, para [31].)

The second arbitration notice

[39] On 26 July 2010, Dunkeld sought an interim anti-suit injunction against GOB in the English Commercial Court. After an ex parte hearing before Steel J, an order was granted restraining GOB from taking any steps in the courts of Belize or elsewhere to enjoin or restrain Dunkeld or the arbitral tribunal in the second treaty arbitration which it was proposed to commence.

[40] Later in that same day, Dunkeld issued the second arbitration notice, dated 26 July 2010, which was served on GOB by facsimile transmission on the following day, 27 July 2010. In this notice, Dunkeld stated (at para 1.3) that the dispute to which it related “concerns a course of action planned and carried out by [GOB] to expropriate Dunkeld’s investment in...Belize and to deny Dunkeld the protection for that investment to which it is entitled under the Treaty, including the right to have disputes relating to its investment resolved by international arbitration under Article 8 of the Treaty”.

[41] Dunkeld expanded the point in the arbitration notice as follows (at paras 1.4 – 1.9):

- “1.4 Dunkeld was the beneficial owner of approximately 71% of the shares in Belize Telemedia Limited, a company incorporated in Belize (Telemedia). At all material times, Telemedia was the largest owner and operator of telecommunications and other media services in Belize. On 25 August 2009, the Government enacted legislation by which approximately 94% of the shares in Telemedia were acquired for and on behalf of the Government, including those shares which were beneficially owned by Dunkeld.
- 1.5 This action was in breach of the Respondent’s obligations to Dunkeld, which is a qualifying investor under the Treaty. By a Notice of Arbitration dated 4 December 2009 (the December 2009 Notice), Dunkeld commenced arbitration proceedings pursuant to Article 8 of the Treaty seeking, among other relief, an order that the Respondent make full reparation to Dunkeld for the loss of its investment in Telemedia.
- 1.6 Despite having agreed, pursuant to Article 8 of the Treaty, that disputes arising between a Contracting State and an Investor shall be submitted to international arbitration, the Government sought and obtained an injunction from the Belize Supreme Court restraining Dunkeld from taking any further steps to pursue the arbitration proceedings commenced by the December 2009 Notice. The arbitration proceedings commenced by the December 2009 Notice are herein referred to as the Injuncted Arbitration.

1.7 The Government also rushed through new legislation creating wide-ranging new offences relating to the breach of injunctions with extremely severe penalties for the commission of those offences. The new legislation also specifically relates to injunctions granted prior to it coming into force, has extra-territorial effect, provides for trials in absentia and that arbitral awards given in breach of an injunction are void.

1.8 The new legislation was passed by the Government as part of a scheme to deprive Dunkeld of its rights to arbitrate its claim arising under the Treaty. In an interview with Love FM radio station on 26 May 2010, the Prime Minister and minister of Finance, the Hon. Dean Barrow (the Prime Minister) said:

'We got an injunction here that said the people mounting the challenge abroad (the Injuncted Arbitration) should not proceed. They completely ignored the court injunction, put out all sorts of statements that I think were rude and disrespectful of the court system here. That is why we amended the Supreme Court of Judicature Act to say if you will ignore injunctions from this court, already you can be, in fact, as it were charged for contempt of court but we increased the penalties because we are letting these people know, don't treat us in that kind of contemptuous fashion, this is a sovereign country...'

1.9 The overall effect of this concerted pattern of behaviour is that Dunkeld, which has been deprived of its rights as an investor under the Treaty, is unable to pursue the Injuncted Arbitration to obtain relief for the Respondent's breaches of the Treaty."

[42] As it had done in the first arbitration notice, Dunkeld again named Mr John Beechey as a member of the arbitral tribunal.

The parties go back to court

[43] By notice of application filed on 2 September 2010, GOB applied for an interim injunction restraining Dunkeld "from taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced by [the

second arbitration notice]”. In support of the application, GOB made a number of points:

- (a) The commencement of new arbitration proceedings by Dunkeld “is no more than a crude, disingenuous and contemptuous attempt by Dunkeld to circumvent the [5 February 2010 order]”.
- (b) The action by Dunkeld “is oppressive, vexatious, inequitable and an abuse of the arbitral process”.
- (c) The proper forum for challenging the injunction granted on 5 February 2010 or impugning the SCJA Act 2010 is the Supreme Court of Belize, and Dunkeld has so far taken no steps to have the injunction set aside.
- (d) The underlying subject matter of the second arbitration is essentially the same as that of the first arbitration, that is, GOB’s compulsory acquisition of the Telemedia shares. Therefore, the commencement by Dunkeld of the second arbitration “to re-agitate the same issues by a devious and circuitous route constitutes a gross and egregious abuse of the arbitral process”.
- (e) The Treaty is not part of the law of Belize, it never having been “transformed into municipal law by enabling legislation”. There is accordingly no agreement between Dunkeld and GOB to refer disputes to international arbitration.
- (f) Even if the Treaty applies, Dunkeld has no locus standi to invoke its provisions.
- (g) The Supreme Court has specific jurisdiction to grant an anti-arbitration injunction under section 106A(8)(i) of the SCJ Act, as amended by SCJA Act 2010, “in addition to the jurisdiction founded on the common law”.
- (h) The case involves a substantial amount of money, is therefore of considerable public importance and is urgent.

[44] In his affidavit sworn to on behalf of GOB on 2 September 2010 (at para 25), his second in the proceedings, Mr Gandhi (after rehearsing in detail the exchanges with the PCA which I have attempted to summarise in paras [30]-[32] above) characterised the events since the 5 February 2010 injunction was granted as “a litany of contemptuous conduct on the part of Dunkeld, acting through Allen & Overy, in wilful disregard of the injunction issued by this Court”.

[45] By an amended notice of application for court orders dated 5 October 2010, Dunkeld in turn applied for an order setting aside the service of the claim form dated 23 December 2009 and discharging the 5 February 2010 injunction. As regards the matter of service, Dunkeld contended that the court had had no jurisdiction to order service outside of the jurisdiction under rules 7.3 or 7.4. As regards the application to discharge the injunction, Dunkeld contended that the court had no jurisdiction over it, it being a company registered in the Turks and Caicos Islands. Further, it had never been served with the application for the injunction or the order granting the injunction. Dunkeld also maintained that, by virtue of the Treaty, GOB, which had consented to the arbitral process, was contractually bound by it. Therefore, its commencement of arbitration under the Treaty was not oppressive, vexatious or an abuse of the arbitral process and there was no basis for restraining Dunkeld from continuing any legal or arbitral proceedings.

[46] In an affidavit filed on its behalf on 5 October 2010 by Mr Llewellyn John Austen, a director of the company (at para 67), Dunkeld emphasised that, by issuing the second notice of arbitration, it was not seeking to recover twice in respect of the loss of its investment in Telemedia:

“It is Dunkeld’s position that if [GOB] were to consent to the discharge of the Second Injunction which restrains the Original Treaty Arbitration, then Dunkeld would consent to a stay of the Second Treaty Arbitration. Dunkeld has no desire to pursue two

arbitrations. However, for so long as the Original Treaty Arbitration remains blocked, Dunkeld is being deprived of redress for the expropriation of its investment in Belize and its right to pursue arbitration under the Treaty and is thus entitled to pursue and justified in pursuing the Second Treaty Arbitration.”

[47] That position would subsequently be formalised in Mr Austen’s second affidavit, sworn to on 20 December 2010, in which it was confirmed (at para 23) that Dunkeld was prepared to give an undertaking to the court in the following terms:

- “A. If this Honourable Court declines to grant the injunction sought by the GOB in its application notice dated 7 September 2010 and set aside the injunction granted by this Honourable Court on 5 February 2010, then, subject to paragraph B below, Dunkeld will:
- (i) apply for a stay of the arbitration commenced by notice of arbitration dated 26 July 2010;
 - (ii) procure that ECOM Limited, BCB Holdings Limited, Thiermon Limited, Mercury Limited and New Horizons Limited, having rejected the offers of compensation made by the Financial Secretary to them in letters dated 8 December 2010 [see paras [51]-[53] below], will not commence proceedings under section 66 of the Belize Telecommunications (Amendment) Act, 2009 whilst Dunkeld’s arbitrations against the GOB commenced by a Notices of Arbitration dated 4 December 2009 and 26 July 2010 (the “Arbitrations” are pending; and
 - (iii) abide by the decision of the Tribunals in either of the arbitrations commenced by notices dated 4 December 2009 and 26 July 2010 (the Arbitrations) as to the merits and quantum of that claim (subject to any rights to challenge an award of the Tribunal).
- B. There are only two circumstances where Dunkeld’s obligation to procure that ECOM Limited, BCB Holdings Limited, Thiermon Limited, Mercury Limited and New Horizons Limited

do not commence proceedings under section 66 of the Belize Telecommunications (amendment) act, 2009 will lapse:

- (i) if the Tribunal renders a final award rejecting Dunkeld's claims in the Arbitrations on jurisdictional grounds (therefore refusing to give a decision as to the merits or quantum of that claim) and rendering itself functus officio; or
- (ii) The Tribunal renders a final award on the merits in Dunkeld's favour (thereby rendering itself functus officio), but the GOB fails to satisfy that award within 90 days of its issue. In that event, Dunkeld, ECOM Limited, BCB Holdings Limited, Thiermon Limited, Mercury Limited and New Horizons Limited should be able to pursue any other remedy to recover compensation for their losses in respect of their former shareholdings in Telemedia to which they are entitled, including proceedings under section 66 of the Belize Telecommunications ("Amendment) Act, 2009."

[48] Finally, insofar as is now relevant, on 28 February 2011 Dunkeld filed an application for an order staying GOB's claim, in accordance with rule 26.1(2)(e) of the CPR and section 26(1) of the Arbitration Act.

[49] There were therefore three applications before the court: (i) GOB's application dated 2 September 2010 for an interim injunction against Dunkeld in respect of the second arbitration notice; (ii) Dunkeld's amended notice of application dated 5 October 2010, for orders setting aside the service of the claim form dated 23 December 2009 and discharging the interim injunction granted on 5 February 2010; (iii) Dunkeld's application dated 28 February 2011 for a stay of the claim.

A parenthesis: further developments re compensation to the five companies

[50] But, in order to complete the record before the commencement of the hearing of these applications, I should mention a few additional matters. On 26 August 2010, nearly a year after its last correspondence on the matter, the

Financial Secretary again wrote to the attorneys for the five companies. Each of the companies was asked (“In order that we may have meaningful and productive negotiations for the payment of compensation to your Client...”) to, among other things: quantify its claim, setting forth the basis of calculation of the amount claimed; cause Dunkeld and Hayward to withdraw their claims for compensation for the same shares and discontinue all arbitration and other proceedings to enforce such claims; and, as a pre-condition for the payment of compensation, indemnify GOB against all claims of Dunkeld, Hayward and any person arising out of or relating to the acquisition of the said shares by the Government.

[51] In a subsequent letter dated 8 December 2010, the five companies through their attorneys having by letter dated 9 November 2010 maintained the stance that their entitlement was to “reasonable compensation within a reasonable time”, the Financial Secretary responded with offers of specific figures, representing what GOB determined to be reasonable compensation to each of the companies, “to be paid within a reasonable time”. The offer, which was based on a share value of \$1.46 per share, was expressly subject to the pre-conditions which had been foreshadowed by the Financial Secretary’s earlier letter:

- “(1) As your Client’s ‘claim’ was expressly made subject to ‘any claims of Dunkeld International Investment Limited (**Dunkeld**) and Hayward Charitable Belize Trust (**Hayward**)’, your Client should arrange with Dunkeld and Hayward that they withdraw their claims for compensation for the same shares, and discontinue all arbitral and other proceedings to enforce such claims.
- “(2) Your Client must indemnify and hold harmless the Government of Belize against all claims of Dunkeld, Hayward or any other person, arising out of or relating to the acquisition of the said shares by the Government, such indemnity to be guaranteed by a bank or other licensed financial institution in Belize.
- “(3) In the interest of finality of proceedings and to bring this matter to a close, your Client, as well as Dunkeld and Hayward, must unreservedly accept the constitutionality of the

Acquisition Act and the Acquisition Order, as determined by the Supreme Court in Claim No. 874 of 2009 (British Caribbean Bank Ltd v. Attorney General et al) and Claim No. 1018 of 2009 (Dean Boyce vs Attorney General et al) on 30 July 2010, and undertake not to impugn the said legislation in any appellate, arbitral or other proceedings.

- (4) In accordance with the Proviso to Section 71 of the Acquisition Act, any arrears of taxes, duties, charges or other sums which are due or payable to the Government from your Client would be deducted from the amount of compensation.
- (5) Contemporaneously with the payment of compensation, your Client, as well as Dunkeld and Hayward, would be required to execute a Release (or separate releases) before a Notary Public (in a form acceptable to the Government of Belize) releasing the Government from all further liability in respect of its acquisition of the said shares held by your Client.

Please advise us urgently whether the above offer is acceptable to your Client.”

[52] By letter dated 20 December 2010, the five companies, through their attorneys, rejected GOB’s offers, on the ground that they did not represent “reasonable compensation”. The attorneys pointed out that the offered share value of \$1.46 per share was “less than one third of the BZ \$5.00 per share which [GOB] attributed to the shares in its prospectus for sale of the shares to the public launched on October 15th 2010”. Further, even that figure, the attorneys’ letter continued, “was, on the Prime Minister’s own admission, at least a dollar below the market price as a preferential price for Belizeans”.

[53] The attorneys advised that the five companies had been provided with an independent expert report, prepared by PricewaterhouseCoopers for the arbitration proceedings, which valued the Telemedia shares as at 25 August 2009 at BZ\$10.23 per share. They further informed GOB that the five companies would be unable to consider the BZ\$1.46 per share offer “without receiving a copy of the valuation report or a comprehensive explanation of how the value was arrived at

by the Government". It was indicated that the five companies were prepared to exchange the respective expert reports "in order that the respective positions can be more properly considered". Lastly, the attorneys pointed out –

"...you give no date by which this compensation would be paid save for the unparticularised statement that it will be paid within a 'reasonable time'. The Government has been under an obligation to pay compensation within a reasonable period of time since it compulsorily acquired the shares in August 2009. We are now 16 months hence and the Government has failed to meet this obligation. This recent derisory offer only compounds this failure. Your offer is also made subject to arbitrary pre-conditions. Conditions 1 – 3 and 5 do not appear anywhere in the [2009 Act] and seek to deprive my clients and other entities of their other legitimate rights, in particular in respect of rights legitimately accruing to other entities under bilateral investment treaties."

[54] By a fixed date claim form filed on 31 March 2011, GOB commenced a claim against the five companies and others, pursuant to section 66 of the principal Act. Citing a "virtual chasm between the positions taken by [GOB] and the Defendants" (at para 15 of the affidavit of Joseph Waight sworn to on 31 March 2011), the claim was for a determination by the Supreme Court of the compensation payable to the defendants as a result of the compulsory acquisition, "having regard to the rules for the assessment of compensation set out in section 67 of the said Act".

The decision of Awich CJ (Ag)

[55] This was therefore the state of play when the three applications referred to at paras [43]-[49] came on for hearing before Awich CJ (Ag) on 1 April 2011. In his considered judgment delivered on 10 May 2011, the learned judge refused to entertain the second and third applications, on the ground that Dunkeld had disobeyed the interim injunction which it now sought to set aside and was therefore in contempt of court. The disobedience referred to by the judge was Dunkeld's involvement in proceedings pursuant to the first arbitration notice after

the grant of the interim injunction on 5 February 2010. Dunkeld's cessation of any involvement in the proceedings after the enactment of the SCJA Act 2010 was regarded by the judge as no more than a partial purging of its contempt, which he accordingly took to be partial compliance with the order of the court. The application for an anti-suit injunction in the English courts and the filing of the second arbitration notice on 26 July 2010 (which was "an act aimed at circumventing and disobeying the interim order made on 5.2.2010"), were among the reasons cited by the judge for his view that, when Dunkeld stopped participating in the arbitration, it only partially purged its contempt. The judge therefore considered that Dunkeld could not be heard on its applications "until it has fully purged its contempt of the order" (para 49). However, the judge observed, "[t]he court...will entertain Dunkeld's submissions to the extent that they are relevant to opposing the application of [GOB]".

[56] As regards GOB's application for an interim injunction to restrain the second arbitration, the learned judge acknowledged (at para 58), that the court "must exercise caution not to interfere with the agreement of the parties to submit to arbitration". But he nevertheless considered that in this case there were several good arguable questions with prospects of success, within the meaning of American Cyanamid Co v Ethicon Co Ltd [1975] 2 WLR 316, including the question of whether rights under the Treaty are enforceable in Belize. On the question of the balance of convenience, the judge regarded it (at para 85) as "unconscionable, vexatious and oppressive [for Dunkeld] to be pressing on with arbitration in the circumstances", in light of the fact that GOB had already made an offer of compensation to the five companies, in response to which they "have not presented in evidence their own valuation of compensation". The judge also took the view (at para 86) that the issues in the two arbitrations were the same as in the instant action and other matters pending before the Supreme Court; and that it would be "vexatious and unconscionable to proceed to lay the same evidence before the arbitral tribunal concurrently, and before this case is concluded".

[57] The learned judge accordingly considered that it was just and convenient to continue the order previously made against Dunkeld on 5 February 2010 and to grant the interim injunction sought by GOB in respect of the second arbitration notice. In a last word on the two applications which he had declined to entertain, the judge said this (at para 91):

“Had I not declined to hear the applications of Dunkeld, I would have decided on the evidence available, to refuse both applications. I do not accept the submission by Mr. Courtenay in regard to R. 7.3(2)(c)(ii). When the application for permission for service of the claim form on Dunkeld outside jurisdiction was made, there had not already been a claim against the resident defendants, and the claimant subsequently wished to serve the claim on Dunkeld who was outside the jurisdiction. Dunkeld was joined with the other defendants right from the start of the claim. If R. 7.3(2)(c)(ii) was wrongly cited, court could act under the correct rule, namely, R.7(5). Note that notice is not required for an application for permission to service claim form outside jurisdiction. All that was required was that the court satisfy itself that the claim had a realistic prospect of success. On the affidavit evidence, this was established.”

The grounds of appeal

[58] In its detailed grounds of appeal filed on 15 June 2011, Dunkeld challenges Awich CJ (Ag)’s judgment on a number of grounds. For convenience, I will gratefully adopt (with slight amendments) Dunkeld’s summary of the four main limbs of the appeal (as set out in para 8 of its written submissions), as follows: the learned judge erred in (i) finding Dunkeld in contempt of court and, in any event, could not lawfully have failed to hear Dunkeld’s application (‘the contempt issue’); (ii) failing to find that the court lacked jurisdiction over Dunkeld and in failing to set aside service of the fixed date claim form and discharge the 5 February 2010 injunction (‘the service issue’); (iii) continuing the 5 February 2010 injunction and granting the 11 May 2011 injunction (‘the anti-arbitration injunction issue’); and (iv) refusing to stay the claim (‘the stay of proceedings issue’).

The submissions

[59] On the contempt issue, Dunkeld submitted that the judge erred in declining to “entertain” its applications, in the light of the modern authorities which indicate that an alleged contemnor is normally entitled to be heard in order to challenge the very order of which he is in breach. In any event, it was submitted, the judge also erred in finding Dunkeld in contempt, on the basis of correspondence between Allen & Overy LLP on its behalf, the PCA and GOB. This is particularly so in the light of the judge's stated position that the first injunction was directed against the parties, not the arbitral tribunal. Dunkeld submitted that the evidence did not support the judge's conclusion that it “deliberately chose” to disobey the order made on 5 February 2010. Finally on this issue, Dunkeld submitted that the judge erred in finding that it had not purged its contempt because of the steps taken in relation to the second arbitration notice, bearing in mind that the issuing of the second arbitration notice was not in breach of the court's order, which was precise and narrow in its terms.

[60] On the service issue, Dunkeld submitted that, contrary to the learned judge's view, the conditions set out in rule 7.3(2)(c) for service out of the jurisdiction were not satisfied. As a pre-condition to the grant of permission to serve the claim form out of the jurisdiction, it was submitted, that rule requires that there should be a real issue which it is reasonable for the court to try between a claimant and a defendant who is or will be served with the claim form within the jurisdiction. It was further submitted that the judge also erred in regarding rule 7.5 as an alternative to rule 7.3(2)(c), as that rule must be read in conjunction with rule 7.3(2)(c), which is the rule under which the application was in fact made in this case. Further still, it was submitted on this point, the application to set aside the claim form and to discharge the first injunction was validly made under rules 7.7 and 17.4(8) and the judge accordingly erred in thinking that rule 9.7, which sets out the procedure for disputing the court's jurisdiction, was of any relevance in these circumstances.

[61] As regards the anti-arbitration injunction issue, Dunkeld's main submission was that the judge did not apply the correct test for the granting of an anti-arbitration injunction. It was submitted that in determining whether it is "just and convenient" to order interim relief in a particular case, the court must, firstly, apply the principles set out in American Cyanamid. Secondly, in the case of an anti-arbitration injunction, the court should apply an extra layer of caution, having regard to the fact that an injunction restraining an international arbitration should only be granted in exceptional circumstances. In its further submissions filed on 24 July 2013, Dunkeld relied heavily on the BCB case, in which the CCJ confirmed that the jurisdiction to grant an anti-arbitration injunction must be exercised with caution and only granted if the arbitral proceedings are vexatious or oppressive. Pointing out that the grounds upon which GOB seeks a permanent injunction restraining the arbitrations in this case are almost identical to those relied on by GOB in the BCB case, Dunkeld invited the court to apply the CCJ decision in this case. That decision, Dunkeld submitted, is indistinguishable "and is determinative of the appeal in its favour".

[62] And finally, on the stay issue, Dunkeld submitted that, if the injunctions were discharged by the court, it would follow that the application for a stay (which is the "flip side" of the applications to discharge the injunctions) should also be granted, on the basis of either section 17 of the Arbitration Act or the inherent jurisdiction of the court. (The application for a stay was originally made under section 26(1) of the Arbitration Act, but, by the time these submissions came to be made, this court had ruled that Part IV of the Act, in which section 26(1) falls, was not enforceable – see Attorney General of Belize v BCB Holdings Ltd and Belize Bank Ltd, Civil Appeal No. 4 of 2011, judgment delivered 8 August 2012, hence the alternative basis for a stay put forward in Dunkeld's submission. For a yet further development, see para [77] below.)

[63] On the basis of these submissions, Dunkeld invites the court to set aside the orders made by the learned judge in the court below and, in the exercise of its

powers under section 19 of the Court of Appeal Act, make new orders. I shall come in due course to consider some of the very many authorities cited by counsel for Dunkeld in support of these submissions.

[64] In response to these submissions, firstly on the contempt issue, GOB was content to say that Awich C J (Ag) was correct in his refusal to entertain Dunkeld's two applications. But in any event, it was submitted, Dunkeld was in fact given the opportunity to be heard fully and had therefore not been prejudiced by the judge's stance. And, as the judge had indicated, even if he had not declined to hear Dunkeld on its applications, "[he] would have decided on the evidence available, to refuse both applications".

[65] GOB made no submissions on the service issue, apparently considering that the real issue to be determined "was the question of the discharge or continuation of the injunction". On that issue, GOB reminded us of the limited circumstances in which this court will interfere with the exercise of a discretion by a judge in the court below (as stated in Hadmor Productions Ltd v Hamilton & others [1983] 1 AC 191, 220 and acted on by this court in British Caribbean Bank v The Attorney General).

[66] It was submitted that, despite the fact that Dunkeld's entire claim was based on the premise that it was the beneficial owner of 71% of the shares in Telemedia through various companies, no evidence to support this was produced by Dunkeld. It followed from this that, in view of section 28 of the Companies Act which provides that no notice of trust is to be entered or received by the registrar, GOB was entitled to disregard any trust in relation to the Telemedia shares held by the five companies and to treat those companies as the only persons entitled to compensation. The judge was therefore correct to hold that the question of Dunkeld's standing in any arbitration under the Treaty was a serious question to be tried and his finding on this should not be disturbed. If Dunkeld has no

standing in the arbitration proceedings, it was further submitted, then those proceedings would be vexatious and the injunctions should be continued.

[67] Finally, on the question of the balance of convenience and the adequacy of damages, GOB again submitted that the judge was correct in his conclusions, essentially for the reasons he gave.

[68] In its brief rejoinder to GOB's reply, Dunkeld observed that GOB was in possession of "clear evidence" of its interest in Telemedia, "and has had such evidence for three years". In any event, it was submitted, if further evidence is required in support of its claim under the Treaty, that will be a matter for the arbitral tribunal appointed to determine the claim.

[69] In its further submissions on the impact of the decision of the CCJ in BCB case, GOB contended that "the factual matrix in the instant case is entirely different from that in the BCB case". GOB restated its argument that Dunkeld's locus to invoke the provisions of the Treaty is questionable in light of the fact that it was not the legal owner of the Telemedia shares. To this, GOB added the consideration that Dunkeld was, as it asserted, a 'shell' company, "which was brought in merely to invoke the Treaty, as none of the registered owners of the shares could have done so". In the absence of evidence that Dunkeld had made any investment in Telemedia shares after it "transferred itself to Turks & Caicos Islands in June 2009", Dunkeld has no locus to invoke the Treaty and its action in doing so is oppressive and unconscionable.

[70] Finally, GOB raised a question as to the validity of any interest held by Dunkeld in Telemedia shares, in the light of the requirements of the Exchange Control Regulations for central bank approval in respect of the holding of securities registered in Belize by non-residents.

Some further developments

[71] It is relevant to note that, as counsel for Dunkeld observed at the outset of their submissions, “the legal landscape has changed significantly since [Awich CJ (Ag)] issued his decision”.

[72] The first matter of significance is that on 24 June 2011 this court unanimously declared that the 2009 Act and the related Orders made under it were unconstitutional and void (**British Caribbean Bank Ltd and Dean Boyce v The Attorney General of Belize and Minister of Public Utilities, Civil Appeals Nos 30 and 31 of 2010**, judgment delivered 24 June 2011).

[73] This decision was swiftly followed on 4 July 2011 by fresh nationalisation legislation relating to Telemedia (The Belize Telecommunications (Amendment) Act 2011 (‘the 2011 Act’) and Statutory Instrument No. 70 of 2011 (‘the 2011 Order’)). Under the terms of these provisions, the Telemedia shares formerly owned by the five companies, to which Dunkeld claims to be beneficially entitled, were re-acquired by GOB.

[74] On 21 October 2011, the National Assembly passed the Eighth Amendment to the Constitution. Among other things, the Eighth Amendment provided for the majority ownership and control of public utility providers (including Telemedia) by GOB and declared that acquisition by GOB of certain property under the 2011 Order “was duly carried out for a public purpose in accordance with the laws authorizing the acquisition of such property” (sections 144(1) and 145(1)(b)).

[75] On 11 June 2012, the Supreme Court ruled that the 2011 Act and the Eighth Amendment were unconstitutional and void in part and that the 2011 Order was unconstitutional and void in its entirety (**British Caribbean Bank Ltd et al v The Attorney General of Belize and Minister of Public Utilities**, Claims Nos 597 and 646 of 2011, judgment delivered 11 June 2012). However, the trial judge held that

that part of the Eighth Amendment Act which provided for GOB's majority ownership of Telemedia was valid, the result of which was that both sides appealed against the decision. That appeal has since been heard by this court and the judgment of the court is awaited.

[76] In perhaps the most significant subsequent development for the purposes of this case, on 25 June 2013, as I have already noted, the CCJ delivered judgment in the BCB case, to which it will in due course be necessary to make extensive reference.

[77] Finally, on 26 July 2013, the CCJ delivered judgment in BCB Holdings and The Belize Bank Ltd v The Attorney General of Belize [2013] CCJ 5 (AJ). The court allowed the appeal from this court's decision that Part IV of the Arbitration Act is not enforceable (see para [62] above), with the result that that part of the Act therefore remains in full force and effect.

The contempt issue

[78] In reliance on Hadkinson v Hadkinson [1952] P. 285, Awich CJ (Ag) (at para 41) took it to be "[t]he general rule that a party who disobeys a court and is in contempt, cannot be heard or take proceedings in the same cause until he has purged his contempt, nor can he appeal from an order made in the cause".

[79] Hadkinson v Hadkinson involved a dispute over the custody of a child, following proceedings for divorce. The wife was given custody of the only child of the marriage until further order of the court, but was directed that the child should not be removed out of the jurisdiction without the court's consent. In breach of the order, the wife, having remarried, took the child to Australia, where she was living with her new husband. The court ordered her to return the child to England and, on appeal against this order, she was met by a submission on

behalf of the child's father that she should not be heard because she was in breach of the original order not to remove the child from the jurisdiction.

[80] Although the court was unanimous in accepting this submission, Romer LJ (with whom Somerville LJ agreed) and Denning LJ arrived at this conclusion by somewhat different routes. In the passage (at pages 288 – 289) upon which the headnote to the law report is based (and upon which Awich CJ (Ag) relied), Romer LJ based his decision on the existence of a general rule that no application to the court by a person who is in contempt will be entertained until he has purged himself of his contempt:

“It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or even void...

Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt.”

[81] But, even then, Romer LJ accepted that the rule was not absolute and might be subject to exceptions):

“One such exception is that a person can apply for the purpose of purging his contempt and another is that he can appeal with a view to setting aside the order upon which his alleged contempt is founded; neither of those exceptions is relevant to the present case. A person against whom contempt is alleged will also, of course, be heard in support of a submission that, having regard to the true meaning and intendment of the order which he is said to have

disobeyed, his actions did not constitute a breach of it; or that, having regard to all the circumstances, he ought not to be treated as being in contempt.”

[82] In tracing briefly the origins of the rule that a party in contempt will not be heard, Denning LJ posed the question (at page 295), “how far does that rule apply today?” This was his answer (at page 298):

“Those cases seem to me to point the way to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what Sir George Jessel M.R. said in a similar connexion in *In re Clements v. Erlanger*. “I have myself had on many occasions to consider this jurisdiction; and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men’s rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction.” Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

The present case is a good example of a case where the disobedience of the party impedes the course of justice. So long as this boy remains in Australia it is impossible for this court to enforce its orders in respect of him. No good reason is shown why he should not be returned to this country so as to be within the jurisdiction of this court. He should be returned before counsel is heard on the merits of this case, so that, whatever order is made, this court will be able to enforce it. I am prepared to accept the view that in the first instance the mother acted in ignorance of the order, but nevertheless, once she came to know of it, she ought to have put the matter right by bringing the boy back. Until the boy is returned we must decline to hear her appeal.”

[83] Denning LJ's less prescriptive approach to the question of whether a party in contempt should be heard was approved by the House of Lords in **X Ltd v Morgan-Grampian (Publishers) Ltd** [1991] 1 AC 1, in which Lord Bridge observed (at page 46) that "...the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning LJ better accords with contemporary judicial attitudes to the importance of ensuing procedural justice than confining its exercise within the limits of a strict rule subject to defined exceptions".

[84] I should also refer to the decision of the Court of Appeal in **Arab Monetary Fund v Hashim and others**, (unreported), 21 March 1997, where Bingham LCJ, after considering the speeches in **X Ltd v Morgan-Grampian (Publishers) Ltd**, concluded that –

"... it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then to ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders."

[85] Lastly on this point, I would refer to a passage from Gee on Commercial Injunctions (5th edn, para 19.076) upon which Dunkeld strongly relies, where the relevant principles governing refusal to hear a party in contempt are summarised in this way:

- "(1) Not hearing a party who is in contempt is a strong thing to do which has to be properly justified on the particular facts and which is a proportionate means of securing a legitimate end.
- (2) The contemnor is not to be prevented from making applications in other proceedings.

- (3) The contemnor is not to be precluded from defending himself in the proceedings (e.g. by appearing to resist an interlocutory application made by another party or by himself at the trial).
- (4) The contemnor is not to be precluded from making an application or advancing an appeal in the action for the purpose of seeking to set aside the very order in respect of which he is in contempt, or an earlier order on which that order depends. This principle may be overridden if, e.g. the contempt, if persisted in, would impede the course of justice and there is no other effective means of securing his compliance: *X Ltd v Morgan-Grampian Ltd*.

This principle applies regardless of whether or not the grounds of the application or appeal contend that the order was itself irregular or was made as a result of irregular proceedings. In the context of a search order it has the effect that a defendant who is in breach of the provisions of the order is not precluded by reason of his contempt from seeking to have the order discharged, either by interlocutory application or at the trial. But he may still be penalised for contempt.

- (5) The contemnor is not to be precluded from making an application or advancing an appeal for the purpose of setting aside subsequent proceedings in the action on the grounds that an order has been made without jurisdiction or there has been some other irregularity.
- (6) Where a contemnor seeks to make a voluntary application or to advance an appeal in the action which does not fall within (4) or (5) above, then the court has a discretion to refuse to hear the contemnor until he has purged his contempt, recognising that this would be a strong thing to do and which has to be properly justified as proportionate to a legitimate end to be secured. The discretion will be exercised taking into account the nature and apparent strength of the application sought to be made and the circumstances of the case."

[86] In the light of these authorities, I am clearly of the view that the learned judge fell into error by refusing to hear Dunkeld on its two applications, one of which was an application to discharge the very order of which it was said to be in breach. In so doing, he failed to appreciate that, even in Hadkinson, which he purported to apply, "all members of the court recognised that a contemnor is

normally entitled to be heard in order to challenge the very order of which he is in breach” (per Moore-Bick LJ, JSC BTA Bank v Mukhtar Ablyazov [2012] EWHC 237 para 12, in which all the leading modern authorities are very helpfully discussed). That is also the fourth of the principles set out in the extract from Gee which I have quoted above. But, as Dunkeld further submitted, correctly in my view, its applications to set aside the service of the claim form and for a stay also brought it within the fifth and sixth of the principles extracted by Gee from the authorities.

[87] It does not appear from his judgment that any of the modern authorities on the question of the hearing of an alleged contemnor were considered by the learned judge. This could well be because, as Dunkeld observed in its submissions, GOB’s argument before the judge was that Dunkeld should be refused relief on the basis of its contempt. It is perhaps a pity that the learned judge did not reveal his inclination not to hear Dunkeld at all on its applications to the parties. Had that been done, there might well have been some discussion before the judge of the post-Hadkinson authorities, which make it clear that “the general rule refusing to hear a party in contempt subject to categorised exceptions...has given way to the exercise of a discretion not to hear based on principle” (Gee, para 19.076).

[88] To the extent that Awich CJ (Ag) appears to have been unaware of these developments, I have no difficulty in concluding that this is an instance in which the learned judge’s exercise of his discretion not to hear Dunkeld on its applications was based on a misunderstanding of the law and must accordingly attract this court’s intervention.

[89] Turning to the question whether Dunkeld could in fact be said to have been in contempt, it is important to keep in mind, I think, the exact terms of the order made against Dunkeld on 5 February 2010: Dunkeld and the other defendants were restrained “until the determination of this claim...or until further order, from taking any or any further steps in the continuation or prosecution of the

arbitration proceedings commenced by [Dunkeld] by Notice of Arbitration dated 4 December 2009”.

[90] The primary respect in which the judge found Dunkeld to be in contempt was that it “deliberately chose to disobey the interim injunction order made on 5.2.2010” (para 39). (The judge’s view that Dunkeld was in contempt from 8 February 2010 is, it is clear, plainly incorrect, since, as Dunkeld points out, the 5 February 2010 order was not perfected until 10 February 2010. In this regard the judge also appears to have misunderstood the evidence as to when Dunkeld was actually served with the 5 February 2010 order.) The judge made it clear that he was here referring to the exchange of correspondence between Allen & Overy LLP, PCA and GOB in connection with the appointment of a second and third arbitrator to complete the panel for the hearing of first arbitration (paras [31]-[32] above).

[91] As has been seen, Allen & Overy LLP’s stance was that the 5 February 2010 order was not directed at the PCA or the arbitral tribunal and that those bodies were therefore free to proceed with the necessary arrangements. Dunkeld submits that Allen & Overy LLP would have been encouraged in this view by the learned judge’s obviously correct statement that his 5 February 2010 order did not bind those authorities. Indeed, the solicitors made this plain in their letter to the PCA dated 19 February 2010 (as of which date Dunkeld had still not been served with the order):

“The second Order of 10 February 2010 is not directed to the Secretary General of the PCA or the Arbitral Tribunal. It is directed at Dunkeld and nine individual defendants (see paragraph 3 of the Order dated 10 February 2010). Awich J made it very clear that his order did not purport to restrain the Arbitral Tribunal. At paragraph 45 of the Decision, Awich J notes: *“I would make sure that such an injunction order was directed against the parties in the UNCITRAL*

arbitration proceedings, not against the arbitral tribunal; I would avoid interference with its foreign status.”

The PCA is not in my view bound to follow the second Order and the first Order has expired. Furthermore, even if the Decision was directed at the PCA, the PCA should disregard it because the PCA is not amenable to the jurisdiction of the Belize courts in respect of the matter before the PCA.”

[92] With the greatest of respect to the learned judge, who clearly thought otherwise, I regard this letter and the further correspondence along similar lines which followed it, as quite unremarkable, given the judge’s stated intention and the terms of the order itself. The fact that the PCA did proceed with the appointment of the second and third arbitrators (in the face of Mr Gandhi’s strident protests) certainly suggests that neither the PCA nor the arbitral tribunal found Allen & Overy LLP’s interpretation of the effect of the judge’s order to be problematic. At all events, I would find it difficult to conclude from this evidence (referred to by the judge at para 39 as the evidence “assembled so far”) that Dunkeld acted in contempt of the judge’s order as a result of the efforts of Allen & Overy LLP on its behalf. In this regard, I cannot lose sight of the fact that, although these were not in any sense proceedings for contempt, the requisite standard of proof in such proceedings is generally accepted to be proof beyond reasonable doubt (In re Bramblevale Ltd [1970] 1 Ch 128).

[93] But, be all of this as it may, it is common ground that after the SCJA Act 2010 came into force on 1 April 2010, Allen & Overy LLP ceased any activity on Dunkeld’s behalf in connection with the first arbitration. The further question which arises is therefore whether, even if Allen & Overy LLP’s conduct up to that time was contemptuous, this cessation of activity could be regarded as a purging of that contempt. In this connection, Dunkeld also relies on the judgment of Lord Bingham LCJ in Arab Monetary Fund v Hashim, in which the court appeared to

accept that the alleged contemnors in that case, a husband and wife, might be able to purge their contempt “by apologising for their breach, by remedying the breach or by expressing [a] genuine intention to do so by demonstrating that they cannot remedy the outstanding breach”.

[94] Awich CJ (Ag) regarded the cessation of any participation in the arbitration as no more than a “partial purging of the contempt”. His reasons were that on 26 July 2010, nearly four months later, Dunkeld had, first, sought and obtained an ex parte anti-suit injunction against GOB in England; second, filed the second arbitration notice against GOB, referring to arbitration “substantially the same questions that arose...in the first arbitration and in the present proceedings”; and third, by filing the second arbitration notice between the same parties as the first arbitration and the proceedings that were already before the court, had done “an act aimed at circumventing and disobeying the interim order made on 5.2.10” (para 48). On this basis, the judge considered that Dunkeld had not fully purged its contempt.

[95] But, again with respect, I find it difficult to see how either the commencement of court proceedings in England or the filing of the second arbitration notice could possibly be a breach of the order specifically restraining Dunkeld “from taking any or any further steps in the continuation or prosecution of the arbitration proceedings commenced...by Notice of Arbitration dated 4 December 2009”.

[96] Steel J's order, as has been seen (para [39] above), was specifically directed at restraining GOB from taking any steps to restrain Dunkeld or the arbitral tribunal in the second treaty arbitration which it proposed to commence. Steel J, as Dunkeld pointed out, did not seem to perceive a difficulty in granting it, despite the fact that Awich CJ (Ag)'s 5 February 2010 order was specifically brought to his attention. The second arbitration notice, in my view, made a distinct complaint from that which was made in the first. The complaint in the

first was that GOB had compulsorily acquired Dunkeld's property in breach of the Treaty, while the complaint in the second was that GOB, by seeking to bar Dunkeld's right of recourse to arbitration under the Treaty to seek a resolution of the matters complained of in the first notice, had committed further breaches of the Treaty. Whether or not Dunkeld is correct in either of these complaints (which it will be for the arbitrators to decide), it seems to me that the two notices therefore covered different, albeit obviously related, fields and that to that extent the issuing of the second was not a breach of the order restraining "the continuation or prosecution" of the first.

[97] For all of these reasons, I have come to the conclusion that the learned judge's finding of contempt and should be set aside. I will therefore proceed to consider Dunkeld's two applications, given the court's power under section 19(1)(a) of the Court of Appeal Act in these circumstances to "...make such further or other order as the case may require".

The service issue

[98] The question of service out of the jurisdiction is governed by Part 7 of the CPR. Rule 7.2 provides that a claim form may be served out of the jurisdiction "only if (a) Rule 7.3 or 7.4 allows; and (b) the court gives permission" (emphasis supplied). In **Lauro Rezende v Companhia Siderurgica Nacional and International Investment Fund Ltd** (Civil Appeal No. 23 of 2009, judgment delivered 20 October 2010), Mottley P observed as follows (at para [7]):

"This provision is restrictive in the sense that, for a Claim Form to be served out of the jurisdiction, it must fall within the provision [sic] of Rule 7.3 and 7.4. Even though the claim itself falls within the provisions of Rule 7.3 and 7.4 the over arching requirement is that the permission of the court is required. These provisions are cumulative and both requirement [sic] must be fulfilled."

[99] In this case, GOB applied for permission to serve the claim form out of the jurisdiction under rule 7.3(2)(c)(ii), which is in the following terms:

“7.3(2) A claim form may be served out of the jurisdiction where

- ...

- (c) a claim is made against someone on whom the claim form has been or will be served and –
 - (i) there is between the claimant and that person a real issue which it is reasonable try; and
 - (ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary and proper party to that claim.”

[100] The procedure for obtaining permission to serve out of the jurisdiction is governed by rule 7.5(1), which provides that the application must be supported by evidence on affidavit stating –

- “(a) the grounds on which the application is made;
- (b) that in the deponent’s belief the claimant has a claim with a realistic prospect of success;
- (c) in what place, within what country, the defendant may probably be found; and
- (d) where the application is made under Rule 7.3(2)(c), the grounds for the deponent’s belief that the conditions are satisfied.”

[101] The equivalent English rule is CPR 6.20(3), the operation of which is described by Professors Clarkson and Hill (in *The Conflict of Laws*, 3rd edn, page 95) as follows:

“Under CPR rule 6.20(3), where a claim is brought against a person on whom the claim form has been or will be served (D1), permission may be granted to serve process on a person out of jurisdiction (D2) if (a) there is between the claimant and D1 a real issue which it is reasonable for the court to try and (b) the claimant wishes to serve the claim form on D2, who is a necessary or proper party to that claim. So, if D1 is served in England or abroad, the court may grant permission for process to be served on D2 abroad, even though the case would not come under any other rule. Where claims against a number of defendants arise out of the same series of transactions and involve common questions of fact, each defendant is to be regarded as a necessary or proper party for the purposes of CPR rule 6.20(3).

The requirement that there should be a real issue between the claimant and the D1 is to enable the court to refuse permission where it appears that the claim against D1 is not brought bona fide, but merely as a pretext to get D2 before the English court.”

[102] In this case, GOB’s application to serve the claim form out of the jurisdiction was made at the same time as its first application for an ex parte interim injunction on 23 December 2009 was made. The application was to serve the claim form and “all other associated documents” on Dunkeld at its address in the Turks and Caicos Islands. In the body of the notice of application, it was stated that the claim form “will be served on all other Defendants within the jurisdiction, and...the 10th [Defendant is a] necessary and proper [party] to the Claim within the meaning of Rule 7.3(2)(c)(ii)”.

[103] The affidavit sworn to on 22 December 2009 in support of the application, under the sub-heading “Service out of the Jurisdiction”, said this in respect of Dunkeld:

“27. [Dunkeld], is resident in the Turks and Caicos Islands and the attorneys for [Dunkeld] are resident in the United Kingdom.

28. Both the 2nd Defendant and [Dunkeld] are necessary and proper parties to the Claim. The Claimant therefore seeks permission of the Court to serve the Claim Form and all other

associated documents on the 2nd Defendant and [Dunkeld] out of the jurisdiction under Rule 7.3(2)(c)(ii) of the Supreme Court Procedure Rules [sic].”

[104] It seems to me to be clear that this application did not satisfy the terms of either rule 7.3(2)(c) or rule 7.5(1). Starting with the rule 7.5(1), beyond stating that Dunkeld and its attorneys were resident outside of the jurisdiction and that Dunkeld was a necessary and proper party to the claim, the affidavit failed to state that in the deponent’s belief GOB had a claim with a realistic ground of success (rule 7.5(1)(b) or the grounds for the deponent’s belief that the conditions of rule 7.3(2)(c) were satisfied (rule 7.5(1)(d). In relation to rule 7.3(2)(c), there was no basis provided in the affidavit itself upon which the learned judge would have been able to satisfy himself that (i) there was a real issue which it was reasonable for the court to try as between GOB and the persons served within the jurisdiction and (ii) that Dunkeld was in fact a necessary and proper party to the claim. The application for permission to serve the claim form on Dunkeld out of the jurisdiction was therefore not, in my view, in conformity with the rules. The learned judge’s view that rule 7.3(2)(c)(ii) was satisfied because “Dunkeld was joined with the other defendants right from the start of the claim” is, it seems to me with respect, quite beside the point, given the plain requirements of the rule itself.

[105] On the basis of the material upon which GOB relied in its application for leave to serve the claim form on Dunkeld out of the jurisdiction, it is in fact not easy to discern any real issue which it was reasonable for the court to try as between GOB and the defendants other than Dunkeld. Mr Gandhi’s affidavit in support of the application made no allegation against them and, from the reliefs sought in the fixed date claim form, in particular, but not only, the injunction to restrain the arbitral proceedings which it had commenced by Dunkeld, it is clear that Dunkeld was in reality the substantial target of the claim. In these circumstances, it is difficult to avoid the conclusion that the claim against Dunkeld was not brought bona fide, but merely as a pretext to get it before the

Belizean courts. Some support for this view may be found in the fact that, as I have already noted (see para [29] above), the action against seven of the defendants who had been served within the jurisdiction was in fact withdrawn on 29 September 2010, no doubt as a sequel to this court's decision in **Jose Alpuche et al** that there was no serious issue to be tried against them.

[106] Perhaps, in recognition (or acknowledgement) of the deficiencies of the application that had grounded his grant of permission, Awich CJ (Ag) suggested that, even if rule 7.3(2)(c) was not satisfied, permission could have been granted under rule 7.5. On the clear language of the rules, it seems to me that this view is quite simply untenable. Rule 7.5 does not prescribe an alternative or free-standing ground for granting permission to serve out of the jurisdiction: rather it prescribes the method by which the application for permission is to be made. The substantive criteria for the grant of permission are contained in rule 7.3(2)(c), as clearly appears from rule 7.5(1)(d) itself, which requires the deponent to the affidavit in support of the application to state, where the application is made under Rule 7.3(2)(c), the grounds for his or her belief that the conditions have been satisfied.

[107] It has long been recognised in the authorities that rules permitting service out of the jurisdiction are “not only an exception to but also an enlargement of the ordinary jurisdiction of the court and should not...be given an unduly extended meaning” (per Lord Porter, in **Tyne Improvement Commissioners v Armement Anversois S/A (The Brabo)** [1949] AC 326, 338). It is for this reason that it is generally accepted that “the court should ‘be exceedingly careful before it allows a writ to be served out of the jurisdiction’” (per Lawton LJ in **Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd and Others** [1983] 1 Ch 258, 268, quoting Farwell CJ in **The Hagen** [1908] P 189, 201).

[108] In this case, it appears to me that GOB's application for permission to serve application out of the jurisdiction was not accorded the degree of care

which it called for, either in its preparation or its determination. In these circumstances, rule 7.7 provides, in my view, a clear basis for Dunkeld's application to set aside service of the claim form:

"(1) Any person on whom a claim form has been served out of the jurisdiction under Rule 7.3 may apply to set aside service of the claim form.

(2) The court may set aside service under this Rule where –

(a) service out of the jurisdiction is not permitted by these Rules;

(b) the case is not a proper one for the court's jurisdiction;
or

(c) the claimant does not have a good cause of action.

(3) This Rule does not limit the court's power to make an order under Rule 9.7 (procedure disputing the court's jurisdiction)."

[109] Rule 17.4(8) is, in my view, also relevant:

"A person against whom an interim order has been made or extended under this Rule shall be at liberty at any time to make an application to the court to discharge the interim order or vary its terms."

[110] Awich CJ (Ag) appears to have thought that Dunkeld's application to set aside the service of the claim form ought properly to have been made under rule 9.7, which permits a defendant who disputes the court's jurisdiction to try the claim, or argues that it should not exercise its jurisdiction, to apply to the court for a declaration to that effect (see paras 62 – 66 of the judgment). However, it seems to me to be clear from the language of rule 7.7(3) ("This rule does not limit the court's power to make an order under rule 9.7.") that, as Dunkeld submitted, both rules were intended to co-exist side by side as alternative or cumulative approaches open to parties in Dunkeld's position.

[111] My conclusion on this issue is therefore that the contention that the service of the claim form on Dunkeld outside of the jurisdiction was not permitted by the rules in this case has been made out. In these circumstances, as Hariprashad-Charles J observed in a case from the British Virgin Islands dealing with rules in virtually identical terms, “[i]f none of the conditions which entitle the court to exercise its discretion to permit service out exist the order [granting permission] must of necessity fall away” (OBM Ltd v LSJ LLC, Claim No BVIHCV 2009/0541, judgment delivered 3 June 2011, para 18).

[112] Pursuant to rule 7.7(2)(a), I would therefore set aside service of the claim form in this case on Dunkeld. As regards the status of the injunction granted by Awich CJ (Ag), the learned judge accepted that “the interim injunction orders would be incidental and dependent on the claim herein”. In Lauro Rezende v Companaia Siderurgica Nacional, Mottley P held (at para [16]) that permission to serve out of the jurisdiction is “a pre-requisite for the granting of an injunction over a defendant who is not within the jurisdiction of the court...even if leave had been granted, but subsequently set aside, there would be no jurisdiction to continue the injunction which had been granted”.

[113] It accordingly must follow, in my view, that if the order granting permission to serve the claim form on Dunkeld out of the jurisdiction is set aside, the orders granting injunctive relief against it on 29 December 2009 and 5 February 2010 must also be set aside.

The anti-arbitration injunction issue

[114] In the BCB case the court set out at the outset of its judgment the important question of law to which the case gave rise (at para [1]):

“What are the principles governing the jurisdiction to issue an injunction restraining international arbitration proceedings

commenced in accordance with an arbitration clause agreed to by the parties to the court proceedings?”

[115] Because of the obvious relevance of this question and the way in which it was answered by the CCJ, it may be helpful to frame the discussion on this issue by a consideration of the CCJ decision. (The Treaty is referred to in the judgment as ‘the BIT’, denoting the ‘Bilateral Investment Treaty’.)

[116] The litigation in that case also had its genesis in the 2009 Act. Among the items of property compulsorily acquired by GOB as part of that exercise were loan and mortgage debenture facilities, having a face value of US\$24 million, owed to the appellant (‘BCB’) by Telemedia. After the acquisition, payment by Telemedia to BCB of principal and interest ceased and, up to the time of the hearing before the CCJ, no compensation had been paid to BCB.

[117] BCB was the claimant in **British Caribbean Bank Ltd v Attorney General of Belize and the Minister of Public Utilities (Civil Appeal No 30 of 2010)**, one of the two consolidated appeals which led to the striking down of the 2009 Act by this court on 24 June 2011. After the re-acquisition of its property by virtue of the 2011 Act and Order and the Eighth Amendment, BCB again filed proceedings challenging the constitutionality of the legislation and claiming ancillary relief.

[118] On 5 May 2010, while its challenge to the constitutionality of the 2009 Act was before the Supreme Court, BCB, which was also registered in the Turks and Caicos Islands, sought redress under the Treaty by initiating international arbitration proceedings. This was met on 16 August 2010 by proceedings initiated by GOB, claiming various declarations and orders in relation to the arbitration proceedings, including an order to restrain BCB from continuing with the arbitration. Simultaneously, GOB also applied for an interim injunction restraining BCB “from taking any or any further steps in the continuation or prosecution of the arbitration proceedings”.

[119] The interim injunction was granted, the trial judge considering that there was a serious issue to be tried whether the Treaty was in force in Belize and whether GOB was bound by it. The judge's assessment was that the balance of convenience favoured GOB, because it would be vexatious or oppressive to allow the arbitration to proceed at the same time as the proceedings then on foot in Belize relating to the constitutionality of the acquisition and other matters. The judge's order restrained BCB from continuing with the arbitral proceedings until the completion of the domestic cases.

[120] By a majority, this court upheld the grant of interim injunction, albeit by, as the CCJ observed [at para [12)], another route:

"They considered that the trial judge exercised his discretion on wrong principles and erred in not limiting the interlocutory injunction to the date of trial of the merits of the substantive application for a (permanent) injunction. They decided to reconsider the matter and exercised their own discretion. They concluded that the BIT was in force and created binding obligations but that the right to go to international arbitration was qualified by the context of the BIT. In the opinion of the majority, the right to arbitrate needed to ripen by the completion of the proceedings in the domestic court. Applying the 'three-pronged' test for the award of interim injunctions as laid down in *American Cyanamid Co v Ethicon Limited* and developed in *National Commercial Bank Jamaica Limited v Olint Corporation Limited*, they held that the injunction should remain in place because there was 'a serious issue to be tried' as to whether the multiplicity of claims in the courts of Belize rendered the arbitration vexatious and oppressive. Apart from the expense of the international arbitration proceedings there might be inconsistent awards and, in any event, the domestic proceedings could provide relief that may make the arbitration unnecessary. They ordered that the parties be restrained from continuing with the arbitration proceedings until the hearing and determination of the substantive claim or further order. The dissenting judgment emphasized that the 1982 Agreement had conferred on the Appellant, 'an indefeasible' and 'an unqualified' right to initiate international arbitration proceedings and that by granting the injunction the court was facilitating the breach of those international obligations."

[121] The three issues considered by the CCJ were (a) whether the Treaty provided BCB with an “unqualified or indefeasible right to proceed to international arbitration”; (b) whether, if there was a power to restrain the arbitral process, the court should make a determination of the merits of the claim for a permanent injunction “or should limit its enquiry and determine only whether there was a serious issue to be tried”; and (c) whether, if the court addressed the merits, “there was any or any sufficient basis, for the grant of the injunction to restrain the injunction” (para [13]).

[122] By the time the matter reached the CCJ, the question of whether the Treaty was still in force was no longer in issue, it being common ground on the appeal that it “remains in force” (para [18]). As regards the first issue, the CCJ determined the true nature of the rights enshrined in the Treaty in the following passage, which I must regrettably quote in full (paras [21] – [23]):

“[21] Thus BCB, the investor, is not a party to the treaty but Article 8 makes a free standing offer which is accepted on submission of the dispute to arbitration and becomes a binding contract between the investor and the State party. The provision is clear and unambiguous. It evidences the intention of the State parties to provide private investors with the right to have the specified disputes settled by international arbitration. The plain wording of the article also demonstrates that there are no preconditions to the right to submit the dispute to international arbitration. This right encompasses any dispute between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this agreement. In this case the disputes include allegations of breaches of the obligations relating to expropriation of property. The right is one of direct access that is not contingent on any one or thing. Once there is a dispute that is not amicably settled, a national or company of one contracting party after giving three months’ notice is entitled to submit the dispute to international arbitration. The right to proceed is clearly independent; no permission or authorization is required from anyone or any state party. There is no language in the agreement from which one could infer that there is a requirement that the parties must first exhaust domestic remedies. It is reasonable that there should be none

because the effectiveness of this type of dispute settlement would be undermined if the investor was required to exhaust remedies in domestic courts before proceeding to international arbitration...An important objective of international arbitration is to avoid possible pitfalls of domestic litigation.

- [22] The right to commence the arbitral proceedings that BCB seeks to exercise arises from a legally binding agreement by the state of Belize to submit to arbitration. It is unconditional, apart from the procedural requirement of three months' notice, in the sense that the BIT does not require the fulfillment of any precondition or the exhaustion of any domestic remedies. It gives rise to an autonomous procedure through which BCB may vindicate rights under international law which are distinct and separate from rights vested as a matter of domestic law. The Court of Appeal was therefore in error when it stated that:

“... since under Article 8 of the Treaty only disputes which are not amicably settled can be referred to arbitration, the dispute between the appellant and the Government of Belize would not be ripe for arbitration until it is determined whether any assets belonging to the appellant have been lawfully expropriated.”

- [23] This is an error which affected the outcome of the case. The courts of Belize do have and retain the jurisdiction to restrain international or foreign arbitral proceedings which are oppressive, vexatious, inequitable, or would constitute an abuse of the legal process. This is a point to which we will return. In this sense there is no unqualified or indefeasible right to arbitrate. Equally, however, there is no requirement to exhaust local remedies before exercising the right to arbitration. Under the doctrine of *kompetenz-kompetenz*, the arbitrators are competent to determine their jurisdiction although the effective exercise of that jurisdiction remains subject to the inherent competence of the court to decide, in relation to an injunction to restrain international arbitration, whether a particular dispute falls within the scope of the arbitration agreement. In the case before us it is clear that the expropriation of Appellant's property fell within the scope of the 1982 Investment Treaty. Article 5 deals specifically with expropriation of investments. The very purpose of the arbitration contract created or generated by the arbitration clause in the investment treaty was it provide for the

protection of the investments of foreign investors, among other things, by providing them with a right to pursue disputes about their investments through international and neutral arbitration as an alternative to submitting themselves to the national courts. The standards by which expropriators of investment are to be judged are the standards set out in the investment protection agreement and international law principles and not necessarily those set out in the domestic system of the host State. An expropriation that is perfectly lawful under the national law could nonetheless trigger a successful investment claim under the investment treaty. Any condition to strive for an amicable settlement before initiation of arbitration cannot include an obligation to litigate the constitutionality of the expropriation. There is therefore no requirement that domestic remedies be exhausted before arbitration can be engaged. Whether the arbitrators choose to stay the arbitral proceedings properly brought before them whilst related domestic proceedings are in train is entirely a matter for them under the doctrine *kompetenz-kompetenz* and the circumstance that arbitrators may do so cannot form an appropriate basis for the domestic court to restrain the arbitration.”

[123] As for the second, the CCJ considered (at para [28]) that, in this case, where “all the relevant materials were before it without any complex issues of facts to be resolved, the Court below ought to have decided whether it was just and convenient to uphold the injunction”. In such a case, therefore, the orthodox American Cyanamid “three-pronged approach” ((i) serious issue to be tried; (ii) whether damages are an adequate remedy; (iii) the balance of convenience) was not appropriate.

[124] As regards the third issue, the CCJ proceeded on the basis of the assumed validity of section 106A(8) of the SCJ Act, as amended by the SCJA Act 2010. The court also accepted this court’s view that, “with the exception of the power to restrain an arbitration on the ground that its continuation would be an abuse of the arbitral process, the section does not make significant changes in the common law that had been applicable prior to its passage” (para [32]).

[125] The extreme caution which the Supreme Court has traditionally exercised in granting such injunctions has not been displaced by section 106A(8). The CCJ reiterated (at para [37]) that the Court “exercises heightened vigilance when asked to restrain international arbitration because the parties have contracted to arbitrate their dispute”; and (at para [38]) that “[t]he approach to modern arbitration agreements contained in investment treaties is for the court to support, so far as possible, the bargain for international arbitration”. Once the validity of the “arbitration bargain” has been established, the court will only grant an injunction to restrain the arbitration “if it is positively shown that the arbitration proceedings will be oppressive, vexatious, inequitable, or an abuse of process”. The burden of showing this is on the party seeking the injunction and it must be discharged “to a higher level than that required to restrain foreign proceedings which do not involve a contract to litigate in the foreign court” (para [39]).

[126] At para [41] of its judgment, the CCJ summarised the principles to be applied to the case, which I have taken the liberty of numbering for convenience, as follows:

- (1) The provisions in section 106A (8) (i) of the Supreme Court of Judicature Act of Belize, as they currently stand, are applicable.
- (2) In a case where the substantive remedy is the grant of the injunction the principles in making an order for an interim injunction are much the same as those governing the making of the final order and the primary power is to make the order where it is just and convenient to do so.
- (3) In a case where there is no significant dispute on the facts and the record before the court is materially complete the court should in the interests of doing justice consider the merits, at least in a preliminary manner, to determine whether there are any violations of the rights of the claimant and not limit itself to determining whether there is a serious issue as to whether there could be such a violation.

- (4) In particular, the jurisdiction to grant an anti-arbitration injunction must be exercised with caution and only granted if the arbitral proceedings are vexatious or oppressive.
- (5) Proceedings could be vexatious where they are absurd or the litigant seeks some fanciful advantage by suing in two courts at the same time but they would not be so held where there are substantial reasons of benefit to the plaintiff to bring the two sets of proceedings.
- (6) There is no presumption that a multiplicity of proceedings, or that merely bringing the proceeding in an inconvenient place, is vexatious. In normal circumstances the widely recognized principle of forum *non conveniens* will apply but in anti-arbitration injunctions cases the mere fact that the court is the natural forum for the case is not sufficient for it to grant the injunction.
- (7) The equitable basis of the jurisdiction makes it a remedy based on the wrongful conduct of the person to be restrained.
- (8) In cases of restraining international arbitration proceedings, the court must re-double the caution it normally exercises in restraining foreign proceedings because of the importance of recognizing and enforcing the agreement of parties to the mechanism for dispute resolution and the accepted principle of international law that the arbitral tribunal should not be subjected to the control of the domestic courts before it makes an award.
- (9) There is a role in the undertaking for damages in supporting the refusal of an injunction.

[127] Turning to BCB's situation, the CCJ considered (at para [45]) that there were many advantages to BCB to pursue the arbitral proceedings because the relief it sought for breach of the treaty was "qualitatively different from the relief it will obtain from the domestic courts". The court thought that the fact that it may be inconvenient or expensive for GOB to be obliged to litigate before the arbitral tribunal "is not an issue that could justify a finding of vexation or oppression". Because the subject matter of BCB's claims before the arbitration were qualitatively different from the claims before the domestic courts, the CCJ concluded (at para [47]) that there could be no doubt that there was a benefit to BCB in going to arbitration.

[128] Lastly, the CCJ came to the question of the efficacy of the undertaking which BCB had offered in the proceedings that, if the injunction issued by the Court of Appeal was discharged, it would suspend the domestic proceedings so as to ensure that there would be no double recovery. The court observed (at para [51]) that the giving of undertakings of this kind “is scarcely foreign in international commercial disputes...the undertaking is meant to facilitate trial of the dispute in accordance with agreement of the parties”. The court accordingly considered (at para [52]) that this court had erred, “in not concluding that the undertaking properly worded would further minimize the risk of double recovery and any prejudice that may result from that incumbrance”.

[129] In the result, the appeal was allowed, the order of the Court of Appeal set aside and the interlocutory injunction was discharged.

[130] In my view, the reasoning of the CCJ in the BCB case provides a complete code for the resolution of the issues that arise from Awich CJ (Ag)’s grant of the anti-arbitration injunction in this case.

[131] Firstly, with respect to the proper approach to the application for the interim injunction, it is clear that, by the time the matter came on for hearing before Awich CJ (Ag), the case had already been copiously documented on both sides. A total of seven affidavits each had been filed on behalf of GOB and Dunkeld (not including those filed in connection with Dunkeld’s application to Awich J to recuse himself). In addition, the learned judge has already delivered himself of two written judgments, giving his reasons for making the 5 February 2010 order and refusing the application for his recusal respectively.

[132] Further, there was by then no real disputes between the parties as to the material facts in the matter, despite GOB’s continued insistence that Dunkeld should disclose the nature of its interest in the five companies. The fact is that Dunkeld had clearly set out in affidavits filed on its behalf and in both the first

and second arbitration notices the route through which it claimed to be the beneficial owner of the Telemedia shares legally owned by the five companies (see para [19] above). Each of the five companies acknowledged Dunkeld's beneficial ownership from the very outset. It therefore seems to me that no further facts will be necessary to determine GOB's claim for declarations and a permanent injunction in the matter. It is now purely a matter of law whether GOB is entitled to the reliefs claimed in the fixed date claim form.

[133] It is also relevant to keep in mind, I think, that by the time the application for the second injunction came on for hearing before Awich CJ (Ag) in April 2011, the litigation had already been on foot for well over a year. But it had not progressed beyond the numerous interlocutory applications which it had spawned, a fact which elicited the judge's lament (at para 7) that "[t]oo much time has been take up with interlocutory applications". All of this strongly suggests that substantially the only objective of interest to GOB in filing the claim was to obtain an interim injunction in order to block the arbitral process.

[134] Against this background, it seems to me that this was very much a case in which, in order to decide whether it would be just and convenient to grant interim relief, the court might well have bypassed the American Cyanamid three-pronged approach and gone straight to the merits of GOB's claim for a permanent injunction, even if only on a preliminary basis. But this is, of course, pure hindsight in the light of the BCB case. It implies absolutely no criticism of how the judge approached the matter, which was entirely in keeping with what he was asked to do and how this court subsequently dealt with it on appeal. However, it is in my view now open to – indeed, incumbent on – this court, in considering whether the judge was right to grant anti-arbitration injunctions in this case, to approach the matter in accordance with the CCJ's guidance in the BCB case. I therefore propose, without pausing to administer the American Cyanamid three-pronged test, to go straight to the question whether GOB has made out its claim to an injunction on the merits.

[135] In the light of the decisions of this court and of the CCJ in the **BCB case**, it cannot now be doubted that the jurisdiction to grant anti-arbitration injunctions is wholly exceptional. It must be exercised with caution and such injunctions will only be granted if the arbitral proceedings are vexatious or oppressive or, in the words of section 106A(8), an abuse of the legal arbitral process.

[136] In this case, it is common ground that the matter which gave this court pause in the **BCB case**, that is, the multiplicity of proceedings, is not a factor. Dunkeld is not a party to the various challenges to the compulsory acquisition of Telemedia that are still winding their way through the courts of Belize. But even if it was, the CCJ decision in that case, as has been seen, has ruled out multiplicity of proceedings as a factor which will necessarily make the continuation of international arbitral proceedings vexatious or oppressive.

[137] GOB nevertheless submitted that multiplicity of proceedings is not the only relevant factor. And, given the infinite variety of factual circumstances that might arise from time to time, I would think that GOB is clearly right on this point: among the instances mentioned by the CCJ in the **BCB case** (at para [33]) would be a case of “pure vexation where the proceedings are so absurd that they cannot succeed”. But this is not, in my view, such a case, nor does GOB suggest that it is.

[138] I would consider this to be a case in which, on the face of it, and naturally subject to satisfactory proof of its claim in the arbitral proceedings, the Treaty fully entitles Dunkeld to seek the “qualitatively different” relief available by way of international arbitration. The arbitral claims in this case are for compensation to Dunkeld for alleged breaches of its rights under the Treaty. This gives rise to questions of international law, cognizable in the international arbitral forum. It will be recalled that in his affidavit in support of GOB's approach to the court to determine the compensation due to the five companies for the compulsory

acquisition of the Telemedia shares, the Financial Secretary observed that a, “virtual chasm” separates GOB and the five companies, among others, in respect of what is reasonable compensation for their shares (para [54] above). In these circumstances, it seems to me to be entirely reasonable that Dunkeld, as the beneficial owner of those shares, should seek redress in the forum for which the parties have stipulated as a matter of contract. In that forum, it could well be that the range of remedies open to Dunkeld will not be limited in the way in which it may be by the Belizean compulsory acquisition regime.

[139] Counsel for Dunkeld makes the point that, save for the existence in the **BCB case** of related proceedings in the Belize courts, the two cases have much in common: both BCB and Dunkeld have commenced international arbitration proceedings under the Treaty; both have obtained anti-suit injunctions in the English courts (BCB also having done so on 4 May 2010, shortly before commencing its arbitration proceedings); in both cases GOB sought permanent injunctions restraining the international arbitrations on almost identical grounds; and BCB and Dunkeld both provided undertakings that they will not seek double recovery for their losses – in Dunkeld’s case, either directly or through the five companies. In these circumstances, Dunkeld submits, the decision in the **BCB case** cannot be distinguished.

[140] I agree. It seems to me that the matters relied on by GOB as “distinguishing features” have absolutely no bearing on the question of whether the arbitral proceedings in this case can be said to be vexatious or oppressive or an abuse of the arbitral process.

[141] The first again raises the question, also relied on by the judge (at para 47 of his judgment) that the five companies have “refused to supply pertinent information to the Financial Secretary as to the nature of Dunkeld’s claim”. Despite the persistence with which GOB has raised this question, I am quite unable to see what this information has to do with the matter with which the

Financial Secretary has been concerned, which is the claim by the five companies for compensation for the compulsory acquisition of the Telemedia shares of which they were the registered owners. As the attorneys for the companies pointed out to the Financial Secretary more than once, all that his notice of acquisition of the Telemedia shares required of persons claiming compensation were their claims, "together with proof of ownership and other supporting documents". Each company provided share certificates establishing its ownership of the shares in respect of which its claim was brought, as well as a copy of its certificate of incorporation.

[142] Ultimately, the basis of Dunkeld's claim to beneficial ownership of those shares, which has more than once been stated in detail by the company (and without contradiction), is a matter for the arbitrators to determine in accordance with the Treaty. In the light of the CCJ's observations in the BCB case on the role of undertakings in international commercial disputes, the spectre of double recovery has already been dealt with adequately by Dunkeld's undertaking in this regard. There is therefore nothing, in my view, in the Financial Secretary's concerns "as to the nature of the Dunkeld's claim" that could possibly render the arbitral proceedings vexatious or oppressive.

[143] The question of section 28 of the Companies Act, which provides that "no notice of any trust, expressed, implied or constructive, shall be entered on the register or be receivable by the registrar"; is, in my view, even less relevant. While it is obviously the case, as GOB submitted, that only the five companies as the registered owners of the Telemedia shares can claim compensation under the 2009 Act, the claim by Dunkeld against GOB as beneficial owners of the shares may, as has already been discussed, cover a wider field. I would therefore reject the contention that the arbitral proceedings are vexatious and oppressive on this basis.

[144] The third distinguishing feature raised by GOB is, in my view, a pure question of construction of the Treaty; that is, whether the protection it gives to investors is applicable “only to those investments which were made while the investor was resident, or incorporated, in the territory to which the Treaty applied”. If this question does in fact arise (which I do not say that it does), then it seems to me to be entirely a matter to be determined by the arbitrators appointed under the Treaty. At all events, I cannot see what in it would at this stage make the arbitral proceedings vexatious or oppressive.

[145] And lastly, GOB raised the question of the Exchange Control Regulations, as a matter affecting Dunkeld’s beneficial ownership of securities registered in Belize. If GOB is right on this and the regulations do in fact apply and have been breached, then this must in my view be a matter for the relevant authorities. At all events, it has not been shown why, on the strength of GOB’s say so alone that the regulations have been breached, the arbitral proceedings should thus be rendered vexatious or oppressive.

[146] On this issue, I would therefore conclude that the learned judge erred in granting injunctions to restrain the arbitral process on 5 February 2010 and 11 May 2011 and that both injunctions should accordingly be discharged.

The stay of proceedings issue

[147] Dunkeld’s application for a stay of proceedings on GOB’s claim was one of the two which the judge declined to hear. I have already indicated my view that, in doing so, the judge erred, so I will now consider whether this was in fact a fit case for the grant of a stay.

[148] The application for a stay was made under the provisions of section 26(1) of the Arbitration Act, which provides as follows:

“26.-(1) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.”

[149] As has already been noted, by a judgment given on 8 August 2012, this court decided that the courts of Belize have no jurisdiction to recognise and enforce Part IV of the Arbitration Act (which includes section 26(1)). But, as I have also pointed out, in the subsequent decision of **BCB Holdings Ltd and Belize Bank Ltd v The Attorney General**, the CCJ has held that the court erred and that Part IV remains in full force and effect. It is therefore open to the court to consider Dunkeld’s application for a stay on the basis on which it was filed.

[150] In this case, both GOB and Dunkeld are parties to the Treaty, which has been found to be in force and binding on them. But two further questions which arise are (i) whether Dunkeld’s application to stay the proceedings was filed “after appearance” (which has since been replaced by the ‘acknowledgement of service’), as section 26(1) requires it to have been; and (ii) whether Dunkeld, by making an application on 26 December 2010 for an order discharging the first injunction, took a step in the proceedings.

[151] In my view, the second question admits of an easier answer than the first. It is clear from the authorities that, in order to deprive a defendant of his right of recourse to arbitration, a step in the proceedings “must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration” (**Eagle Star Insurance Co. Ltd v Yuval Insurance Co. Ltd [1978] 1 Lloyd’s Rep. 357**,

per Lord Denning MR at page 361). Thus, “an action taken to resist an interim injunction would not be a step in the proceedings” (Russell on Arbitration, 23rd edn, para 7.043). I therefore consider that the fact that, in this case, Dunkeld’s application to discharge the 5 February 2010 injunction, which was obviously a purely defensive step, was filed before the application for a stay does not disentitle it to a stay.

[152] The first question is more problematic: the application for a stay was in fact filed on 28 February 2010, while, as the learned judge records in the judgment under review (at para 34), Dunkeld filed its acknowledgement of service of the claim form on 1 April 2010, “the first day of the hearing of these applications”. The language of section 26(1) clearly indicates that the application for a stay should be made before appearance is entered and the learned editors of Russell on Arbitration state (at para 7-042), in respect of the substantially similar provision in section 9(3) of the UK Arbitration Act 1996, that the application for a stay “cannot be made until service of the originating process has been acknowledged by the applicant”.

[153] I therefore consider that this court cannot in the circumstances grant the stay of the proceedings sought by Dunkeld. I have not lost sight of the fact that in its submissions, on the assumption at that time that section 26(1) was not available to it, Dunkeld did suggest that the court could, as an alternative, order a stay under section 17 of the Arbitration Act or in the inherent jurisdiction. However, it seems to me that in the absence of full argument on the point, it would not be prudent to grant a stay on this basis and I would accordingly decline to do so.

[154] Dunkeld also submitted, in my view correctly, that the application for a stay was “the flip side” of its application to discharge the injunctions. In these circumstances, my reluctance to deal with the stay may therefore not be of any or much practical significance in the light of my earlier decision on the application

to discharge the injunctions. This is particularly so, it seems to me, since, as I have already observed, the main objective of the GOB's action in the first place appears to have been to enable it to secure injunctive relief to block the arbitral process.

Conclusion

[155] For all of these reasons, I consider that the learned judge erred in (i) refusing to hear Dunkeld on its applications on the ground that it was in contempt of the court's order of 5 February 2010; and (ii) refusing to discharge that injunction and granting a fresh injunction on 11 May 2011. I also consider that Dunkeld has made good its application to set aside service of the fixed date claim form and that this court's order should go accordingly. However, I would dismiss Dunkeld's application for a stay of the proceedings.

[156] I would therefore allow the appeal. 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 date of delivery of this judgment. In that event, the question of costs will be decided by the court on written submissions to be filed within a further 15 days.

MORRISON JA

MENDES JA

[157] I have had the privilege of reading in draft the judgment of Morrison JA. I agree with all of his reasoning and the conclusions which he has reached. I too would allow the appeal, with the consequences as to costs which he proposes.

MENDES JA