



[2017] CCJ 16 (AJ)1

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No BZCV2011/002
BZ Civil Appeal Nos 31 of 2010

BETWEEN

DEAN BOYCE	APPELLANT
AND	
THE ATTORNEY GENERAL OF BELIZE	1 ST RESPONDENT
THE MINISTER OF PUBLIC UTILITIES	2 ND RESPONDENT

CCJ Appeal No BZCV2014/005
BZ Civil Appeal No 19 of 2012

BETWEEN

DEAN BOYCE	
TRUSTEES OF THE BTL EMPLOYEES TRUST	
DUNKELD INTERNATIONAL	
INVESTMENT LIMITED	APPELLANTS
AND	
THE ATTORNEY GENERAL OF BELIZE	
THE MINISTER OF PUBLIC UTILITIES	RESPONDENTS

CCJ Appeal No BZCV2014/008
BZ Civil Appeal Nos 18 and 19 of 2012

BETWEEN

THE ATTORNEY GENERAL OF BELIZE	1 ST APPELLANT
THE MINISTER OF PUBLIC UTILITIES	2 ND APPELLANT
AND	
DEAN BOYCE	1 ST RESPONDENT
THE TRUSTEES OF THE BTL	
EMPLOYEES TRUST	2 ND RESPONDENT

Interpretation of contracts – implying terms into contracts – identifying the intention of the parties – an objective determination of what the parties meant by the language used - what a reasonable person having all the background knowledge that would have been available to the parties would have understood the words used in the contract to mean.

EXECUTIVE SUMMARY

This summary is not intended to be a substitute for the reasons of the Caribbean Court of Justice or to be used in any later consideration of the Court's reasons.

- [1] On 11 September 2015, after years of litigation and accumulation of costs, the parties had agreed to terms in a ‘Settlement Agreement’. The purpose of this was to bring an end to a long-running saga resulting from the disputed nationalisation of Belize Telecommunications Ltd (BTL) and associated companies. This had led to legal proceedings reaching the CCJ and also to arbitration proceedings before a tribunal under an international investment treaty. The Settlement provided *inter alia* that the Government of Belize (GOB) would pay compensation to Dunkeld and the Trust in three tranches. The dispute related to the amounts of US dollars and Belizian dollars that were due to be paid in the third tranche by GOB to Dunkeld and the Trust on the 12-month anniversary date of the issuance of the Final Award, which turned out to be 28 June 2017.
- [2] Pursuant to a Consent Order by the CCJ on 19 October 2015, the proceedings before the CCJ had been stayed on the terms of the Settlement with liberty to apply only for the purposes of enforcement of those terms. Pursuant to this Order, the GOB on 28 June 2017 and Dunkeld and the Trust on 4 July 2017, each made applications to the Court concerning the final amounts of the compensation.
- [3] Some of the final amounts were payable in US dollars and some in Belizean dollars. The amount payable in Belizean dollars was important to the GOB as those funds were to be held by Dunkeld and the Trust on trust to assist the GOB fund projects to help the people of Belize. Thus, the larger the amount payable in US dollars, the smaller would be the amount available for the charitable trusts. Since the vast majority of the liabilities of Dunkeld and the Trust had been incurred in US dollars, reimbursement in US dollars was critical for them.
- [4] The formula designed for calculating the mix of funds was set out in clauses 4.3 and 5.3 of the Settlement. These clauses concerned actual liabilities of Dunkeld and the Trust that included “legal, accounting, funding and ancillary costs incurred in connection with” GOB’s compulsory acquisition of BTL shares. The “Dunkeld Liabilities” and the “Trust Liabilities” (plus specified “Investment Loans”) would first be reimbursed in US dollars out of the portion of compensation determined by the Arbitral Tribunal to be the enhanced value of BTL shares attributed to the commercial advantages conferred by a controversial Accommodation Agreement made in 2005 by the executive of a former Belize Government. This Agreement had conferred very substantial advantages on Dunkeld and the Trust as owners of BTL shares (eg as to a tax-free guaranteed investment return) and the successor Government considered the Agreement invalid, so refusing to honour it. By the Settlement the enhanced portion of the compensation was known, respectively, as the “Dunkeld Restricted Amount” and the “Trust Restricted Amount”. There had to be deducted therefrom the Dunkeld Liabilities and the Trust Liabilities. The remaining sum would be paid to Dunkeld and the Trust in Belize dollars subject to an obligation to assist the GOB to fund projects to help the people of Belize.¹ The Settlement, however, was silent on the process by which these Liabilities were to be ascertained.

¹ *ibid* clauses 4.4, 4.4 and 5.5,5.6.

- [5] Dunkeld and The Trust, without any consultation with GOB, proceeded to employ highly regarded, independent, international firms of accountants to audit their Liabilities. These firms carefully reviewed the documentation alleged to support Liabilities in accordance with the Settlement Agreement. Only if the firms were satisfied that the liabilities were in fact incurred “in connection with” the compulsory acquisition were the liabilities included in their calculation. Relying on the audited figures certifying the relevant amounts due on 28 June 2017, Dunkeld and the Trust claimed due compensation from GOB. GOB, refused to accept the externally audited figures, though not doubting the professional expertise of the two international auditing firms, having in March 2017 made it clear that it would not accept whatever the external auditors claimed to be due.
- [6] The GOB argued that it must be implied from the Agreement that the “Dunkeld Liabilities” and the “Trust Liabilities” are only those liabilities agreed to by the GOB after a verification process conducted by the GOB. For this purpose, the GOB required Dunkeld and the Trust to produce to the GOB in a timely manner, copies of all documentation and explanations used by them and furnished by them to their auditors, subject to obligations of confidentiality on the part of the GOB. Dunkeld and the Trust rejected this and argued that the Liabilities were actually whatever their own internal audit revealed, though they had been prepared to do more than this by employing independent external auditors and claiming the amounts certified by them as due.
- [7] In relation to the law on implying a term into the Agreement, the parties only relied on the English law position which is that the court ought to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.”²
- [8] The CCJ found that any reasonable person would objectively consider the Agreement to be a final compromise of all claims (domestic and arbitral) so as to have a clean break of hostilities, and that the parties simply used the term “Dunkeld Liabilities” and “Trust Liabilities” to cover all actual liabilities specified as including “but not limited to, legal, accounting, funding and ancillary costs incurred in connection with the nationalisation of BTL” (but not claimed in the First and Second Dunkeld Arbitration). The quantum of these Liabilities would be matters peculiarly within the knowledge of Dunkeld and the Trust, but, given the history of animosity between the parties, it was inconceivable that clauses 4.3 and 5.3 meant that Dunkeld and the Trust were at liberty unilaterally or arbitrarily to produce figures purporting to be their Liabilities to GOB. Neither could it have been the intention that the GOB ought to carry out their own verifications so that the Liabilities were only those agreed by them.
- [9] The CCJ noted that ideally, the parties ought to have had an express term to provide a process for determining the Dunkeld and Trust Liabilities. For instance, they could have agreed on employing a particular auditor whose certificate, based on agreed terms of reference, would be final as to the amounts certified as Dunkeld and Trust Liabilities. In the absence of such a term, the best way of resolving the difference would have been

² *Arnold v Britton* [2015] UKSC36, [2015] AC 1619, [15]. See also *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* discussed by Lord Neuberger P in *Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742.

This summary is not intended to be a substitute for the reasons of the Caribbean Court of Justice or to be used in any later consideration of the Court's reasons.

for the parties to agree a firm of reputable independent auditors to determine the liabilities or, in the absence of agreement, for the Court to appoint independent auditors.

- [10] Although this approach had not been taken, the Court found that no aspersions had been cast by GOB on the professional competence and integrity of the international firms which audited the Liabilities who were experienced in determining actual costs incurred in connection with compulsory acquisitions. Moreover, there was nothing to suggest that a fresh independent audit would produce different, let alone substantially different results, so that it would serve no useful purpose to quash the existing audits and order a fresh audit.
- [11] The Court resolved the issue by accepting the Dunkeld and Trust Liabilities as those determined by the independent auditors. It considered that the blinkered conduct of Dunkeld and the Trust in proceeding with independent auditors without consulting with GOB or applying to the court to resolve the process for establishing the Liabilities, so that those Liabilities were not determined till delivery of judgment in this case, justified ordering that no interest will be payable by GOB in respect of the period between 28 June 2017 and 10 November 2017. Extra days were allowed for due payment on Friday 10 November after delivery of judgment on 1 November 2017 to take account of the fact that the money payable on a due date should have been known well before such date to allow arrangements to be made to pay the large payment of requisite US dollars and Belizean dollars.
- [12] In relation to other reliefs sought by GOB in its application, the CCJ *refused* to grant declarations: (a) that the pre-Award and post-Award interest accrued on the Dunkeld and Trust Restricted Amounts formed part of the said Restricted Amounts; (b) that interest as determined by the Arbitral Tribunal ceased to run on any sums comprising part of the Final Dunkeld and Trust compensation that had been prepaid or tendered by the GOB to Dunkeld and the Trust; (c) that the Dunkeld and Trust Restricted Amount Balance are not limited to amounts actually paid by the Government in Belize dollars; and (d) that GOB was entitled to deduct US\$10 million from the sums to be paid to the Trust based on clauses 5.4 and 5.5 of the Agreement.
- [13] The Court ordered the Financial Secretary to make the necessary payments to Dunkeld and the Trust on or before 10 November 2017. After this date interest would begin to run. The parties were given permission to apply to the Court in respect of any issue concerning the Court's judgment. The parties were also directed in due course to file with the Registrar of the Court a joint certificate of compliance with the above Order for payment. No order was made as to costs.

This summary is not intended to be a substitute for the reasons of the Caribbean Court of Justice or to be used in any later consideration of the Court's reasons.