[2017] CCJ 16 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

N APPEAL FROM THE COURT OF APPEAL OF BELIZE

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

BETWEEN

DEAN BOYCE **APPELLANT**

AND

THE ATTORNEY GENERAL OF BELIZE **1ST RESPONDENT**
THE MINISTER OF PUBLIC UTILITIES **2ND 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 **1st APPELLANT**
THE MINISTER OF PUBLIC UTILITIES **2ND APPELLANT**

AND

DEAN BOYCE **1ST RESPONDENT**
THE TRUSTEES OF THE BTL
EMPLOYEES TRUST **2ND RESPONDENT**

Before The Rt Honourable **Sir Dennis Byron, President**
and The Honourables **Mr Justice Saunders**
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson

Appearances

Mr. Eamon Courtenay, SC with Ms. Angeline Welsh for the Appellants/ Respondents

Mr. John Carrington, QC with Mr. Nigel Hawke, Ms. Agassi Finnegan and Ms. Magalie Perdomo for the Respondents/Appellants

JUDGMENT
of
The Right Honourable Sir Dennis Byron, and
The Honourable Justices Saunders, Wit,
Hayton and Anderson

Delivered by
The Honourable Mr Justice Hayton
on the 1st day of November 2017

[1] Pursuant to this Court's Order allowing the parties liberty to apply in connection with the enforcement of a settlement agreement contained in a consent order of the Court dated 19 October 2015, the application made by each of the parties concerns the nature of the mix of funds (US dollars and Belizean dollars) that must be paid by the Government of Belize (GOB) as compensation for its nationalization of Belize Telemedia Ltd (BTL). Some of the compensation is payable in US dollars and some in Belizean dollars. The amount payable in Belizean dollars is important to the GOB as those funds are to be held on trust to assist the Government of Belize (GOB) fund projects to help the people of Belize. Thus, the larger the amount payable in US dollars, the smaller will be the amount available for the charitable trusts.

[2] The amount of Belize dollars hinges upon the interpretation of the Settlement Agreement (the Settlement) made on 11 September 2015 between (1) GOB, (2) Dunkeld International Investment Ltd (Dunkeld) and (3) The Trustees of the BTL Employees Trust (The Trust) and incorporated in the Telecommunications Acquisition (Settlement) Act, No 14 of 2015. The purpose of this Settlement was to bring an end to a long-running saga resulting from the disputed nationalization of BTL in 2009 that required GOB to pay reasonable compensation within a reasonable time to those whose BTL shares it had compulsorily acquired.

[3] Since the vast majority of the liabilities of Dunkeld and the Trust incurred in connection with acquiring BTL shares, disputing the nationalization of BTL and seeking compensation in arbitration proceedings under an international investment treaty had been incurred in US dollars, reimbursement in US dollars was critical for them. In compromising a claim to immediate compensation in US$, compensation of US$0.72 per share was to be paid to Dunkeld and the Trust as partial compensation one business day after enactment of the Settlement.[1] Payment of the balance was to be made in two instalments once the arbitration tribunal (the Arbitration Tribunal) had made its Final Award in US dollars after determining not just the value of a BTL share but also the portion thereof representing an enhanced value attributed to the commercial advantages conferred on BTL by a controversial Accommodation Agreement entered into by GOB and BTL on 19 September 2005. It turned out under the Final Award that a BTL share was valued at US$5.6547 representing a real value of US2.2674 and an enhanced value of US$3.3873, the latter figure being much lower than expected.

[4] Fifty per cent of the balance remaining after the partial payment was to be paid in US dollars within ten business days of the Final Award which turned out to be made on 28 June 2016.[2] The other fifty per cent was payable on the twelve months' anniversary date of the Award.[3] The dispute between the parties concerns this final payment because it depends upon a formula designed to ensure that the "Dunkeld Liabilities" and also the "Trust Liabilities" (plus specified "Investment Loans") would first be reimbursed in US dollars out of the lower than expected portion of compensation representing the above enhanced value (known, respectively, as the 'Dunkeld Restricted Amount' and the 'Trust Restricted Amount').[4] The amount of US dollars remaining after payment of such Liabilities would be paid in Belize dollars to Dunkeld and the Trust subject to an obligation to assist GOB to fund projects to help the people of Belize.[5] As we have already held under an earlier application as to the calculation of the first net 50% payment[6], "What clause 4 of the Settlement Agreement did envisage in clause 4.1(b)(ii) was that the enhanced value less the former owners' liabilities was to be deducted only from the Second 50% Payment and paid in Belizean dollars."

[1] Settlement clauses 4.1(a) and 5.1(a) for Dunkeld and the Trust respectively.
[2] ibid clauses 4.1(b)(i) and 5.1(b)(i).
[3] ibid clauses 4.1(b)(ii) and 5.1(b)(ii).
[4] ibid clauses 4.2, 4.3 and 4.5 for Dunkeld and clauses 5.2 to 5.5 and 5.7 for The Trust.
[5] ibid clauses 4,4, 4.4 and 5.5,5.6.
[6] *Boyce and others v Attorney General of Belize and others* [2016] CCJ 20 (AJ), [34].

[5] The key issue is thus the amount of the Dunkeld Liabilities and the Trust Liabilities that can be deducted from the enhanced value known as the Restricted Amount. As to the Liabilities, clauses 4.3 and 5.3 of the Settlement respectively state as follows:

> "**4.3** The Government acknowledges that Dunkeld has outstanding liabilities that include, but are not limited to, legal, accounting, funding and ancillary costs incurred in connection with the compulsory acquisition of its interest in the Telemedia shares pursuant to the 2009 Act, the 2009 Order, the 2011 Act, the 2011 Order and the Eighth Amendment but not claimed in the First Dunkeld Arbitration and the Second Dunkeld Arbitration ("the **Dunkeld Liabilities**")..."
>
> "**5.3** The Government acknowledges that the Trust has outstanding liabilities that include, but are not limited to, legal, accounting, funding and ancillary costs incurred in connection with the 2009 and 2011 nationalisation of Telemedia ("the **Trust Liabilities**")..."

[6] It is to be noted that both clauses refer to "liabilities … incurred in connection with" the compulsory acquisition flowing from the nationalisation of BTL, while clause 4.3 relating to Dunkeld's claim excludes all costs "not claimed in the First … and Second Dunkeld Arbitration".

[7] Clauses 4.3 and 5.3 respectively do not set out any mechanism for arriving at the respective liabilities of Dunkeld and the Trust. The clauses are entirely silent on the process by which these liabilities were to be ascertained. Dunkeld and The Trust unilaterally employed highly regarded, independent, international firms of accountants to audit their Liabilities. Stanley Ermeav Sr, Senior Partner in Horwath Belize LLP, by his affidavit of 11 July 2017, reflecting the language of clause 4.3 of the Settlement, swore that his firm certified the precise amount of "all outstanding liabilities of Dunkeld in United States dollars, including, but not limited to, legal, accounting, funding and ancillary costs incurred in connection with the 2009 Act, the 2009 Order, the 2011 Act, the 2011 Order and the Eighth Amendment but not claimed in the First Dunkeld Arbitration and the Second Dunkeld Arbitration", so that the firm stipulated the amount due from GOB to Dunkeld in a mix of US and Belize dollars on 28 June 2017. Similarly, Reynaldo Magana, Senior Partner in Moore Stephens Magana LLP, swore that his firm certified the precise amount due to The Trust for such liabilities incurred in connection with the compulsory acquisition (there being no need to deal with

Dunkeld Arbitration costs) so that the firm stipulated the amount due to the Trust in a mix of US and Belize dollars on 28 June 2017.

[8] Both Mr Eameav and Mr Magana also swore that their firms had carefully reviewed the documentation alleged to support liabilities that had been "incurred in connection with" GOB's compulsory acquisition of BTL and had had regular meetings with the representatives of Dunkeld and the Trust at which were raised any questions as to whether certain liabilities had been properly so incurred. Only if the firms were satisfied that the liabilities were in fact incurred "in connection with" the compulsory acquisition were the liabilities included in the calculation of Liabilities. Such discretionary exercise is well within the capacity of the auditors and extends to remedying the impact of nationalization so as to cover the clause 4.3 and clause 4.5 "funding costs" of US loans taken out to enable BTL shares to be purchased but, as a result of the nationalization, not repaid out of the substantial income stream expected to flow from that purchase or out of promptly provided compensation for the nationalization.

[9] On the basis of certified amounts of actual Liabilities (allocating amounts to the four heads of "legal, accounting, funding and ancillary costs") as audited and verified by highly reputable independent accounting firms, Dunkeld and the Trust claimed due compensation from GOB based upon a deduction of such Liabilities under the Settlement. GOB, however, refused to accept the externally audited figures for Dunkeld and Trust Liabilities, though not doubting the professional expertise of the two international auditing firms.

GOB's Application filed 28 June 2017 concerning Dunkeld and Trust Liabilities

[10] GOB, in disputing the amount of the Dunkeld Liabilities and The Trust Liabilities, sought three heads of relief as follows:

> "(a) A Declaration that on the true construction of clauses 4.3 and 5,3 of the Settlement Agreement the Government of Belize is entitled to verify and agree or seek a determination of the basis and quantum of each of the Dunkeld Liabilities and the Trust Liabilities respectively and for this purpose Dunkeld and the Trust are obliged to furnish the Government at its request with all accounting records, and supporting documents with respect to the outstanding liabilities claimed by Dunkeld and the Trust.
>
> (b) An order directing Dunkeld and the Trust to produce to the Government of Belize copies of all documentation and explanations used by them and furnished by them to their auditors to determine their respective

outstanding liabilities pursuant to Articles (sic) 4.3 and 5.3 of the Settlement Agreement.

(c) A declaration that on the true construction of the Settlement Agreement, in so far as the Government of Belize has been unable to make the final payments due to Dunkeld and the Trust on account of their failures to furnish the documents and explanations to the Government so that it could be satisfied that the outstanding liabilities claimed are in accordance with the terms of the Settlement Agreement, the Government is not deemed to have defaulted in payment of any part of the agreed payments to Dunkeld and the Trust so as to become liable to pay interest calculable under clause 6 of the Settlement."

[11] GOB is thus claiming that Dunkeld and the Trust must accept that the Dunkeld Liabilities and the Trust Liabilities are only those Liabilities agreed to by GOB after a verification process conducted by GOB. For this purpose, GOB requires Dunkeld and the Trust to produce to GOB copies of all documentation and explanations used by them and furnished by them to their auditors. GOB further argued in their written and oral submissions[7] that no interest at all should be payable on Liabilities, whether interest under clauses 4(1)(c) or 5(1)(c) or interest on unpaid interest under clause 6, due to the conduct of Dunkeld and the Trust that had caused delay in determining those Liabilities.

[12] The parties clearly recognised that the Settlement Agreement left room for differences and disputes in connection with its interpretation. They inserted a specific clause, clause 17, that indicated how such differences should be determined. The courts of Belize (which naturally include this Court) were given a non-exclusive jurisdiction to determine such disputes and an arbitration option was made available. Moreover, under the terms of a Tomlin Order made by this Court on 19 October 2015 the litigation between the parties was stayed by consent on the terms set out in the Settlement with liberty to apply only for the purposes of enforcement of those terms, as has already occurred in respect of clauses 4 and 5 of the Settlement.[8]

[13] In paragraph 51 of his 'Speaking Note' Mr Carrington SC asked the Court to imply into the Settlement a term that "the Government is entitled to disclosure of documents and information in a timely manner so as to enable it to verify or have determined the liabilities that are to be attributed to the Restricted Amount to arrive at the Restricted Amount Balance." In argument he accepted that the

[7] Record pp 21495 and 21599.
[8] See *Boyce and others* supra (n 6).

Government would also be "subject to obligations of confidentiality": such clause could come after "timely manner."

Interpretation of Contracts: implying further terms

[14] The parties relied on English common law to determine their rights. They did not refer to guidance from other jurisdictions, though this Court considers, that, as stated by Cromwell J in giving a unanimous judgment of the Supreme Court of Canada[9], the Court has scope "to develop the common law to keep in step with the dynamic and evolving fabric of our society where it can do so in incremental fashion and where the ramifications of the development are not incapable of assessment." In particular, Cromwell J made a survey of the current state of the common law in 2014[10], enabling the Supreme Court to develop Canadian law so as recognise good faith as "an organizing principle" in matters of contract as under the United States' Commercial Code, though accepting that English law[11] does not yet recognise any general duty of good faith despite Lord Mansfield's valiant effort more than two hundred years ago to introduce it as a "governing principle … applicable to all contracts and dealings."[12]The civil law Codes of civilian states like France, Germany and The Netherlands have long incorporated such a general principle or standard, building on a long tradition of Roman and canon law. This is not to say, however, that on our necessarily limited appreciation of such general duty, its existence would have affected the practical outcome of this case.

[15] The parties referred to Lord Simon's views in *BP Refinery (Westenport) Pty Ltd v Shire of Hastings*[13] as discussed by Lord Neuberger P in *Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd*[14].Lord Simon had stated:

> "[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;(3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

[9] *Bhasin v Hrynew* [2014] SCC 71, [2014] 3 SCR 494, [40].
[10] ibid [42]- [58].
[11] *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789, [45] (Moore-Bick LJ).
[12] *Carter v Boehm* [1766] 3 Burr 1905, 1910 ,97 ER 1162, 1164.
[13] [1977] UKPC 13, (1978) 52 ALJR 20.
[14] [2015] UKSC 72, [2016] AC 742.

[16] In particular, Lord Neuberger P pointed out[15] that the implication of a term was "not critically dependent on proof of an actual intention of the parties when negotiating the contract." Moreover, "the test was not one of 'absolute necessity', not least because the necessity is judged by reference to business efficacy", it being more helpful to say, "that a term can only be implied if, without the term, the contract would lack commercial or practical coherence".[16] He further accepted[17] that the factors to be taken into account in a question of implication include the general rules of interpretation of a contract.

[17] He had spelled these out in *Arnold v Britton*[18]

> "When interpreting a written contract, the court is concerned 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' to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts or circumstances known or assumed by the parties at the time the document was executed and (v) commercial common sense, but disregarding any evidence of any party's intentions."

[18] Lord Steyn[19] has also emphasised:

> "The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene."

The background context

[19] In summary, strong animosity arose between the so-called "Lord Ashcroft Alliance" of bodies controlled or substantially influenced by Lord Ashcroft and the United Democratic Party (UDP) government that succeeded the People's

[15] ibid [21].
[16] ibid.
[17] ibid [27]; also [76] (Lord Clarke).
[18] [2015] UKSC36, [2015] AC 1619, [15].
[19] *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] UKHL 54, [2004]1 WLR 3251, [18].

United Party (PUP) government after the Accommodation Agreement (the AA) was entered into by the latter. The AA conferred very substantial ongoing advantages on the Alliance (e.g. as to non-payment of taxes, freedom from exchange control restrictions, and a guaranteed income yield from Alliance investments). The UDP government considered its predecessor had acted improperly and that the AA was invalid and refused to honour it. It also considered that nationalization of the telecommunications industry and, in particular BTL and associated companies and securities was in Belize's interest, leading to compulsory acquisition of the Alliance's shares.

[20] A flood of litigation ensued, so that cases on the August 2009 nationalization legislation and then on the allegedly retrospective 2011 nationalization legislation and the Eighth Amendment to the Constitution of Belize proceeded all the way up to the CCJ. Arbitration proceedings under an international investment treaty were also taken with respect to the repudiation of the AA, and anti-suit injunctions were sought in various countries. GOB, however, ensured enactment of legislation imposing severe mandatory sentences on persons involved in breaking injunctions granted by Belize courts until key aspects of the legislation were declared unconstitutional and invalid by the CCJ. GOB has throughout been fighting the other side as hard as it possibly could in what it considered to be the best interests of the Belizean people. Indeed, in efforts to prevent enforcement of foreign judgments and arbitration awards and payment out of Central Bank funds, there is now a Crown Proceedings (Amendment) Act 2017 and a Central Bank of Belize (International Immunities) Act 2017.

[21] No compensation having been received, Dunkeld and the Trust became very concerned over the increasing amount of their outstanding US dollar liabilities (appreciated by GOB[20]), but GOB was very keen to restrict its US dollar liabilities and its liability to interest. It therefore made objective sense for both sides to negotiate a compromise finally to put an end to their very acrimonious disputes. Thus, the parties negotiated with each other so as to compromise all relevant claims in the Settlement on 11 September 2015, as summarised in [2]- [5] above. It is notable that, to avoid occasions for much to be disputed, the Settlement in clauses 4.3 and 5.3 did not refer to "*reasonable* outstanding liabilities" or to "costs *reasonably* incurred" in connection with the compulsory acquisition so as to

[20] See Fifth Affidavit of Philip Osborne Record 20476-20477.

remedy the impact of such acquisition. It was thus concerned with actual liabilities and actual costs.

The construction of the words "Dunkeld Liabilities" and "Trust Liabilities"

[22] Under the Settlement the overall amount of compensation to be paid to Dunkeld and the Trust was to be determined by the Arbitration Tribunal in its Final Award which was to determine what part of the value of the acquired BTL shares was to be attributed to the AA and treated as enhanced value. The determination of such amount to be attributed to the enhanced value of a share (known as the "Dunkeld Restricted Amount" or the "Trust Restricted Amount") and the amount to be attributed to the Dunkeld Liabilities and Trust Liabilities were each of crucial significance since, as we have already pointed out, the amount of the latter was to be deducted from the former in order to help Belize benefit by having a US dollar amount paid in Belize dollars to fund projects to help the people of Belize.

[23] All parties were equally in the dark as to the former amount but could do nothing about it. GOB, however, in the light of some knowledge acquired in the course of extensive legal proceedings and correspondence associated therewith, appreciated there was a fairly large amount of US dollar liabilities incurred by the other side and hence the other side's need for the above off-setting in US dollar currency. Nevertheless, in the Settlement, which any reasonable person would objectively consider to be intended to be a final compromise of all claims, the parties simply used the term "Dunkeld Liabilities" and "Trust Liabilities" covering "outstanding liabilities that include, but are 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), so covering the actual costs that had been incurred, thereby simplifying ascertainment of an appropriate figure.

[24] The quantum of the Dunkeld Liabilities and of the Trust Liabilities respectively would be matters peculiarly within the knowledge of those parties. But, given the history of litigation and animosity as between these parties on the one hand and GOB on the other, it is inconceivable that Clauses 4.3 and 5.3 meant that Dunkeld and the Trust were at liberty unilaterally or arbitrarily to produce a figure for GOB.

[25] GOB asks the Court to imply into the Settlement a term that "the Government is entitled to disclosure of documents and information in a timely manner (subject

to obligations of confidentiality) so as to enable it to verify or have determined the Dunkeld Liabilities" or Trust Liabilities as the case may be. For GOB Mr Carrington SC accepts that if GOB is not prepared to agree a particular figure for some reason then the disagreement between the parties will need to be resolved by recourse to the CJJ – or a court or arbitrator under clause 17 of the Settlement.

[26] Such an implied term is not so obvious that "it goes without saying." Indeed, with GOB's history of doing its utmost to minimise its compulsory acquisition liabilities and Dunkeld and the Trust doing their best to frustrate GOB's efforts, a reasonable person aware of such history would have expected the Settlement to have been drafted with the commercial rationale of finalising the parties' position, with a clean break between them so far as practically possible. To leave the crucial amount of Liabilities to be whatever GOB agrees or to whatever GOB agrees to see fit after its own audit of such figures or to whatever is ultimately determined by the CCJ or other arbiter under clause 17 of the Settlement, offends objective, necessary business efficacy. Resort to such determination procedures would lead to further irritable interaction, further costs and further delays when payment of the final amount of compensation was due under clauses 4.1(b)(ii) and 5.1(b)(ii) of the Settlement twelve months from 28 June 2016, the date of the Arbitration Tribunal's Final Award.

[27] Ideally, the parties ought to have had an express term to provide a process for clarifying and determining Dunkeld or 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 Liabilities or Trust Liabilities. We cannot, however, speculate as to why such a term, reasonable as it may be, was not provided.

[28] Lawyers for Dunkeld and the Trust took the overly strict view that "there was no obligation on our clients to go to the effort of having the Liabilities independently audited and verified. Nevertheless, they did so in order to provide the Government with independent verification of the Liabilities incurred."[21] On this basis, though prepared to go further, they considered that the Liabilities were whatever their own internal audit revealed. We consider that no reasonable person, aware of the bitter background between the parties, would have understood the parties to have

[21] See letter of Allen & Overy, Record pp 20268-20269 and Mr Courtenay's submission Record p 20344 para 15 and p20951 para 35.

meant that GOB's exposure to Dunkeld and the Trust Liabilities depended upon the "say so" of the latter's own auditors.

[29] On the other hand, we also consider that no such reasonable person would have understood the parties to have intended such Liabilities to mean whatever were the Liabilities after timely disclosure (subject to obligations of confidentiality) of documents and information to GOB so as to enable it to verify and agree the Liabilities. This would have left Dunkeld and the Trust exposed to further continuing acrimonious interaction with GOB.

[30] In our view, such a reasonable person would say that the parties have not expressed themselves as well as they could and that here arose a matter that should go before the courts for determination either under Clause 17 or under the liberty to apply clause in the Tomlin order. Dunkeld and the Trust, though needing to establish their precise entitlement to compensation, neglected to take any such step, despite GOB's attorney's email of 26 February 2017 to Mr Courtenay SC representing Dunkeld and the Trust, making it clear that GOB would not regard the independent auditors' figures as final, reserving the right to challenge those figures. Nor did Dunkeld and the Trust seek to agree a process with GOB for the determination of the liabilities. Instead, they took it upon themselves to imply into the agreement a right on their part unilaterally to employ independent auditors who would certify the quantum of the liabilities. And then having done so, they indicated to GOB what they had done. Unsurprisingly, that action precipitated these proceedings.

[31] In our view, in light of the genuine difference that had arisen as to the process for determining the Liabilities, we consider that some blame must be attributed to the above blinkered conduct of Dunkeld and the Trust. GOB cannot be faulted for placing the matter before the court. For the reasons expressed above, however, we do not share GOB's own suggestion for resolving the difference.

[32] In our view, the best way of resolving this difference would have been 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. As it is, no aspersions have been cast by GOB on the professional competence and integrity of the international firms which audited the Liabilities and are experienced in determining actual costs incurred in connection with compulsory

acquisitions. There is 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, the less so given the thrust of the Settlement Agreement to stop spiralling litigation from dragging on much longer.

[33] The court therefore considers that the difference should be resolved, on the on hand, by ultimately accepting as the Dunkeld Liabilities and the Trust Liabilities the liabilities as determined by Messrs Horwath Belize LLP and Moore Stephens Magana LLP respectively, thereby enabling them to certify the amounts due to Dunkeld and the Trust from GOB on 28 June 2017[22], and, on the other hand, by ordering that no interest shall be payable by the GOB in respect of the period that has elapsed between 28 June 2017 and 10 November 2017 as to which see [44] below. No order shall be made as to costs so that each party bears its own costs of these proceedings.

Disposition of claims (a), (b) and (c) in GOB's application of 28 June 2017

[34] In the above premises the reliefs claimed in paragraphs (a), (b) and (c) and set out in [10] above are refused. However, on the grounds set out in the preceding paragraph, GOB has achieved the outcome sought in (c) because GOB is not regarded as in default and liable to pay any interest from 28 June 2017 until after 10 November 2017. This leaves the reliefs claimed in paragraphs (d), (e) and (f), which are substantially affected by our decision on the reliefs claimed in (a), (b) and (c).

GOB's claims (d), (e), and (f) and 4 July 2017Application of Dunkeld and the Trust

[35] GOB claims:

> "(d) A Declaration that on the true construction of clauses 4.1(c) and 5.1(c) of the Settlement Agreement, the pre-Award and post-Award interest accrued on that part of value of the Telemedia shares that in the Final Award of the Tribunal is stated to be attributable to the Dunkeld and Trust Restricted Amounts forms part of the said Restricted Amounts;
>
> (e) A Declaration that interest as determined in the Final Award of the Tribunal ceases to run on any sums comprising part of the Final Dunkeld Compensation and Final Trust Compensation under clauses 4.1(c) and 5.1(c) of the Settlement Agreement that have been prepaid or tendered by the Government of Belize to Dunkeld and to the Trust.

[22] Record pp 20399 and 20411.

(f) A Declaration that the Dunkeld restricted Amount Balance and Trust Restricted Amount Balance that are to [be] applied pursuant to the provisions of clauses 4.4 and 5.6 of the Settlement Deed respectively are to be calculated in accordance with the provisions in clauses 4.3 and 5.3 respectively and are not limited to amounts actually paid by the Government in Belize dollars out of the sums to be paid pursuant to clauses 4.1(b)(ii) and 5.1(b)(ii) respectively."

[36] It is necessary to consider along with the above reliefs the reliefs claimed in the 4 July 2017 Application of Dunkeld and the Trust that, pursuant to the liberty to apply to the CCJ under the Tomlin order, seeks declarations as to breach of the Settlement by virtue of non-payment of due sums of money and also orders as to payment of particular sums of money. Counsel were content for Mr Carrington SC in dealing with paragraphs (d), (e) and (f) also to deal with Mr Courtenay SC's written submissions supporting his July Application and Mr Carrington SC's written submissions opposing such Application. Mr Courtenay then replied to Mr Carrington's oral submissions.

[37] The relief claimed in (d) concerns the agreement in clauses 4(2) and 5(2) relating to Dunkeld and the Trust respectively "that should any portion of the value per Telemedia share be determined in the Final Award to be attributed to the Accommodation Agreement…" In our view that wording plainly refers to the capital or principal value placed upon the value per Telemedia share, ignoring any issue as to interest thereon, as reflected in the external auditors' certified calculations that we have now held to be binding. The relief is thus refused.

[38] The relief claimed in (e) relates to purported tendering of payment of the final part of the compensation due on 28 June 2017 by GOB on 12 April 2017 so as to stop interest running. The funds, however, were paid into an account of GOB with the Central Bank of Belize, not an account of Dunkeld or the Trust with a financial institution or of a notified nominee of such parties under clauses 4.5 and 5.7, GOB regarding making the funds available to be obtained by such parties sufficing in the absence of being given relevant banking details. In our view, the claim for relief must be rejected because the Settlement did not provide for payment "on *or before* the 12-month anniversary date of the issuance of the Final Award" which turned out to be 28 June 2017. Thus, the date for due payment was "*on*" 28 June

2017 and the date for a valid tender did not arise until then[23], and therefore interest was payable till then at the rate provided in clauses 4(1)(c) and 5(1) (c). Moreover, taking account of such interest, the debtor must tender the full amount of the debt[24] and the amount paid into the Central Bank was well below the expected amount of the final payment due.

[39] Despite the latter legal principle, Dunkeld and the Trust in their discretion did not insist upon it, but accepted that when on 18 July 2017 GOB made payments of US$ 15,450,148.03 to Dunkeld and US$ 5,024,936.10 to the Trust by depositing those amounts into accounts designated by them, interest would then cease to accrue on those amounts. As it happens, however, we have held in [33] above that interest will not, in any event run from 28 June 2017 to 10 November 2017.

[40] The relief claimed in (f) must also be rejected as inconsistent with our construction of clauses 4.3 and 5.3 in [5] above, taking account of our earlier decision[25] on such clauses, and inconsistent with the external auditors' certified calculations that we have now held to be binding.

[41] Finally, it is necessary to deal with GOB's response[26] to the July Application of Dunkeld and the Trust by claiming that it is entitled to deduct US$10 million from the amount of compensation to be paid to the Trust to cover an outstanding principal balance of BZ$20 million within "Investment Loans" made by GOB and the Social Security Board and referred to in clauses 5.4 and 5.5 of the Settlement. These loans had been made in order to enable Sunshine Holdings Limited (when wholly owned by the Trust) to purchase BTL shares. After nationalization of BTL, Sunshine Holdings Limited became wholly owned by GOB and clause 5.4 crucially states as follows:

> "The Government and the Trust acknowledge that the loans to Sunshine Holdings Limited by the Social Security Board and the government in connection with the funding of Sunshine Holdings Limited's original investment in the shares of Telemedia remain outstanding and that the principal balances owed under these loans total BZ$20,000,000 (together the **Investment Loans**) and further that *any liability for the*

[23] *Dixon v Clarke* (1848) 5CB 365, 378-379; Halsbury's Laws of England 5th ed Vol 22 para 543; Chitty on Contracts 32nd ed at 21-096.
[24] ibid at 21-087.
[25] See *Boyce and others* supra (n 6).
[26] See Record pp 20952-20953, 21442 and 21506-21507.

Investment Loans is for Sunshine Holdings Limited[27], which will continue to be wholly owned by the Government."

[42] The Government can expect to repay the loans from the dividend stream anticipated from the compulsorily acquired shares and no longer available to the Trust. The Settlement contains no term for deduction in respect of Investment Loans of US$10 million from the compensation payable to the Trust. Indeed, clause 5.5 expressly requires the "total outstanding principal balance of the Investment Loans" to be used to reduce the Trust Restricted Amount (the portion of compensation representing the enhanced value of the BTL shares attributed to the Accommodation Agreement).

[43] In our view, giving effect to the ordinary plain meaning of words, it is clear that Sunshine Holdings Limited remains liable for the Investment Loans as, in any event, reflected in the external auditor's calculation of the amounts due from GOB to the Trust on 28 June 2017.

Disposition of the June and July Applications

[44] Because the amounts due on the due date for payment should have been notified well in advance, so as to enable GOB to have time to organise payment of the huge sums due, we consider it appropriate that GOB should only be ordered to make the due payments set out below on or before 10 November 2017.

[45] The Court orders the Financial Secretary on or before 10 November 2017 to pay:

(i) to Dunkeld the amount of US 62,849,799.23 representing US$78,299,947.26 as certified to be due on 28 June 2017 by Horwath Belize LLP less US$15,450,148.03 paid by GOB to Dunkeld on 18 July 2017;

(ii) to Dunkeld the amount of BZ$245,155.36 as the Dunkeld Restricted Amount Balance as certified to be due on 28 June 2017 by Horwath Belize LLP;

(iii) to the Trust the amount of US$15,314,006.84 representing US$20,338,942.94 as certified to be due on 28 June 2017 by Moore

[27] Emphasis added.

Stephens Magana LLP less US$5,024,936.10 paid by GOB to the Trust on 18 July 2017;

(iv) to the Trust the amount of BZ$10,300,518.34 as the Trust Restricted Amount Balance as certified to be due on 28 June 2017 by Moore Stephens Magana LLP.

[46] To the extent that full payment is not made on or before 10 November 2017, interest will run thereafter at 8.34% pa compounded quarterly pursuant to para 362(j) of the Arbitration Tribunal's Final Award, and in default interest on unpaid interest at the rate of 6% pa compounded monthly pursuant to clause 6 of the Settlement.

[47] The parties have the Court's permission to apply to this court in respect of any issue concerning this judgment. They are directed in due course to file with the Registrar of the Court a joint certificate of compliance with the above Order for payment.

[48] No order is made as to costs.

/s/ CMD Byron

The Rt. Hon. Sir Dennis Byron, President

/s/ A Saunders

The Hon Mr Justice A Saunders

/s/ J Wit

The Hon Mr Justice J Wit

/s/ D Hayton

The Hon Mr Justice D Hayton

/s/ W Anderson

The Hon Mr Justice Anderson