IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction
ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No. BZCV2011/002
BZ Civil Appeal No. 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
THE 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 Honourables **Mr Justice Nelson**
Mr. Justice Wit
Mr. Justice Anderson

Appearances
Mr. Eamon Courtenay, SC for the Appellants/Respondents
Mr. Denys Barrow, SC and Mr. Jaraad Ysaguirre for the Respondents/Appellants

REASONS FOR DECISION
of
The Honourable Justices Nelson, Wit and Anderson
Delivered by
The Honourable Mr. Justice Nelson
on the 21st day of October, 2016

[1] On September 29, 2016, this Court gave its decision and short reasons on an application arising out of a consent order given in this appeal. The Court indicated that it would give fuller reasons at a later date. Accordingly, the Court provides these fuller reasons for its decision in the ensuing paragraphs as promised.

The relevant background

[2] The genesis of this application and the underlying appeal is the nationalization of Belize Telemedia Limited ("Telemedia") by the Government of Belize ("the Government") on August 25, 2009. The Belize Telecommunications Act No.16 of 2002 was amended in 2009 to provide for the assumption of control over telecommunications by the Government. The Act and a 2009 Order issued under it ("the 2009 enactments") acquired the shares in Telemedia (71.3% in the case of Dunkeld International Limited ("Dunkeld") and 23.6% in the case of the BTL Employees Trust ("The Trust")) as well as a Mortgage Debenture with the Belize Bank (Turks and Caicos) Ltd.

[3] The Court of Appeal on June 24, 2011 ruled that the 2009 enactments were unconstitutional and void. On July 4, 2011 an Act was passed amending the Belize Telecommunications Act 2002. On the same date an Order was made under the amending Act of 2011 (together here referred to as "the 2011 enactments") compulsorily acquiring *inter alia* (a) 94.5% of the shares in Telemedia, and (b) the US$22.5 Loan Facility and Mortgage Debenture.

[4] The 2011 enactments and the Eighth Amendment to the Belize Constitution were successfully challenged in the Supreme Court. On May 15, 2014 the Court of Appeal, reversing the Supreme Court, held that the 2011 enactments and the Eighth Amendment were constitutionally valid but took effect from July 4, 2011.

[5] In addition to the legal challenges to the 2009 and 2011 nationalizations, Dunkeld initiated arbitration proceedings in London pursuant to a 1982 bilateral investment treaty between the United Kingdom and Belize for the Promotion and Protection of Investments. In those proceedings (PCA Case No. 2010-13 and Case No. 2010-21) Dunkeld, BTL Employees Trust and Mr. Dean Boyce sought compensation from the Government. On March 18, 2009 the London Court of International Arbitration (LCIA) Arbitral Tribunal pronounced a final award in which it held that an Accommodation Agreement, in which the previous Belize administration had granted generous concessions to Telemedia in September 2005, was valid and binding upon the Government of Belize.

[6] On September 11, 2015 Dunkeld, the Government and the Trust entered into a Settlement Agreement at a time when the appeals to this Court on the 2009 and 2011 enactments were pending and before precise figures of the compensation due to Dunkeld and the Trust had been calculated by the Arbitral Tribunal in PCA Case No. 2010-13).

[7] Pursuant to the Settlement Agreement, Dunkeld was added as party to three pending consolidated appeals by a consent order of this Court dated October 19, 2015. That consent order at paragraph 4 stated as follows:

> "All further proceedings in the CCJ appeals are stayed in the terms contained in the Settlement Agreement dated September 11, 2015 between the Government of Belize, Dunkeld and the Trustees of the BTL Employees Trust ("the Settlement Agreement") (set out in the Schedule hereto), save for the purposes of enforcement of the terms of the Settlement Agreement, with permission to apply to the Caribbean Court of Justice for the said purpose."

[8] In compliance with the Settlement Agreement, the Government enacted the Telecommunications Acquisition (Settlement) Act No. 14 of 2015 ("the Settlement Act"), to which the Settlement Agreement was scheduled. The Settlement Act authorized the Government to enter into the Settlement Agreement, provided that all payments to be made to Dunkeld and Trust were a charge on the Consolidated Revenue Fund. The Act also authorized the Financial Secretary to make the payments mandated by the Settlement Agreement and granted certain exemptions from taxes and exchange control.

[9] The provisions in the Settlement Agreement as to the mechanism of payment of compensation to Dunkeld and to the Trust are contained in clauses 4 and 5. These provisions are in essentially identical terms *mutatis mutandis.* Therefore, the analysis and conclusions in respect of clause 4 (Payments to Dunkeld) also apply to clause 5 (Payments to the Trust).

[10] Clauses 4.1 of the Settlement Agreement prescribes that compensation is payable in three tranches "subject to sub-clauses 4.2 to 4.4 as applicable.":

(a) an initial payment of US.72 cents per share (quantified in the Settlement Agreement) after legislation enacting the Settlement Agreement is passed;

(b)(i) 50% of the remainder of the Final Award (not then known) less the initial payment within 10 business days after the issuance of the Final Award;

(ii) 50% of the remainder of the Final Award (not then known) less the initial payment on the 12-month anniversary date of the issuance of the Final Award.

[11] The method and currency of payment of the Final Award were spelled out in the Settlement Agreement at paragraph 4. The importance of Clause 4 is underscored by the fact that it involved a variation of the principle that bilateral investment treaties ('BITs') require that compensation be "freely transferrable" and "effectively realizable" and that paying compensation in a freely convertible currency generally satisfies the requirement that compensation be effectively realizable. The Settlement Agreement envisaged that a portion of the award would be payable in Belizean dollars. The dispute in this case revolves around the extent to which the principle was modified and the application of the Arbitral Tribunal breakdown of the market value into (a) real value payable in US dollars and (b) enhanced value payable in Belizean dollars.

[12] In order to appreciate the problem, it is necessary to set out in full clauses 4.2 and 4.3 (identical to 5.2 and 5.3) of the Settlement Agreement:

"4.2 The Government and Dunkeld agree that should any portion of the values per Telemedia shares be determined in the Final Award to be attributed to the Accommodation Agreement between the Government and Telemedia dated 19 September, 2005 (as amended), the same portion per

each of the 34,107,117 shares owned by Dunkeld in Telemedia prior to the nationalization, shall be designated as a restricted amount ("the **Dunkeld Restricted Amount**").

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**"). The Government further acknowledges that the Dunkeld Liabilities should be attributed on a pro rata basis to the Partial Dunkeld Compensation and the Final Dunkeld Compensation and that as a result a proportionate amount of the Dunkeld Liabilities should be attributed to the Dunkeld Restricted Amount ("**the Dunkeld Attributed Liabilities**"). The Government and Dunkeld agree that the Dunkeld Restricted Amount shall be reduced by the amount of the Dunkeld Attributed Liabilities and the remaining balance ("the **Dunkeld Restricted Amount Balance**") shall be subtracted from the payment to be made by the Government to Dunkeld pursuant to Clause 4.1(b)(ii) and shall instead be paid by the Government in Belize Dollars into a bank account designated by Dunkeld. Provided that if for any reason Dunkeld is not permitted by applicable law, regulation or permission to receive the Dunkeld Restricted Amount Balance in Belize dollars, then the Government shall pay the equivalent amount of the Dunkeld Restricted Amount Balance to Dunkeld in the currency of the United States of America into an account with a financial institution designated by Dunkeld."

[13] It is therefore clear that the Dunkeld and the Trust Restricted Amount Balances are to come out of the Second 50% Payment pursuant to Clause 4.1(b)(ii) or Clause 5.1(b)(ii) and are "instead" payable in Belizean dollars.

[14] Clauses 4.5 and 5.7 provide that all payments are to be made in US dollars subject to payment of Dunkeld or the Trust Restricted Amount Balance in Belizean dollars.

[15] By a draft consent order appended to the Settlement Agreement and eventually made by the Arbitral Tribunal, the parties agreed that:

"(iv) the Arbitral Tribunal may proceed to determine the quantum of the compensation to be paid to the Claimant, which the Parties agree shall include the fair market value of the Claimant's interest in the Telemedia shares at 25 August 2009 (plus costs, expenses and interest) …"

The Final Award

[16] On June 28, 2016 the Arbitral Tribunal issued its final award. So far as is relevant to the issues in this appeal:

(1) The value of the Telemedia shares as at August 25, 2009 was BZ$5.6547 per share. Of that amount BZ$3.3873 per share was attributable to the value of the Accommodation Agreement ("the enhanced value").

(2) Dunkeld's total compensation and interest was US$174,589,122.

(3) The Trust's total compensation and interest was US$55,797,086.

[17] On June 29, 2016 the Prime Minister is reported to have said at a press conference that the Final Award was split in two. He stated that 60% of the amount of the value of the shares was attributable to the Accommodation Agreement and would be payable in Belizean dollars for the benefit of the Belizean people. However, the Settlement Agreement was not framed in those terms but rather in terms of a 50% split of the remainder of the Final Award after the initial payments in Clause 4.1(a) and 5.1(a)

[18] On June 29, 2016 since the initial payment had been made, Allen & Overy LLP, Attorneys-at-law for the Applicants wrote to the Government indicating that the First 50% Payments of US$75,015,979 in respect of Dunkeld and US$23,905,301 in respect of the Trust were due by July 13, 2016.

[19] On July 13, 2016 the Government made the following payments:

(a) To Allen & Overy LLP

(1) For Dunkeld US$22,297,382.32 (legal costs omitted)

(2) For the Trust: US$7,251,899.26

(b) To Courtenay Coye LLP

(1) For Dunkeld: BZ$101,908,041.63

(2) For the Trust: BZ$33,039,412.03

[20] By letter dated July 15, 2016 Attorneys-at-law for the Applicants confirmed receipt of these payments but averred that the sums paid to Courtenay Coye LLP were being held

without prejudice. The Applicants asserted that the Government was in breach of the Settlement Agreement. Allen & Overy LLP for the Applicants also demanded payment of the shortfall of US$52,718,616.68 to Dunkeld and US$16,653,401.74 to the Trust by the close of business on July 19, 2016 in London. No reply to that letter has been received and no payment of the amounts demanded in US currency has been made.

[21] The Final Award made on June 28, 2016 was later corrected by virtue of Order 11 (Correction of the Tribunal's Award of June 28, 2016) by the Arbitral Tribunal on August 17, 2016 in the following sums:

(i)	Dunkeld Final Award (incl. compensation and interest)	US$168,952,643.36
(ii)	Trust Final Award (incl. compensation and interest)	US$54,949,391.01

[22] The amounts listed in the Allen and Overy letter of July 15, 2016 were also amended to reflect the outstanding sums of US$50,798,613.44 to Dunkeld and US$16,521,510.54 in respect of the Trust as at September 29, 2016.

This Application

[23] By a notice of application dated July 20, 2016 the Applicants, Dunkeld, the Trust and Mr. Boyce in his capacity as a trustee of the Trust seek *inter alia* the following relief, against the Attorney-General of Belize ("the Respondent" on the application):

> "a. A declaration that the Respondent, is in breach of the Settlement Agreement dated the 11 September 2015 between the Government of Belize ("the **Government**), Dunkeld and the Trust and owes Dunkeld USD50,798,613.44 pursuant to Clause 4.1(1)(b)(i) and 4.5; and the Trust USD16,521,570.54 pursuant to Clause 5.1(1)(b)(i) and 5.7;
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> b. An Order directing the Respondent, through the Financial Secretary, to pay Dunkeld USD50,798,613.44 and the Trust USD16,521,570.54 together with interest accrued thereon, within 48 hours of this Order."

Analysis

[24] Much of the written submissions were concerned with whether the Government had sufficient available US currency available to it from the Central Bank to pay the compensation now claimed by the Applicants. Both parties, however, recognized that because the Court's order was a Tomlin Order there was no order for payment hence issues as to the availability of US currency were premature. This Court accepts that if

by a term in a schedule to a Tomlin Order a party is to pay money to another party and defaults in doing so, an application must be made for an order for payment to enable judgment to be entered and execution to issue.[1]

[25] The real issue relates to the interpretation of the Settlement Agreement. We set out the relevant rival submissions but note that the principal submission of the Government was that it is required to pay only 40% of the Final Award in US dollars.

[26] The core of the dispute between the parties is contained in paragraphs 13-14 of the first affidavit of Mr. Joseph Waight, Financial Secretary of the Ministry of Finance, which mirrors the statement made by the Prime Minister on June 29, 2016:

> "9. The Government says it has no obligation to now pay 50% of the total sum awarded to the appellants because, contrary to the assumption that underlies the provision in the Agreement for payment in two parts of 50% each (clauses 4.1 and 5.1), the unrestricted amount is less than the restricted amount. More pointedly, the unrestricted amount is less than 50% of the total award. To now pay 50% of the total award to account of the unrestricted amount would be to pay more than the entirety of the unrestricted amount.
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> 10. Therefore, it was a false assumption that the first payment to account of the unrestricted amount would be greater than 50% of the total award. The premise that led to the making of this false assumption – that the unrestricted amount would be greater than the restricted amount – arose from the fact that as at the date of the Agreement the Appellants were contending in the still pending Arbitration for a value of $10.23 per share.[2] As stated by Mr. Osborne in paragraph 10, the Tribunal later determined the value at $5.6547 per share.
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> 11. As against that value, as stated by Mr. Osborne, the Tribunal attributed a value to the AA of $3.3873 per share.
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> 12. If the appellants' premise had been correct, therefore, the ratio of the unrestricted amount to the restricted amount would have been roughly 67% to 33%."

[27] Against this view, the Applicants point to the plain words of clause 4.1(b)(ii) of the Settlement Agreement. The provision that the Dunkeld Restricted Amount Balance is to be subtracted from the payment to be made by the Government to Dunkeld pursuant

[1] see Atkins Court Forms Vol. 12(1) at [21]; Horizon Technologies International Ltd v Lucky Wealth Consultants Ltd. [1992] 1 All ER 469
[2] Prime Minister's Remarks Record page 19476 para 2

to Clause 4.1(b)(ii) is unambiguous. It does not say Clause 4.1(b)(i) and (ii). Thus no subtraction is to be made against the First 50% payment.

[28] It is to be noted that this case does not bear resemblance to *Rainy Sky S.A. v Kookmin Bank*[3] where the issue between the parties was the role to be played by considerations of business common sense in arriving at what the parties meant. The instant application concerns primarily what the actual words used in clause 4 of the Settlement Agreement mean.

[29] The argument that paying 50% of the Final Award minus the initial payment would be to pay more than the entirety of the "unrestricted amount" (40%) is misconceived. First, the concept of an "unrestricted amount" does not appear in the Settlement Agreement. Secondly, it is the Settlement Agreement that is to be construed not the terms of the Arbitral Award. The only relevant part of the Arbitral Award is the reference to the Final Award.

[30] It is, of course, true that there is an underlying assumption in clause 4.1(b)(ii) that the Dunkeld Restricted Amount Balance would be less than the ceiling figure represented by the Second 50% Payment. It seems that the parties never conceived that the Dunkeld Restricted Amount Balance could exceed the amount of the Second 50% Payment. However, the mistake or false assumptions of the parties cannot affect the interpretation of the Settlement Agreement.

[31] The meaning of a written contract is to be gleaned from the language of the contractual terms. This Court adopts the words of Lord Neuberger in *Arnold v Britton*[4] at [17] where he said:

> "Unlike commercial commonsense and the surrounding circumstances, the parties have control over the language they use in the contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

[3] [2011] 1 WLR 2900 (Sup. Ct)
[4] [2015] UKSC 36

[32] The fact that a contract is badly drafted is no excuse for the court to embark on an exercise of "searching for, let alone constructing, drafting infelicities in order to facilitate departure from the natural meaning …"

[33] Thirdly, Lord Neuberger emphasized that "it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalize an astute party"[5]. This principle is an answer to the submission by Mr. Barrow S.C. that the court should read words into the chapeau of clause 4 to the effect that the enhanced value of the Telemedia shares was to be held in trust for the Belizean people in Belizean dollars, whereas the actual value of the shares stripped of the enhanced value was to be paid to the former owners of the Telemedia shares in US dollars.

[34] The facts and circumstances known to the parties at the time the contract was made did not include what portion of the market value of the Telemedia share was attributable to its enhancement by the Accommodation Agreement ("the enhanced value"). In the present case, there is no evidence in the body of the Settlement Agreement or contemporaneous documents as to what the enhanced value was. 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. Nothing in clause 4.1 speaks of dividing the total Final Award in two so that one portion represented the actual value of the shares payable in US dollars and the other the enhanced value of the shares payable in Belizean dollars. However, the Prime Minister of Belize is said to have remarked on June 29, 2016: "The Final Award, as you all know, was handed down yesterday. The Award is split in two. That is an amount for the actual value of the shares that we nationalized, an amount for the Accommodation Agreement gifted to the former owners by then PUP Government."

[35] It is clear that the Prime Minister's remarks on June 29, 2016 could not have formed part of the relevant background knowledge necessary for interpreting the Settlement

[5] Supra, at fn 4 at [20]

Agreement. It was contended that it was "a transcendent condition for the Government of any settlement that the people of Belize would not have to pay the cost of the Accommodation Agreement and this was emphasized during the Financial Secretary's consultations with the Prime Minister during the negotiations.

[36] In *Investors Compensation Scheme v West Bromwich*[6], Lord Hoffmann averred rightly at p.114 that "the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification." Lord Hoffmann expands the exceptions to the exclusionary rule to cover not only a claim for rectification but also for estoppel in *Chartbrook Ltd. v Persimmon Homes Ltd.*[7] No evidence of negotiations or of subjective intent is admissible in this case that would affect the plain and unambiguous words of Clause 4.1 of the Settlement Agreement.

[37] In the Court's view, the proper approach to contractual interpretation on the facts of this case is contained in the dictum of Lord Neuberger in *Arnold v Britton*[8] where he said: "a court should be slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed …"

[38] The Court will leave aside for the moment any issue of the execution or enforcement of the order it is about to make since the subject-matter of this case involves the protection of a fundamental right under the Constitution, the supreme law of Belize, and the Court must provide an effective remedy and sweep aside any archaic notion of State protection in whatever guise.[9] The principle is supplemented by the agreement of the parties in clause 17.4(a)(iii) of the Settlement Agreement.

Conclusion

[39] For the avoidance of doubt the Court states that its conclusions in respect of Dunkeld apply equally to the Trust since Clause 5 (applicable to the Trust) is similarly worded *mutatis mutandis.*

[6] [1998] 1 All ER 98
[7] [2009] 1 AC 1101 at [42]
[8] Supra, at fn 4
[9] Gairy v AG of Grenada [2002] 1 AC 167 (P.C.)

[40] In the result the Court orders the Financial Secretary to pay forthwith to Dunkeld US$50,798,613.44 and to the Trust US$16,521,510.54 which includes principal, interest and default interest as at September 29, 2016. After September 29, 2016, interest at 8.34% per annum compounded quarterly, if any, pursuant to paragraph 362(j) of the Final Award and default interest, if any, at the rate of 6% per annum compounded monthly pursuant to paragraph 6 of the Settlement Agreement. The parties have the Court's permission to apply to this Court. The Respondent will pay the costs of this application to the Applicants.

/s/ R. Nelson

The Hon Mr Justice R Nelson

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ W. Anderson

The Hon Mr Justice W Anderson