IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 30 OF 2010

BETWEEN:

BRITISH CARIBBEAN BANK LIMITED	**Appellant**
AND	
THE ATTORNEY GENERAL OF BELIZE	**First Respondent**
THE MINISTER OF PUBLIC UTILITIES	**Second Respondent**

CIVIL APPEAL NO. 31 OF 2010

BETWEEN:

DEAN BOYCE	**Appellant**
AND	
THE ATTORNEY GENERAL OF BELIZE	**First Respondent**
THE MINISTER OF PUBLIC UTILITIES	**Second Respondent**

BEFORE:

The Hon. Mr Justice Morrison	**-**	**Justice of Appeal**
The Hon. Mr Justice Alleyne	**-**	**Justice of Appeal**
The Hon. Mr Justice Carey	**-**	**Justice of Appeal**

Eamon Courtenay SC and Mrs Ashanti Arthurs-Marin for the appellant British Caribbean Bank Limited.
Godfrey P. Smith SC and Mrs Magali Marin Young for the appellant Dean C. Boyce.
Ms Lois Young SC and Nigel Hawke for the respondents in both appeals.

—

25, 26, 27 and 28 January 2011, 24 June 2011

MORRISON JA:

An overview

[1] By section 3 of the Belize Telecommunications (Amendment) Act, 2009 ('the Acquisition Act'), which came into force on 25 August 2009, the Belize

Telecommunications Act ('the Telecoms Act') was amended to add a new Part XII (sections 63 to 74). Section 63(1) of the Telecoms Act, as amended, now provides among other things that where the Minister of Public Utilities ('the Minister') considers that control over telecommunications should be acquired "for a public purpose", he may acquire for and on behalf of the Government of Belize ('GOB'), "all such property as he may, from time to time, consider necessary to take possession of and to assume control over telecommunications, and every such order shall be *prima facie* evidence that the property to which it relates is required for a public purpose".

[2] On 25 August 2009 and 4 December 2009 respectively, the Minister issued two orders, pursuant to section 63 of the Telecoms Act as amended (Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instruments Nos 104 and 130 of 2009), acquiring control over Belize Telemedia Limited ('Telemedia') for a public purpose ('the stated public purpose'), which was "the stabilisation and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices and in a harmonious and non-contentious environment". Telemedia was formed in May 2007 and is the successor company to Belize Telecommunications Limited ('BTL'). I shall refer to these two orders respectively as 'the 25 August Order' and 'the 4 December Order', and collectively as 'the Acquisition Orders'.

[3] By means of the 25 August Order, GOB took control of some 94% of the issued share capital of Telemedia, as well as the entire issued share capital of Sunshine Holdings Limited ('Sunshine'). The two shareholders in Sunshine immediately prior to the compulsory acquisition were Mr Dean C. Boyce ('Mr

Boyce') (the appellant in Civil Appeal No. 31 of 2010), in his capacity as one of the two Trustees of the BTL Employees Trust and the 'Trustees of the BTL Employees Trust'. Sunshine was in turn the owner of 11,092,844 shares in Telemedia (said to be 22.39% of the issued shares of Telemedia). By means of this order, GOB also acquired the rights of British Caribbean Bank Ltd ('the Bank') (the appellant in Civil Appeal No. 30 of 2009) under a mortgage debenture made between Telemedia and the Bank dated 31 December 2007, by the terms of which the Bank made available US$22,500,000.00 to Telemedia for, among other things, the purchase of telecommunications equipment. Further, by means of the 4 December Order, GOB also took possession of the rights of the Bank under loan agreements between the Bank and Telemedia and the Bank and Sunshine (in respect of which the amounts outstanding on the books of the Bank were US$22,500,000.00 in respect of Telemedia and US$2,616,140.96 in respect of Sunshine).

[4] Both the Bank and Mr Boyce challenged the constitutionality of the Acquisition Act and Orders in separate actions in the Supreme Court, on several grounds, including that the Acquisition Act was not in compliance with section 17(1) of the Belize Constitution ('the Constitution') and was therefore null and void, that there was no legitimate public purpose for the compulsory acquisition of their property, which did not advance the stated public purpose, as well as, as will presently appear, various others.

[5] These actions were heard together by Legall J, who, in a considered judgment delivered on 31 July 2010, dismissed both claims, holding that the Acquisition Act and Orders were constitutional and in keeping with the stated public purpose. In supplemental notices of appeal filed on 18 January 2011, both

the Bank and Mr Boyce (whom I shall describe collectively in this judgment as 'the appellants') challenged Legall J's conclusions on the grounds that the judge erred in (i) concluding that the Acquisition Act was in conformity with the requirements of section 17(1) of the Constitution, which proscribes the compulsory taking of property of any description otherwise than by virtue of a law providing for the matters set out in the section, relating to the determination and payment of reasonable compensation to the property owner; (ii) failing to find that the compulsory taking of the appellants' property was unlawful, because it was not carried out for a public purpose, it was disproportionate, it was arbitrary and unlawful and the procedure adopted by the Minister was unfair; and holding that, in the light of the evidence, the compulsory acquisitions were constitutional. Additionally, Mr Boyce contended that the judge erred in failing to find that, in compulsorily acquiring his shares, he was treated in a discriminatory manner on the basis of his place of origin, contrary to section 16(2) of the Constitution.

[6] These appeals accordingly call for a consideration in some detail of the provisions of the Constitution, in particular sections 3(d), 16 and 17, the basis of the appellants' challenge to the legislation and the reasons for the compulsory acquisition put forward by GOB in affidavit evidence filed on its behalf in the Supreme Court actions.

The background to the Acquisition Act and Orders

[7] On 24 August 2009, the Honourable Dean Barrow, the Prime Minister of Belize ('the Prime Minister'), introduced in the House of Representatives the Bill that would in short order become the Acquisition Act. All the parties to this appeal have referred to and placed reliance in varying degrees on what the Prime Minister had to say in his statement to the House on that occasion. At the

very outset of the statement, the Prime Minister made clear GOB's intention to take the Bill through all its stages that very day. While the "lack of notice" was regretted, he said, it "could not, in the circumstances, be helped...[as]...the current owners of Telemedia, as they have repeatedly demonstrated, will stop at nothing to frustrate the business of governance in this country; and will act with every resource to thwart the interest and legitimate aspirations of the Belizean people". Considering, as he put it, that it was necessary "to rehearse for the house and the nation a fair amount of background", the Prime Minister went into the history of Telemedia under previous administrations in some detail, going back to 1987, when the telecommunications industry in Belize was under "the control of the foreign entity Cable and Wireless". He described the process by which Lord Michael Ashcroft came to be in "total control" of the company and the steps by which he had been able in 2006 to secure from the then government "the infamous secret Accommodation Agreement, in which the PUP government guaranteed the Ashcroft group a minimum rate of return of 15%". That agreement, which it was said, was unfair to the Belizean people in a number of respects, had been denounced by GOB as soon as the new government came into power in 2008. Michael Ashcroft and Telemedia had retaliated by invoking the arbitration clause in the agreement to enforce it against GOB, resulting in an arbitration award in their favour for some $38.5 million, with a threat of further claims to come, in the London Court of International Arbitration.

[8] This was an intolerable state of affairs, the Prime Minister continued, hence the resolve of GOB to "put up with it no longer". In the exercise of its sovereignty, GOB had determined that there "will be no more Telemedia awards against us; no more Telemedia court battles; no more debilitating waste of government's energies and resources; and there will be no more suffering of this

one man's campaign to subjugate an entire nation to his will". It was against this background, the Prime Minister announced, that GOB had decided, after "long and sufficient consideration" to acquire Telemedia, given the central part played by telecommunications in "the development apparatus of any modern society".

[9] I cannot avoid reproducing in full below the Prime Minister's extended peroration:

> "Think on it Mr. Speaker. Telecommunications uses the airwaves as its medium. But these airwaves constitute a God-given natural resource of Belize, just like our sun, our sea, our rivers, our forests. These things together help to make up the patrimony of the Belizean people, and the exploitation of that patrimony must always be consistent with the interests of Belizeans. When those that come to partner with us demonstrate beyond all doubt that they will upend equitability, upend reasonableness, that they will, infamy upon infamy, beat us about our heads with our own inheritance, the very blood coursing through our Belizean veins obliges us to act.
>
> Just as fundamental, though perhaps a little more prosaic, telecommunications - information and communications technology - is a critical part of the development apparatus of any modern society. Indeed, as has been officially recognized by our regional integration movement CARICOM, it is an indispensable tool in that restructuring of developing countries' economies that, in the face of the global crisis, must begin to take place now. Accordingly, unregulated monopoly control and abuse of the sector cannot be permitted. Yet, that is precisely what the Accommodation Agreement mandates. This is especially so in view of the fact that even the very limited mobile phone so-called competitor to Telemedia, is owned by Telemedia. That is right and I have the documents to prove it. 77.38% of Speednet is owned by three companies - Callerbar Limited, Riddermark Ventures Limited, and Heaver Holdings Limited. These three companies are headquartered at the Belize City Cork Street premises of Michael Ashcroft, and controlled by two of the now notorious Trusts owned by Michael Ashcroft.
>
> And so Mr. Speaker let no one be in any doubt as to why we are doing what we are doing today. Let no one misunderstand our purpose. This is not ideology, this is not triumphalism. This is a country in particular circumstances reaching the end of its patience and doing a singular, necessary, righteous thing to protect its national interest. It is not part of any pattern, part of no new philosophy. It is plain and simple a special measure for a special case. We make no apologies for it, but we also do not seek to elevate it. As must be clear from the developments in even the global bastions of super capitalism and private property, this is what

countries do to protect themselves. It is an article of faith and a cardinal rule of statecraft that a nation will act in any way necessary to preserve its national interest. That national interest, in these circumstances, now abundantly demands our present course of action.

So there you have it, Mr. Speaker, the government's brief from the heart. In the days to come, the dissection and the deconstruction, both at home and abroad, will of course take place. But no matter which way you look at it, ours is a straightforward case and a compelling case. We will move ahead not unaware of the difficulties that will be thrown up, but with a confidence that is both supreme and serene because we know we are right.

Before I conclude, just let me spend a little time telling you what will happen as we proceed. First of all, you will see that the Bill makes every provision for fair and proper compensation to be paid to the owners of the shares we will acquire. This is not, I repeat, some cowboy action but something done in the full plenitude of, and compliance with, our Constitution. As well, we are only acquiring the 94% or so of Telemedia that is controlled by the Ashcroft interests. The shareholding owned by Belizeans will be left intact. The actual acquisition will be done by way of an order made by the Minister of Telecommunications, who will in that same order appoint a new Board of Directors. As soon as practicable after, an extraordinary general meeting will be held and new Articles of Association adopted. The new Articles will essentially be the Articles of the successful BTL that was launched in 1988. In other words, the safeguards to protect Belizean shareholders will be re-established, including protection of the special share and the limitation on the amount of single ownership. As well, and perhaps most importantly, the articles will guarantee that dividends will be paid to shareholders at the rate of 40% of the yearly profits.

Of course, a prospectus will as early as possible be published. On this basis, Belizeans will be invited to purchase the shares now being acquired in Telemedia by the Government. In other words, there is no intention for government to hold on to those shares. This acquisition is, rather, to give all Belizeans a chance to invest once again in a company that has proven to be a money maker.

I also want to say that the new Board of Directors will be chaired by Mr. Nestor Vasquez and will have the Right Honorable Manuel Esquivel as a member. Telemedia's current employees will, of course, all keep their jobs. Indeed, we expect a greatly improved industrial relations climate and the quick resolution of outstanding worker grievances. I think particularly of the arbitration case of the dismissed workers, a case the current ownership of Telemedia has utterly frustrated. I am positive, therefore, that Telemedia's staff, like all other right-thinking Belizeans, will completely support the Government's move and cooperate to make the transition as seamless as possible. For consumers, we expect services to continue uninterrupted. We do not believe the present operators of the company will try any kind of sabotage. If they do, we will have to use

already existing provisions of the law to move in and take control even before the passage of this Bill.

Mr. Speaker, I close by saying that no one need feel any sympathy for Lord Ashcroft.

This is not an ad hominem move: it is to deal with a structural problem. Indeed, apart from his compensation, Lord Ashcroft's interests will remain profit-making participants in Belize's Telecommunications sector, because those interests own Speednet, the other Telecoms provider. This, I repeat then, is only about Telemedia; and no more and no less than a case of the Belizean national interest trumping any other consideration.

Thank you, Mr. Speaker, and I look forward to the debate."

The Acquisition Act

[10] It is against this stirring rhetorical background that, on the same day as the Prime Minister's speech, the National Assembly took the Acquisition Act through all its stages. Section 63(1) empowers the Minister by order to take control over telecommunications by compulsory acquisition where he considers it necessary to do so for a public purpose and provides, importantly, "every such order shall be *prima facie* evidence that the property to which it refers is required for a public purpose". Section 63(2) now provides that, upon publication in the Gazette of the Minister's Order made pursuant to section 63(1), "the property to which it relates shall vest absolutely in [GOB]" and section 63(3) states that in every case in which the Minister makes such an order "there shall be paid to the owner of the property that has been acquired by virtue of the said Order, reasonable compensation within a reasonable time in accordance with the provisions of this Act". Section 63(4) provides that any person claiming an interest in or a right over the acquired property "shall have a right of access to the courts for the purpose of determining whether the acquisition was duly carried out for a public

purpose in accordance with this Act". Section 63(6) empowers the Minister, in any order made under section 63(1), to give ancillary and consequential directions as may be necessary to give full effect to his order, including the appointment of an interim board of directors of a public utility provider and its subsidiaries. Section 63(9) defines 'property' in broad terms, to include "shares, stock, interests of all kinds, including a mortgagee's or chargee's interest in property…"

[11] Section 64(1) provides for the giving to the public of notice of acquisition requiring all interested persons to submit claims within a specified time, while section 65(1) mandates the Financial Secretary, on receipt and verification of claims, to "without delay…enter into negotiations with the claimants for the payment of reasonable compensation within a reasonable time". In default of agreement, section 65(2) provides for the compensation payable under the Act to be determined by the Supreme Court and section 66(1) provides that such proceedings may be commenced by either the claimant or the Financial Secretary by fixed date claim form, in accordance with the Supreme Court (Civil Procedure) Rules 2005. Where such proceedings are commenced by the Financial Secretary, section 66(2) requires him to join all interested parties known to him as parties to the proceedings and section 66(3) empowers the court in cases of disability or incapacity to appoint a guardian *ad litem.*

[12] Section 67 sets out detailed rules for the determination of compensation. These rules speak to matters such as the manner in which the value of the property is to be ascertained (by reference to its value on the open market), to the application of generally accepted methods of valuation "of the kind of property that has been acquired", the exclusion in ascertaining value of the

special suitability or adaptability of the property for any purpose, the taking into account of pending litigation or potential claims against a public utility provider and the assessment and payment of compensation in the lawful currency of Belize. Sections 68 and 69 make provision for the court to award interest in awarding compensation and to make orders for the payment of the costs (including fees, charges and expenses) of the proceedings. Section 70 provides that, save in cases in which the court considers that injustice may otherwise be done, claims for compensation in respect of compulsory acquisition will not be entertained unless they are made in writing within 12 months after the date of acquisition. Finally, section 71 provides that all amounts awarded by way of compensation "shall be paid out of moneys voted for the purpose by the National Assembly and all such compensation shall be paid within a reasonable time".

The Acquisition Orders

[13] So far as is relevant for present purposes, the 25 August Order provides as follows:

> **"WHEREAS**, section 63 of the Belize Telecommunications Act, as amended, provides, inter alia, that where the Minister (responsible for telecommunications) considers that control over telecommunications should be acquired for a public purpose, he may, with the approval of the Minister of Finance, by Order published in the Gazette, acquire for and on behalf of the Government, all such property as he may from time to time consider necessary to take possession of and to assume control over telecommunications;
>
> **AND WHEREAS**, after a careful consideration of all the facts and circumstances, I consider that control over telecommunications should be acquired for a public purpose, namely, the stabilisation and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in a harmonious and non-contentious environment.

NOW, THEREFORE, in pursuance of the above objectives, it is hereby ordered as follows:

1. This Order may be cited as the

BELIZE TELECOMMUNICATIONS (ASSUMPTION OF CONTROL OVER BELIZE TELEMEDIA LIMITED) ORDER, 2009

2. The property specified in the Schedule to this Order is hereby acquired for and in behalf if the Government of Belize for the public purpose aforesaid.

3. This Order shall take effect on the date of its publication in the Gazette.

4. (1) Upon the commencement of this Order, the existing Boards of Directors of Belize Telemedia Limited (hereinafter referred to as "Telemedia") and all of its subsidiaries shall cease to function and the Minister shall forthwith appoint interim Boards of Directors of Telemedia and its subsidiaries by notice published in the Gazette, who shall manage and regulate the affairs of their respective companies until such time as new Boards of Directors can be appointed in accordance with the Articles of Association and the reconstituted capital structure of Telemedia and its subsidiaries.

(2) Every person (including a director) who in any manner impedes or obstructs the interim Boards of Directors appointed under subparagraph (1) above from taking over the management and control of Telemedia and its subsidiaries shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding five thousand dollars for each day the offence continues, or to imprisonment for a term not exceeding two years, or to both such fine and term of imprisonment.

5. (1) Upon the commencement of this Order, the existing Company Secretary of Telemedia shall forthwith deliver all books, records and other documents belonging to Telemedia and its subsidiaries to the Chairman of the interim Board of Directors appointed by the Minister under paragraph 4 of this Order."

[14] Part 1 of the schedule to the 25 August Order lists the shares in Telemedia actually being acquired by GOB as follows:

Name of Shareholder	Address	No. of Shares acquired
1. BB (or BCB) Holdings Limited	P.O. Box 1764, Belize City	1,234,859
2. BTL International Inc.	P.O. Box 71, Tortola, BVI	895,552
3. BTL Investments Limited	BTL, St. Thomas St., Belize City	750,000
4. ECOM Limited	P.O. Box 1764 212 North Front St., Belize City	15,178,488
5. Mercury Communications Limited	P.O. Box 1764, 212 North Front St., Belize City	4,786,230
6. New Horizons Inc.	212 North Front St., Belize City	20,581
7. Sunshine Holding Limited	P.O. Box 1258, 212 North Front St., Belize City	11,092,844
8. Thiermon Limited	212 North Front St., Belize City	12,886,959
Total number of Shares acquired		46,845,513

[15] Part II of the Schedule comprises (under the rubric, "Other Property Acquired") proprietary and other rights or interests held by the Bank under the mortgage debenture dated the 31 December 2007. It is not necessary to set out at length the actual text of the 4 December Order and it suffices to say that its effect was to amend Part II of the Schedule to the 25 August Order by adding, under the rubric, "Other Property Acquired", the Bank's proprietary and other rights and interests under the Facility, the Sunshine Facility, the security agreement and the Overdraft Facility Agreement.

The constitutional provisions

[16] The respective positions of the parties to this appeal are best understood in the context of the relevant provisions of the Constitution itself. Section 3 of the Constitution recognises and proclaims the fundamental rights and freedoms to which every person in Belize is entitled, irrespective of race, place of origin, political opinions, colour creed or sex, subject only to respect for the rights and freedoms of others and for the public interest. Among these fundamental rights and freedoms (in section 3(d)), is "protection from arbitrary deprivation of property". Sections 4 to 22 which follow are stated to be for the purpose of affording protection to the rights and freedoms listed in that section, "subject to such limitations as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest".

[17] Section 16(1) provides that, subject to certain exceptions which are for the most part not relevant to this matter, "no law shall make any provision that is discriminatory either in itself or in its effect", while section 16(2) provides that "no person shall be treated in a discriminatory manner by any person or authority". Section 16(3) defines the expression discriminatory as used in the section to mean "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description". Section 16(4) provides that, among other exceptions, section 16(1) "shall not apply to any law so far as that law makes provision -... (b) with respect to persons who are not citizens of Belize".

[18] Section 17(1) provides as follows:

> "17.-(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that -
>
> (a) prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time; and
>
> (b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of -
>
> (i) establishing his interest or right (if any);
>
> (ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;
>
> (iii) determining the amount of the compensation to which he may be entitled; and
>
> (iv) enforcing his right to any such compensation."

The appellants' claims and GOB's response

[19] This matter generated a great many affidavits from all three parties, although in some respects there was at the end of the day no significant dispute as to the facts. What follows is a summary of the effect of the main affidavits, to the extent necessary for a proper appreciation of the issues, indicating where necessary any remaining areas of dispute between the parties.

The Bank's claim

[20] The Bank, which was previously known as The Belize Bank (Turks and Caicos) Ltd, was incorporated in the Turks and Caicos Islands on 8 September 1998 and changed its name on 9 February 2009. The Bank's ultimate parent company is BCB Holdings Ltd, a publicly listed company. On 6 July 2007, the

Bank agreed a Term Loan Facility ('the Facility') in Telemedia's favour, pursuant to which the sum of US$22,500,000.00 was made available to Telemedia on demand. The purposes of the Facility were (i) for a loan by Telemedia to its subsidiary Telemedia Investments Ltd ('TIL'), to enable TIL to purchase 9,219,181 shares in Telemedia from RBTT Merchant Bank Ltd ('RBTT') as attorney in fact for Belize Telecom Ltd by virtue of a stock power; (ii) for the purchase and installation of equipment for the provision of telecommunications services in Belize; and (iii) for general working capital.

[21] Clause 9 of the Facility stated that the indebtedness of Telemedia to the Bank thereunder "shall become immediately due and payable, if (a)...[Telemedia] fails to make when due, any payment of interest, principal, or other amounts payable to the Bank hereunder and such failure has not been remedied by [Telemedia] within seven (7) business days' notice of such failure from the Bank to [Telemedia];..." and "(f) any event constituting an act of default under any Security Document occurs".

[22] As part of the security required as a condition of the grant of the Facility, Telemedia charged its assets in favour of the Bank under the terms of a Mortgage Debenture between Telemedia and the Bank dated 31 December 2007 ('the mortgage debenture'). Under the terms of the mortgage debenture, upon failure by Telemedia to pay any amount due to the Bank on the due date and to remedy this failure within seven business days of notice of such failure by the Bank, the monies secured under the mortgage debenture and any unpaid interest accrued "shall become immediately due and payable and the security hereby created enforceable". Any change in the ownership structure or

management of Telemedia without the consent of the Bank would also give rise to the same result.

[23] The Bank contended that Telemedia failed to make interest payments due on 10 September and 10 October 2009 and that the 25 August Order had also brought about a change of the ownership structure of Telemedia, to which the Bank had not consented, and that Telemedia was accordingly in default of its obligations under the mortgage debenture, which had in turn triggered a cross event of default under the Facility. However, the Bank was unable to enforce its security against Telemedia, because its security over Telemedia's assets had been acquired by GOB pursuant to the Order, as at the date of which the amount outstanding and due under the Facility remained at US$22,500,000.00. It will be necessary later in this judgment to review the detailed evidence of the steps taken by the Bank to recover the moneys allegedly owed to it by Telemedia (see paras [143] – [145] below).

[24] GOB also acquired 11,092,884 shares held by Sunshine in Telemedia, as well as the two shares held by Mr Boyce and the Trustees of the Belize Telecommunications Limited Employees Trust in Sunshine. On 19 September 2005, the Bank had agreed a Syndicated Loan Facility ('the Sunshine Facility') in favour of Sunshine, pursuant to which US$10,000,000.00 had been made available to Sunshine on demand. On that same date, the Bank had also entered into a Security Agreement ('the Security Agreement') with Sunshine as a condition precedent to the grant of the Sunshine Facility and, as part of the Security Agreement, Sunshine had given a first legal charge to the Bank over the 11,092,844 Telemedia shares owned by Sunshine as already stated. Further, the Bank had granted an overdraft facility to Sunshine under a letter dated 19

May 2006 ('the Overdraft Facility Agreement'), pursuant to which an overdraft facility of up to US$1,000,000.00 was made available to Sunshine by the Bank, secured by way of a first legal charge in favour of the Bank over the entire issued share capital of Sunshine.

[25] The amounts outstanding to the Bank under the Sunshine Facility and the Overdraft Facility Letter as at 21 October 2009 were US$2,616,140.96 and US$961,432.93 respectively. The Bank's position was that the compulsory acquisition by GOB of the 11,092,844 shares in Telemedia owned by Sunshine and the entire issued share capital of Sunshine constituted acts of default by the borrowers under the terms of the Security Agreement and the Overdraft Facility Letter. However, as GOB had compulsorily acquired all of Sunshine's holding in Telemedia and the entire share capital of Sunshine, "the Bank's ability to recover the funds loaned to Sunshine by way of enforcing its security has been removed as the security has become worthless" (First Affidavit of Philip Johnson, sworn to on 21 October 2009, para. 38).

[26] By its amended fixed date claim form dated 21 January 2010, the Bank sought declarations that the Acquisition Act and Orders are contrary to sections 3(d), 16 and 17 of the Constitution and therefore unconstitutional and void and that the compulsory acquisition by GOB of the proprietary and other interests of the Bank in Telemedia under the mortgage debenture, the Facility, the Sunshine Facility, the Security Agreement and the Overdraft Facility agreement is unconstitutional and void; such other declarations and orders and such directions as may be necessary for enforcing or securing the enforcement of these declarations; damages (including punitive damages); interest; and costs.

[27] In his first affidavit in support of the amended fixed date claim form, Mr Philip Johnson, in his capacity as a director and shareholder of the Bank, set out the legal bases of the Bank's claim, referring in particular to sections 3(d) and 17(1) of the Constitution which, in his words, "are intended to provide protection against the deprivation of any and all property, save as provided in subsection 17(2)". With respect to the stated public purpose, Mr Johnson contended (in paras 45 – 46) that the Bank's securities had no effect on those purposes in any way, making the point that the Bank, as lender/mortgagee "has never involved itself with telecommunications"; and further (in para. 47), that the stated public purpose did not correspond with the Prime Minister's explanation to the House of Representatives of the purpose of the acquisitions when he tabled the legislation on 24 August 2009, the Prime Minister having made it clear that GOB's "true target was the Accomodation Agreements between Telemedia and [GOB], which has no connection whatsoever with the Bank's Facility" (para. 50). Mr Johnson stated further (in para. 49) that the Bank's loan to Telemedia was provided "for the express purpose of purchasing and installing equipment for the provision of telecommunications services in Belize and general working capital". However, in the light of the fact that an event of default had now occurred, the Bank was entitled to repayment in full, thus jeopardising Telemedia's ability to provide reliable telecommunications services at affordable prices. Mr Johnson stated further (in para. 51) that he had been advised and verily believed that GOB's actions would be regarded as arbitrary "if they are disproportionate, unfounded and inconsistent". In the light of all of the above, Mr Johnson concluded that the Acquisition Act and Orders did not achieve the stated public purpose and were arbitrary, disproportionate and discriminatory. Further, the compulsory acquisition of the Bank's interests served no purpose except to deprive the Bank of its property.

Mr Boyce's case

[28] Until 25 August 2009, Mr Boyce was Chairman of the Executive Committee of the Board of Directors of Telemedia, having held that position from the formation of Telemedia in May 2007. Before that, he was Chairman of the Executive Committee of the Board of Directors of BTL between 1 January 2003 and March 2004, and from 29 August 2005, until BTL's dissolution and its succession by Telemedia in May 2007. Mr Boyce was until 25 August 2009 the holder of one share in Sunshine, in his capacity as a trustee of the BTL Employees Trust and, as already indicated, Sunshine was the owner of 11,092,884 shares (or 22.39% of the issued share capital of Telemedia).

[29] By his fixed date claim form dated 18 December 2009, Mr Boyce sought declarations that the Acquisition Act and the 25 August Order are contrary to sections 3(a) and (d), 6(1), 16, 17 and 68 of the Constitution and therefore unconstitutional and void; such other declarations and orders and such directions as may be necessary for enforcing or securing the enforcement of these declarations; damages (including punitive damages); interest; and costs.

[30] Just as Mr Johnson had done in respect of the Bank's claim, Mr Boyce set out in his first affidavit (sworn to on 18 December 2009) the legal bases of his claim, going over in significant respects the ground already covered by Mr Johnson. Thus he also made reference (in paras 28 - 29 to sections 3(d) and 17(1) of the Constitution and the prohibition against the compulsory acquisition of property, save as permitted by the Constitution itself. He also referred (in para. 30) to section 6(1) (the right to equality before the law) and (in para. 31) to section 16(2) (the prohibition of discrimination). Mr Boyce also joined Mr

Johnson in challenging (in paras 33 – 34) the stated public purpose in the 25 August Order as discordant to the explanation for the acquisitions given by the Prime Minister to the House of Representatives. But Mr Boyce also made the further point (in para. 35) that "even on its own terms, the purposes stated in the Order do not correspond with the form of the measures adopted", as Telemedia already provided a stable, reliable and affordable service; was already undertaking improvement works to the telecommunications network; there had been no complaint from GOB or the Public Utilities Commission ('PUC') about the service Telemedia was providing; and had there been any such recurrent complaint, the Government could have threatened to revoke Telemedia's licence. No such threat or complaint was received and, even if it had been, nationalisation was a disproportionate response to any such issue. Mr Boyce went on to observe (at para. 36) that, "rather than helping to stabilise the sector (assuming for the sake of argument that there was a problem in the sector to be resolved) press reports and recent events have highlighted how disruptive the nationalisation has been, and will continue to be…." In this regard he listed adverse comments on the compulsory acquisitions by members of the Opposition, the Belize Chamber of Commerce and Industry, the international press and the managing director of investments at a well known international investment bank, making the further point (in para. 39) that GOB's "forcible acquisition" of share and securities in Telemedia "can only deter potential investors", as would the replacement of the entire board of directors of the company on the day the legislation was enacted, thus depriving it of its experienced management team.

[31] Again as Mr Johnson had done, Mr Boyce stated (at para. 42) that the Prime Minister's position in the House and the stated public purpose in the Order "do not

correlate" and that the Prime Minister's speech revealed "the true 'mischief' at which the legislation was aimed, namely Lord Ashcroft's interests" (which was in any event discriminatory and unconstitutional). Mr Boyce took further issue (at para. 47) with the Acquisition Act and Orders as being in breach of the principle of separation of powers as an attempt to oust the jurisdiction of the courts, by "using the nationalisation to end litigation between [GOB] and Telemedia", and to pre-empt the enforcement of the arbitral award already made in favour of Telemedia. And finally, Mr Boyce questioned (at para. 54 - 58) whether the provisions of the Acquisition Act on the matter of compensation were consonant with section 17(1)(a) of the Constitution, which requires the making of provision for reasonable compensation within a reasonable time.

GOB's position – the public purpose

[32] GOB's position in respect of both claims was primarily set out in affidavits sworn to by Mr Joseph Waight, the Financial Secretary, and the Minister. In his first affidavit (sworn to on 8 December 2009) in claim no. 847 of 2009 ('the Bank's action'), Mr Waight gives something of the history of Telemedia, speaking, among other things, to the circumstances in which Lord Ashcroft came to have a substantial interest in the company, owning or controlling by 2001, through a company known as Carlisle Holdings Ltd, some 52% of the company's shares. After referring to the enactment in 2002 of the Telecoms Act and the coming into being of the PUC as the "regulator of the telecommunications sector within a competitive environment", Mr Waight stated (at paragraph 15 of this affidavit) that, "Once Carlisle Holdings Ltd obtained controlling shares in BTL in 2001, BTL became a very litigious company". He then proceeded to set out a list of 10 actions filed in the Supreme Court between 2003 – 2004, in which BTL was

involved as either claimant or defendant (in fact, BTL was claimant in six, while GOB was claimant in one, the Social Security Board in one, the PUC in one and 31 former employees claiming retirement and severance benefits in the other). Mr Waight sought to draw the court's attention "to the fact that the litigation mostly concerned BTL's challenges to its competitors and to the [PUC]".

[33] Mr Waight then recounted the events of 2004, which saw GOB purchasing Carlisle's 52% of the issued share capital of BTL, and the subsequent reacquisition by Carlisle/Lord Ashcroft ("through different companies, as for example, Ecom Limited, Mercury Communications Limited, Thiermon Limited, BB Holdings Ltd, and Sunshine Holdings Limited") of control over BTL by October 2005. Thereafter, Mr Waight stated, "a barrage of litigation started again", referring to "at least five court cases between 2005 and 2007", and to the observation by the then Chief Justice in his judgment, in an action in which BTL was the defendant, that, because of various battles for control of its management, BTL had been "dragged into the courts of this country at every opportunity".

[34] Mr Waight next turned his attention what he described as "secret agreements" between the former government and BTL (the "Accomodation Agreement" to which the Prime Minister had devoted much time during his speech to the House of Representatives on 24 August 2009) and to the altered stance which had been adopted by GOB in relation to them after the change of government in 2008.

[35] Mr Waight then challenged the legitimacy of the Bank's loan to BTL, contending that the majority of the loan amount of US$22,500,000.00 had been utilised to enable the purchase of BTL shares from RBTT and not for the purposes stated by the Bank. As a result, he contended, the true effect of the mortgage debenture was "in effect to place the entire business of BTL under the control of the Bank", which is itself owned and/or controlled by the same entities who are now in control of BTL/Telemedia. It had therefore been necessary for GOB to acquire the Bank's proprietary and other rights under the mortgage debenture and the Facility, as the Bank would otherwise have retained control over the assets of Telemedia and thereby "rendered the acquisition useless". In these circumstances, Mr Waight concluded, the acquisition had been for a public purpose and the Bank had already in any event filed its claim for compensation pursuant to the provisions of the Acquisition Act. Mr Waight also exhibited to his affidavit a chart showing "the current inter-relationship" between the Bank and other Ashcroft controlled entities.

[36] The Minister in his first affidavit in the Bank's action (also sworn to on 8 December 2009) adopted as his own the facts as stated by Mr Waight in his affidavit. He added information on steps taken by BTL to enforce its rights under the Accommodation Agreements and GOB's resolve to resist, disputes between BTL and the revenue authorities over the company's tax liabilities and the detrimental impact of the extent of the Ashcroft interests in the telecommunications sector on the promotion of competition in the sector. In these circumstances, the Minister asserted, "The acquisition was for the purpose of liberating a vital part of the patrimony of the Belizean people, to wit, the

telecommunications industry. It is in the national interest that the industry should continue to develop in a non-hostile and regulated environment."

[37] The Minister went on to make the point that the Bank's mortgage debenture and the Facility "placed at the mercy of the [Bank] all the assets of BTL, tangible and intangible, its good will and revenue streams", thus making the acquisition of all proprietary and other rights held by the Bank under those instruments "a necessary part of [GOB's] acquisition of the majority owner's shares in BTL". Against this background, the Minister concluded, "the reasons for the acquisition are as set out in the Prime Minister's statement to the House of Representatives on 24 August 2009".

[38] Both the Minister and Mr Waight also filed affidavits on behalf of GOB in claim no. 1018 of 2009 ('Mr Boyce's action'). In his first affidavit (sworn to on 5 February 2010), the Minister (after adopting one of Mr Waight's earlier affidavits) again addressed the Accommodation Agreements and their "very serious financial impact on [GOB]", as a result of their guarantee to BTL of a 15% annual rate of return on its investment and GOB's obligation to make up any shortfall between the 15% and the actual return on its investment to the company in any given year (para. 11). He again covered much of the ground already dealt with by him in respect of the Bank's action and concluded, as he had in that action, that the acquisition of BTL "was for the purpose of liberating vital part of the patrimony of the Belizean people…" (para. 21).

[39] The Minister then turned his attention specifically to "the public interest for [GOB] to acquire ownership of Sunshine Holdings Ltd". After tracing the interest of Lord Ashcroft in BCB Holdings Ltd (74.7%), its immediate predecessor, BB Holdings Ltd and, before it, Carlisle Holdings Ltd, the Minister concluded that "Sunshine Holdings Limited is owned and or controlled by Lord Ashcroft" (para. 23). It is against this background that the Minister then stated the public purpose of the acquisition of the Sunshine shares in the following terms (paras 24-25):

> "It would have run counter to the purpose of the acquisition to have left the ownership of those shares with Sunshine Holdings Ltd., a company wholly controlled by Lord Ashcroft. The fact of the matter is that Sunshine Holdings Ltd. owes the Government $10 million dollars, and owes the Social Security Board $10 million dollars of workers contributions.
>
> It would have run counter to the purpose of the acquisition to have left the ownership of Sunshine Holdings Ltd. in the hands of two persons under the complete control of The Belize Bank Ltd. The way to safeguard the publicly invested money and the proceeds of compensation is to acquire the ownership of the company itself."

Against this background, the Minister then set out again an extract from the Prime Minister's statement to the House of Representatives on 24 August 2009.

[40] The Minister next questioned Mr Boyce's entitlement to bring the claim for constitutional relief in respect of the acquisition of the Sunshine shares, and challenged his assertion that the new board of Telemedia lacked the experience to run the company. He then devoted some time to bringing into question Mr Boyce's own stewardship of Telemedia during his tenure as chairman of the executive committee which was responsible for the day to day management of the company, stating that, "I have been informed by Mr Nestor Vasquez and verily believe that Mr Boyce failed to manage Telemedia in a prudent way or in the best interests of the company" (para. 36). To support this statement, the Minister listed a number of "improper transactions to the detriment of Telemedia"

(15 in total), for which Mr Boyce had either been responsible or in which he had participated during his tenure (para. 37). These included imprudent dividend declarations; accessing a loan of US$22.5 million from the Bank which was "in violation of the Companies Act of Belize, and was unlawful and void"; reckless investments; unsubstantiated payments out of the company's funds; improper writing off of $10 million of debt due to the company; improper diversion to the Bank of funds lawfully due to the company; and failure to pay taxes on transactions subject to tax, resulting in a current indebtedness of Telemedia to the tax department for a sum in excess of $15 million for unpaid taxes. (These allegations would subsequently be dismissed by Mr Boyce as "unfounded … invalid, inaccurate and irrelevant" – see para. 50 of his second affidavit, sworn to on 19 March 2010.)

[41] GOB also relied on a total of five affidavits sworn to by Mr Nestor Vasquez and filed in the Bank's action. As foreshadowed by the Prime Minister in his statement (and further to paragraph 4 of the 25 August Order), the board of directors of Telemedia had ceased to function with immediate effect and an interim board had been appointed by the Minister to manage and regulate the affairs of the company, pending the appointment of a new board in accordance with the articles of association of the company. Mr Vasquez, who had previously served two separate terms as chairman of the company under earlier dispensations, was appointed chairman of the interim board and executive chairman of the company.

[42] Mr Vasquez's first affidavit (sworn to on 19 February 2010) gave rise to a sustained controversy between himself, on the one hand, and Mr Johnson and Mr Boyce on the other hand, in the main with regard to factual aspects of the

manner in which the business of BTL/Telemedia had been conducted in the past and, in particular, during Mr Boyce's term of office as chairman of the executive committee of the company. Thus, Mr Vasquez's first, second and third affidavits, were all responded to in detail by Mr Johnson in his fourth affidavit and by Mr Boyce in his second affidavit, which then led to a further exchange of affidavits in rebuttal on both sides.

[43] Each of the parties to this exchange of affidavits referred dismissively to several of the allegations made by the other, so much so that at the end of the day, neither of them having been cross examined b, it is virtually impossible to determine on the face of these affidavits what are the true facts. Thus, for example, in his second affidavit, Mr Boyce referred to Mr Vasquez's first three affidavits (among others by the Minister and Mr Waight), with the comment that much of their content "seeks deliberately to obfuscate and confuse matters and to introduce prejudice into what is in essence a very simple matter" (para. 4.1). Mr Vasquez in his fourth affidavit countered with the comment that "there are some assertions made by both Mr Boyce and Mr Johnson which are factually incorrect" (para. 1), before going on to observe that "Mr Boyce is being less than frank with the Court…" (para.39). This then prompted a further response from Mr Boyce, in his third affidavit, in which he accused Mr Vasquez of being party to "a deliberate attempt to further cloud the legal issue before this Court" and of making assertions that "are factually incorrect and incredible" (para. 3).

[44] While I do not propose to dwell in any detail on the actual content of this energetic exchange (not least of all because there is ultimately no way of resolving in these proceedings many aspects of the controversy), I will in due course return to consider one aspect of it, as it relates to the actual state of

Telemedia in 2009 when the decision was taken by the Minister to acquire control of the company.

Legall J's judgment

[45] Virtually from the outset of his judgment, Legall J accepted two of the fundamental premises of GOB's justification for the compulsory acquisition of Telemedia. The first was that the Acquisition Act had been preceded by various law suits which "show that there were fights for control and management of B.T.L, which were unsettling and detrimental to the public interest" (para. 12 of his judgment). The judge also observed that the Accomodation Agreements had "generated litigation in the Supreme Court…" (para. 18). The second premise was that, as the judge concluded, "Lord Ashcroft was in a position to influence Belize Telemedia, Dean Boyce and [the Bank]" (para. 22, and see again at para. 85).

[46] The judge then went on to express the view that, in interpreting the Constitution, "some well known constitutional principles" applied, foremost among which was the presumption of constitutionality and the concomitant heavy onus on the challenger to the constitutionality of legislation to prove its invalidity (paras 41-43). With regard to the stated public purpose, the judge accepted that it was indeed a public purpose and concluded on the evidence (including the possibility of a winding up of Telemedia and other factors, among them the influence of Lord Ashcroft) that the Minister had acted in furtherance of it (para. 109). The learned judge considered further that the Acquisition Act and Orders did not offend the principle of proportionality (para. 123); that the Minister was not obliged to afford the claimants a hearing before the enactment of the Acquisition Act or Orders (para. 126); that the relevant sections of the Acquisition Act did

make adequate provisions for compensation within a reasonable time as required by section 17(1)(a) of the Constitution (para. 136) (although the judge did express "grave concern" that negotiations were not in progress for the payment of compensation to the claimants – para. 139); that the Acquisition Act and Orders were not discriminatory on the basis of place of origin (para. 150); and that there had been no breach of the doctrine of the separation of powers in the enactment of the Acquisition Act and Orders (para. 158).

[47] In the result, Legall J dismissed both claims, but made an order that the Financial Secretary should comply with section 65(1) of the Telecoms Act, as amended, with regard to "the payment to the claimants of reasonable compensation within a reasonable time for the properties, rights and interest acquired by the Acquisition Act and Orders" (para. 161).

The grounds of appeal

[48] The Bank filed three grounds of appeal in its supplementary notice of appeal, filed on 18 January 2011. These are as follows:

> "GROUND 1
>
> 2.1 The learned Trial Judge erred in concluding that the Belize Telecommunications (Amendment) Act 2009 ("the Act") was constitutional (paragraph 136 of the judgment - page 1044 of the Record). The Appellant submits that the Act does not provide:
>
> a. the principles on which and manner in which reasonable compensation is to be determined;
>
> b. the principles and manner in which reasonable compensation is to be given within a reasonable time;
>
> c. a right of access to the Court for the purpose of establishing a party's interest or right to the property; and

d. for the purpose of enforcing his right to any such compensation;

and is therefore inconsistent with the mandatory provisions of section 17(1) of the Constitution and is therefore void.

GROUND 2

2.2 The learned Judge erred in failing to find that the compulsory taking of the Appellant's property pursuant to the Acquisition Orders was unlawful for the reason that:

a. It was not duly carried out for a public purpose;

b. It was disproportionate having regard to the Stated Public Purpose;

c. It was arbitrary and unlawful;

d. The procedure adopted by the Minister was unfair.

GROUND 3

2.3 The Learned Judge erred in holding, on the weight of the evidence, in favour of the Respondents."

[49] The grounds of appeal filed by Mr Boyce (which were also set out in a supplementary notice of appeal filed on 19 January 2011) were, save for a slight verbal difference in ground 2(d), identical to the Bank's. But, in addition, Mr Boyce relied on a fourth ground (numbered 3), which was in the following terms:

> "The learned judge erred in failing to find that when the Appellant's shares and interest were acquired, he was being treated in a discriminatory manner on the basis of his place of origin contrary to section 16(2) of the Belize Constitution."

[50] For ease of reference, I will hereafter refer to the Bank's three grounds, which are common to both appellants, as grounds 1, 2 and 3, and to Mr Boyce's additional ground as ground 4.

A summary of the arguments

[51] I am grateful to all three leading counsel who appeared in this matter for their detailed and comprehensive skeleton arguments, which they expertly supplemented by oral argument of sustained quality. I fear that I cannot give these submissions their proper due without overburdening what is already threatening to become an overlong judgment. (Mr Courtenay SC's skeleton arguments run into 185 paragraphs, Mr Smith SC's into 105 and Ms Young SC's into 248.) What follows is therefore my attempt, without, I hope, too much injustice to any of them, to summarise the submissions in my own words.

[52] Before going to the submissions on the actual grounds, I should indicate that Mr Courtenay very helpfully provided us with a considerable amount of material, as well as detailed submissions, on the principles to be applied in interpreting constitutions, in particular the so called 'presumption of constitutionality' and the burden of proof in litigation which seeks to challenge the constitutionality of legislation. Ms Young for her part countered with submissions of her own on these points and I will refer to some of this material when I come in due course.

[53] Ground 1 challenges the constitutionality of the Acquisition Act and Orders on the basis that they are not in compliance with section 17(1) of the Constitution, which provides that the Acquisition Act should lay out a comprehensive code or regime for the carrying out of compulsory acquisitions by the State. In particular, it was contended, in reliance on the decision of this court in **San Jose Farmers' Co-Operative Society Ltd v Attorney General (1991) 43**

WIR 63, sections 64, 65, 66, 67 and 71 of the Acquisition Act failed to satisfy the mandatory requirements of section 17(1), in that they did not prescribe the principles on which and the manner in which reasonable compensation for the compulsory acquisition was to be determined and given within a reasonable time, and to secure to any person claiming an interest or right over the property a right of access to the court for the purpose of establishing his interest or right and of enforcing his right to compensation. Mr Courtenay took issue in particular with section 63(1) of the Acquisition Act, which provides that an order made under the Act shall be *prima facie* evidence that the property in question was required for a public purpose, contending that this provision (as, it was submitted, **San Jose Farmers** had decided) ran contrary to section 17(1)(b)(ii), which sought to ensure to the citizen a right of access to the courts for the purpose of determining that very question. Mr Smith adopted in all respects Mr Courtenay's submissions on this ground, adding only the observation that, from the standpoint of his client, "the absence of the required constitutional protections in relation to compensation has had the direct result that, nearly a year and a half after the Acquisition Act, [Mr Boyce] has still not received any compensation".

[54] In respect of ground 2, which challenged Legall J's conclusion that the compulsory acquisitions had been carried out in furtherance of the stated public purpose, the reasons for the acquisition given by the Minister were subjected to detailed analysis by Mr Smith in his skeleton argument, which was adopted in full by Mr Courtenay on this point. Thus, the appellants contended, there was no evidence before the court that, at the time of the acquisitions in 2009, the telecommunications industry was unstable and in need of improvement; that telecommunications services were unreliable and being delivered at high prices;

or that the telecommunications environment was contentious and disharmonious. As regards the need for improvement in the telecommunications industry and the reliability of the services being offered, Mr Smith made particular reference to the report of the board of directors of Telemedia to the shareholders for the fiscal year 1 April 2008 to 31 March 2009 (which had been had in fact been prepared and issued by the board of directors put in place by GOB after the compulsory acquisitions), which spoke to improvements in the industry and the delivery of service to consumers being effected by the company. As to the alleged disharmony and contention in the sector, Mr Smith pointed out that most of the litigation to which Mr Waight had referred was not current, and he specifically challenged Legall J's finding that ongoing litigation was "detrimental to the public interest". But in any event, it was submitted further, seeking to prevent litigation by taking control of a party was not a legitimate public purpose, particularly in the absence of any evidence in this case that litigation was having a detrimental effect on Telemedia. Still on the question of the stated public purpose, Mr Smith also drew attention to other factors referred to by the judge as being relevant, such as the alleged influence of Lord Ashcroft, the alleged loan from Telemedia to Belize Bank Ltd, the US$22,500,000.00 loan from the Bank to Telemedia and the possibility of Telemedia being wound up, contending that those factors could have no possible connection with the stated public purpose. As regards the Bank's position in particular, Mr Courtenay made the further point that the stated public purpose had absolutely no reference to his client and submitted that the evidence relied on by GOB fell short of providing any justification for the taking of the Bank's property in purported furtherance of the stated public purpose. There was therefore, it was submitted, no rational connection between the stated public purpose and the taking of the Bank's property.

[55] On behalf of both appellants, it was also submitted that the compulsory acquisitions were disproportionate, having regard to the stated public purpose, relying in particular on this point on the test laid down in **Regina (Daly) v Secretary of State for Home Development [2001] 2 AC 532**, among other cases. Further that the compulsory acquisitions were not for a legitimate public purpose and were therefore arbitrary and in breach of section 3(d) of the Constitution (placing great reliance on this point on what the Prime Minister had said to the House of Representatives on 24 August 2009). Both appellants also contended that the procedure adopted by the Minister/GOB had been unfair and that, in particular, the judge had erred in concluding that the appellants did not have a right to be heard by the Minister before he issued the Acquisition Orders affecting their property, contending that there was considerable Commonwealth authority that supported the existence of a right to be heard in circumstances such as those existing in the instant case.

[56] Finally, the complaint in ground 4 that the Minister/GOB had acted in a discriminatory manner in relation to Mr Boyce, was supported in submissions made on behalf of both appellants, in reliance in particular on section 16(2) of the Constitution. The evidence of discriminatory conduct on the part of GOB was to be found, it was submitted, in the Prime Minister's statement, in which he had stated specifically that "the shareholding owned by Belizeans will be left intact", thereby making it clear that the Acquisition Act and Orders were targeted at people who were not from Belize. It was submitted further that although section 16(3) of the Constitution, in which a definition of 'discriminatory' was given, did not specifically embrace 'citizenship' within the prohibition against discrimination, citizenship was clearly an analogous category to 'place of origin', which was

specifically mentioned, and on this basis fell to be treated as coming within the prohibition against discrimination in section 16(2).

[57] From the very outset of her submissions in response, Ms Young also placed considerable reliance on the Prime Minister's statement, which made it clear, she submitted, that the motive for the nationalisation of Telemedia was in the preservation of Belize's national interests. Accordingly, it was not an *ad hominem* move, but was designed to deal with a structural problem in the telecommunications sector. Against this background, the stated public purpose therefore fell "to be construed as a whole, and not fragmented whereby the pieces lose sight of the whole". It was not necessary for the Minister "to explain every step of the way how [GOB] proposed to act" in realising the stated public purpose and the judge was not for his part required "to take the Minister's explanations and subject them to a rigorous legalistic scrutiny". The correct approach "is to review the Minister's evidence as a whole and decide if it is cogent and persuasive".

[58] As regards ground 1, Ms Young's submission was that the relevant sections of the Acquisition Act were in conformity in all respects with the requirements of section 17(1) of the Constitution. The reliance by the appellants on **San Jose Farmers** for the submission that the '*prima facie*' provision in section 63(1) of the Acquisition Act offended section 17(1)(b)(ii) of the Constitution was misplaced, as this was not an issue decided by the court in that case, though, if she was wrong on this, Ms Young submitted, the provision is clearly severable without doing violence to the other provisions of the Act. The requirement in section 71 that any compensation payable as a result of a

compulsory acquisition "shall be paid out of moneys voted for the purpose by the National Assembly" was a realistic provision, given GOB's responsibility to have regard to the limits of the country's national budget. Legislation can only provide a framework within which a public authority is to carry out its functions and section 17 of the Constitution does not contemplate that, in order to secure compliance, the acquiring legislation must provide details as to, for example, "deposits, incremental payments, bond[s], debentures and the like". In a "general acquisition law such as Act No. of 2009", Parliament can only legislate in a general way and for it to do otherwise would be "to trespass into the domain of the Courts, who are the sole arbiters of what is reasonable". Ms Young submitted that a right of access to the courts for the purpose of establishing a person's right or interest in property was adequately secured by sections 63(4) and 66(1) of the Acquisition Act and that in this regard the impugned provision in **San Jose Farmers** was clearly distinguishable. As regards the complaint that a right of access to the court for the purpose of enforcing a right to compensation had not been secured by the Acquisition Act, in light of the fact that the Act did not provide for a method of enforcement of the payment of compensation, Ms Young pointed out that there is a presumption that Parliament will comply with the law and that all branches of government will respect orders made by the court. The rights of citizens were therefore adequately secured by the power of the courts to make declaratory orders, which would normally be expected to be respected by government. But in any event, it was submitted, an order of the court will be enforceable against members of the National Assembly and the court does have the jurisdiction to issue a coercive order against the legislature where it is necessary to give full effect to the Constitution.

[59] As regards ground 2, Ms Young's submission was that the core of the appellants' complaints is that they consider that the trial judge came to the wrong conclusion on the evidence before him. In fact, there had been little or no contradiction by the appellants of most of the evidence adduced on behalf of GOB and the judge had in any event shown a proper understanding of the evidence on both sides and how it related to the stated public purpose. The court had been clearly entitled to take account of the historical development of telecommunications in Belize and was not obliged to confine itself to the state of the industry on 25 August and 4 December 2009, as the appellants suggested. The trial judge had properly considered all the relevant matters and had come to conclusions on the evidence that were reasonable and correct and ought not to be interfered with by this court, given that the role of this court is to review the judge's findings for error of law in his interpretation of the evidence that was before him. On the question of proportionality, Ms Young submitted that the principle was not a "stand alone ground of review for executive action", but rather was "an element of the classic review ground of irrationality", which would only have been relevant if the appellants had sought to challenge the orders made by the Minister by way of an application for judicial review. But in any event, it is clear that Legall J had assessed the Minister's decision with a view to ascertaining whether there was balance in GOB's response to the problems in the telecommunications industry and whether on the evidence the Minister had struck a fair balance by deciding to issue the Acquisition Orders. On that evidence, the judge had therefore properly concluded that the Minister's decision to acquire 94.5% of the issued share capital of Telemedia as well as the Bank's securities had been a reasonable response to the problems faced by the telecommunications industry. But further still, this is also an area in which the

court is required to afford a margin of discretion or a degree of latitude to the executive as the decision maker.

[60] On the questions of arbitrariness and discrimination, Ms Young submitted that no basis had been shown to disturb Legall J's findings on these points, for which there had been ample support in the evidence. There had been no reference in any part of the evidence given on behalf of the respondent to place of origin or nationality and in those circumstances Mr Boyce's claim of having been the victim of discriminatory treatment had no factual basis to support it. And finally, in respect of the appellants' claim that they had a right to be heard, Ms Young submitted that where property is compulsorily acquired in accordance with section 17 of the Constitution, the common law right to be heard does not apply.

[61] Needless to say, all three counsel referred to a great many authorities in support of their submissions, to some of which it will be necessary for me to refer and to consider in some detail in assessing the proper weight to be given to the submissions, which is the task to which I shall now turn. In this regard, the issues for consideration appear to me to be these:

(i) Did the Acquisition Act comply with the requirements of section 17 of the Constitution;

(ii) was Legall J justified in his conclusion that the Minister had issued the Acquisition Orders for the stated public purpose;

(iii) was the Minister's response to the problems of the telecommunications industry proportionate in the circumstances;

(iv) were the actions of GOB/the Minister arbitrary and/or discriminatory in the circumstances; and

(v) did the appellants or either of them have a right to be heard by the Minister before the Acquisition Orders were made.

The presumption of constitutionality

[62] But before turning to the issues themselves, it may be helpful to consider briefly the parties' submissions on the question of the proper approach to the interpretation of the Constitution, in particular as regards the so called presumption of constitutionality.

[63] Legall J considered that "a presumption of constitutionality" flowed from the basic premise of the Constitution, set out in section 2, that it is "the Supreme Law of Belize, and that if any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void" (para. 41). He then went on to state, after citing various dicta from decisions of the Privy Council and others, that "The court therefore begins with the presumption of constitutionality of the legislation, and the onus is on the person challenging the legislation to prove its invalidity" (para. 43).

[64] Mr Courtenay, in submissions adopted by Mr Smith, submitted with some force that the presumption of constitutionality, which was no more than a rule of statutory interpretation, was not applicable to the instant case, because there was no provision of the Acquisition Act that was ambiguous that was required to be construed by the implication of any language. It went no further than that and, in the instant case, on a proper construction of section 17, the burden is on the State to justify a compulsory acquisition, once its constitutionality has been challenged by a member of the public. Referring to section 3 of the Constitution, which recognises the fundamental rights and freedoms enjoyed by every person

in Belize, subject to a number of specific limitations in the wider public interest set out in sections 4 to 22, Mr Courtenay submitted finally on this point that, "if a measure derogating from a fundamental right and freedom purports to fall within one of the stated limitations, then a person challenging such a measure must prove that it does not…[while if]…the measure does not purport to fall within the stated limitation, then it falls to the state to justify the constitutionality of the measure."

[65] Ms Young on the other hand, submitted that "The presumption of constitutionality in the case of written Constitutions is an accepted principle of our Constitutional jurisprudence…[and]…is not confined to textual adjustments or tax statutes…". However, Ms Young submitted, GOB's case in the court below was not conducted in reliance on the presumption of constitutionality (or on the 'prima facie' of 63(1)), but rather, the case was conducted positively and the court was provided "with a surfeit of evidence calculated to demonstrate…the justification for the nationalization". Thus, Ms Young concluded, if and to the extent that there was indeed a burden cast on GOB to prove the validity of the Minister's decision, "this burden was on a civil standard and was more than adequately met".

[66] Both counsel found some solace in the way in which the presumption of constitutionality has been articulated by judges, some at the highest level of authority, over the years. Thus Mr Courtenay naturally referred us to **The Attorney General of The Gambia v Momodou Jobe [1984] AC 689**, in which the Board applied the presumption to a law passed by the Gambian Parliament, the provisions of which were, as Lord Diplock expressed it (at page 702), "characterised by an unusual degree of ellipsis that has made it necessary to

spell out explicitly a great deal that is omitted from the actual words appearing in the sections and has to be derived by implication from them". In these circumstances, Lord Diplock described the presumption as "but a particular application of the canon of construction embodied in the Latin maxim *'magis est ut res valeat quam pereat'* which is an aid to the resolution of any ambiguities or obscurities in the actual words used in any documents that is manifestly intended by its makers to create legal rights or obligations". Thus where, Lord Diplock continued, as in the instant case, omissions by the draftsman of the law to state in express words what can be inferred to have been Parliament's intention, the court "ought to construe the law as incorporating, by necessary implication, words which would give effect to such inferred intention, wherever it do so does not contradict the words actually set out in the law itself and to fail to do so would defeat Parliament's intention by depriving the law of all legal effect" (emphasis supplied).

[67] Mr Courtenay also referred us to the statement of the principle by Lord Bridge of Harwich, speaking for the Board, in **Hector v The Attorney General of Antigua & Barbuda [1990] 2 AC 312, 319**, is in similar (albeit simpler) language: "[It] requires that, if it is possible to read the statutory language as subject to an implied term which avoids conflict with constitutional limitations, the court should be very ready to make such an implication" (emphasis supplied). However, in that case, the Board considered that it was not possible so to read the impugned statutory language and therefore concluded that the section of the Act in which it appeared offended against the Constitution of Antigua & Barbuda and could not therefore have any effect.

[68] These cases therefore both emphasise that, as with other 'rules' of statutory construction, the presumption of constitutionality must give way, in appropriate cases, to the clear provisions of the Constitution itself, as happened in **Hector**.

[69] Ms Young, for her part, directed our attention to **Mootoo v Attorney General of Trinidad & Tobago (1979) 30 WIR 411, 415**, in which Sir William Douglas, speaking for the Board, remarked that it was not in dispute between the parties, "that in a case involving an Act of Parliament the presumption of constitutionality applies, and that the burden cast on the appellant to prove invalidity is a heavy one". However, in **Grant v The Queen [2007] 1 AC 1, 12**, to which Ms Young also referred us, Lord Bingham of Cornhill, citing **Mootoo** in support, put in slightly, but it appears to me significantly, differently, stating that, "It is clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and the burden on a party seeking to prove invalidity is a heavy one" (emphasis supplied).

[70] Ms Young's final reference on this point was to **Surratt v Attorney General of Trinidad & Tobago [2008] 1 AC 655, 673**, in which Baroness Hale of Richmond, delivering judgment for the majority of the Board, stated (citing in support **Grant** and **Mootoo**) that, "The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one" (emphasis supplied). It is of more than passing interest to note, however, that Lord Bingham who was the sole dissenter in that case, considered, in agreement in some respects with the decision of the Court of Appeal of Trinidad & Tobago in the court below, that aspects of the impugned legislation were unconstitutional. It is therefore clear

that **Surratt** was a case in which that learned judge, who was the author of the judgment of the Board in **Grant**, considered that the presumption of constitutionality had been displaced in the circumstances.

[71] What appears to me to be clear from these cases is that, despite differences in formulation and emphasis, the presumption of constitutionality is no more than a convenient starting point in the consideration of any challenge to the constitutionality of a particular piece of legislation. Its ultimate applicability will in all cases be subject to actual language of the Constitution itself by which it will, in appropriate cases, be displaced. In this regard, it seems to me to be not without significance that in **Mootoo**, in which the presumption perhaps finds its most unqualified expression, Sir William Douglas considered that the Board was doing no more than applying the test laid down by the Board in its earlier decision in **Attorney General v Antigua Times Ltd (1975) 21 WIR 560**, in which it was stated (at page 574), "that the proper approach to the question is to presume, until the contrary appears or is shown" that the legislation is in conformity with the requirements of the Constitution.

[72] In the instant case, it seems to me that the only relevance of the presumption of constitutionality is the obvious one that, the Acquisition Act having been duly passed by the National Assembly and brought into force by the assent of the Governor-General, it was for the appellants, who challenged its constitutionality, to mount their challenge by bringing these proceedings against the Minister. Their having done that, it seems to me further that, as regards the aspect of the challenge to the constitutionality of the Acquisition Act that is based on its non-conformity to the requirements of section 17 of the Constitution, this is a pure question of the construction of the provisions of the Act in the light of the

requirements of the Constitution and that, as the approach taken by this court in **San Jose Farmers** demonstrates, the presumption of constitutionality has no part to play in this exercise. As regards the wider questions raised by the other aspects of the appellants' challenge to the legislation (and subject to the efficacy of the *'prima facie'* presumption in section 63(1), to which I shall in due course return), it seems to me that, given GOB's position that, although it is entitled to do so, it is not obliged to rely on the presumption because of the strength and cogency of the evidence put forward by it to justify the compulsory acquisitions, it may well be that, as Ms Young submitted, the entire debate is, if not irrelevant, in large part academic.

Compulsory acquisition – the common law heritage

[73] By way of a final preface to my consideration of the issues themselves, it may be helpful to add a few words on the common law backdrop to the Constitution, in particular sections 3(d) and 17(1). In the leading older case of **Attorney-General v De Keyser's Royal Hotel Limited [1920] AC 508**, a wartime case, the House of Lords was called upon to declare the rights of the owners of a hotel that had been taken possession of by the Crown, purporting to act under the Defence of the Realm Regulations, for the purpose of housing the headquarters personnel of the Royal Flying Corps. The owners, whose rights to compensation had been denied by the Crown, had yielded up possession under protest and without prejudice to their rights and moved the court for a declaration that they were entitled to rent for use and occupation or, alternatively, to compensation under the Defence Act 1842. The unanimous decision of the House of Lords, dismissing the Crown's appeal from the decision of the Court of Appeal, was that the Crown had no prerogative power to take possession of lands and that the owners were entitled to compensation under the 1842 statute.

[74] In his concurring speech in that case, Lord Parmoor observed (at page 568) that "The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the executive, and in the extension of Parliamentary protection in favour of the subject, under a series of statutory enactments". Thus "The Royal Prerogative has of necessity been gradually curtailed, as a settled rule of law has taken the place of an uncertain and arbitrary administrative discretion". In this vein, Lord Parmoor then went on to refer (at page 576) to "the well established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment".

[75] It is against this background that, in **Prest v Secretary of State for Wales and another (1982) 81 L.G.R. 193, 198**, to which we were referred by the appellants, Lord Denning MR, applying **Attorney-General v De Keyser's Royal Hotel**, said this:

> "It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, where it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced – for or against compulsory acquisition – the decision – by whomever it is made – should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid."

[76] In **Jones v Clianthi [2006] EWCA Civ 1712** (at para. 82), which was also cited by the appellants, Jonathan Parker LJ referred to "the well-known common law principle, variously expressed, that an Act should not be construed so as to injure or interfere with a person's [property] rights without compensation unless

the court is obliged so to construe it". It is clear that, at common law there is thus a single, unbroken and completely non-controversial stream of authority, insulating rights to land against arbitrary deprivation by the executive.

[77] In his brief concurring judgment in **R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532** (a case concerned with access to legal advice and the right to legal professional privilege, to which we were referred by both parties on the issue of proportionality, and to which I will in due course return in that context), Lord Cooke of Thorndon said this (at page 548):

> "The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them…such rights may be curtailed only by clear and express words, and then only to the extent necessary to meet the ends which justify the curtailment. The point that I am emphasising is that the common law goes deep."

[78] There are obviously many factors that inform the making of a constitution such as ours (hardly least of all, as Lord Hope of Craighead characterised it memorably, in a wholly different context, the "march of international jurisprudence" - **Watson v R [2004] 3 WLR 841**, para. 30). But it nevertheless seems to me that the attitude of the common law towards the deprivation of property does find a clear reflection in the Constitution, thus providing some validation of Lord Cooke's observations referred to in the previous paragraph. There are firstly the recitals, which affirm (at (e)) the requirement by the people of Belize of "policies of state…which preserve the right of the individual to ownership of private property and the right to operate private businesses", then section 3(d), to which I have already referred, which prescribes, as one of the fundamental rights and freedoms to which every person in Belize is entitled,

"protection from arbitrary deprivation of property", and ultimately section 17, which supplies the detailed machinery for the protection of this right. There can therefore be no doubt that the Constitution, as did the common law, "evinces a particular solicitude for the protection of property in several of its provisions" (per Conteh CJ in **Bruce v The Attorney General and the Minister of National Resources and Environment**, Claim No. 929 of 2009, judgment delivered 11 May 2010, at para. 45).

Issue (i) - is the Acquisition Act in conformity with section 17(1) of the Constitution?

[79] The appellants challenge the Acquisition Act on the basis that it does not make provision, as it is required by section 17(1) to do, for the principles and manner in which reasonable compensation for the property compulsorily acquired is to be determined and given within a reasonable time (section 17(1)(a); a right of access to the court to a person for the purpose of establishing his interest or right to the property (section 17(1)(b)(i)), or for the purpose of enforcing his right to any such compensation (section 17(1)(b)(iv)).

[80] In **San Jose Farmers**, Liverpool JA summarised the requirements of section 17(1) in this way:

> "In my view section 17(1) of the Constitution, which protects property from deprivation, seeks to ensure that a law which provides for compulsorily taking possession of property, or for compulsorily acquiring an interest in, or right over property, must prescribe certain things, and secure certain rights to the person whose property is being (as in this case) compulsorily acquired or compulsorily taken possession of. The things which the law must prescribe are: (a) the principles on which reasonable compensation is to be determined and given within a reasonable time; and (b) the manner in which reasonable compensation is to be determined and given within a reasonable time.

> The law must also secure to any person who claims an interest in or right over the property a right of access to the courts for the following purposes: (a) to establish his interest or right; (b) to determine whether the taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition; (c) to determine the amount of compensation to which the person may be entitled; and (d) to enforce that person's right to the compensation."

[81] In that case, the court was faced with a challenge to the constitutionality of certain sections of the Land Acquisition (Public Purposes) Act, ('the Act'), under the aegis of which GOB purported to acquire compulsorily a 76.82 parcel of land near to the San Jose Village in Orange Walk District. The appellant ('the Society') claimed for declarations that the purported acquisition was void and in violation of the constitutional rights of the members of the Society, which also claimed damages for the alleged breach by GOB of a contract for the sale of the said parcel of land to the Society. On the trial of a preliminary issue, the learned Chief Justice (acting) found that sections 3, 19 and 22 of the Act contained provisions as regards the payment of compensation which did not conform with section 17 of the Constitution: section 3 by providing that the Minister's declaration was "conclusive evidence that the land to which it related was for a public purpose"; section 19 by providing for the assessment of compensation to be based on the market value of the property two years prior to the date of acquisition; and section 22 by empowering the Board for the Compulsory Acquisition of Land to add a fixed rate of interest of 6% *per annum* on unpaid awards.

[82] However, the Chief Justice considered that the offending sections could be modified by the court, pursuant to section 134 of the Constitution, so as to bring them into conformity with the Constitution. Thus he considered that section

3 of the Act should be construed to read that the Minister's declaration should be *prima facie* (in place of conclusive) evidence that the acquisition as for a public purpose; that section 19(a) (the valuation date) should be construed with the words 'two-year period' deleted from the section; and that section 22 (the rate of interest) was to be construed to mean that every award of compensation should carry interest at the rate of 6% per annum, but that the Board of Compensation might also include interest at such rate as it thought just on the whole or part of the compensation, for the whole or any part of the period between acquisition of the land and payment of compensation. But the Chief Justice declined to accept the Society's further submission that section 32 of the Act, which conferred on the Minister a discretion to order that compensation might in certain circumstances be paid over a 10 year period, with interest also calculable at the rate of 6% per annum, was not in compliance with section 17. On the question of access to the courts, the Chief Justice held that section 24 of the Act provided for such access by way of an appeal to the Court of Appeal from the Board for the Compulsory Acquisition of Land, or also by way of section 20 of the Constitution, which provided a means of access to the courts to anyone alleging a breach of his fundamental rights. By this means, the Chief Justice therefore held that sections 17(1)(b)(i), (ii) and (iii) of the Constitution had been complied with.

[83] The Society appealed from the Chief Justice's decision on a number of grounds, one of which was that "the replacement of the words 'conclusive evidence' in section 3 of the Act with the words '*prima facie* evidence' fails to cure the Act's non-conformity with section 17(1)(b)(ii) of the Constitution." It was held by a majority of the court (Henry P and Liverpool JA) that, despite the Chief Justice's intervention, several of the provisions of the Act remained in breach of the Constitution and should accordingly be modified (pursuant to section 134) to

bring them in conformity with the Constitution. (Sir James Smith JA dissented, not as to the substance of the decision of the majority, but on the question whether it was open to the court to effect the modifications proposed by the majority under the provisions of section 134 of the Constitution.)

[84] As regards the reasonableness of the compensation payable upon compulsorily acquisition and payment within a reasonable time, the court held, firstly, that sections 19(a) and 22 of the Act (providing for the value of the land to be assessed as at a date two years before the date of the compulsory acquisition and fixing the rate of interest at 6% respectively) failed to satisfy the requirements of section 17 relating to reasonable compensation. And, secondly, that so did section 32, which provided for payment of any award of compensation over a specified amount to be made over a 10 year period (with interest payable at a fixed rate of 6% per annum). With regard to the right of access to the courts, it was held that the mandatory requirements of section 17(1) were not met either by means of a right of access to the courts provided for in other sections of the Constitution itself (such as section 20), or by way of an appeal from the findings of the Board for the Compulsory Acquisition of Land. What was required by section 17(1) was that the law providing for the compulsory acquisition should itself make provision for direct access to the courts for the purpose of establishing the interest or right of a claimant over property compulsorily acquired, or for the purpose of determining whether the acquisition was for a public purpose, or for the purpose of enforcing his right to compensation.

[85] However, the court considered that it was possible to modify sections 3, 8, 17 and 18 of the Act so as to bring them into conformity with the Constitution.

The proposed modifications were set out in the judgment of Henry P (at page 74), with the concurrence of Liverpool JA, as follows:

> "(a) the insertion of section 3 next after subsection (4) of the following as subsection (4A) –
>
> '(4A) Any person claiming an interest in or right over the land shall have a right of access to the courts for the purpose of determining whether the acquisition was duly carried out for a public purpose in accordance with this Act.'
>
> (b) the insertion in section 8 next after subsection (2) of the following as subsection (3) –
>
> '(3) Any person claiming an interest in or right over the land shall have a right of access to the courts for the purpose of establishing his interest or right (if any).'
>
> (c) The insertion in section 17 next after subsection (2) of the following as subsection (3) –
>
> '(3) the award may be enforced in the same manner as a judgment or order if the Supreme Court to the same effect.'
>
> (d) the insertion in section 18 next after subsection (3) of the following as subsection (3A) –
>
> '(3A) The determination by the magistrate under this section may be enforced in the same manner as a final judgment or order of the magistrate within the meaning of section 25 of the District Courts (Procedure) Act."

[86] In **San Jose Farmers**, it was possible for the court to adopt this approach, because the Act was an "existing law", as defined by section 134(6) of the Constitution and the court was therefore empowered by section 134(1) to construe it "with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution".

[87] Against this background of settled authority, I come now to consider how the provisions of the Acquisition Act measure up to the requirements of section 17(1), as expounded by this court in **San Jose Farmers**. For this purpose, I have subdivided the requirements of section 17(1)(a) into the principles on which reasonable compensation is to be **determined** and the principles upon which it is to be **given,** within a reasonable time.

(a) The principles on which and manner in which reasonable compensation is to be **determined** within a reasonable time

[88] The appellants make no point about sections 64, 65 and 66 of the Acquisition Act, in which the manner in which reasonable compensation is to be determined is set out. Those sections make provision, as has been seen, for the notification of acquisition and submission of claims, negotiations and, failing agreement, by the institution of proceedings by the persons claiming to be entitled to compensation.

[89] The appellants likewise do not make any general objections to section 67, which sets out the principles on which reasonable compensation is to be assessed. In **San Jose Farmers**, Liverpool JA had described the largely similar provisions of the Act under scrutiny in that case as "a simple, compendious and sensible way in dealing with the principles which are to be taken into account in assessing compensation" (page 81). However, Mr Courtenay did complain that section 67 appears appropriate to property for which it is necessary to determine a market value and not to property, such as the Bank's loan facility, "the value of which can be easily ascertained without negotiation or court action". Ms Young's response to this complaint was that it incorrectly presumed that the value of the property is not in dispute, as would be the case where, as here,

there is a challenge to the validity of the Bank's loan of US$22.5 million to BTL, on the ground that it was made in violation of the Companies Act.

[90] Without making any judgment on the viability of the challenge to the validity of the loan (which is a matter yet to be adjudicated), I think that Ms Young's comment is a generally fair one. For while, as Mr Courtenay maintained, the book value of the loan facility might be easily ascertainable, it might yet be necessary to ascertain whether any impediments exist to the Bank's recovery of its full value. But in any event, and perhaps more concretely, section 67(1)(a), which provides that the value of the property shall be taken to be the amount which it might be expected to fetch if sold in the open market, is expressly subject to the sub-paragraphs which follow, including section 67(1)(c), which mandates the court to employ "the generally accepted methods of valuation <u>of the kind of property that has been acquired</u>" (emphasis supplied). This makes it clear, it seems to me, that the valuation process must take into account the actual nature of the specific property acquired. I do not therefore consider that, taken as a whole, section 67 falls short in any substantial respect of the requirements of section 17(1), even when allowance is made for the special nature of property acquired from the Bank.

(b) <u>The principles on which and manner in which reasonable compensation is to be **given** within a reasonable time</u>

[91] Section 63(3) of the Acquisition Act provides that "there shall be paid to the owner of the property that has been acquired by virtue of the said order, reasonable compensation within a reasonable time in accordance with the provisions of this Act" and section 71 provides further that "All amounts which have been awarded by way of compensation…shall be paid within a reasonable

time". The first point which Mr Courtenay makes as regards section 63(3) is that the constitutional requirement that the law by virtue of which the compulsory acquisition is being carried out must prescribe the principles on which and the manner in which reasonable compensation is to be given within a reasonable time, is not met by the mere repetition in the Acquisition Act of the language of the Constitution itself. I would have thought that Mr Courtenay was clearly right on this point: had the framers of the Constitution been of the view that nothing further needed to be said about the principles upon and the manner in which compensation would be determined and paid to the property owner within a reasonable time beyond what is already stated in section 17(1)(a) itself, then it seems to me that they would not have found it necessary to require that those principles be explicitly stated in the acquiring legislation. In other words, what section 17(1)(a) requires is that the principles regarding determination and payment must be elaborated in the acquiring legislation itself.

[92] But Ms Young in answer to this point directs our attention to other sections of the Acquisition Act, such as sections 64(1) and (2) (notification to owners), 65(1) (treating with claimants, including, if necessary by way of court proceedings), 66(2) (parties to be named in the proceedings), 66(3) (protection of parties under a disability or incapacity), 68(2) (the power of the court to award interest at commercial rates), 69(1) (power of the court to order costs), and 71 (compensation to be paid and moneys voted for the purpose by the National Assembly). Taken together, Ms Young submitted, these provisions amply satisfy the requirement of section 17(1)(a).

[93] I accept that those sections identified by Ms Young do go some way towards describing the manner in accordance with which compensation will be

determined. In **San Jose Farmers,** the court found comparable provisions of the Act to be in conformity with section 17(1)(a) (see per Liverpool JA at page 81). (Although I would observe in passing that neither sections 68(2) nor section 69(1), as to the power of the court to award interest and costs respectively, adds anything to the powers of the court under the general law.) However, they do not in my view address the principles on which compensation will be determined and paid. So, for instance, it would obviously be important to an affected property owner to know what is the basis upon which payment is intended to be made, given, as Liverpool JA observed in **San Jose Farmers** (at page 82) that "Compensation within a reasonable time can only mean that payment must be made in full as soon as is reasonably practicable after the amount of compensation due is finally settled". While the ideal way of achieving this (certainly from the property owners' standpoint) would be by payment in full immediately after determination of the amount (and if this is GOB's intention, then the legislation should so state), this may not be practical given the exigencies of government and the many other demands on the public purse. If what GOB proposes is payment in instalments (always bearing in mind that in **San Jose Farmers** the court did not consider payment over 10 years at 6% interest to be payment of compensation within a reasonable time), then one would also expect the proposed basis of payment to be spelled out in the legislation as well.

[94] In my view, the specificity of the requirements of section 17(1) demonstrates the intention of the framers of the Constitution that, as part of its explicit aim of providing protection from arbitrary detention of property, the acquiring legislation should as far as possible insulate the property owner against the purely discretionary exercise of governmental power. The real problem with

section 32 of the Act in **San Jose Farmers** was, as Liverpool JA observed (at page 83), that it left it within the Minister's discretion, unilaterally, to order that compensation should be paid in particular cases over a 10 year period. Similarly in the instant case, a provision such as section 63(3), which merely repeats the constitutional incantation that compensation shall be paid within a reasonable time, has the result, as Mr Courtenay observed, that the landowner may be left entirely to the discretion of government as to what constitutes a reasonable time in all the circumstances. It is clear that it is for precisely this reason that section 32 was held to be constitutionally offensive in **San Jose Farmers** and it is equally for this reason that I also consider section 63(3) to be similarly deficient, by the omission from it of the principles upon which compensation will be determined and paid, as required by section 17(1)(a). That this is hardly an academic point is surely demonstrated by the fact that, in the instant case, notwithstanding Legall J's obvious concern "that negotiations for the payment of compensation have stalled" and his clear directive to the Financial Secretary to "without delay, comply with the provisions of section 65(1) of the Acquisition Act for the payment to the claimants of reasonable compensation within a reasonable time …" (para. 161), it appears that, up to the date when the hearing of these appeals was completed, there had been no movement whatsoever in this regard.

[95] I would therefore conclude that section 17(1)(a) requires that the acquiring legislation do more than provide a framework within which government is to comply with its obligations. I accordingly consider that, in order to fulfil the constitutional requirements, the acquiring legislation is required to do precisely what Ms Young submitted (at para. [58] above) that it was not required to do, that is, to provide details in the acquiring legislation itself, with regard to, for example, "deposits, incremental payments, bond [sic] debentures and the like".

[96] Finally as regards section 71 of the Acquisition Act, Legall J's comment on the appellants' complaint that the section was deficient in not making any provision for what would happen if the National Assembly refused to vote the funds requires to pay any amount awarded to the property owner for compensation to ensure payment within a reasonable time was that the Supreme Court would, if necessary, "command" the national assembly to obey the law and the Constitution (para. 131). Despite the fact that, as Ms Young reminded us, the court in **San Jose Farmers** did not consider that there was anything offensive in the comparable section of the Act in that case (indeed, as Liverpool JA observed at page 82, no complaint was made by the Society against this provision), the provision seems to me to be problematic in a number of respects. In the first place, it is not at all clear how, from a practical point of view, a judge of the Supreme Court would frame an order against the National Assembly requiring its members to vote in favour of payment of an amount awarded as compensation for a compulsory acquisition. And secondly, even if such an order could by judicial ingenuity be drawn, it is equally unclear how it would possibly be enforced against the National Assembly as a body or against individual members, as such an order would, as the appellants submitted, clearly be in breach of parliamentary privilege.

[97] Ms Young referred us in a related context (see para. [106] below) to the decisions of the Privy Council in **Gairy v Attorney-General of Grenada (No 2) [2001] UKPC 30** and **Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette [2000] UKPC 31**. In **Gairy**, the constitutional right of the appellant to payment of the sum of EC$2.792 million was being infringed by non-payment to him by the Government of Grenada. The Privy Council made an order (at para, [31]) directing the Minister of Finance "to

take all steps necessary to procure that payment be made to the appellant forthwith" for the amount due plus interest. The order further provided that "If the exigencies of public finance prohibit the immediate payment to the appellant of the full sum outstanding, the Attorney-General, representing the Minister of Finance, may apply to [a] judge for approval of a schedule of payment by instalments". However, despite the clear view of the Board that the appellant was being kept out of money that was constitutionally due to him, their Lordships nevertheless declined to make a 'mandatory' order against the Minister, in the sense of having some sanction for non-compliance (whether explicit or implicit), such as committal, attached to it. In a judgment delivered by Lord Bingham of Cornhill, the Board nevertheless issued a warning that it would "caution against the view that a mandatory order made against a Minister (or a Government or a public official) may be disregarded with impunity; a court charged under the Constitution with securing effective protection of fundamental rights cannot be denied such powers of enforcement as proves necessary for the task" (para. [24]). The Board did not however elaborate on what those powers of enforcement might be and how they could be enforced if necessary.

[98] Although **Gairy** is a case of obvious importance (not least of all for the clear statement that "in interpreting and applying the Constitution of Grenada today, the protection of guaranteed rights is a primary objective, to which the traditional rules of the common-law must so far as necessary yield" – see para [9]), it seems to me that it cannot avail GOB in the instant case. A direction, or indeed an order, of the court to a minister or other public official that payment of reasonable compensation to the property owner should be made, would still not

be effective to secure what section 71 requires, which is for the necessary funds to be voted by the National Assembly.

[99] **Bahamas District** is, in my view, even less promising. The case was concerned with whether the courts had jurisdiction to interfere in the legislative process at the Bill stage, to forestall the threatened enactment by Parliament of legislation that might be in breach of the Constitution of The Bahamas. In a judgment delivered by Lord Nicholls of Birkenhead, the Board referred to the common law principle by which the courts recognise that Parliament has exclusive control over the conduct of its own affairs, with the result that a challenge to what is said or done within the walls of parliament in performance of its legislative functions will not be allowed by the courts (**Prebble v Television New Zealand Ltd [1995] 1 AC 321**). That principle was essential, Lord Nicholls observed, "to the smooth working of a democratic society which espouses the separation of powers between a legislative Parliament, an executive government and an independent judiciary". However, the Board considered that that principle should be modified in the case of a state, such as The Bahamas, with a supreme, written constitution, "to the extent, but only to the extent, necessary to give effect to the supremacy of the Constitution". Accordingly, it was held that, although the courts of The Bahamas should as far as possible avoid interfering with the legislative process, the courts would, in exceptional cases, "have *jurisdiction* to entertain a claim that the provisions of a Bill, if enacted, would contravene the Constitution…and consider whether any relief is called for". Pre-enactment relief would therefore be granted by the court "only when, exceptionally, this is necessary to enable the courts to afford the protection intended to be provided by the Constitution".

[100] **Bahamas District** was therefore primarily concerned with an issue which does not arise in the instant case, that is, whether and to what extent the court has jurisdiction to intervene in the legislative process at the Bill stage to forestall a threatened breach of a fundamental right and it is to that extent of no assistance on the question with which this case is concerned, which is whether section 71 of the Acquisition Act satisfies the mandatory requirements of section 17(1) of the Constitution. It nevertheless seems to me that, by its affirmation of the general principle that Parliament has control over its own affairs, even in the context of a supreme, written constitution, save in the highly exceptional circumstances of the case itself, **Bahamas District** plainly supports the appellants' contention that section 71, by providing that all amounts awarded by way of compensation for compulsory acquisition "shall be paid out of moneys voted for the purpose by the National Assembly", falls short of the requirement of section 17(1)(a), given the virtual impossibility of enforcing any order directed at the National Assembly or its members.

(c) A right of access to the courts for the purpose of establishing his interest or right to any person claiming an interest or right over the property (section 17(1)(b)(i)).

[101] It appears to be common ground that there is no provision in the Acquisition Act corresponding to section 8(3) of the Land Acquisition Act, which provides that "Any person claiming an interest in or right over the land shall have a right of access to the courts for the purpose of establishing his right or interest (if any)". This section has its genesis in **San Jose Farmers**, in which the court held that the omission of such a provision from the Act, as it then stood, was inconsistent with the clear requirement of section 17(1)(b)(i) that such a provision should be included in the acquiring legislation (see per Henry P, at page 73). A

provision in the precise terms in which it now appears in section 8(3) of the Land Acquisition Act was therefore proposed by Henry P as one of the modifications to Act required to bring it into conformity with section 17(1)(b)(i) (see, per Henry P, at page 74).

[102] In the instant case, Ms Young pointed out that section 63(4) of the Acquisition Act expressly gives to any person claiming an interest in or right over the acquired property a right of access to the courts "for the purpose of determining whether the acquisition was duly carried out for a public purpose in accordance with this Act". She also directed our attention to section 66(1), which provides for proceedings in respect of any claims to compensation (other than claims determined by agreement) to be commenced by fixed date claim form in accordance with the Supreme Court (Civil Procedure) Rules, 2005. On the basis of these provisions, Ms Young submitted that, once there was a right of access to the courts by a person claiming an interest in or right over the acquired property for the reasons stated in those sections, then the determination of that person's right to or interest over the property would be "an incident of the Court's jurisdiction".

[103] The primary issue on this point in **San Jose Farmers** was, as Ms Young was careful to point out, whether the requirement of section 17(1)(b)(i) could be satisfied by a right of access either by way of appeal or pursuant to some other law (including section 20 of the Constitution itself). However, it appears to me that her submission before us does nevertheless bear some general similarity to the submission made on behalf of the Attorney General in that case that the requirement of access in section 17(1)(b)(i) was satisfied once the claimant's

access to the courts for some other purpose was secured (see per Henry P at pages 71 – 72). It therefore seems to me that the submission must attract the same response as it did in **San Jose Farmers**, which is that "section 17(1) is clear and unambiguous in its terms and specifically requires the particular law by or under which the property is compulsory acquired to contain the provisions referred to in paragraphs (a) and (b) of section 17(1)". Accordingly, the general principle of constitutional interpretation which calls for "a generous and purposive interpretation of constitutional provisions, especially those protecting and entrenching fundamental rights and freedoms...cannot be applied to the interpretation of clear, unambiguous and specific provisions" (per Henry P, at page 72).

[104] In my view, therefore, the omission from the Acquisition Act of a provision in terms similar to that now contained in section 8(3) of the Land Acquisition Act is in breach of the mandatory provision of section 17(1)(b)(i).

(d) A right of access to the courts for the purpose of enforcing his right to compensation to any person claiming an interest over or a right to the property (section 17(1)(b)(iv))

[105] Mr Courtenay submitted that there is no provision in the Acquisition Act for enforcing the payment of compensation arrived at either by way of negotiation with the Financial Secretary, pursuant to section 65(1), or by way of a judgment handed down by the Supreme Court on a claim brought by the property owner. With regard to the latter, Mr Courtenay referred us to the traditional prohibition against the issuing of a writ of execution against the Crown (Part 46.6 of the Supreme Court (Civil Procedure) Rules 2005), or the enforcement of any

payment due from the Crown by the issuing of any "execution, or attachment or process in the nature thereof…" against the Crown (Crown Proceedings Act, section 25(4)).

[106] Ms Young did not dispute that this was a lacuna in the Acquisition Act. However, she submitted, there is a presumption that Parliament will comply with the law and that, while "it is accepted that sometimes this does not happen, the principle has to be given recognition and respect". In support of this submission, Ms Young referred us to textbook authority on the efficacy of declarations and to the decisions in **Gairy** and **Bahamas District** (see para. [97] above). The problem with this submission, it seems to me, is that, as Mr Courtenay submitted, in my view correctly, "reliance on other laws as a basis for enforcement does not pass constitutional muster". In my view, this must follow irresistibly from the decision of the court in **San Jose Farmers**, that what the Constitution states in section 17(1)(b)(iv) is that there must be provision as to the enforcement of compensation contained in the law which effects the compulsory acquisition (per Henry P, at pages 71 – 72 and Liverpool JA, at page 83).

[107] I would therefore conclude on this issue, in agreement with the appellants, that the Acquisition Act is in contravention of section 17(1) of the Constitution, in that it:

(i) does not prescribe the principles on which reasonable compensation is to be paid within a reasonable time;

(ii) does not secure to a person claiming an interest or right over the acquired property a right of access to the courts for the purpose establishing his interest or right; and

(iii) does not secure to a person who has been awarded compensation a right of access to the courts for the purpose of enforcing his right to compensation.

[108] In so far as the consequenceof this conclusion is concerned, section 2 of the Constitution provides, as is well known, that any law which is inconsistent with it shall, to the extent of inconsistency, be void. In **San Jose Farmers**, the court, applying the Privy Council decision in **Hinds, and others v R (1975) 24 WIR 326**, determined that certain invalid sections of the Act could be modified, while others could be severed, on the basis that what remained in the Act after severance would still constitute "a practical and comprehensive scheme" (per Lord Diplock at page 344). In the instant case, I do not think that either remedy is available to this court, the one because the court's powers under section 134 of the Constitution are not available in respect of the Acquisition Act, because it is not an 'existing law' for the purposes of section 134 (see para. [86] above), and the other because what I have found to be offensive to the Constitution in the Acquisition Act relates to omissions, to which the tool of severance naturally cannot apply. The result in respect of these omissions is therefore that mandated by section 2 of the Constitution, which is that the Acquisition Act must be declared void to the extent of its inconsistency with section 17(1).

Issue (ii) – were the compulsory acquisitions duly carried out in accordance with the stated public purpose?

[109] There is no question that section 63(4) of Acquisition Act fulfils the requirements of section 17(1)(b)(ii) by providing that "Any person claiming an interest in or right over property shall have a right of access to the courts for the purpose of determining whether the acquisition was duly carried out for a public purpose in accordance with the provisions of this Act". This was, in large part, what the proceedings that gave rise to these appeals were about.

[110] The objective of section 17(1)(b)(ii) is, in my view, to provide additional protection to property owners against the arbitrary deprivation of their property, by prescribing a means whereby government's stated public purpose can be interrogated by the court with a view to ascertaining that the taking of property was carried out for a public purpose. At this stage, therefore, it is the court's determination, and not the Minister's, which is important.

[111] It is obviously for this reason that, at first instance in **San Jose Farmers**, the acting Chief Justice concluded that section 3 of the Act that was before the court in that case, by providing that the Minister's declaration was "conclusive evidence that the land to which it related is required for a public purpose", did not conform with section 17(1)(b)(ii): the conclusive statutory presumption thus created excluded the court from conducting the very exercise that is required of it by the Constitution.

[112] It further seems to me that, on careful analysis of the decision of this court in **San Jose Farmers**, the court considered that the Chief Justice's substitution of the words '*prima facie* evidence' for the words 'conclusive evidence' in section 3 did not improve the situation and that the section, even with that emendation, remained in breach of the Constitution. While I fully accept that, as Miss Young pointed out, none of the judges specifically addressed this issue, it nevertheless appears to me that the conclusion that this court did not consider the Chief Justice's modification satisfactory is inevitable, for at least two reasons. In the first place, one of the specific grounds of appeal against the Chief Justice's decision was that "the replacement of the words 'conclusive evidence' in section 3…with the words '*prima facie* evidence' fails to cure the Act's non-conformity with section 17(1)(b)(ii)…" (see the judgment of Liverpool JA at page 78). And secondly, and in my view decisively, Henry P concluded that section 3 should be modified by deleting the words "and the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose" (at page 70). The fact that Henry P did not go on to propose any additional or substitute wording, suggests to me that, in agreement with the Society (who were the appellants in that case), the learned President did not consider that the substitution of the words *'prima facie* evidence' was sufficient to satisfy the constitutional mandate.

[113] I accordingly consider that, in accordance with the decision of this court in **San Jose Farmers**, section 63(1) of the Acquisition Act, to the extent that it purports to make the Minister's order "prime facie evidence that the property to which it relates is required for a public purpose", is inconsistent with both sections 63(4) of the Act and 17(1)(b)(ii) of the Constitution, which reserve to the

court the task of determining whether the acquisition was carried out for a public purpose. I wish it to be clear on this point, however, that, even if I am wrong in reading **San Jose Farmers** to have so decided, I would nevertheless consider that the '*prima facie*' provision in section 63(1) is in principle inconsistent with section 17(1)(b)(ii), because it seeks either to limit or qualify the property owner's right to a determination by the court whether the taking was for the stated public purpose. I should add, by way of a footnote on this point, that it is unfortunate that Legall J, who concluded that there is nothing in section 17 of the Constitution which forbids the National Assembly from making the *prima facie* provision in section 63(1) of the Acquisition Act (para. 35), does not appear to have considered at all whether the decision in **San Jose Farmers** might have had any bearing on the point.

[114] The result of all this is that, in my view, section 63(1) is, to the extent of its inconsistency with section 17(1)(b)(ii), void. However, I accept that, as Miss Young submitted (and the appellants did not dispute), if necessary, this particular deficiency could be cured, without doing any violence to the remainder of the legislation, by applying the principle of severance (see para. [108] above).

[115] I now turn to consider the matter reserved to the court by section 17(1)(b)(ii) of the Constitution and section 63(4) of the Acquisition Act, that is, the determination of whether the compulsorily acquisitions in this case were "duly carried out for a public purpose". Putting the '*prima facie*' point on one side, I do not propose to dwell too much on the spirited and very interesting debate between the parties on the incidence of the legal and evidential burdens of proof

with regard to this exercise. It seems to me that what the Constitution requires of the court is a consideration and assessment of the reasons for the compulsory acquisition put forward by GOB, with a view to determining whether the taking was indeed for the stated public purpose. GOB accepted this challenge by filing copious evidence that, it was contended, demonstrated the justification for the acquisitions and it seems to me that, however it may be characterised in traditional burden of proof analysis, it is for the court to consider that evidence for what it is worth. In this regard it therefore seems to that Lord Denning MR's statement (in **Prest**, para. [76] above) that "in any case…where the scales are evenly balanced – for or against compulsory acquisition – the decision – by whomever it is made – should come down against compulsory acquisition" is unremarkable and apt to convey no more than that in such a case, the court will not have been able to determine, on an overall assessment of the evidence put forward by both sides, that the compulsory acquisition was in fact duly carried out for a public purpose. In the context of this exercise, Lord Scarman's caution that "the technicalities of the law of evidence must not be allowed to become the master of the court" (in the context of judicial review proceedings in **R v Home Secretary, Ex parte Khawaja [1984] 1 AC 74, 114**), also appears to me to be entirely apposite.

[116] The preamble to the 25 August Order states the Minister's conclusion that control over communications should be acquired for a public purpose, the terms of which it may be helpful to repeat:

> "…namely, the stabilisation and improvement of the telecommunications industry and the provision of reliable

telecommunications services to the public at affordable prices in a harmonious and non-contentious environment".

[117] It is right to say at once, as Ms Young more than once reminded us, that the appellants did not dispute that the public purpose, as stated by the Minister, was indeed a 'public purpose' (or that, as Mr Courtenay put it, "these are purposes that serve the public"). What is in dispute, however, is whether the evidence adduced on behalf of GOB in these proceedings explains why compulsory acquisition was required in order to achieve the stated public purpose. The evidence relied on by GOB was put forward in affidavits sworn to by the Minister himself, the Financial Secretary, Mr Waight, and Mr Nestor Vasquez, the interim Chairman of Telemedia. In her printed skeleton argument, Ms Young summarised GOB's case as follows:

(i) In light of (a) the extensive and all embracing security taken by the Bank to secure the loan of US $22.5 million to BTL; and (b) the fact that the loan was in default prior to the compulsory acquisition and, based on the terms of the mortgage debenture, was treated by the Bank as in default immediately upon the compulsory acquisition, "the…bank placed itself in a position whereby it had the authority and the capacity to wind up BTL" and, further, "that upon acquisition the bank …bank intended to wind-up BTL". This action would have been detrimental to the public interest in that it would have defeated the object of nationalisation to acquire control of telecommunications for the stated public

purpose and it would also mean that the industry would be monopolised by one telecommunications company, given that the Bank, BTL and Speednet were all owned by or control by the same person or entity.

(ii) The acquisition of 94% of the issued shares in BTL gave GOB control over telecommunications, which was directly connected to GOB's ability to achieve the stated public purpose.

(iii) The motive for the nationalisation of BTL was in the preservation of Belize's national interests, as was made clear by the Prime Minister in his speech to the House of Representatives.

(iv) Nationalisation was "no ad hominem move", but was for the purpose of dealing with a structural problem in the telecommunications sector.

[118] At the heart of the case, therefore, is the stated public purpose. In my view, this court is in as good a position to assess the evidence as Legall J was, given that all the evidence was given on affidavit and there was no cross examination of any of the persons who swore affidavits. However, in this exercise, the learned judge's views and conclusions on the matter must naturally be regarded with respect and, where possible, treated with deference.

[119] I fully accept that, as Ms Young submitted, it is important that the stated public purpose be construed "as a whole and not fragmented whereby the pieces lose sight of the whole" and I also accept that, in judicial review proceedings, as Mumby J observed (in **R (Sarkistan) v Immigration Appeal Tribunal [2001] EWHC Admin 486**, para. 18, cited by Ms Young), it is no part of the court's functions to "strive by way of tortuous mental gymnastics to find error in the decision under review when in truth there has been none". And further, that the court's concern "ought to be substance not semantics".

[120] But I think that it is also necessary to bear in mind that what the court is concerned with in the instant case is not an application for judicial review of the findings of an administrative tribunal, but with the constitutionally mandated determination whether the compulsory acquisition of the appellants' property "was duly carried out for a public purpose". To the extent that the public purpose upon which the compulsory acquisitions were predicated is contained in a statutory instrument having legislative force, it seems to me that, although applying one's common sense and seeking after substance over semantics are qualities much to be admired and if possible applied in any such exercise, it is impossible to avoid subjecting the Minister's order to close, textual analysis to ascertain the true dimensions of the public purpose upon which he relies. The distinction is clearly implicit in my view in the judgment of Sullivan J in **R (Puspalatha) v Immigration Appeal Tribunal [2001] EWHC Admin 333**, another judicial review case also cited by Ms Young, when he said this (at para. 43):

> "In my judgment it is very important that special adjudicators' determinations are read as a whole in a common sense way. It is not appropriate to focus on particular sentences and to subject them to the kind of legalistic scrutiny that might perhaps be appropriate in the case of a statutory instrument, charter party or trust deed." (Emphasis supplied.)

[121] The Minister's order sets out two major elements of the public purpose, which were the stabilisation and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices, in a harmonious and non-contentious environment. The first element appears to assume that, and therefore begs the question whether, the telecommunications industry was unstable and/or in need of improvement in August 2009. Implicit in the second element are the assumptions that the telecommunications services then available to the public were neither reliable nor affordable, and that the then prevailing environment was inharmonious and contentious. It is clear that there is a significant area of overlap in the assumptions in respect of both elements and I will now turn to consider briefly the evidence with regard to each of them.

(i) The unstable/contentious or inharmonious environment

[122] As will be recalled, the evidence upon which GOB relied in this regard was primarily provided by the Financial Secretary, Mr Waight (see para [32] – [35] above). Mr Waight's general theme was captured in the rubric "BTL Litigious

under Lord Ashcroft", under which he referred to various Supreme Court actions in which BTL had been involved between 2003 and 2004. In all, there were 10 such actions, in which BTL was the claimant in six (three against GOB and/or an emanation of GOB, and three against the PUC and others), GOB was the claimant in one, the PUC in two, the Social Security Board in one and 31 former employees of BTL in one. Then there was, Mr Waight stated, a further "barrage of litigation" between 2005 and 2007, giving rise to Conteh CJ's observation (in a judgment issued on 31 May 2007 in an action brought against BTL by Belize Telecom Ltd) that "for quite some time now BTL has been plagued with difficulties stemming largely from the battle for control of its management, and it has as a consequence been dragged into the courts of this country at every opportunity". Mr Waight finally referred to two later actions filed in 2009 against GOB (in neither of which BTL was involved as a party), before concluding this chronicle by referring to a statement to the House of Representatives on 10 December 2004 by the then Prime Minister of Belize, the Honourable Said Musa, ('the former Prime Minister'), on the subject of "the controversy surrounding the BTL shares". In that statement, the former Prime Minister had spoken of a "quagmire of law suits which were detrimental to the public interest", involving Carlisle Holdings Ltd and BTL.

[123] But in addition to Mr Waight's evidence, there was, of course, the Prime Minister's statement to the House of Representatives on 24 August 2009, to which the Minister specifically referred in his evidence (para. [37] above) as having set out "the reasons for the acquisition". In this statement, the Prime Minister had made a few references to litigation, the first of which was a general statement that "the PUP double dealing…has produced litigation after litigation.

The second was that "Between 2005 and 2006 alone, there were at least six BTL cases in Belize, England, the US and Canada. In the end, Ashcroft prevailed and cemented his total control". The third was by way of a promise that, after nationalisation, "There will be no more Telemedia awards against us; no more Telemedia court battles; no more debilitating waste of government's energies and resources". And lastly there was an expectation that after the nationalisation of Telemedia there would be "a greatly improved industrial relations climate and the quick resolution of outstanding worker grievances".

[124] Legall J was plainly impressed by this evidence, referring (at para. 10) to a statement by Carey JA (in **BTL v the Attorney General, Civil Appeal No. 6 of 2006**) that "all is not well with [BTL]; there are ensuing fights for the control and management of the company…there is much litigation not only before the courts of Belize, but also in Miami Florida U.S.A." The judge also referred (at para. 11) to the observations of Conteh CJ and to the statement of the former Prime Minister (both quoted in the previous paragraph), and stated that "The law suits show that there were fights for control and management of B.T.L. which were unsettling and detrimental to the public interest". Finally, returning to the same theme much later in the judgment, the judge referred (at para. 91) to "the quadmire" [sic] of law suits, which "produced a contentious environment", before concluding that "the evidence of the law suits involving the company had a direct connection or nexus to the public purpose".

[125] I regret that I am quite unable to agree with the judge on this issue, for a number of reasons. In the first place, the evidence of previous litigation provided

by Mr Waight (which the Prime Minister's statement had foreshadowed) was almost entirely historical, the most recent action filed by BTL as claimant referred to by him having been filed in 2003, some six years before the compulsory acquisitions. Secondly, given that, as the judge himself observed (at para. 92), "every person…has a constitutional right of access to the court", it is impossible to draw any conclusion as to whether a particular entity is litigious, in the sense of being "given to litigation, fond of going to law" (which is the sense in which the word is obviously used by Mr Waight, as opposed to the more neutral sense, which is "tending to go to law to settle disputes" – cf. the Concise Oxford Dictionary of Current English, 6th edn, page 635 and the 11th edn, page 832), without any information on or analysis of the causes of the litigation and without making any distinction between cases in which that entity was the claimant and those in which it was defending itself in an action brought against it. Thirdly, there was absolutely no evidence before the judge to support the conclusion that there was any litigation extant in 2009 that was either having a deleterious effect on the company itself (which the Chief Justice himself had described in 2007 as, despite the difficulties, "one of the most successful in the country…[providing]…vital services for the nation" – see para. [122] above for a reference to another passage from this same judgment), or was "unsettling and detrimental to the public interest". Fourthly, it does not appear from the evidence, even assuming that the litigation described by Mr Waight was in fact detrimental to the company and/or the public interest, it was not made to appear on the evidence precisely how the compulsory acquisitions would achieve a reduction or the elimination of such litigation (in fact, the instant proceedings themselves are hardly a hopeful sign in this regard). Fifthly, and this is a point which the Bank obviously made with some force, there was no evidence of any involvement by the Bank in any litigation between BTL/Telemedia and GOB

(indeed that litigation was for the most part instituted before the Bank made any loans to either Telemedia or Sunshine or held security over their assets). Sixthly, despite Mr Waight's efforts, there was at the end of the day no evidence whatsoever of any instability in the telecommunications industry in or around August 2009 to justify the need for the compulsory acquisitions as, as it was certainly made to appear, an emergency measure.

[126] I do not think, naturally with the greatest of respect, that the Prime Minister's promises in his statement of "no more Telemedia awards…, etc", as well as "a greatly improved industrial relations climate", can in any way take this aspect of the matter any further, in the absence of evidence of the impact of either the "Telemedia awards" or a less than satisfactory industrial relations climate (of which there was in any event no evidence) in the telecommunications sector prior to the compulsory acquisitions. In any event, it seems to me that the promise of no more Telemedia awards clearly attracts the additional comment, which the appellants also submitted on this issue, that seeking to prevent litigation by taking control of a party is not a legitimate public purpose (see **Re Burns and Township of Haldimand (1966) 52 DLR 101**, which is discussed further at para. [162] below).

(ii) Reliable telecommunications services at affordable prices

[127] The answer to the question whether a particular industry is or is not in need of improvement turns on both subjective and relative factors. Opinions will differ, sometimes radically, based on the viewpoints of the persons whose opinions are sought and it will often be relevant to ascertain, whenever the question is asked, the relative framework within which it has been posed. Thus,

those charged with the management of a public utility, or indeed of any enterprise, may well have a distinctly different answer to this question than a consumer of the particular service or services provided by that enterprise may have. The relative factor may also make the task of answering such a question a particularly difficult one for a court, which is often, no matter how full the evidence produced on both sides, not in possession of all the relevant facts, both historical and contemporary, that should inform such a judgment.

[128] These limitations could well be, although he did not say so, the reason why Legall J did not seek to make any finding on the question. It nevertheless seems to me that, in assessing whether the compulsory acquisitions were duly carried out for the stated public purpose, it is plainly a matter of high importance, given that the improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices are obviously critical aspects of the stated public purpose, to give some consideration to the actual state of the telecommunications industry, particularly from the standpoint of Telemedia's involvement in it as the major player, in the period immediately prior to the compulsory acquisitions.

[129] There was, regrettably, no evidence before the judge on this question, though there was, as I have already noted, a deep and sharp disagreement between Mr Boyce and Mr Vasquez about the quality and impact of their navigation of Telemedia during their respective periods at its helm. Although it seems to me to be impossible to resolve this disagreement on the basis of their affidavits, in this kind of situation it is nearly always helpful to assess the matters

in dispute by reference such of the evidence in a particular case that can be considered to be objective and, happily, there was some such evidence available to the court in this matter.

[130] It will be recalled that, pursuant to the 25 August Order, Mr Vasquez replaced Mr Boyce as chairman of the board of Telemedia with immediate effect. By that time, the company's previous fiscal year, that is, 1 April 2008 to 31 March 2009, was already completed, but it fell to the interim board of directors led by Mr Vasquez to sign off on the Director's Report to the shareholders for the period 1 April 2008 to 31 March 2009. In the directors' introduction to the report, the shareholders were quite properly reminded that the report had been produced by a board "that is entirely different from the Board that was in place during the fiscal year to which this Report relates". The report also stated that, since the new board had been installed, "Substantial changes have taken place in the operations and focus of the Company …some of which result from the coming to light of information on activities undertaken and on Telemedia's business strategy during the period under review as well as during prior periods, and which affected the Company's operations and financial results".

[131] That having been said, the board then proceeded to report in detail on the company's activities and performance over the year past, as well as to project some expectations for the future. The opening paragraphs of overview set the tone as follows:

> "During the fiscal year ended March 31st 2009, the Company directed most of its efforts towards the roll out of two major networks, which were aimed specifically at expanding mobile and

> fixed telecommunication services to areas that were not previously served, and more generally at improving the quality of telecommunications services. A new GSM 850/1900MHz EDGE network was installed in order to expand significantly Digicell coverage while providing additional capacity, features and functionality for customers. The new CDMA 450 network is being rolled out to provide fixed wireless telephone service along with high-speed Internet, particularly to rural and outlying communities. This network expansion programme, along with other investment in new and emerging technology, systems and software, were all a part of the strategic direction taken in upgrading the quality and reliability of telecommunications services across the nation.
>
> To complement this improvement programme, Telemedia also expanded and upgraded its transmission network to increase capacity and build additional redundancy in its infrastructure. The Company partnered with Belize Electricity Limited to utilise that Company's power transmission infrastructure for its fiber-optic network, initially linking Belize City to Belmopan. Additionally, a much larger fiber cable was being installed between Belmopan and Benque Viejo to increase transmission capacity along the entire western route, all the way to the western border.
>
> With the completion of the two new networks and additional transmission capacity, the Company is better poised to respond to the added demands of customers and prospective investors. Telemedia believes that these new developments will significantly improve the Company's competitive edge, and will make it possible to provide an expanded range of telecommunication-based business, residential and social networking services to a broadened customer base."

[132] But, the report went on to state, the picture was not all positive, because, over this period while the company's development projects were underway, "there was a substantial deterioration in the financial results during the year to March 31, 2009 compared with the previous three years". Some of this decline was attributed to "the combined result of some reduction in consumer spending caused by the global recession, increased used of VOIP ['Voice over Internet Protocol'] services from external telecommunications service providers and increased competition in the local mobile cellular market". Expenditure also rose noticeably, "reflecting higher operating costs, increased legal and advisory fees, higher taxation, and increased financial expenses as a result of increased

borrowing". Company liquidity was negatively affected by a number of financial transactions, including a large dividend payment in later 2008, and debt service payments on a loan that was contracted by the Company to purchase its own shares, a transaction which did not provide any operational benefit to the Company". Given the change in leadership of the company, provision had been made for taxation on previously unreported revenues, resulting in a restatement of the accounts. The company had also suffered from special arrangements with Speednet, a company controlled by the then principals of Telemedia, which resulted in an unfair competitive advantage over the company and a loss of revenue and market share.

[133] However, the report continued, there were a significant number of positive developments, which I would summarise as follows:

- improvement in internal efficiencies in network development, human resources, customer services, service delivery and overall project management;
- additional investments in staff training, network upgrades and overall quality standards;
- improved quality and range of services to customers;
- completion of a new GSM 850/1900 MHz EDGE network, expected to bolster substantially the reach, reliability, performance and capabilities of the Digicell service and to reinforce Telemedia's reputation for offering the best in telecommunications services, while helping to maintain market leadership in mobile communications and to offer new and existing services to customers;
- installation of new CDMA 450 network expected to be completed in current fiscal year and to benefit more than 5,000 customers in rural and outlying areas by way of new fixed line and high-speed internet services not previously available;
- expansion of fibre-optic infrastructure, including first ever optical ground wire link between Belize and Belmopan, with

additional links to Dangriga, Punta Gorda, Placencia and Independence;

- replacement of telephone exchange equipment in several rural communities with new state of the art telecommunications switches not previously available in those areas;

- improvement, enhancement and expansion of cellular services, resulting in 7.2% growth, benefits, including increased value with cheaper calling plans and much cheaper text bundles; in mobile phone customer base over the year;

- introduction of a new billing process 'e-Service' and 'e-Directory', to improve overall efficiency of customer service operations;

- a 25% increase in high-speed internet connections and expansion of free internet service to schools;

- expansion of payphone installations country-wide;

- introduction of 'Webtalk' to permit customers to make low cost voice and video calls over the internet and to safeguard company's business against external VOIP service providers;

- continuation and expansion of social services and contributions.

[134] The report's conclusion was as follows:

> "During the year Telemedia continued to rely on its dedicated employees who contributed significantly in upgrading key areas of Company facilities and operations, maintaining equipment and services, and providing support and assistance to the Company's customers, enabling Telemedia to maintain its leadership position in the provision of telecommunications services in Belize."

[135] This report was exhibited by Mr Boyce to his third affidavit in his action, which was sworn to on 10 February 2010. The only comment on this affidavit and on the 2008 – 2009 Directors' Report from Mr Vasquez that I have been able

to find is in his fourth affidavit in the Bank's action (sworn to on 26 March 2010), in which he stated (at para. 29) as follows:

> "… I have to say that any Directors Report must be assessed in the context of accompanying Financial Statements. The performance of a company is measured by its bottom-line profit. The Financial statements accompanying the Directors Report (and in the Directors Report) for the year 1st April 2008 to 31st March 2009 exhibited to this affidavit…reveal that 2008 to 2009 was a disastrous financial year for the Company".

[136] I have no reason to question whether Mr Vasquez's comment was a fair one. (I should add in passing that I consider it an unsatisfactory feature of how this litigation was conducted that the court did not have the benefit of any truly independent evidence on either side to enable it to break the deadlock between Messrs Boyce and Vasquez.)

[137] However, I am bound to say that, if it was the view of Mr Vasquez's board that the "disastrous financial year" that the 2008 – 2009 financial statements depicted was likely to have a negative or damaging impact on Telemedia's fortunes in future, whether in the short, medium or long term, I would have expected the Directors' Report to so state. Instead, and to the contrary, the report painted the picture of a company that was generally on the right track "to maintain its leadership position in the provision of telecommunications services in Belize", despite certain inconveniences which the new board had encountered and had had to take steps to correct upon coming to office (such as the reporting and payment of outstanding taxes and the consequent restatement of the accounts). I certainly would not expect that Mr Vasquez, as a practising accountant in Belize for over 40 years and a member of the Institute of Chartered

Accountants in Belize for 25 of those 40 years, would have subscribed a report to the shareholders of the major telecommunications provider in Belize that was in any way overstated or otherwise misleading.

[138] Finally, I should add that there was no evidence before the judge (who made no finding in this regard) to suggest that Telemedia's services were either unreliable or uncompetitively priced and, indeed, the trajectory described by 2008 – 2009 Directors' Report was plainly in the opposite direction.

(iii) Other factors

[139] Despite not having made any findings on some of the matters which I have been discussing that were clearly relevant to the stated public purpose, Legall J also took into account some other factors which had been strongly urged on him on behalf of GOB. These factors (which were helpfully summarised by the judge, at para. 108) were "the influence of Ashcroft"; the quadmire [sic] of law suits; the loan to Belize bank; and the large US loan to Belize Telemedia to purchase shares in itself; and the possibility of a winding up of Telemedia". These factors when all considered, the judge concluded, were "connected to the Stated Public Purpose and...the Minister having taken these matters into consideration acted reasonably, in accordance with law, on sufficient evidence, took relevant matters into consideration, when he made the Acquisition Orders which acquired the properties".

[140] Leaving aside "the quadmire of law suits" [sic], which I have already considered (see paras [122] – [126] above), the judge obviously considered that

the most important of these additional factors which it was necessary for him to take into account was "the influence of Ashcroft". Earlier in his judgment, under the sub-heading "The Ashcroft factor", the judge had concluded (at para. 85) that GOB's evidence left him in no doubt that "Lord Ashcroft was in a position to exercise influence on [the Bank], Dean Boyce, and Belize Telemedia". He had, of course, been provided with considerable material by GOB in support of this view, starting with the Prime Minister's statement to the House of Representatives (in which reference had been made to "the predatory designs of one man"), followed by the evidence of Mr Waight (the chart showing the extent of Lord Ashcroft's holdings and influence), and the evidence of the Minister himself. While it is naturally no part of the court's function in this appeal to reach any conclusions or to draw any inferences from all of this, it seems to me what it is necessary to ask is, even assuming the correctness of each and every allegation made as regards the influence of Lord Ashcroft and that Legall J was right in his conclusions on this, what possible connection could this factor have had to the stated public purpose or to the compulsory acquisitions? I agree with the appellants that the judge offered no explanation as to how the supposed influence of Lord Ashcroft was connected or relevant to the stated purpose, beyond the bare and hardly illuminative statement that the influence of Lord Ashcroft is "connected to the Stated Public Purpose…" (see para. [139] above).

[141] The alleged loan by Telemedia to Belize Bank and the US $22.5 million loan by the Bank to Telemedia seem to me to attract the identical comment, which is that no connection was shown by the evidence, neither was any demonstrated by the learned judge, between those two transactions and the stated public purpose.

[142] The final additional factor referred to by Legall J was the possibility of a winding-up of Telemedia. The judge was obviously impressed by GOB's position on this issue, observing (at para. 95) that the winding-up of Telemedia "was something under consideration by [the Bank]". The judge then went on to state (at para. 101) "that the possibility of the winding up of Telemedia provided reason for the Acquisition Orders, and was directly connected to the public purpose". Thus, he concluded (at para. 104), "the Minister acted reasonably and in accordance with the law when he made the acquisition orders in order to prevent a clear possibility or option by [the Bank] of the winding up of [Telemedia], a major company with more than 900 Belizean shareholders, which provides vital telecommunication services to the people of Belize and elsewhere, and which affects 'Belizean Interest' and plays a role 'to develop the country'".

[143] I have not found the judge's path to his conclusion on the winding-up point easy to follow. Even assuming that the possibility of the winding-up of Telemedia could have any connection to the stated public purpose (which appears to me to be, at best, remote), it seems to me that the spectre of winding-up achieved an importance in the case that can hardly be justified by the evidence. The unchallenged evidence was that all monies due from Telemedia to the Bank would become immediately due and payable and the Bank's security enforceable (a) if Telemedia failed to make any payment due as required by the Facility and did not remedy the failure within seven days after notice from the Bank, and (b) if the ownership structure or management of Telemedia changed without the consent of the Bank. Mr Johnson's evidence was that the terms of the mortgage debenture were no different from "those of the normal security which a lender requires a borrower to enter, nor do they give the Bank an

unusual degree of control over the day-to-day running of Telemedia or impose unusually onerous terms".

[144] The (again unchallenged) evidence was that, in breach of the Facility, Telemedia failed to make monthly interest payments due on 10 September and 10 October 2009. (There was also evidence of a previous default in June 2009, which had led, Mr Boyce had stated, to an agreement with the Bank to defer repayments of principal under the loan for a year. For a reason that is not clear, the judge stated that he disbelieved Mr Boyce on this, despite the fact that the agreement to which Mr Boyce referred had also been confirmed by Mr Johnson, at para. 15 of his fourth affidavit, sworn to on 19 March 2010.) In addition, the Bank not having consented to Telemedia's ownership structure and management changes brought about by the 25 August Order, the Bank considered that there had been an event of default under the mortgage, which in turn triggered a cross event of default under the Facility. Accordingly, on 14 October 2009, the Bank wrote to Telemedia pointing out these facts and making a demand for payment of the entire amount of principal and interest outstanding, that is, US $22,363,944.53, plus accrued interest by 23 October 2009, "failing which the Bank will take all necessary steps to recover the amounts which are due and owing". A similar letter bearing the same date was also dispatched to Sunshine. Nothing having come of these letters, on 20 November 2009 the Bank commenced proceedings in the Supreme Court (Claim No. 942 of 2009) against Telemedia seeking to recover the moneys which it claimed to be outstanding.

[145] The Bank's attorneys (by letter dated 24 November 2009) again wrote to Telemedia, restating the Bank's position with regard to the event of default

referred to in the Bank's earlier letter. The letter ended with a formal demand for payment pursuant to section 131(a) of the Companies Act, failing which (within three weeks), the attorneys advised, "we expect to be instructed to take appropriate steps pursuant to the Companies Act to recover the sum owned by Telemedia without further reference to you". A similar letter, again of the same date, was also dispatched to Sunshine. By a further letter dated 9 December 2009, the Bank's attorneys advised Telemedia attorneys, in answer to their enquiry, that no decision had been taken by the Bank "to initiate proceedings for the winding up of [Telemedia]" and declined to give the undertaking sought that no winding-up would take place. (Subsequently, on 14 December 2009, Telemedia in fact obtained an injunction against the Bank restraining it from taking winding-up proceedings.)

[146] Section 130(1) of the Companies Act provides that a company may be wound-up by the court if it is "unable to pay its debts" and section 131(a), pursuant to which the Bank's attorneys had written to Telemedia on 24 November 2009, provides that a company shall be deemed to be unable to pay its debts if, within three weeks of a creditor's demand for payment, the company "has neglected to pay the sum". All that the evidence on the winding-up point suggests to me is that the Bank, mindful of its own interests, as any commercial lender, particularly of a substantial sum, must surely be entitled to be, was taking all necessary steps to protect its position, within the context of the rights given to it by the security documentation entered into freely by both parties, and within the laws of the country. The Bank's chairman, Mr Johnson, made a similar point (in his third affidavit) when he observed (at para. 18) that the recovery of money lent was "a normal part of any bank's business activities", and further, (at para. 23)

that a claimant "is entitled to seek recovery by all lawful means". Not only have I been unable to discern any sinister intent in the Bank's actions in this regard, but, even more pertinently, I am unable to see the basis of Legall J's conclusion (at para. 101) that "the possibility of the winding up of the company provides reason for the Acquisition Orders...[and the]...winding up possibility is directly connected to the Stated Public Purpose".

[147] As part of his consideration of the winding-up point, the judge also referred (at para. 96) to a submission that had been made to him by the appellants that the possibility of a winding-up of Telemedia, which arose subsequent to the compulsory acquisition, could not be used as evidence to support the stated public purpose. He concluded that he was entitled to take the evidence of subsequent events into consideration, on the basis of a statement by Denning LJ in **Prest** (at page 200) that, in proceedings challenging the validity of compulsory acquisition orders, "fresh evidence can and should be admitted on similar grounds to that in the courts of law – in those cases where it has arisen since and would in all probability have an important influence on the result". On this basis, Legall J considered that he was entitled to consider the evidence of the reference by the Bank's attorneys in their 24 November 2009 letter to the possibility of a winding-up as a factor supporting the stated public purpose.

[148] It appears to me, with respect, that in coming to this conclusion the learned judge missed the real point against using evidence of the reference to winding-up in the attorneys' letter as a justification for the compulsory acquisitions. It is not that evidence that became available after the Minister's

order was made could not in any circumstance be taken into account, which is what **Prest** decided was not the law, but that evidence of steps taken by the Bank to protect its legitimate interest (in essence, defensively), as a direct result of the Minister's order, as in the instant case, cannot possibly have any connection to or bearing on the stated public purpose in this case. Any other conclusion on this point, it seems to me, would have the result of placing a party in the position of the Bank in this case in the wholly impossible – not to mention unfair - position of not being able to protect its own interests by legitimate means without providing additional fuel to the case against it.

[149] At the end of the day, it appears to me that there was absolutely no evidence to suggest that a threat of winding-up played any real part in the Minister's deliberations and I cannot therefore see a basis for the judge's conclusion (at para. 95) that "from the evidence, the winding up of Belize Telemedia was something under consideration by the [Bank]". The answer to the judge's rhetorical question why did the Bank not give an undertaking not to commence winding-up proceedings when asked for one by Telemedia must surely be that, from its standpoint, there was a debt outstanding to it which required it to maintain and preserve all its options, including those given by the law to persons in its position.

[150] For all of these reasons, I do not think that, on the evidence, the compulsory acquisitions were duly carried out for the stated public purpose, either on the bases advanced by the Minister in his 25 August Order, or on any of the other bases identified by the judge in his judgment.

Issue (iii) – was the Minister's response to the problems of the telecommunications industry proportionate in the circumstances?

[151] In **R (Daly) v Home Secretary**, the House of Lords had to consider the effect of a prison regulation that permitted the search of a prisoner's cell by prison officers in the prisoner's absence, in particular, whether the right given to prison officers as a security measure, to examine, but not to read, correspondence between the prisoner and his legal advisors was an infringement of his right to legal professional privilege. It was held that it was, and that a person sentenced to a custodial order retained, along with the rights of access to a court and to legal advice, the right to communicate freely with his legal advisor under the seal of legal professional privilege. The further question for the court was whether this breach of the prisoner's common law right to privilege could be justified "as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime" (per Lord Bingham, at page 543).

[152] The House of Lords held unanimously that the prison policy provided for a degree of intrusion into the prisoner's privileged legal correspondence that was greater than could be justified by the objectives of the policy. It accordingly violated not only the prisoner's common law rights, but also his right under Article 8(1) of the European Convention to respect for his correspondence. Lord Bingham observed (at page 545) that although interference with the prisoner's Convention rights by a public authority might be permitted, "if in accordance with the law and necessary in a democratic society" in the wider public interest, the prison policy interfered with the prisoner's rights in this case "to an extent much greater than necessity requires".

[153] Lord Steyn observed (at page 547) that the "contours of the principle of proportionately" were familiar, referring with approval in this regard to the three-stage test adopted by the Privy Council in **De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80**:

> (i) whether the legislative objective is sufficiently important to justify limiting a fundamental right;
>
> (ii) whether the measures designed to meet the legislative objective are rational connected to it; and
>
> (iii) whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

[154] Legall J accepted (at para. 122) that the principles of proportionality were "principles developed in the interest of fairness and good administration". He also accepted the proposition that "administrative action or legislation may be struck down as unconstitutional, as being in conflict with the principles of proportionality which may be an implied requirement of the fundamental rights provisions of the Constitution of Belize". However, the judge concluded, he was not satisfied "that the Acquisition Act or Orders were disproportionate or breached the proportionality principles, especially when one considers, as shown above, the intention of [the Bank] of a possible winding up of [Telemedia], a company providing telecommunication services to the Belizean people and others".

[155] I have already sought to demonstrate (at paras [143] – [149] above), why I do not consider that there was any basis for the judge's conclusion that the question or the possibility of winding-up had a bearing on the stated public purpose and I regard his reliance on it in this context as similarly misplaced. It

further appears to me that the learned judge, having accepted that the principle of proportionality was part of the constitutional law of Belize, then failed entirely to submit the evidence before him to the three stage test dictated by the very authorities upon which he relied for that conclusion.

[156] The first question, that is, whether the legislative objective was sufficiently important to justify limiting the appellants' right to protection from the arbitrary deprivation of property, overlaps to a large extent with the question, which I have already discussed and attempted to answer, whether the compulsory acquisitions were duly carried out for the stated public purpose (see paras [115] – [150] above). Accordingly, for the reasons already given by me, I do not consider that in this case the legislative objective as revealed by the stated public purpose justified the compulsory acquisition of the appellants' property rights.

[157] Similarly, as regards the question whether the measures designed to meet the legislative objective were rationally connected to it, there was absolutely no evidence to suggest how the compulsory acquisition of either Mr Boyce's interest in Telemedia or the Bank's security interests in both Telemedia and Sunshine will assist in the improvement of the telecommunications industry by the provision of reliable telecommunications services to the public at affordable prices.

[158] And it also seems to me finally that the judge gave no consideration of any kind to the third aspect of the test, which is whether the compulsory acquisitions were more than was necessary to accomplish the stated public purpose. Both Messrs Courtenay and Smith made reference in their

submissions to a number of alternative (and less intrusive) means that might have been resorted to by GOB in furtherance of the stated public purpose. One such means would have been by way of a request to the PUC, as the statutory regulators of the telecommunications industry, to intervene for the purpose of effecting the desired improvements, pursuant to statutory powers under the Telecoms Act and the Public Utilities Commission Act. (This submission had also been made to the judge, who noted it at paras 64 and 66, but made no finding in respect of it.) It was also suggested that GOB could have opted to acquire a lesser majority than 94% of the issued share capital of Telemedia, which would have given it sufficient authority to influence the company's policies and direction. And further still, GOB could have offered assistance to Telemedia to repay the Bank's US $22.5 million loan.

[159] In contending that the proportionality principle (despite Legall J's unqualified acceptance of it) "ought not to engage in this case as a structural test of justification" Ms Young submitted that, while the test "may fit in assessing derogations from fundamental rights permitted according to specified parameters, such as a derogation of freedom of speech...[it] is not suited to the discretionary power based on policy considerations", which is conferred on the Minister by the Acquisition Act.

[160] I have found it difficult to appreciate the distinction that is implicit in Ms Young's submission on this point, but it does appear to me in any event that the instant case does in fact fall squarely within the category of case in respect of which Ms Young appeared to accept that application of the proportionality principle might be appropriate. What section 17(1)(b)(ii) of the Constitution in fact requires of the court is a determination whether GOB's derogation from

appellants' fundamental right to protection from arbitrary deprivation of property has been carried out according to the "specified parameters", as Ms Young put it, in my view accurately, laid down in the section itself. The principle of proportionality is therefore, as Saunders CJ (Ag) (as he then was) observed in **Attorney General of Anguilla et at v Bernice Lake QC, et al (Civil Appeal No. 4 of 2004**, unreported, at para. [48]), and as Legall J also accepted in the court below, "a principle to be applied when considering a substantive constitutional right and whether [it] has been or is being infringed". Applying this principle, therefore, I would conclude that in this case the Minister's response to the problems of the telecommunications industry were not proportionate in the circumstances.

Issue (iv) – were the actions of GOB/the Minister arbitrary and/or discriminatory in the circumstances?

(a) Arbitrariness

[161] It is common ground that section 3(d) of the Constitution seeks to provide explicit protection "from arbitrary deprivation of property". The appellants rely on the statement of Conteh CJ in **Bruce** (at para. 85), that the exercise of a statutory power granted by the legislature "in a wide discretionary format…must be informed by **reasonableness**, **fairness** and should **not be arbitrary**" (emphasis in the original). In support of this statement, Conteh CJ referred to **Westminster Corporation v L and NW Railway [1905] AC 425, 430**, in which Lord NcNaughton said that a public body invested with statutory powers "must act in good faith…[and]…must act reasonably", and to **Williams v Giddy [1911] AC 381**, a decision of the Privy Council, in which Lord McNaughton reiterated the principle that, even where the executive is conferred with a discretion by law, it is

not “an arbitrary discretion…[but]... a discretion to be exercised reasonably, fairly and justly”.

[162] In addition, the appellants also relied on **Smith v East Elloe Rural District Council [1956] AC 736**, in which it was accepted that, although an act “was ostensibly done in execution of the statutory power and within its letter, it would nevertheless be held not to come within the power if done otherwise than honestly and in the spirit of the enactment” (see the judgment of Lord Morton of Henryton stated (at page 757, quoting from the 10th edn of Maxwell on the Interpretation of Statutes, page 122). The appellants relied further on the Canadian case of **Re Burns and Township of Haldimand**, to which I have already referred (para. [126] above), in which a by-law made by a local authority providing for the compulsory acquisition of land which was the subject of a pending action for trespass brought by the owner against the local authority, was quashed by the court on the basis that the intention of the by-law, which was to prevent the owner from pursuing his claim, was not a legitimate purpose.

[163] The appellants submitted to the judge, as they did in this court, that the Acquisition Act and Orders were introduced for an illegitimate purpose, in that they were an *ad hominem* attack on a single individual, that is to say, Lord Ashcroft. Although Legall J considered that what he described as “the influence of Lord Ashcroft” was a relevant factor as regards his determination that the compulsory acquisitions had been duly carried out for the stated public purpose (see para. [139] above), he rejected the further submission that the purpose of the legislation had been to target Lord Ashcroft and had therefore not been for a legitimate public purpose, stating (at para. 109) that “the evidence…as I have

found is that the purpose of the Acquisition Act and Orders was to achieve the Stated Public Purpose".

[164] I have already stated my conclusion that, contrary to what the judge found, the evidence does not support the view that the compulsory acquisitions were duly carried out for the stated public purpose. The further question that arises is whether the judge was correct in his finding that the compulsory acquisitions were nevertheless not arbitrary and were for a legitimate purpose in the circumstances. The appellants rely in the main on this ground on the contents of the Prime Minister's statement to the House of Representatives in introducing the Bill on 24 August 2009. Early in his address, it will be recalled, the Prime Minister drew attention to the events of February 1992, when "the predatory designs of one man" were facilitated by the then government, which began to sell shares in BTL to Michael Ashcroft "at a rate and in a manner that was counter intuitive and counter nationalistic". This had in due course led, the Prime Minister said, after "litigation after litigation", to Lord Ashcroft "having prevailed and cemented his total control". By 2006, there were "the infamous secret Accomodation Agreements" which "guaranteed the Ashcroft group a minimum rate of return of 15%". The Prime Minister went on, in terms which it is not necessary to repeat, to speak of the overall control by Lord Ashcroft of both Telemedia and Speednet, its supposed competitor, and of GOB's determination to end "this one man's campaign to subjugate an entire nation to his will".

[165] I have already quoted in full (at para. [9] above) the closing passages of the Prime Minister's speech and it suffices to say that he remained faithful to his theme, telling the House that "there will be no more suffering of this one man's campaign to subjugate an entire nation to its will". However, the Prime Minister

obviously felt it necessary to assure the House that the nationalisation of Telemedia "is not an ad hominem move; it is to deal with a structural problem… [this]…is only about Telemedia; and no more than a case of the Belizean national interest trumping any other consideration".

[166] Both Mr Waight (who had provided the chart showing the extent of the Ashcroft interests) and the Minister (who adopted the reasons for the compulsory acquisitions advanced by the Prime Minister) echoed the same dominant theme. Additionally, there was also the evidence that on 25 November 2009, in a radio interview, the Prime Minister described the legislation as "part of a continuing fight to ensure that Michael Ashcroft will never break the will of this government". In that interview, the Prime Minister characterised Lord Ashcroft as his "adversary" and as a "determined, ruthless, ambitious enemy" and stated in conclusion that "this is the people of Belize against the Ashcroft interests and I will never relent".

[167] In her submissions on this point, Ms Young submitted (at para. 163 of her skeleton arguments) that Legall J's judgment, taken as a whole, demonstrated that "he thoroughly assessed the facts and submissions, and came to a reasonable conclusion based thereon, that the Respondents had not actual [sic] unreasonably, unfairly or arbitrarily". She submitted further than an allegation of bad faith should not be lightly made against a public authority and that there was nothing in the Prime Minister's statement that could reasonably be construed as using public power to pursue a private vendetta. Similarly in relation to the Minister, who had adopted the Prime Minister's stated reasons for the compulsory acquisitions, Ms Young submitted that the appellants' challenge amounted to a charge of bad faith, a grave charge, carrying as it did connotations

of dishonesty. However, both Mr Courtenay and Mr Smith, in their joint skeleton argument in reply, specifically took issue with this submission, "roundly" rejecting the suggestion that any allegation of dishonestly had been made against the Minister.

[168] As regards the question of bad faith, Ms Young referred us to **Cannock Chase District Council v Kelly [1978] 1 All ER 152**, in which a tenant of a council house contended that the local authority, which had served her with notice to quit, had failed to act in good faith and to take into account all the relevant considerations. The tenant appealed from the decision of the trial judge that a prima facie case that, in giving notice to quit, the local authority had not acted in good faith and had taken into account all relevant considerations, had not been made out and that the local authority was accordingly entitled to an order for possession against the tenant. At the hearing of the appeal, however, the tenant disclaimed any charge of dishonesty on the part of the local authority or its officials.

[169] Megaw LJ said this (at page 156);

> "So, the burden is on the tenant. It is for the tenant first properly to allege, and then, if challenged, to prove, the 'contravention of the law' in what, prima facie, is a permitted and lawful act of the local authority. One of the grounds on which a challenge can be made, and, if established, should certainly succeed, is bad faith. As Lord Greene MR ([1947] 2 All ER 680 at 682, [1948] 1 KB 223 at 228) says: 'Bad faith, dishonesty—those, of course, stand by themselves.' I would stress, for it seems to me that an unfortunate tendency has developed of looseness of language in this respect, that bad faith or, as it is sometimes put, 'lack of good faith', means dishonesty; not necessarily for a financial motive, but still dishonesty. It always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant. If a charge of bad faith is made against a local authority it is entitled, just as is an

> individual against whom such a charge is made, to have it properly particularised. If it has not been pleaded, it may not be asserted at the hearing. If it has been pleaded but not properly particularised, the pleading may be struck out. I need say no more of that here, however, because, despite the allegation in the amended defence that 'the [local authority has] failed to exercise [its] power and duties …in good faith', counsel for the tenant in this court has disclaimed any charge of dishonesty on the part of the local authority or its officials.
>
> Lack of good faith goes. What remains? On Lord Greene MR's analysis, even though there has been no bad faith, a public authority's exercise of its statutory powers may properly be challenged before the court if it can be shown, the burden being on the challenger, that the authority has, as a material factor in reaching its decision, taken into account a factor which as a matter of law should not have been taken into account or has failed to take into account a factor which should have been taken into account. To that extent a local authority, as landlord, is under a stricter obligation than a private landlord, in a case where the tenancy is not subject to the Rent Acts. But, if such a challenge be made, it is for the tenant to particularise the relevant consideration or considerations alleged to have been taken into account or omitted, as the case may be, and to prove that erroneous taking into account or that erroneous omission, which constitutes the so-called 'abuse of the powers'."

[170] Megaw LJ's statement of the position, with which I entirely agree, therefore makes a clear distinction between an allegation of lack of good faith, or bad faith, and a challenge to the decision of a public authority on the ground that the authority has, as a material factor in reaching its decision, taken into account a factor which as a matter of law should not have been taken into account or has failed to take into account a factor which should have been taken into account. In this regard, I will say at once that I consider the appellants' challenge to the Acquisition Act and Orders on the ground now being discussed as one which falls into the latter category, that is, that GOB honestly, though mistakenly, took into account irrelevant factors in its decision-making. I fully accept that no allegation of bad faith or dishonesty of any kind has been made against either the

Prime Minister or the Minister and, accordingly, I do not approach the issue raised by this ground on that basis.

[171] So the question which remains is whether the appellants' contention that the judge erred in his conclusion that the compulsory acquisitions in this case were not arbitrary and were carried out for a legitimate purpose. In the light of my conclusion that the evidence in this matter has failed to justify the compulsory acquisitions as having been necessary to promote or further the stated public purpose and that the compulsory acquisitions were not a proportionate response to the requirements of the stated public purpose, coupled with the clear evidence that the compulsory acquisition had, as an explicit, dominant objective, the bringing to an end of "this one man's campaign to subjugate an entire nation to his will" ("a special measure for a special case"), I cannot but conclude that, in carrying out the compulsory acquisitions, GOB acted for an illegitimate purpose, and thus breached the appellants' constitutional right to protection from arbitrary deprivation of their property.

(b) Discrimination

[172] Section 16(1) of the Constitution provides that, "Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect". One of the exceptions to this section is to be found in subsection (4)(c), which provides that section 1 "shall not apply to any law so far as that law makes provision…with respect to persons who are not citizens of Belize'.

[173] Section 16(2) provides that "no person shall be treated in a discriminatory manner by any person or authority". Section 16(3) defines 'discriminatory' to

mean “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed”, whereby persons of one such description are not made subject or are accorded privileges or advantages which are not accord to persons of another such description.

[174] While Mr Boyce appeared to accept that the Acquisition Act does not on its face discriminate, since it applies to all telecommunications providers equally (thus making section 16(1) inapplicable), he relied strongly on section 16(2) (none of the exceptions to which applied in this case, Mr Smith submitted), on the basis that the Acquisition Act and Orders were explicitly targeted at, and as such, constituted discriminatory treatment of, non-Belizeans. Mr Smith relied on the decision of the Supreme Court of Canada in **Andrews v Law Society of British Columbia [1969] 1 S.C.R. 143**, to make the point that, on a generous interpretation of the phrase “place or origin” in section 16(2), ‘citizenship’ could be argued to be an analogous category. In that event, it would not matter whether the discrimination was on the basis of these types of analogous grounds.

[173] The basis of the claim of discrimination in this case was the statement by the Prime Minister in his statement to the House on 24 August 2009, that the purpose of the Acquisition Act and Orders was the “Re-Belizeanization of the company” and that “the shareholding owned by Belizeans will be left intact”. Further, there was no evidential dispute between the parties, Mr Smith submitted, that the Acquisition Act and Orders were targeted at people who were not from Belize.

[174] Legall J considered, no doubt correctly, that the burden of proving discrimination was on Mr Boyce, who had alleged it. However, he was of the view that there was no evidence before him of the place of origin of either Mr Boyce or the Bank, and he concluded (at para. 149) that there was "no evidence that the 6% of the shares not acquired belong to Belizeans and…of the place of origin of those who held the 94% of shares acquired and those who held the 6% of shares not acquired". Hardly surprisingly, Ms Young urged us not to disturb the judge's finding on this point, for a number of reasons, including those given by the judge.

[175] While I accept in general terms the distinction urged by Mr Smith between section 16(1) and section 16(2), a point which Legall J appears to have missed, I would nevertheless also accept the judge's conclusion that discrimination had not been proved by Mr Boyce (or indeed the Bank) on the evidence before him. While, it is clear from the Prime Minister's unequivocal remarks on the point in his statement that it was the intention of GOB not to disturb the shares held by Belizeans, I do not think that there was sufficient evidence before the court to enable the judge to form any clear view as to whether or how this intention was carried into effect as a matter of fact. I would therefore not disturb the judge's findings on this ground.

Issue (v) – did the appellants or either of them have a right to be heard by the Minister before the Acquisition Orders were made?

[176] The appellants submitted, as they had done in the court below, that they had, and had been denied a right to be heard by the Minister before the Acquisition Orders were issued. They relied on **Bruce**, which was a case in which the claimant challenged a decision by the Minister of Natural Resources

and the Environment to compulsorily acquire his property, pursuant to the Land Acquisition (Public Purpose) Act. Conteh CJ said this (at para. 74):

> "It is, in my view, elementary fairness and justice that a person whose land is about to be compulsorily acquired should know beforehand and be afforded an opportunity, if he wants, to make representation to dissuade the decision maker".

[177] Legall J's comment on this dictum was (at para. 125) that, "Though generally, the right to be heard and fairness are legally required, there seem to be noted exceptions". Citing a statement by the editors of Wade, Administrative Law (8th edn, page 44) that "there is no right to be heard before making legislation whether primary or delegated unless it is provided by statute", as well as two cases in which "a hearing was excluded because urgent action had to be taken", the judge expressed the view (at para. 126) that "the Minister did not have to provide a hearing before making the Acquisition Order or Orders". In any event, the judge concluded, basing himself on a dictum by Lord Wilberforce in **Malloch v Aberdeen [1971] 1 WLR 1578, 1595**, a hearing "would have made no difference; and would have been a 'useless formality'."

[178] In their submissions before us, counsel for the appellants relied on two authorities, from Canada and South Africa respectively, in which it was held, albeit in somewhat different circumstances in either case, that the rule of *audi alteram partem* applied. Ms Young, on the other hand, submitted that the common law right to be heard does not apply in cases of the compulsory acquisition of property in accordance with section 17 of the Constitution, and, further, that there is no basis to imply such a right into the Acquisition Act. She

sought to distinguish **Bruce**, and to rely on Wade, as well as on the decision of the English Court of Appeal in **Cinnamond v British Airport Authority [1980] 2 All ER 368**. Ms Young also placed reliance on the judge's conclusion that a hearing in the instant case would have been a useless formality.

[179] The two cases dealing with public health and safety to which the judge referred (**White v Redfern (1879) 5 Q.B.D. 15** and **R v Davey [1899] 2 QB 301**) can, I think, be safely put on one side, as the need for dispatch in matters relating to health and safety can readily be understood. In any event, it is not clear to me on what basis Legall J concluded that, on the facts in the instant case, the Minister "clearly felt the need to take urgent action". Neither the Minister nor the Financial Secretary (whose evidence the Minister adopted as his own) spoke to any particularly urgent circumstances that might have precluded a hearing, the majority of their evidence having been devoted to rehearsing the history of Telemedia/BTL. In the case of the Prime Minister, although at the outset of his statement to the House of Representatives, there was a reference to some urgency (to justify GOB'S stated intention to take the Bill through all its stages in a day), there was no discernible urgency, it seems to me, in the circumstances described by the Prime Minister.

[180] **Malloch v Aberdeen**, upon which the judge also relied for the proposition that a hearing is unnecessary if it would be a "useless formality", is in fact a well known and much cited example of the right to be heard, as an aspect of the rules of material justice, in action. In that case, a Scottish teacher employed to a local education authority successfully contended that his dismissal by the authority without a hearing was contrary to the principles of natural justice and was therefore a nullity. Although the authority did contend in that case that a

hearing would have been a "useless formality", it was for the reason that it considered itself legally bound by the terms of new education regulations to dismiss the teacher, irrespective of whatever he might have had to say. The House of Lords by a majority rejected that submission on the basis that there was, (as Lord Reid put it at pages 1582 – 83) "a substantial possibility that a sufficient number of the committee might have been persuaded not to vote for the [teacher's] dismissal".

[181] What Lord Wilberforce, upon whom Legall J relied, in fact said (at page 1595) was that it was not enough for the teacher to show that, in principle, he should have a right to make representations before the decision to dismiss him was taken, but that he also needed to show "that if admitted to state his case he had a case of substance to make". In the result, Lord Wilberforce, in agreement with the majority, held (at page 1598) that the teacher had satisfied this test, "there were genuine contentions to be made" and he had therefore been entitled to a hearing. With regard to what he had described as the teacher's "genuine contentions, Lord Wilberforce said this:

> "… I find it hard to believe that in a field of employment, based on the possession of qualifications historically accepted, it can really have been intended that men and women, validly qualified by certification before the regulation was amended, were ipso facto to be deprived of employment without any regard for vested rights. I would think there is much to be said for an interpretation of the amended regulation in such a manner as not to produce this result."

[182] It accordingly seems to me that Legall J seriously misread **Malloch v Aberdeen** (or, at any rate, Lord Wilberforce's judgment) and the case is therefore no authority against the appellants being given a hearing in the instant case. Further, and in any event, as Messrs Courtenay and Smith observed in their joint reply, I consider it wholly inapt for the Minister, a public authority, to maintain, as Ms Young submitted that he could in this case, that there would have been no point in his giving the appellants a hearing, as he had already made up his mind on the matter, irrespective of any submissions, however powerful, they might have made.

[183] **Cinnamond**, upon which Ms Young also relied as a case in which representations would have made no difference to the result and were therefore held to be unnecessary, was a very unusual case on any view. The appellants, as the headnote shows, were a group of six minicab drivers, who had been successfully prosecuted, as Lord Denning MR put it, "scores and scores of times", by the British Airports Authority for loitering and touting for passengers at an airport owned and operated by the authority. They persistently refused to pay the fines and continued to loiter and tout for fares. Acting under a byelaw made by clear statutory authority, which permitted it to prohibit any persons from entering the airport except as bona fide airline passengers, the authority notified the appellants that, until further notice, they were so prohibited. The appellants sought a declaration that the notices were invalid because, firstly, the byelaw was *ultra vires* the statute and, secondly, that there had been a breach of the rules of natural justice, in that they had not been given an opportunity to make representations to the authority before the ban was imposed. The judge held that the byelaw was not *ultra vires*, that in the circumstances there had been no

breach of the rules of natural justice, and that, in any event, he would have exercised his discretion to refuse the declaration sought by the appellants.

[184] The appellants' appeal from the judge's decision was dismissed on the ground that the authority had implied statutory power to prohibit persons other than *bona fide* airline passengers from entering the airport and that the byelaw was in any event *intra vires* the authority's statutory regulation making power. On the natural justice point, it was held that there had been no breach of the appellants' rights because, in view of their conduct, they could not have had a legitimate expectation of being heard.

[185] Lord Denning MR observed (at page 374) that, although the rules of natural justice clearly applied to persons exercising administrative powers, their application might also depend "on the nature of the administrative power which is being exercised". Lord Denning MR referred to his own judgment in the earlier case of **Schmidt v Secretary of State of Home Affairs [1969] 1 All ER 904, 909**, in which he had suggested that the question of whether an administrative body ought in a particular case to afford a hearing to a person affected by its decision "all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say". In the instant case, the appellants by their previous conduct, with a long record of convictions and large fines outstanding, could have had no such legitimate expectation and the simple duty of the authority in these circumstances was "to act fairly and reasonably" (page 375), which they had done.

[186] Ms Young drew our attention in particular to the judgment of Shaw LJ, in which he said this (at page 375):

> "As to the suggestion of unfairness in that the plaintiffs were not given an opportunity of making representations, it is clear on the history of this matter that the plaintiffs put themselves so far outside the limits of tolerable conduct as to disentitle themselves to expect that any further representations on their part could have any influence or relevance. The long history of contraventions, of flouting the regulations and of totally disregarding the penalties demonstrate that in this particular case there was no effective deterrent. The only way of dealing with the situation was by excluding them altogether."

[187] Although Ms Young did not say so in so many words, it appeared to me that her obvious purpose in referring us to what Shaw LJ said in **Cinnamond** on the natural justice point was to suggest that the appellants in this case were similarly disentitled by their previous conduct "to expect that any further representations on their part could have any relevance or influence". For my part, I did not think that there is any resemblance between the appellants in **Cinnamond**, who, as Lord Denning MR told it (at page 371) had been prosecuted, convicted and fined "Every few weeks or so", and the appellants in the instant case. Taken at its highest, it seems to me that GOB's case does not suggest that the appellants have been anything more than attentive to their own commercial interests, as they are no doubt fully entitled to be.

[188] In support of a right to be heard in the circumstances of this case, the appellant both relied on the cases of **Homex Realty v Development Co. Ltd v Village of Wyoming (1980) 116 DLR (3d) 1** (a Canadian case) and **The South African Roads Board v City Council of Johannesburg** (Case No. 485/89, judgment delivered 24 May 1981) (as the name suggests, a South African case).

[189] The issue in **Homex** was whether Homex, a landowner, whose right to enjoyment of property was infringed by two By-laws passed by the municipality of the village of Wyoming, pursuant to the relevant planning legislation, had been entitled to a hearing, A dispute had arisen between Homex, which was the purchaser of several lots in a new sub-division within the municipality, and the municipality, over the question of Homex's liability to undertake certain obligations that had been imposed by the municipality on the person responsible for the original sub-division. These obligations had to do with the costs associated with the surfacing of roads, installation of services, and drainage. Despite protracted negotiations between the parties, they were unable to reach agreement, and the municipality, without notice to Homex, passed a By-law which was aimed solely at the lots owned by Homex, which in effect cut off the water supply to these lots. Some months later, the municipality passed a second By-law, which in effect deprived Homex of the right to sell any of its lots without the consent of the municipality.

[190] On Homex's challenge by way of judicial review to the validity of the By-Laws, the Supreme Court of Canada held that the action taken by the municipality in passing the second By-law was not legislative, but quasi-judicial in nature and as such attracted the principle of *audi alteram partem*. However, the court declined to grant the order for certiorari sought by Homex on discretionary

grounds, which it is not now necessary to explore. In a minority judgment, Dickson J (with whom Ritchie J agreed), did not accept that there was any distinction between legislative and quasi-judicial measures for the purposes of the right to a hearing, concluding (at page 10) that the authorities "clearly establish that a right to procedural 'fairness' no longer [depends] on *a priori* classification of a process as judicial or quasi-judicial".

[191] In **South African Roads Board**, the National Transport Commission ('the Commission') proposed to declare a road, sometimes referred to as the Southern bypass, a toll road to facilitate the construction of a major motorway, which would itself, after construction (which was slated to take approximately seven years) was complete, be a toll road. The Commission's decision to use the Southern bypass as a temporary toll road until the new motorway was built was part of the arrangements necessary to secure the financial viability of the overall motorway project. In pursuance of this decision, construction of a toll gate on the Southern bypass commenced, which then gave rise to proceedings by the City Council of Johannesburg ('the City Council').

[192] The City Council objected to the decision to declare the Southern bypass a toll road and the erection of the toll gate, on the basis that the imposition of a toll on the bypass would inevitably lead to a build up of the traffic, which would ordinarily use that road, seeking alternative routes in order to avoid paying the toll. This would in turn result in those alternative routes becoming congested, thereby disrupting the traffic flow in the area. These alternative routes were all by roads which were the property of the City Council and the additional traffic which these roads would be required to carry if the toll were imposed would result in a greater financial obligation being place on the City Council for the

upgrading and maintenance of these roads to cater for the additional traffic. Another basis for the City Council's objection was that the Commission had not given the City Council an opportunity to be heard before arriving at the decision to declare the Southern bypass a toll road, which was a decision which, it was said, affected the City Council's property rights.

[193] The Appellate Division of the Supreme Court of South Africa accepted (at page 21) that the City Council's rights and property were, "in a broad sense", affected by the decision. However, the Commission submitted that the declaration of a toll road, pursuant to statutory powers, was by its nature a legislative act and that the *audi alteram partem* rule could have no application in those circumstances. Delivering the judgment of the court, Milne JA referred (at page 26) to the preference which the court had expressed in previous cases for the view that the *audi alteram principle* "comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary; as opposed to the view which requires the audi principle, if it is to apply, to be impliedly incorporated by the statute in question."

[194] Further, Milne JA pointed out (at page 27) that "this court has now moved away from the classification of powers as, for example, judicial, quasi-judicial or purely administrative in order to determine whether the audi principle applies". And further still, Milne JA considered that the distinction between 'legislative' and 'non legislative' acts was not one on which it was possible to draw satisfactorily. Thus the true rule, he considered might both be stated in this way:

> "I am not persuaded that the categorization of statutory powers of action or decision into executive (or administrative) and legislative should in all cases provide the criterion as to whether the repository of the power is obliged in exercising it to observe the dictates of natural justice. It seems to me rather that a distinction should be drawn between (a) statutory power which, when exercised, affect equally members of the community at large and (b) those which, while possibly also having a general impact, are calculated to cause particular prejudice to an individual or particular group of individuals. Here I use the word "individual" to include a legal persona such as a corporation or a local authority, clothed with corporate personality; and the word "calculated" to mean not "intended" but ":likely in the ordinary course of things" to have this result (cf. Johannesburg Liquor Licensing Board and Another v Short 1946 AD 713, at 722-3). It is not necessary in this case to consider how large such a group of individuals may be."

[195] Milne JA accordingly took the view (at pages 34 -35) that a departure from the formal classification of decisions as a criterion "would provide a more rational foundation for the application of the rules of natural justice in this area". The brief comparative survey undertaken by Milne JA in the **South African Roads** case of relevant Commonwealth authorities (including **Homex** from Canada, **Creednz v Governor-General [1981] 1 NZLR 172** and **Fowler and Roderique v Attorney-General [1987] 2 NZLR 56**, both from New Zealand and **State of South Australia v O'Shea 73 ALR 1**) seemed to confirm his view that the common law was moving away from a rigid classification of the nature of decision making power as a precondition to the applicability of the *audi alteram partem* principle.

[196] I therefore come back, as I must to the statement of Professor Wade upon which the judge and Ms Young relied that "there is no right to be heard before making legislation whether primary or delegated unless it is provided by statute" (see para. [177] above). The same point is made by Professor Paul Craig in his work, 'Administrative Law' (6th edn , para. 12-012), that the courts "have...held that rules of a legislative nature are not generally subject to natural

justice". The only exceptions mentioned by Professor Craig are where a statute specifically imposes a duty to consult and where there is evidence of a legitimate expectation that a hearing would be given (para. 12-028).

[197] Both Professor's Wade and Craig are of course describing the position under English law (both citing as authority the case of ***Bates v Lord Hailsham of Marylebone [1972] 1 WLR 1373***) and the question that therefore naturally arises is whether that should be accepted, in the absence of either a statutory right to be heard or a legitimate expectation, as conclusively decisive of Belizean law, as Legall J considered it to be.

[198] It is now generally accepted that a decision maker is under an obligation to act fairly and reasonably, which in the context of the strict provisions of section 17(1) of the Constitution (the "strict solicitude for the protection of property" of which Conteh CJ spoke in **Bruce)**, must mean that the Minister is obliged to give some consideration to the interests of the property owner before deciding to make an order for compulsory acquisition of his property. No reason has been advanced in this appeal why we should prefer the English position, that exempts legislative acts of all kinds, whether primary or delegated, from the application of the *audi alteram partem* principle, over the implication of a rule that would require, in the absence of express contrary statutory provision, that whenever a public official or body is empowered to do an act or take a decision that may prejudicially affect an individual in his constitutionally protected property rights, he should be entitled to a hearing before the act is done or the decision is taken. It seems to me that the implication of such a requirement is entirely in keeping with the clear tendency of the authorities to which we have been referred, as also with the statement of Conteh CJ in **Bruce**, with which I find myself in respectful

agreement, that it is "elementary fairness and justice that a person whose land is about to be compulsorily acquired should know beforehand and be afforded an opportunity, if he wants, to make representation to dissuade the decision maker".

[199] I have therefore come to the view that in the instant case, in which the Minister's decision to compulsorily acquire their property plainly and prejudicially affected their protected constitutional rights, the appellants were entitled to be heard by the Minister before the Acquisition Orders were issued.

A margin of discretion?

[200] Ms Young submitted that the court is required to afford a "margin of discretion", (or a "margin of appreciation", as it is sometimes described), to decisions of the executive, in recognition of the fact that the executive "is taken to understand the society it functions in and the requirements of governance" (para. 144 of her printed skeleton arguments). In this regard, we were referred to the decision of the Privy Council in **Brown v Stott [2001] 2 WLR 817**, in which it was confirmed that while a national court does not usually accord a margin of appreciation, as it is applied by a supra-national court such as the European Court, it will nevertheless "give weight to the decisions of a representative legislature and a democratic Government within the discretionary area of judgment accorded to those bodies" (per Lord Bingham of Cornhill, at page 835). Lord Steyn made the same point, pointing out (at page 842) that while the jurisprudence of the European Court which affords domestic courts a margin of appreciation "is logically not applicable to domestic courts…national courts may accord to the decisions of national legislatures some deference where the context justifies it" (emphasis in the original).

[201] I fully accept these authoritative confirmations of the duty of national courts to afford to the legislature and the executive a margin of appreciation, or an area of discretion (as Lord Phillips MR described it in **R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840**, para. 38), in mediating some of the difficult choices between competing imperatives with which governments are often, sometimes routinely, faced. However, as Lord Steyn was careful to emphasise, the context of the particular enquiry with which the court is concerned must justify application of the principle. The principle is also further qualified, it seems to me, by the important consideration that, while issues of social and economic policy, to take but two examples, are quintessentially matters within the purview of the democratically elected legislature and the executive, this is self evidently "much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection" (Lester & Pannick, Human Rights Law and Practice (1999), page 74, para. 3.21, quoted by Lord Hope of Craighead in his speech in **R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326, 380-381**).

[202] In my view, all of the matters raised by these appeals fall into the latter of the two categories described in the previous paragraph and are therefore not matters in respect of which the margin of discretion should deter the court from carrying our its clear duty under the Constitution itself.

Disposal

[203] For all of the reasons stated in this judgment, at, I fear (and for which I apologise), far too great length, I would therefore grant the relief sought by the appellants by making the following orders:

(a) Civil Appeal No. 31 of 2010 is allowed.

(b) Paragraphs (1) and (3) of the Order of Legall J dated 24 August 2010 in Claim No. 1018 of 2009 is set aside.

(c) Civil Appeal No. 30 of 2010 is allowed.

(d) Paragraphs (1) and (3) of the Order of Legall J dated 18 August 2009 in Claim No. 874 of 2009 is set aside.

(e) It is hereby declared that the Acquisition Act and Orders are inconsistent with the Constitution and are unlawful, null and void.

(f) The respondents are to pay the appellants' costs in this court and in the court below, to be taxed if not sooner agreed.

MORRISON JA

CAREY JA

Introduction

[204] On 25 August 2009, there was enacted into law, The Belize Telecommunications (Amendment) Act, 2009 (the Act). By section 63(1), it was provided as follows:

> "Where the licence granted to a public utility provider is revoked by the Public Utilities Commission, or where the Minister considers that control over telecommunications should be acquired for a public purpose, the Minister may, with the approval of the Minister of Finance, by Order published in the Gazette acquire for and on behalf of the Government, all such property as he may, from time to time, consider necessary to take possession of and to assume control over telecommunications, and every such order shall be prima facie evidence that the property to which it relates is required for a public purpose." [Emphasis added.]

Power was conferred by section 63(10) on the Minister to make, for and on behalf of the Government, the Order contemplated in section 63(1). "Property" was broadly defined in section 63(a) to include "shares, stock, interests of all kinds, and mortgagee's or chargee's interests in property." On 25 August 2009, the Minister exercising his powers under section 63(10), made the Order, The Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009 S.I. No. 104 of 2009. Its effect was the nationalization of the telecommunication industry which was operated by Telemedia Limited. That was a political act, the manifestation of the people's will.

[205] The court is altogether apolitical and must manifestly appear to be so. We are not called upon to determine the merits or otherwise of a monopolistic system vis-à-vis a free market system. The court's jurisdiction has been triggered because the appellants complain that their constitutional rights have been infringed by the Government's compulsory acquisition of their property.

A backdrop

[206] The parties who claim relief against the nationalization of their property, are The British Caribbean Bank Limited (the Bank) and Dean C. Boyce who represents Belize Telemedia Limited (Telemedia), the principal operator of the telecommunications industry in Belize. Leave was granted for the proceedings to be consolidated.

[207] The Bank is wholly owned by BCB Holdings Limited, a Belizean public investment company. In July 2007, the Bank loaned Telemedia $22,500,000 and secured its loan by a mortgage debenture which comprised a charge by Telemedia over its fixed plant, machinery and equipment, freehold and leasehold property, interest in all its stocks, shares, debentures, bonds or other securities, to name but a few of its assets. Upon the signing of the Order, the government compulsorily acquired 94% of the shares in Telemedia, 100% of the issued share capital of Sunshine and the Bank's mortgage over certain of Telemedia's assets.

[208] With respect to the other appellant, Dean C. Boyce, he was the Chairman of the Executive Committee of the Board of Directors of Telemedia. He held also one share in Sunshine Holdings Limited, which had an issued share capital of two shares.

[209] By the Minister's Order signed on 25 August 2009, 94% of Telemedia's issued share capital was compulsorily acquired. This included Sunshine Holdings Limited's 23.39% shareholding in Telemedia.

The Relief sought

[210] Both claimants took action by way of fixed date claims against the Attorney General and the Minister of Public Utilities seeking identical declarations and other relief which are set out hereunder:

> "(a) A Declaration that the Belize Telecommunications (Amendment) Act, 2009 and Statutory Instrument No. 104 of 2009 Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009 are contrary to sections 3(d) and 17 of the Constitution of Belize and are unconstitutional and void.
>
> (b) A Declaration that the Belize Telecommunications (Amendment) Act, 2009 and Statutory Instrument No. 104 of 2009, Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009 are contrary to sections 3(a) and 6(1) of the Constitution of Belize and are unconstitutional and void.

(c) A declaration that the Belize Telecommunications (Amendment) Act, 2009 and Statutory Instrument No. 104 of 2009 Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009 are contrary to section 16 of the Constitution of Belize and are unconstitutional and void.

(d) A declaration that the Belize Telecommunications (Amendment) Act 2009 and Statutory Instrument No. 104 of 2009 Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009 are in breach of the doctrine of the Separation of Powers enshrined in the Constitution of Belize and are unconstitutional and void.

(e) A Declaration that the Belize Telecommunications (Amendment) Act, 2009 and Statutory Instrument No. 104 of 2009 Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009 are contrary to section 68 of the Constitution of Belize and are unconstitutional and void …"

They sought other consequential relief and damages including punitive damages.

Dénouement

[211] The matters were heard before Legall J who, in a considered judgment, dismissed the claims with costs. He directed however, that the Financial Secretary comply with section 65(1) of the Act. The claimants have appealed to this Court on a number of grounds which challenge not only his approach, but also his findings, really his holdings in law, and seek declarations denied them below.

The Appeals

[212] I cannot begin this part of the judgment without paying tribute to the clarity of the submissions deployed by all counsel. I presume to speak on behalf of my brethren when I say that their efforts were of the greatest help. The apportionment of the work between counsel for the appellants obviated unnecessary repetition of

submissions and prevented an undue prolongation of the hearing. At the conclusion of submissions, it was announced that the court would take time to consider and would hand down its decision at a later date. My contribution to the resolution of the appeal follows below.

The grounds of Appeal

[213] Ground 1.

The learned trial judge erred in concluding that the Belize Telecommunications (Amendment) Act 2009 ("the Act) was constitutional. The appellant submits that the Act does not provide:

(a) the principles on which and manner in which reasonable compensation is to be determined;

(b) the principles and manner in which reasonable compensation is to be given within a reasonable time;

(c) a right of access to the Court for the purpose of establishing a party's interest or right to the property; and

(d) for the purpose of enforcing his right to any such compensation;

and is therefore inconsistent with the mandatory provision of section 17(1) of the Constitution and is therefore void.

Ground 2.

The learned judge erred in failing to find that the compulsory taking of the Appellant's property pursuant to the Acquisition Orders was unlawful for the reason that:

a. It was not duly carried out for a public purpose;

b. It was disproportionate having regard to the stated public purpose;

c. It was arbitrary and unlawful;

d. The failure by the Minister to give the appellant a hearing before making the Acquisition Orders was unfair and contrary to natural justice.

Ground 3.

The learned judge erred in failing to find that when the appellant's shares and interest were acquired, he was being treated in a discriminatory manner on the basis of his place of origin contrary to section 16(2) of the Belize Constitution.

A fourth ground was filed but was not dealt with and is accordingly omitted.

The Constitution

[214] The compulsorily acquisition of a person's property or the taking of a person's (land) against his will to use the language of Watkins LJ in **Prest v Secretary of State for Wales and another 81 LGR 193** at 211 is, "… a serious invasion of his proprietary rights." The right to own property is one of the fundamental rights guaranteed to the citizens of Belize by its Constitution which ordains in section 17(1) as follows:

17.1(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that: -

(a) prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time; and

(b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of -

(i) establishing his interest or right (if any):

(ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;

(iii) determining the amount of the compensation to which he may be entitled; and

(iv) enforcing his right to any such compensation.

The conditionalities which must be satisfied are set out in clear and unambiguous language for implementation whenever the state contemplates the compulsory taking of a person's property. It will be necessary to return to consider these stipulations in some little detail hereafter, when ground 1 is discussed. The failure to comply with this constitutional requirement enables the Court to intervene. The case of **San José Farmers' Co-operative Society Ltd. v Attorney General [1991] 43 WIR 63** is an example of a type of interference. There the court did not strike down the law (viz, The Land Acquisition (Public Purposes) Act, but invoked the provisions of section 134(1) of the Constitution which allows the Court within five years of Independence, to construe laws deemed to be inconsistent with the Constitution, "with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring them into conformity with [it]." Intervention by the Court after that period, would result in the legislation being struck down as void.

[215] I pass then to consider ground 1, which charges that none of the four stipulations in section 17(1) of the Constitution are provided for in the Belize Telecommunications (Amendment) Act, 2009. Section 17(1)(a) of the Constitution requires that the applicable law must prescribe the principles and the manner in which reasonable time is to be determined. The respondents identified section 67 of the Act as the relevant provision which states as follows:

67.(1) Subject to this Act, the following rules shall apply to the determination of compensation for the acquisition of property:

(a) the value of the property shall, subject as hereinafter provided, be taken to be the amount which the property in its condition at the time of acquisition, if sold in the open market by a willing seller, might have been expected to have realised at the date of publication in the Gazette of the Order made under section 63 of this Act;

(b) where the property is acquired consequent upon the revocation of the licence of the public utility provider, or on the cessation of telecommunications operations by such provider, the market value of the property shall be reduced by such amount as may be considered reasonable in all the circumstances;

(c) in assessing compensation, the Court shall employ the generally accepted methods of valuation of the kind of property that has been acquired, taking particularly into account the comparable sales of such property in Belize;

(d) the special suitability or adaptability of the property for any purpose shall not be taken into account if that purpose is a purpose to which the property could be applied only in pursuance of statutory powers or other permit, licence or authority not already granted or revoked, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department or a public statutory body;

(e) account shall be taken of any pending litigation against the public utility provider and of any pending or potential claims against such provider;

(f) all compensation assessed under this Act shall be expressed and payable in the lawful currency of Belize.

(2) In assessing compensation, no allowance shall be made on account of:-

(i) the acquisition being compulsory or the degree of urgency or necessity which had led to the acquisition;

(ii) any disinclination on the part of the person interested to part with the property acquired;

(iii) any damage sustained by the person interested which, if caused by a private person, would not render such person liable to an action or claim;

(iv) any increase in the value of the property acquired likely to accrue from the use to which the property acquired will be put;

(v) any outlay or improvement of, or other dealings with, such property, which have been made, commenced or effected within twelve months immediately before the publication of the Order under section 63, with the intention of enhancing the compensation to be awarded therefor in the event of such property being acquired for public purposes;

(vi) any accommodation or other agreements or settlement deeds (by whatever name called), containing provisions contrary to law.

Mr. Courtenay SC contended that in drafting the principles of assessment as appears above, the draftsman clearly had in contemplation the assessment of property, compulsorily acquired, where the property had no obvious value, as for example land or equipment. The regime promulgated was no different, he urged, from what one would find in Land Acquisition Acts in most jurisdictions in the Caribbean. He pointed to the property of the Bank which was compulsorily acquired, comprising proprietary

and other rights and interests under facility agreements, a syndicated loan agreement, a security agreement and a mortgage debenture. Section 67, he observed, was not addressing the situation as it related to the Bank's property which was acquired compulsorily. Mr. Smith associated himself with the submissions of Mr. Courtenay in this regard, although in the case of Mr. Boyce, the property taken consisted of shares.

[216] As I understood Ms. Young SC, her answer was that the language of the provision was sufficiently expansive to cover the situation as respects the property of Mr. Boyce or that of the Bank. She gratefully grasped this lifeline suggested by a member of the court and adopted this posture as a solution.

[217] The Constitution as the supreme law, mandates in clear and unambiguous language what the statute seeking to compulsorily acquire property must contain by way of protection for a person being deprived of a right guaranteed under the Constitution. As the case of the **San Jose Farmers' Co-operative Society Ltd. v Attorney General** (supra) shows, the interpretation of these provisions is to be strict. See per Henry JA ibid at p. 8. On that footing, there is force in the submission advanced by Mr. Courtenay that the draftsman had in contemplation property not such as taken from the bank. That is a little curious seeing that the nature of the property being acquired under the Act would have been known when the Act was in draft, and it would be reasonable to expect that the Act of acquisition would be custom- built to suit the peculiar circumstances of the case. It is relevant to note that the Prime Minister in his speech to Parliament in support of the Act, stated that "it is a plain and simple special measure for a special case." Such an observation cannot be dismissed as mere rhetoric or hyperbole in a political forum. Never-the-less, it has no legal effect if the political intent is not translated into appropriate language, for it is that language which is scrutinized in the construction of the particular legislation. It is clear that no provision was made for the protection of persons adversely affected, as required by the Constitution, in respect of prompt and adequate compensation.

[218] From what I have said above, it is clear that no provision was made for the property compulsorily acquired pursuant to Orders made by the Minister. In my judgment, no provision was made in the Act setting out the principles and the manner for determining reasonable compensation for the property acquired. The Rules in the

Act are apt for acquisition where the property is land. In those circumstances, one can speak of sale in the open market because sale of land is a fairly frequent event in most economies. I would therefore reject the proposition that the words of the provision are sufficiently wide to embrace the property acquired. The fact is that the Rules in the Act are altogether inapplicable to this property.

[219] It was also submitted by Mr. Courtenay SC that the Act does not provide the principles and manner in which compensation is to be given within a reasonable time. The provisions which speak to compensation within a reasonable time are section 63(3) and 11 of the Act. The former is in these terms:

> "In every case where the Minister makes an Order under subsection (1) above, there shall be paid to the owner of the property that has been acquired by virtue of the said Order, reasonable compensation within a reasonable time in accordance with the provisions of this Act."

The latter section 71, enacts as follows:

> "All amounts which have been awarded by way of compensation under this Act, including interest and costs to be paid by the Financial Secretary, and all other costs, charges and expenses which shall be incurred under the authority of this Act, shall be paid out of moneys voted for the purpose by the National Assembly and all such compensation shall be paid within a reasonable time."

Mr. Courtenay SC contended that these two provisions taken together did not meet the constitutional prescription because they did not provide the principles and manner in which compensation is to be given within a reasonable time. He said that merely repeating in the Act what is contained in section 17(1) of the Constitution did not provide the principles and manner in which compensation is to be given in a reasonable time. He summed up this part of his submission, by saying that once compensation is determined, the Act in contravention of the Constitution made no provision for the manner in which the compensation can be collected by the property owners. Section 71 of the Act states the obvious, namely, the source of moneys payable by way of compensation. He makes the point that although the Act states that payment is to be timeously made, it does not prescribe the manner in which it is

to be achieved. In this respect, the Act is deficient as an essential requirement of section 17(1) of the Constitution, is not provided.

[220] Ms. Young SC responded at length to these submissions, but at the end of the day, I was not persuaded that she had met any of the points raised. Her response was that the Act provided a process which begins with

(i) notifying the owners of the property (section 64(1) and (2))

(ii) treating with the claimants and if there is default access to the Supreme Court (section 65(1))

(iii) specifies the parties (section 66(2))

(iv) protects persons under disability (section 66(3))

(v) interest may be added by the court (section 68(2))

(vi) costs may be awarded by the court (section 69(1))

(vii) all such compensation shall be paid out of moneys voted for the purpose by the National Assembly and shall be paid within a reasonable time. (section 71)

With respect, it is impossible to see how any of the seven matters adverted to, speak either to principles or the manner in which compensation will be given to a party dispossessed of his property compulsorily. Legall J found that this court had approved section 19 of the impugned Act in the **San Jose case** (supra) which was similar to section 67 of the Act, and held that the submission as to inadequacies had merit. The conclusion, with respect, is flawed. The submission before him and renewed before this court, is, that the rules made were altogether inapt in relation to the property taken. There was no such argument deployed in the **San Jose case** (supra).

[221] I turn now to consider section 71 of the Act which states, so far as material that –

> "All amounts which have been awarded by way of compensation shall be paid out of moneys voted for the purpose by the National Assembly and all such compensation shall be paid within a reasonable time."

As part of the regime in the Act, it was submitted that this rule was also deficient. There was no time frame spelled out in the Act: the provision was content to echo the words of the Constitution. The judge held that it was sufficient to repeat the phrase "within a reasonable time." That approach does not accord with the decision in **San Jose** (supra) which is clear that the Act must fully deal with all the elements mandated in the Constitution. Mr. Courtenay's submission that section 71 merely articulates the source of the funds for compensation is in my view, eminently justified. The provision provides no time frame for payment. It is not unimportant to note that the money must be voted for by the National Assembly. The person whose property has been taken from him compulsorily can have no idea when that vote will occur. It is little comfort to that person in those circumstances to be told that the law says it shall be paid within a reasonable time. As Liverpool JA observed in **San Jose** (supra) at p. 16 –

> "Compensation within a reasonable time can only mean that payment must be made in full as soon as is reasonably practicable after the amount of compensation due has been finally settled …"

In that case, this court struck down section 32(1) of the Land Acquisition (Public Purpose) Act which provided that the Minister could order compensation to be paid over a ten-year period as it was of the Constitution, outwith section 17(1)(a) of the Constitution. The situation in the instant case is materially different: no time frame is included in the Act. It is a wise counsel, I would suggest, to include a time frame, which, looked at objectively, would be regarded as reasonable.

[222] Ms. Young SC in support of section 71 of the Act which she thought unobjectionable, advanced arguments which were not a little farfetched. She was not afraid to assert that if the National Assembly failed to vote or the vote was

defeated, the Court "could step in and order the payment by the National Assembly." She submitted that the Court could enjoin members of the Assembly to vote in a particular way. Indeed, she made bold to say that the court could imprison the majority of members if they choose not to vote in favour. All this must, of course, be dismissed as without merit.

[223] The constitutional principle of the separation of powers precludes any such event. Counsel cited **Gairy v Attorney General of Grenada [2001] UKPC 30** and **The Bahamas District of the Methodist Church in The Caribbean and The Americas and others v The Hon. Vernon J Symonette MP Speaker of the House of Assembly and 7 others**; **Poitier and 14 others v The Methodist Church of the Bahamas and others** (All England Official Transcripts (1997 – 2008)]. The Privy Council held in the former case that the court had power to make coercive orders against a minister. In the latter case, the Privy Council held that the court had power to entertain a claim where the provisions in a Bill, [which], if enacted, would contravene the Constitution. I do not think that either of these cases supported her submissions or were otherwise helpful.

[224] Section 17(1)(b)(i) of the Constitution requires that the Acquisition Act must provide access to the court to any person claiming an interest in or right over the property compulsorily acquired, for the purpose of establishing his interest or right (if any). Mr. Courtenay SC submitted that there was no provision in the Act dealing with access for this purpose.

[225] Ms. Young's position was that the Act expressly provided for that situation in section 63(4). That section states as follows:

> "(4) Any person claiming an interest in or right over the acquired property shall have a right of access to the courts for the purpose of determining whether the acquisition was duly carried out for a public purpose in accordance with this Act."

She said also that the point was largely academic because neither appellant was in any way prejudiced.

[226] There is no question that the appellants are prejudicial in any way by the omission to include the provision for access to the court for the purpose of establishing the dispossessed person's right or interest in the property. But in my opinion, that cannot be a satisfactory answer, given that its absence, means that there has been a breach of the constitutional requirements, the effect of which must be that the Act would be unconstitutional. In San Jose (supra), this court, invoking section 134 of the Constitution, modified the statute to include such a provision. By so doing, the impugned Act was brought into conformity with the Constitution.

[227] It is clear that section 63(4) of the Act, contrary to Ms. Young's strongly expressed view, does not speak to access to the court for determining rights or interest in the property. That provision confers locus standi on a person who claims an interest, for the purpose of a determination whether the acquisition was for a public purpose. This Act is not therefore, in conformity with the constitutional mandate. In the result, the submissions of Ms. Young in this regard must be rejected.

[228] We come then to the final failure identified by the appellants. The submission was that the Act did not provide access to the courts for the purpose of enforcing the right to compensation as required by section 17(1)(d) of the Constitution. Ms. Young dispairingly argued that the relevant provision is section 71 of the Act which is in this wise -

> "All amounts which have been awarded by way of compensation under this Act, including interest and costs to be paid by the Financial Secretary and all other costs, charges and expenses which shall be incurred under the authority of this Act, shall be paid out of moneys voted for the purpose by the National Assembly and all such compensation shall be paid within a reasonable time.
>
> Provided that …"

[229] When the draftsman uses the words "enforcing his right to compensation", he is to be understood I would suggest, as meaning execution of some process to collect the award. This follows from the sequence of steps the dispossessed property owner must take from the point in time when his property is compulsorily

acquired until he enforces, that is, seeks to collect the award. Although she confidently asserted that the order was enforceable by coercive means, she was quite unable to demonstrate where that procedure appeared in The Belize Telecommunications (Amendment) Act, 2009. Indeed, in the course of her submissions she did say that "it (that is, the Act) doesn't tell you how to enforce." (Transcript p. 488, l. 10). Any discourse thereafter, is, I fear, without substance and pointless.

There can be little doubt that the Act in that respect is also deficient.

[230] The judge did not appear to deal with this point but he mentioned section 71 of the Act which Ms. Young put forward as the "enforcing" provision. He expressed himself thus (Vol 6 p. 70 Record)

> "The Constitution, not the National Assembly, is supreme; and if the National Assembly fails to vote the moneys for compensation, then the Supreme Court, on a proper application, will command the National Assembly to obey the law and entrenched provisions of the Constitution and pay reasonable compensation for the properties acquired, within a reasonable time."

This is all very grand like the charge of the Light Brigade. Reality however, it is not. The Constitutional principle of the separation of powers precludes any such an arrogation of power by the judicial arm of government to command the National Assembly to do its will. Of course, it is permissible for coercive orders to be made against the Executive, viz, the Minister or the senior civil servant in the relevant ministry. See **Gairy v Attorney General of Grenada** (supra).

Ground 2.

[231] We come now to consider ground 2 in which the appellants complained that the judge erred in failing to find that the compulsory taking of the appellants' property was unlawful for a number of reasons which were itemized as follows:

a. it was not duly carried out for a public purpose;

b. it was disproportionate having regard to the stated public purpose;

c. it was arbitrary and unlawful;

d. the procedure adopted by the Minister was unfair.

These will be considered in turn.

a. The acquisition was not duly carried out for a public purpose.

Mr. Courtenay who argued the point, submitted that the judge erred in concluding that the acquisition of the appellant's property was carried out in furtherance of the stated public purpose in the absence of evidence from the respondents that at the time of the acquisitions the telecommunications industry was unstable and required improvement, that telecommunications services were unreliable and being delivered at high prices; and that the telecommunications environment was contentious and disharmonious.

[232] In order to appreciate this aspect of the appeal, the public purpose which the Minister promulgated in Statutory Instruments No. 104 and 130 of 2009 must be set out. In each case, it was recited that the Minister considered that control over telecommunications should be acquired for a public purpose, viz, "the stabilisation and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in a harmonious and non-contentious environment." The appellants disclaimed any suggestion that the purpose stated in these Orders, was not a public purpose. They questioned, however, whether the compulsory acquisition of their property, was at all necessary to achieve that purpose. Mr. Courtenay SC noted in his skeleton argument that section 63(1) of the Act only permits the compulsory acquisition of property for a public purpose, and only such property as is "necessary" to achieve such purpose can be "duly" acquired.

[233] He also submitted that the judge erred in concluding that the acquisition of his client's property was carried out in furtherance of the stated public purpose in the absence of evidence from the respondents that at the time of the acquisitions, the

telecommunications industry was unstable and required improvement, that telecommunications services was unstable and being delivered at high prices, and that the telecommunications environment was contentious and disharmonious. Further, he said, that the compulsory taking of the property would further the stated public purpose.

[234] In relation to the same ground, Mr. Smith SC, who followed Mr. Courtenay SC, was critical of the judge's approach and appreciation of the issue for determination which, in this regard, was whether the acquisition was indeed carried out for the stated purpose. He referred us to paragraph 71 of the judgment where the judge said this –

> "It was urged by the defendants that the Acquisition Act and Orders were made for a public purpose. In order to decide whether they were made for a public purpose, the court has to consider the behaviour of B.T.L. and Belize Telemedia and see whether the acquisition was for the general interest of the community or the people of Belize rather than particular interests of individuals. We have already considered above the behaviour of B.T.L. and Belize Telemedia in relation to the accomplishments of the company as submitted by Dean Boyce, and also in relation to the fights for control of B.T.L. under the heading quadmire (sic) of law suits; and the restrictions of the P.U.C. under the Accommodation Agreements."

[235] Counsel's complaint was that having identified the behaviour and misdeeds of the company, the judge had not demonstrated how that conduct amounted to instability, unreliability or other deficiencies in the industry. In fact, he contended, aspects of the behaviour of the company which were identified bore no rational nexus to the stated public purpose. The judge thus mis-framed the issue for his determination and wrongfully laid emphasis on certain irrelevant behaviour of Telemedia, which laid the foundation for his falling into error. He commended a statement by Watkins LJ in **Prest v Secretary of State for Wales 81 LGR 193** at p. 211 -

> "In the sphere of compulsory land acquisition, the onus of showing that a compulsory order has been properly confirmed rests squarely on the acquiring

authority and, if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be more carefully scrutinized. The Courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."

[236] Mr. Smith SC in applying this dictum to the instant case, said that the judge should have set for himself the task of examining the Minister's decision to see whether it was based on right legal principles, adequate evidence and proper consideration of the factors that swayed his mind. He concluded that the judge had failed "absolutely" in that regard. So far as the Minister was concerned, he had failed altogether to address those issues.

[237] With respect to the evidence adduced on behalf of the respondents, he was at one with Mr. Courtenay SC in arguing that the respondent had failed to show in their evidence that there was instability, unreliability, lack of affordability, or lack of improvement in the industry. There was, he would add, a failure on the part of the respondents to attempt to show how the acquisition of the appellants' property and interest could aid or could achieve these stated public purposes.

[238] It becomes very necessary at this juncture to examine the evidence which the respondents did adduce to justify the take-over. The relevant Minister at the time of the acquisition was Mr. Melvin Hulse, whose affidavits are or should be significant. They must be examined to see whether the taking was necessary to meet the public purposes articulated in the statutory instruments and as well, whether the taking was duly carried out to meet those public purposes. At paragraph 19 of his first affidavit he deposes as follows:

"The acquisition was for the purpose of liberating a vital part of the patrimony of the Belize people, to wit, the telecommunications industry. It is in the

national interest that the industry should continue to develop in a non-hostile and regulated environment."

This statement in the highly charged partisan environment of a debate in the National Assembly, is a powerful and rousing call to arms. However, without seeming patronising, it is, not unsurprisingly, a political speech. As evidence justifying the acquisition of person's property, it is not in my opinion very useful. To justify the acquisition, it has to be shown that the Minister acted upon the right legal principles, adequate evidence and a proper consideration of the factors which sways his mind into the decision. (see Watkins LJ in **Prest v Secretary of State for Wales** (supra) at p. 211). It is reasonable to ask the question prompted by the first sentence, "liberate the patrimony from" what? The answer is not, I suggest, self evident, especially given the follow up enigmatic observation of the Minister. The Financial Secretary, Joseph Waight, does not in his first affidavit, refer to any of the purposes stated in the statutory instruments. For the most part, his affidavit detailed how Lord Ashcroft came to be the dominant shareholder in Belize Telemedia Limited. Ms. Young SC told us that this epic account was a necessary historical lead up to the acquisition and showed not only the purpose of the acquisition, but also the situation existing at that time. The latter assessment was doubtless accurate but the former could only be accurate if the purpose of the acquisition was to nullify the influence of Lord Ashcroft. If that was the purpose, then, it would be inconsistent with the public purposes as set out in the statutory instruments and could scarcely support an argument in favour of compulsory acquisition.

[239] The Financial Secretary listed some six cases in which BTL brought suits against the government and three suits in which BTL was the defendant. These suits were filed between 2003 and 2004. The judge described the suits as "the quagmire of law suits" and connected to the stated public purpose and was a matter which the Minister could take into consideration in arriving at his decision.

[240] It is not altogether easy to appreciate how six cases filed within a one year period approximately, between 2003 and 2004, can have any bearing on any acquisition taking place in 2009. We were not told that these cases had not been finalized. The absence of such information would strongly suggest that they have been resolved. If that be the case, they could not fairly be considered as creating an

ensuing litigious and contentious environment at the time of acquisition. The conclusion is obvious, that this factor cannot, in my judgement, be "connected to the stated public purpose" as the judge held.

For completeness and to be fair to Mr. Waight, he did depose to a "barrage of litigation" between 2005 and 2007. No further or better particulars of this "barrage" is recited, save a reference to a claim 185 of 2007 in which BTL was the defendant. He also called attention to "two challenges to the validity of the Accommodation agreements were filed in the Supreme Court of Belize, namely: Claim No. 275 of 2009 brought by the Public Utilities Commission against the Government; and Claim No. 279 of 2009 brought by the Association of Concerned Belizeans and Godwin Hulse against the Government of Belize" (para. 41 p. 378 of the Record). Neither BTL nor Telemedia was a party in these proceedings. It has not been suggested in any form or manner that these actions were frivolous or vexatious. In a democratic society as Belize, any aggrieved citizen or party is entitled to vindicate his rights before the courts of the land. Where a party is not involved in the suits filed, it is reasonable to suppose that he has acted on that basis and can scarcely become a part of a litigious environment. In the result, I am unable to accept that any contentious environment existed at the time of acquisition.

[241] In continuing to examine the evidence adduced on behalf of the respondent, it is to be noted that Mr. Waight in his affidavit, adverts to the mortgage debenture executed by BTL with British Caribbean Bank and gave as his opinion that the effect of entering into a mortgage debenture was "to place the entire business of BTL under the control of the Bank." He also deposed to the fact that "the British Caribbean Bank Limited and the majority shareholders in BTL are all owned and or controlled by the same person or entity." This concatenation of factors rendered it necessary to acquire this Bank's property and, as he submitted, demonstrate that the acquisition was "for a public purpose."

[242] The public purpose which the Minister recited in the statutory instruments was – "the stabilisation and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in a harmonious environment." It would have been helpful if Mr. Waight had particularised the public purpose. Ms. Young SC did rehearse all this evidence

before us but never did explore its significance in relation to the public purpose as reiterated above, as opposed to "a purpose."

[243] In his second affidavit, Mr. Waight does not address any facet of the public purpose. Ms. Young SC in her oral submissions did not seek to connect the evidence of this deponent to the stated public purpose.

[244] The affidavits of the Minister, for obvious reasons, should, one would expect, provide a deal of material, calculated to justify the acquisition. The Minister in his first affidavit, adopted as his own "the statements of fact as set out by Mr. Joseph Waight, the Financial Secretary, in his first affidavit" and at paragraph 23 of the affidavit, disclosed that "the reasons for the acquisition are as set our in the Prime Minister's statement to the House …"

[245] The second affidavit of the Minister can properly be described as of a housekeeping nature but never vouchsafed the Minister's consideration for the acquisition. It is true that at some point therein, it is asserted that the acquisition of the Loan Facility and the overdraft Facility involving Sunshine Holdings Limited was done "for a public purpose", but the Minister does not specify the public purpose he had in mind. He does not in fact link the acquisition with the public purpose. As an example, at paragraph 4 of this second affidavit, he deposes as follows:

> "I wish to state that the acquisition of the Loan Facility was done in order to clarify that the entire debt and the Claimant's interest in the security for the debt had been acquired."

[246] Mr. Courtenay SC made the point that the affidavits of the Minister and those of Mr. Waight, are silent on:

a. any instability in the telecommunications industry in or around August 2009;

b. any explanation as to how the taking of the [appellants'] property would correct that instability and lead to the stabilization of the telecommunications industry;

c. any unreliability in telecommunications service, or evidence of services being offered at unaffordable prices;

d. any evidence as to how the taking of the [appellants'] property would restore reliable telecommunications services and provide such services to the public at affordable prices; and

e. disharmony in the telecommunications industry in August 2009 and how the taking of the [appellants'] property would ostensibly introduce a harmonious and non-contentious environment.

Although Ms. Young in her riposte said that the Minister in his "three" affidavits had set out his considerations for acquisition, that did not accord with what he did. He adopted statements of Mr. Waight and pointed to the Prime Minister's statement to the House as providing reasons for the acquisition. Accordingly, her evaluation of what the Minister did, was, it would seem, overly optimistic and I fear, inaccurate.

[247] At this point, an examination of the Prime Minister's statement is called for, and of course, it must be tested against the stated public purpose. Mr. Smith SC submitted that there were three reasons to be extracted from the statement. He identified them as:

i. The Re-Belizeanisation of Telemedia

ii. putting an end to disrespect of

- the Accommodation Agreement

- Telemedia awards

- Telemedia court battles

- one man's campaign to subjugate an entire nation to his will

iii. unregulated monopoly in the sector.

Ms. Young SC was critical of the appellants' deconstructing and parsing out the reasons. She said the speech needed to be taken as a whole but to what end, she did not choose to divulge. We were taken meticulously through the Prime Minister's statement. She was invited by the court to separate what she considered rhetoric from what she said was operative. She did not relate the matters about which the Prime Minister spoke very passionately, to the public purpose stated in the Statutory Instruments. The three reasons for the acquisition which Mr. Smith correctly identified do not deal with instability in the telecommunications industry at the time of acquisition nor with any unreliability in those services nor of services being offered at unaffordable prices nor how the acquisition of the appellants' property would correct these deficiencies.

[248] Legall J at paragraph 108 of his judgment stated as follows:

> "When the chart is considered. The influence of Ashcroft, the quadmire (sic) of law suits; the loan to Belize Bank; and the large US loan to Belize Telemedia to purchase shares in itself; and the possibility of a winding up of Belize Telemedia are considered, all of which were discussed above, it seems to be that these matters are connected to the stated Public Purpose and that the Minister having taken these matters into consideration acted reasonably, in accordance with law, on sufficient evidence, took relevant matters into consideration, when he made the Acquisition Orders which acquired the properties."

The first observation one would make in relation to this diffident finding by the judge is that the judge offered no reasons for the conclusion, that these factors justified the Acquisition Orders. The first factor which he puts forward is the structure chart which the respondents tendered in evidence to show the dominance and influence of Lord Ashcroft in Telemedia and in the appellant bank. In his skeleton arguments, Mr. Smith made the point that the judge failed to explain why or to make any findings that any influence Lord Ashcroft exerted over any party had any connection with the stated public purpose or necessitated taking away the appellant's interests in Telemedia. The same point applies equally to the appellant bank's interests and rights.

[249] The judge did not demonstrate that commercial transactions viz, the loans to which he alluded, between Telemedia and banks were in any way connected to the public purpose or for that matter, was the possibility of the winding up of Telemedia. The conclusion to which one is compelled, is that the acquisition was not carried out for the public purpose promulgated in the Acquisition Orders, nor was it done in accordance with the Act because acquisition of the property was not necessary to achieve the public purposes set out in the Statutory Instruments.

Proportionality

[250] The appellants invited the court to find that the acquisition was disproportionate having regard to the stated public purpose. The principle of proportionality was stated by Lord Steyn in **Daly v Secretary of State for Home Development [2001] 2 AC 532** at p. 547. He said -

> "The contours of the principle of proportionality are familiar. In de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 the Privy Council adopted a three stage test. Lord Clyde observed at p. 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > "whether (i), the legislative objective is sufficiently important to justify limiting a fundamental right;
> >
> > (ii) the measures designed to meet the legislative objective are rationally connected to it; and
> >
> > (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

"Proportionality involves the striking of a fair balance between the rights of the individual and the interest of the community", per Sedley LJ in **Erithea v Secretary of State of the Home Department** [2007] EWCA 801 at para. 20. Legall J accepted that "administrative action or legislation may be struck down as unconstitutional, as being in conflict with the principle of proportionality which may be an implied

requirement of the fundamental rights provisions of the Constitution." [See p. 1270 of his judgment]. He did not however accept that the Acquisition Acts or Orders in the instant case were disproportionate.

[251] In his submissions, Mr. Smith submitted that the judge should have asked the questions propounded by Lord Clyde in **de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing** (supra). He would have had to remind himself of what the legislative objective was, which was to introduce reliability, stability et cetera. Having failed to do so, he could not properly gauge whether it was sufficiently important. There was no balancing exercise. The result, he added, was predictable because there was no evidence of any instability nor other deficiencies. Further, as he contended, the second test is that the measures designed to meet the legislative objective were not rationally connected to it. There was no evidence that the taking of the appellants' property would have helped to introduce reliability et cetera. Third, he said, the means to impair the rights and freedom of the appellants were far more than necessary to accomplish the objectives. In the case of the appellant Boyce, there was at the disposal of the government, a tailor-made tool, viz, the Public Utilities Commission, which in 2002 had been given all the powers necessary to achieve the very same public purpose.

[252] To reinforce this point, we were referred to section 3 of the Belize Telecommunications Act 2002, which provides (so far as material) as follows:

> 3. The primary object of this Act when read together with the Public Utilities Act, is to provide for the regulation and control of telecommunications matters in the public interest, and for that purpose to -
>
> (a) promote reliable and affordable telecommunication services of high quality accessible to Belizeans in both urban and rural areas in all regions of Belize;
>
> …

(d) encourage investment and innovation in the telecommunications sector;

(e) ensure and promote fair pricing and the use of cost-based pricing methods by providers in Belize;

(g) promote stability of the telecommunications sector;

…"

Section 6(ii)(a) of this Act is, as he pointed out, also relevant. That section gave the Public Utilities Commission power –

"(a) to implement the policy of the Government relating to the telecommunications industry and the objectives of this Act;"

[253] Mr. Smith SC then suggested other alternative methods which were less intrusive than compulsory acquisition. With respect to Telemedia, he argued, the government could have acquired majority shares but not all the shares they in fact acquired. When the present administration first formed the government as the Prime Minister noted in his address to the House, the privatisation of BTL worked "wonderfully well", and remained the proudest accomplishment of the 1984 – 89 administration. Then, the government held a majority of the shares viz, 51%. The significance of that information was that there was a less intrusive means. With respect to the appellant Bank, he said that Telemedia Ltd. could have entered into discussion with the banks with a view to having the loan assigned to another financial institution.

[254] Mr. Courtenay SC reasoned that if taking the Bank's security interest resulted in the government having to compensate by paying the same amount, it must be disproportionate to compulsorily take it. Government having taken over ownership of Telemedia, then could make arrangements for Telemedia to pay. If, he said, the government takes it compulsorily, it ends up in the same position of having to pay. Clearly therefore, he submitted, compulsory acquisition must be disproportionate.

[255] For the respondents, Ms. Young SC did not meet this issue of proportionality frontally. She began by questioning the applicability of proportionality to sections 3(d) and 17(1) of the Constitution because the Act effects no taking of property. Whatever one makes of this proposition, she was not permitted to expand thereon for she had not challenged the judge's finding that the principle was applicable to any infringement of the fundamental rights guaranteed under the Constitution by filing a respondent's notice. She did seem to accept this ruling and then submitted that what the judge did, was not to apply the "hard edge proportionality test." This category of test which she advocated is not supported by any authority. I am content to say that the judge's appreciation of the test was correct and is supported by authority as he makes clear in his judgment and to which I have made reference at the commencement of this aspect of the issue. In the result, there is much merit in the submissions of the appellants in this regard and I agree with them. It is no disrespect to Ms. Young SC to say that I did not derive assistance from the many cases cited by her on this aspect of the appeal.

[256] The acquisition was arbitrary and unlawful.

The appellants, on the issue, submitted that compulsory acquisition must be for a legitimate purpose and must not be arbitrary, that if there is no legitimate purpose, then it will be arbitrary. That is an inevitable inference. The exercise of power in those circumstances, is, they submit, arbitrary and unlawful and the decision must be struck down. There was, the argument ran, an absence of any evidence of a legitimate purpose and therefore, the true purpose of the compulsory acquisition was an attack on Lord Ashcroft. The underlying political purpose of the acquisition was made repeatedly clear viz to damage the commercial and reputational interests of a single individual. As an example of this intent, counsel Mr. Courtenay SC in his skeleton arguments, said that the Prime Minister admitted that to the House when tabling the Act. The Prime Minister is reported to have said:

> "Michael Ashcroft had Telemedia invoke arbitration in London to enforce the Accommodation Agreement. And he obtained a judgment of BZ $38.5 million … There will thus be no more Telemedia awards against us; no more Telemedia Court battles … and there will be no more suffering of this one man's campaign to subjugate an entire nation to his will. After long and

> sufficient consideration … the government will now acquire Telemedia … as well, we are only acquiring the 94% or so of Telemedia controlled by the Ashcroft interests. The shareholding owned by the Belizeans will be left intact."

[257] Counsel concluded by saying that it was clear on the evidence that the Prime Minister was of the opinion that Michael Ashcroft controlled Telemedia, and the object of acquiring Telemedia's shares was to put an end to "suffering of this one man's campaign to subjugate an entire nation to his will." This view was corroborated when the Prime Minister gave an interview to "Wake up Belize" in which he described the legislation as "part of a continuing fight to ensure that Michael Ashcroft will never break the will of his government."

[258] We were referred to paragraph 109 of the judge's reasons where he said this:

> "It was submitted that the Prime Minister had said in the media that "This is the people of Belize against the Ashcroft interest and I will never relent" and therefore the purpose of the Acquisition Acts and Orders purpose (sic) was to target one man – Lord Ashcroft and therefore the legislation was not for a legitimate purpose … But the evidence as shown above, and as I have found is that the purpose of the Acquisition Act and Orders was to achieve the stated Public Purpose."

The judge's conclusion, it was said, could not be upheld having regard to the evidence. Counsel, in reinforcement of his submissions, drew our attention to S**mith v East Elloe RDC [1956] AC 736** where it was held that a decision based on malice is one directed to the person e.g. where a by-law or order has been made especially to thwart an individual application for a permit. Another case cited was a Canadian case **Re Burns and Township of Halidimana (1966) 52 DLR 101**. In that case the court inferred bad faith from the fact that a by law was made for the compulsory purchase of land which was the subject of pending litigation between the owner and the local authority. The court held that this constituted a personal attack on that owner, and was accordingly unconstitutional and should be struck down. Mr. Courtenay SC urged strongly that there was cogent evidence before the learned judge that the object of the acquisition was the result of a personal attack on Lord

Ashcroft who was believed to be in control of Telemedia, and was wrongly believed in the light of the evidence in the case, to be able somehow, through the appellant Boyce, to control Telemedia or cause it to be wound up. Counsel also contended that the attack by the Prime Minister may be imputed to the Minister of Public Utilities since, on the evidence, he adopted the Prime Minister's statement in the House as setting out the reasons for the acquisition. Finally counsel urged that an *ad hominem* attack on a particular individual is in bad faith and for an improper purpose, it is therefore arbitrary and unconstitutional.

[259] Ms. Young SC in her reply repeated what she said was the effect of the evidence advanced by the respondents and agreed with the judge's conclusion on the evidence, namely that one person was in a position to influence Belize Telemedia, Dean Boyce and the appellant bank. She faithfully repeated the misdeeds of Telemedia, the quagmire of law suits, deals between the previous administration, and BTL, loans made by the bank to BTL, arbitration proceedings between BTL and the government, and agreed with the judge's conclusion that these matters justified the acquisition.

[260] There is no question that the judge referred to all those matters mentioned by her but, at no place did he show how these factors affected the public purpose, viz, the stabilization and improvement of the telecommunications industry and the provision of reliable telecommunications services to the public at affordable prices in a harmonious and non-contemptuous (sic) environment."

There was never any analysis of that evidence. There was a recital of the evidence and a conclusion that the content of that evidence was connected to the stated public purpose. The evidence was incapable of showing that there was instability and other deficiencies which the compulsory acquisition would rectify. It follows as night the day that if there was no call for improvement, then, there must be some other purpose. It is difficult in examining the Prime Minister's statement, which the Minister deposed contained his reasons, to find a justification for the acquisition in terms of the stated purpose. It is a matter of regret to have to say that the statement did single out one individual for adverse comment. The authorities to which reference has been made in this judgment provide the basis for saying that inference can be drawn from a personal attack on one person. It is not at all necessary to find bad

faith. Where the evidence adduced does not support or justify the compulsory acquisition, it seems reasonable to find that since the stated purpose is not demonstrated, there must be some other purpose, that not being legitimate. In the result, I must, for these reasons, differ from the finding of the judge.

[261] Failure to give hearing unfair.

The judge recognized that the right to be heard and fairness are legally required. He expressly so stated but noted that there were exceptions. Relying on the opinion stated in Wade Administrative Law, 8th Edition p. 544, that "there is no right to be heard before making legislation whether primary or delegated unless it is provided by statute", he rejected the submissions by the appellants that the Minister did not have to provide a hearing before making the Acquisition Orders. He also found that on the facts in the instant case, because there was a need for urgent action, a hearing could be excluded. Lastly, he ruled that a hearing would have been a useless formality.

[262] The respondents argued that there is no legal requirement for the court to imply a right to be heard in the Act. Since the judge did not accept this proposition, I need say no more about it.

[263] The opinion in Wade (supra) is not supported by any authority and I entertain the gravest reservations about it. We were referred to two Commonwealth cases which differ from Wade's thesis. See **Homex Realty & Development Co. Ltd. v Village of Wyoming [1980] 2 RLS 1101** where the Supreme Court of Canada held that the *audi alteram* principle applied to a by law and in the **South African Roads Board v City Council of Johannesburg** [Case No. 485/89 dated 24 May 1991] where the Appellate Division of the Supreme Court of South Africa was of opinion that once the decision while possibly having a general import, is calculated to cause particular prejudice to an individual or particular group of individuals, the person had a right to be heard. This opinion is entitled to respect and is a persuasive authority. It is not doubted that the appellants were individually affected by the expropriation of their property. This was, as stated in the House, a special measure for a special case. The parties, in my judgment, had a right to be heard.

Discrimination

[264] The appellants both averred in their fixed date claim, that the National Assembly cannot pass law which discriminates against any person on the ground of, among other things "place of origin" and that the "Order and the Acquisition" are contrary to section 16 of the Constitution. They both cited section 16(1) of the Constitution. Neither referred to section 16(2). It is a little surprising that Mr. Smith SC in his skeleton arguments stated that the appellant Boyce relied on section 16(2). It is right to say that the judge did not mistake the particular provision relied on. I do not think however, that Mr. Smith's misunderstanding is of any crucial significance.

[265] The factual basis on which the appellants rest their claim that it has been discriminated against, is that the shares of Belizeans in Telemedia were being left intact, implying that non-Belizeans were being targeted.

[266] The judge rejected this ground because he said that he had no evidence that the 6% shares not acquired belong to Belizeans and he had no evidence of the place of origin of those who held the 94% of shares acquired and those who held the 6% shares not acquired.

[267] The appellants did not urge that there was any evidence of the place of origin of the appellants. It was their submission that there was clear evidence that the Acquisition Act and Orders were targeted against non-Belizeans, the Act and Orders were discriminatory and accordingly there was simply no need for further evidence regarding the nationality and place of origin of the parties involved. The argument is attractive but flawed. On the face of it, even assuming without accepting the suggestion that the legislation was "targeted against non-Belizeans, it goes some way to proving that there was unequal treatment. The Constitution defines discrimination in section 16(3) thus:

> "In this section, the expression discrimination means affording different treatment to different persons attributable wholly or mainly to their respective description by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject

or are accorded privileges or advantages which are not accorded to persons of another such description."

The onus which is on the appellants in light of their pleadings was to prove the legislation made provision that is discriminatory either of itself or in its effect. It was never the submission that the Act or Orders included any such discriminatory provision. Although there appeared to be different treatment as section 16(2) required, there was in fact no proof that the difference was on the basis of place of origin. In my opinion, the weight of the evidence gives good reason to think that the treatment was prompted by the intention to deprive Lord Ashcroft of his perch of perceived dominance in the industry. That factor is not however within the descriptions prescribed in the Constitution.

[268] In all the circumstances I am of opinion that the judge came to a correct decision on this ground.

[269] There remains three other matters raised by Mr. Courtenay SC which were not contained in any ground but which the court allowed him to argue. His complaint was that the judge erred in his interpretation and application of the principles which govern the interpretation of constitutions. The judge erred in:

"(a) Determining that section 63(1) of the Acquisition Act does not contravene the Constitution as there is nothing in the Constitution which forbids the prima facie provision of section 63(1);

(b) his application of the presumption of constitutionality; and

(c) determining that the legal and evidential burden in establishing that the Acquisition Act and Orders are unconstitutional and lay on the Appellant.

In my opinion, seeing that a definitive response to any or all of these complaints is not dispositive of this appeal, it can serve in the instant case, only to prolong these

reasons which are already of some length, to deal with them. I am not to be taken as suggesting that these complaints are without merit.

[270] In the final result, I would allow the appeals. I agree with the orders proposed by Morrison JA.

CAREY JA

ALLEYNE JA

[271] I have read the judgment of Carey JA. I agree and have nothing to add.

ALLEYNE JA