

IN THE SUPREME COURT OF BELIZE, A.D. 2009

CLAIM NO: 874 OF 2009

IN THE MATTER OF an application under Section 20 of the Belize Constitution

AND

IN THE MATTER OF SECTIONS 3, 16 and 17 of the Belize Constitution

AND

IN THE MATTER OF the Belize Telecommunications (Amendment) Act, 2009

AND

IN THE MATTER OF Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument No. 104 of 2009,

**BETWEEN:**

**BRITISH CARIBBEAN BANK LIMITED**

**Claimant**

- and -

**THE ATTORNEY GENERAL OF BELIZE**

**First Defendant**

**THE MINISTER OF PUBLIC UTILITIES**

**Second Defendant**

FIXED DATE CLAIM FORM

APPLICATION FOR CONSTITUTIONAL REDRESS

Claim Form

The Claimant, the **BRITISH CARIBBEAN BANK LIMITED** of Governor's Road, Leeward, Providenciales, Turks and Caicos Islands, a company duly formed and existing under the laws of the Turks and Caicos Islands

claims against

the First Defendant, **THE ATTORNEY GENERAL OF BELIZE**, Attorney General's Ministry, Belmopan City, Cayo District, Belize

and

the Second Defendant, **THE MINISTER OF PUBLIC UTILITIES**, NEMO Building, Belmopan City, Belize.

1. Pursuant to Section 20 of the Constitution and Rule 56 of the Supreme Court (Civil Procedure) Rules the following relief:
  - (a) A Declaration that the Belize Telecommunications (Amendment) Act, 2009 is contrary to Sections 3(d) and 17 of the Constitution of Belize and is unconstitutional and void;
  - (b) A Declaration that Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument No. 104 of 2009 is contrary to Sections 3(d) and 17 of the Constitution of Belize and is unconstitutional and void;
  - (c) A Declaration that Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument No. 104 of 2009 is contrary to Section 16 of the Constitution of Belize and is unconstitutional and void;
  - (d) A Declaration that the compulsory acquisition by the Government of Belize of all the proprietary and other interests held by the Claimant in Belize

Telemedia Limited and its subsidiaries under a Mortgage Debenture dated 31 December 2007 (including any amendments thereto) executed between Belize Telemedia Limited as the Mortgagor and The Belize Bank Limited (Turks and Caicos) Limited as Mortgagee, and registered in the Companies and Corporate Affairs Registry, Belmopan, on or about 8 February 2008 pursuant to Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument No. 104 of 2009 is unconstitutional and void;

- (e) Such other declarations and orders and such directions as this Honourable Court may consider appropriate for the purpose of enforcing or securing the enforcement of the aforementioned Declarations and Orders;
- (f) Damages including punitive damages;
- (g) Interest;
- (h) Such other reliefs as the Court deems just and equitable; and
- (i) Costs.

2. The Grounds of this Application are:

- (a) Under and by virtue of the Belize Telecommunications (Amendment) Act, 2009 (the **Act**), the Minister of Public Utilities (the **Minister**) is conferred with the power to compulsorily acquire and take possession of for and on behalf of the Government any or all of the shares, stock, interests of all kinds, including a mortgagee's or chargee's interest in property or assets of Belize Telemedia Limited (**Telemedia**);
- (b) As a result of Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument No. 104 of 2009 (the **Order**), the Minister acquired 94% of the issued share capital of Telemedia, 100% of the issued share capital of Sunshine Holdings Limited (**Sunshine**) and the Claimant's security over the assets of Telemedia (together the **Acquisition**);

(c) A further result of the Order was to impair substantially and thereby render near valueless the security that the Claimant had over the shares Sunshine held in Telemedia and over the shares the B'IL Employees Trust (the **Employees Trust**) held in Sunshine. This is because those shares were compulsorily acquired under the Order. As a result there is nothing left against which security could be enforced;

(d) The Order stated that this acquisition was 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".*

(e) Section 3(d) of the Constitution of Belize (the **Constitution**) provides that:

*"Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –*

...

*(d) protection from arbitrary deprivation of property."*

(f) Section 17(1) of the Constitution provides that:

*"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 therefore 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."*

- (g) Sections 3(d) and 17(1) of the Constitution are intended to provide protection against the arbitrary deprivation of any and all property, save as provided in subsection 17(2). There was no national emergency, labour unrest, service failure or other reason on 24 and 25 August 2009 to justify the action by the Government to acquire compulsorily and take possession of the Claimant's security over Telemedia's assets or over Sunshine's shares in Telemedia or over the Employees Trust's shares in Sunshine. Such action by the Government was arbitrary and was not carried out for a public purpose.
- (h) The Act and the Order do not satisfy all of the mandatory manner and form requirements set out in Section 17 of the Constitution and are therefore inconsistent therewith and *pro tanto* unconstitutional and void;
- (i) The Act, the Order and the Acquisition are therefore in breach of the Fundamental Rights and Freedoms which are contained in Sections 3(d) and 17(1) of the Constitution and are unlawful, unconstitutional and void.
- (j) Section 16(1) of the Constitution provides:
- "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".*
- (k) Section 16(3) of the Constitution provides:
- "In this section, the expression "discriminatory" means 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 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."*
- (l) The National Assembly therefore cannot pass law which discriminates against any person on the grounds of, among other things "place of origin". The Act allows for the possibility that only certain shares in and/or assets of Telemedia and the Claimant could be compulsorily acquired. The Order provided for this – only 94% of the issued share capital of Telemedia and the Claimant's security over Telemedia's assets were compulsorily acquired.

The Prime Minister has stated that the Act and the Order seek to achieve the "*re-Belizeanisation*" of Telemedia, therefore discriminating against any non-Belizean. The Order and the Acquisition are contrary to Section 16 of the Constitution of Belize and is therefore unconstitutional and void;

(m) Section 2 of the Constitution provides:

*"This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."*

(n) The Act, the Order and the Acquisition are unlawful and unconstitutional and are therefore void.

3. An affidavit in support of this Claim is filed herewith.

FILED by COURTENAY COYE LLP of 15 'A' Street, Belize City, Attorneys-at-Law for the Claimant.

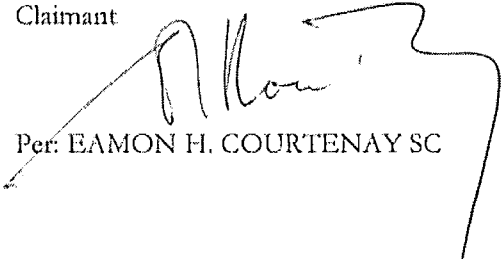
The Claimant's address for service is:

**COURTENAY COYE LLP**  
Attorneys-at-Law for the Claimant  
15 "A" Street, Belize City, Belize  
Telephone No.: 223 1476/ Facsimile No.: 223 0214

DATED this 21<sup>st</sup> day of October in the year of Our Lord 2009

**COURTENAY COYE LLP**  
Attorneys-at-Law for the  
Claimant

Per: EAMON H. COURTENAY SC



TO: The Attorney General of Belize  
East Block  
Independence Hill  
Belmopan City

The Minister of Public Utilities  
NEMO Building  
Belmopan City  
Belize

**NOTICE TO THE DEFENDANT**

The first hearing of this claim will take place at Hon. Justice Legall on Monday the 9 day of November 2009, at 9:00 a.m./~~p.m.~~

If you do not attend at that hearing, judgment may be entered against you in accordance with the claim.

If you do not attend, the judge may –

- (a) deal with the claim; or
- (b) give directions for the preparation of the case for a further hearing.

A statement of claim or an affidavit giving full details of the claimant's claim should be served on you with this claim form. If not and there is no order permitting the claimant not to serve the statement of claim or affidavit you should contact the court office immediately.

You should complete the form of acknowledgement of service served on you with this claim form and deliver or send it to the court office (address below) so that they receive it within 14/28 days of service of this claim form on you. The form of acknowledgement of service may be completed by you or a legal practitioner acting for you.

You should consider obtaining legal advice with regard to this claim. See the notes on the back of this form or on the next page.

This claim form has no validity if it is not served within 6 months of the date below unless it is accompanied by an order extending that time.

Dated *20<sup>th</sup> October, 2009* ..... [SEAL]

The court office is at Treasury Lane, Belize City, Belize, telephone number 227-7377, fax 227-0181. The office is open between 8.00 a.m. and 12.00 a.m. and from 1.00 p.m. to 5.00 p.m. except on public and bank holidays.

The Claimant's address for service is:

Courtenay Coye LLP  
15 'A' Street  
Belize City  
Belize  
FAO: Mr Eamon H. Courtenay, SC



### NOTES FOR DEFENDANT (FIXED DATE CLAIM)

The claimant is seeking an order from the court as set out in this claim form on the basis of the facts or evidence set out in the statement of claim or affidavit served with it. The claimant will not be entitled to enter judgement against you without a hearing.

You may:

**A. *Admit the claim***

If so, you should complete and return the form of acknowledgement of service to the court office within 14/28 days stating this. You may attend the first hearing if you wish to do so.

**B. *Dispute the claim***

If so, you should complete and return the form of acknowledgement of service as under A. You should also file at the court office and serve on the claimant's legal practitioner (or the claimant if the claimant has not legal practitioner):

- (a) a defence if the claim form was accompanied by the claimant's statement of claim,

OR

- (b) an affidavit in answer if the claim form is accompanied by an affidavit sworn by or on behalf of the claimant

within 28/42 days for the day on which the claim form was served on you. Your defence or affidavit must set out briefly ALL the facts on which you rely to dispute the claim made against you.

**You should also attend the first hearing. If you do not the judge may deal with the claim in your absence.**

**C. *Make a claim against the claimant***

If so, you should complete and return the form of acknowledgement of service as under A. You must file a statement of claim (a counterclaim) setting out full details of what you claim against the claimant and the facts on which you will rely. This must be done within 28/42 days of the date on which the claim form was served on you. The statement of claim should set out ALL the facts on which you rely in disputing any part of the claimant's claim against you.

**You should also attend the first hearing. If you do not the judge may deal with the claim in your absence.**

IN THE SUPREME COURT OF BELIZE, A.D. 2009

CLAIM NO:           OF 2009

IN THE MATTER OF an application under Section 20 of the Belize  
Constitution

AND

IN THE MATTER OF SECTIONS 3, 16 and 17 of the Belize Constitution

AND

IN THE MATTER OF the Belize Telecommunications (Amendment)  
Act, 2009

AND

IN THE MATTER OF Belize Telecommunications (Assumption of  
Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument  
No. 104 of 2009,

BETWEEN:

BRITISH CARIBBEAN BANK LIMITED

Claimant

- and -

THE ATTORNEY GENERAL OF BELIZE

First Defendant

THE MINISTER OF PUBLIC UTILITIES

Second Defendant

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FIRST AFFIDAVIT OF PHILIP  
JOHNSON

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I, Philip Johnson, of 60 Market Square, Belize City, Belize, Banker, MAKE OATH  
AND SAY as follows:

1. I am a director and shareholder of the British Caribbean Bank Limited, the  
Claimant in these proceedings. The facts in this affidavit are, save where is

otherwise stated or appears from the context, within my personal knowledge and are true to the best of my belief.

2. The Claimant in these proceedings is the British Caribbean Bank Limited, of Governor's Road, Leeward, Providenciales, Turks and Caicos Islands (the **Bank**). The Bank is ultimately wholly owned by BCB Holdings Limited (**BCB Holdings**), a Belizean public investment company, publicly listed on the Alternative Investment Market of the London Stock Exchange in the United Kingdom (**AIM**). BCB Holdings has approximately 1000 shareholders.
3. The First Respondent in these proceedings is the Attorney-General of Belize who is the principal legal adviser to the Government of Belize (the **Government**) and in whose name all constitutional claims against the Government are instituted.
4. The Second Respondent in these proceedings is the Minister of Public Utilities who is assigned Cabinet responsibilities for telecommunications (the **Minister**).
5. This is my first affidavit in these proceedings and is made in support of the Claimant's challenge to the constitutionality of the Belize Telecommunications (Amendment) Act, 2009 (the **Act**), Belize Telecommunications (Assumption of Control over Belize Telemedia Limited) Order, 2009, Statutory Instrument No 104 of 2009, (the **Order**), the compulsory acquisition of the Claimant's security over certain assets of Belize Telemedia Limited (**Telemedia**) and the elimination of value in certain security agreement granted by Sunshine Holdings Limited (**Sunshine**) in favour of the Bank. Copies of the Act and the Order are now produced and shown to me marked "**PJ1**" and "**PJ2**", and are attached hereto. I am duly authorised to make this affidavit on behalf of the Claimant.
6. This affidavit is arranged as follows:
  - 6.1 **Section A** sets out a summary of the Act and of the Order;
  - 6.2 **Section B** sets out the Government's publicly stated reasons for enacting the Act and the Order;
  - 6.3 **Section C** sets out the background to the Bank and its interest in Telemedia;

6.4 Section D sets out the background to the Bank's security over the Telemedia shares owned by Sunshine and its security over Sunshine itself;

6.5 Section E sets out the legal background to these proceedings; and

6.6 Section F is a conclusion.

**A. Summary of the Act and the Order**

7. On 24 August 2009, the Prime Minister Honourable Dean Barrow tabled the Act in the House of Representatives. All three readings of the Bill were completed in one day. I am advised that the speed with which the legislation was passed was exceptional. The members of the House, including the Opposition were presented with the Bill that morning, leaving little, if any, room for debate in the House in relation to this extraordinary measure. I also note that Prime Minister Barrow himself stated that the lack of notice of the legislation was to be "*regretted*" but explained that this was a deliberate move by the Government to frustrate opposition to this measure. A copy of the Prime Minister's speech to the House of Representatives on 24 August 2009 is now produced and shown to me marked "PJ3" and is attached hereto. On 25 August 2009, the Bill was passed by the Senate and submitted to the Governor General who gave his assent thereto.

8. Section 63 (Assumption of control by Government on revocation of licence or for a public purpose) of the Act provides that:

"63. (1) *Where the licence granted to a public utility provider is revoked by the Public Utilities Commission, or where a licensee ceases operations or loses control of operations, 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.*"

9. The Act defines "*property*" in Section 63(9) in very broad terms and includes "*shares, stock, interests of all kinds, including a mortgagee's or chargee's interest in property*".

10. Under Section 63(10) of the Act the Minister has the power to make an order under Section 63 for and on behalf of the Government by statutory instrument with legislative effect.

11. Section 67 of the Act provides for rules to be applied when assessing the value of compensation for any acquisition of property. Those rules seek in a number of ways to reduce the value of such compensation. Further, as I explain in more detail below, Section 70 of the Act prevents the Government from paying any compensation without National Assembly approval.
12. On 25 August 2009, the Order was signed by the Minister of Public Utilities compulsorily acquiring, amongst others, approximately 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. Part II of the Schedule reads:

"OTHER PROPERTY ACQUIRED

*All proprietary and other interest held by The Belize Bank (Turks and Caicos) Limited in Belize Telemedia Limited and its subsidiaries under a Mortgage Debenture dated the 31 December, 2007 (including any amendments thereto) and executed between Belize Telemedia Limited as the Mortgagor and The Belize Bank (Turks and Caicos) Limited as the Mortgagee, and registered in the Companies and Corporate Affairs Registry, Belmopan, on or about the 8 February 2008".*  
(emphasis added)

13. Section 4(1) of the Order provided that the existing Board of Directors of Telemedia "shall cease to function" and by a notice published in the Gazette on 25 August 2009 an interim Board of Directors was appointed in its place. Therefore, pursuant to the Order, the ownership and management of Telemedia has changed and the Government has acquired the Bank's interest as mortgagee of certain of Telemedia's assets.
14. The Order states that the acquisition was 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".*
15. The acquisition was published in the Gazette on 25 August 2009. A copy of the Gazette is now produced and shown to me marked "PJ4" and is attached hereto. A Notice of Acquisition was sent to the former shareholders of Telemedia on 27 August 2009 (including BCB Holdings). To the best of my knowledge, information and belief the Claimant has not received any Notice of Acquisition. A copy of the Notice of Acquisition is now produced and shown to me marked "PJ5" and is attached hereto.

16. By its Fixed Date Claim Form, the Bank seeks various declarations that the Act, the Order and the compulsory acquisition are unconstitutional and void, as well as consequential relief. The declarations sought are set out in full in the Fixed Date Claim Form which this affidavit accompanies. In this respect, in what follows, I have been advised and verily believe that both:

- (a) The Act and Order in themselves do not comply with the requirements of the Constitution which must be met in order for them to be valid; and
- (b) The way that the Act and the Order have been applied to the Bank, the mortgage over the assets of Telemedia and their effect on its security over the shares of Sunshine, also amount to a breach of the Constitution.

**B. The Government's publicly stated position**

17. The Honourable Prime Minister Dean Barrow gave a lengthy speech to the House of Representatives on 24 August 2009 when tabling the Bill. The Prime Minister purportedly set out a detailed background to Telemedia, its ownership, its relationship with the Government, and what he referred to as "*the infamous secret Accommodation Agreement*" (referring to an Accommodation Agreement between Telemedia and the Government dated 19 September 2005, the **Accommodation Agreement**). The Prime Minister did not mention the Bank and its security over Telemedia's assets, nor the bank's security over Sunshine's assets, or the shares in Sunshine, nor did he give any evidence of any difficulties in the Bank's relationship with Telemedia or with the Government.

18. The Prime Minister stated inter alia:

*"... Michael Ashcroft had Telemedia invoke arbitration in London to enforce the Accommodation Agreement. And he obtained a judgment of BZ\$38.5 million and a court mandated requirement that government now begin to honor the Accommodation Agreement. Well I have said that as God is my witness I will never pay that award. But it doesn't stop there. In April of 2009 Telemedia informed the government of further claims they will make to the London Court of International Arbitration and that the size of a new award "could pale the current award of 38 million into significance".*

*Mr. Speaker, Members, fellow Belizeans: this is intolerable. I, and the United Democratic Party government, in the name of the people will put up with it no longer. That an agreement so patently illegal, so patently immoral, so patently anti-Belize, should continue to torture us, to bleed us, to subject us to this death by a thousand cuts, cannot for one second more be countenanced. This is our House, this is our country. Here we are masters, here we are sovereign. And with the full weight of that sovereignty we must now put an end to this disrespect, to this chance taking, to this new age slavery. There will thus 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. After long and sufficient consideration, therefore, and in the exercise of that national power that is ours by Constitution and inalienable right, this government will now acquire Telemedia...*

*As well, we are only acquiring the 94% or so of Telemedia that is controlled by the Ashcroft interests. The shareholding owned by the Belizeans will be left intact...*

*This is not an ad hominem move; it is to deal with a structural problem... 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".*

19. The rationale for the Act and for the Order, as expressed by the Prime Minister in his speech, no longer even existed when the legislation was introduced to the House because Telemedia had already repudiated the Accommodation Agreement earlier that day. A transcript of a news story taken from Channel 7 television news "*Telemedia Transfers Ownership of Channel 5*" dated 24 August 2009 is now produced and shown to me marked "PJ6" and is attached hereto. However, the Prime Minister did not report this to the House. Thus, it appears that what actually happened is that the Government nationalised Telemedia in a clear attempt to avoid its contractual obligations.
20. Whereas the Prime Minister has provided an explanation of the Government's position in relation to the acquired shares in Telemedia, the Government has never even tried to explain the rationale for the compulsory acquisition of the shares in Sunshine or of the Bank's security over Telemedia's assets.

**C. Background to the Bank and its interest in Belize Telemedia Limited**

21. The Bank, previously known as The Belize Bank (Turks and Caicos) Limited, was incorporated in the Turks and Caicos Islands, on 8 September 1998 and changed its name on 9 February 2009. A copy of the Certificate of Change of Name is now produced and shown to me marked "PJ7" and is attached hereto.

22. On 6 July 2007, the Bank agreed a Term Loan Facility in Telemedia's favour (the Facility). Pursuant to the Facility, US\$22,500,000 was made available to Telemedia on demand. A copy of the Facility is now produced and shown to me marked "PJ8" and is attached hereto. The current principal amount outstanding pursuant to the Facility is US\$22,500,000. Two of the expressly stated purposes of the Facility (see Clause 1(b)) are:

- (a) the purchase and installation of equipment for the provision of telecommunications services in Belize; and
- (b) general working capital.

23. Pursuant to Clause 9 of the Facility:

*"9. All indebtedness and liability of [Telemedia] to the Bank shall become immediately due and payable, if any one or more of the following events of default occurs:*

- (a) (i) [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]; ...*
- (f) any event constituting an event of default under any Security Document occurs".*

24. As is apparent, a stated primary purpose of the Facility was to purchase and install equipment for the provision of telecommunications services in Belize. This was therefore a loan with the objective of helping to maintain and develop the telecommunications sector specifically in Belize. A condition precedent to the Facility was Telemedia's grant of security in the Bank's favour. The Bank's interest as mortgagee was set out in a Mortgage Debenture between Telemedia and the Bank dated 31 December 2007 (the Mortgage). The Mortgage comprised a charge by Telemedia over, inter alia, its fixed plant, machinery and equipment, freehold and leasehold property, interest in all its stocks, shares, debentures, bonds or other securities and uncalled capital, all book and other debts and other monies due, owing and payable or incurred to Telemedia, all monies in its bank accounts with the Bank and the goodwill, undertakings and all other properties and assets (both present and future). A copy of the Mortgage is now produced and shown to me marked "PJ9" and is attached hereto.



25. Clause 9 (Default and Acceleration) of the Mortgage provides that:

*"...the monies secured hereunder and all unpaid interest which have accrued thereon shall become immediately due and payable and the security hereby created enforceable:*

*(1) if (a) [Telemedia] fails to pay as required by the Facility Letter Agreement any amounts of principal or interest thereon or other amounts payable to the [Bank] and such failure has not been remedied by [Telemedia] within seven business days notice of such failure from the [Bank] to [Telemedia] ...;*

*(9) if [Telemedia] changes its ownership structure or management without the consent of [the Bank]"*.

26. Pursuant to the Facility, Telemedia was obliged to make a monthly interest payment to the Bank on 10 September 2009. In breach of the Facility, Telemedia failed to make this interest payment. Telemedia has not remedied this failure. Telemedia was also obliged to make an interest payment on 10 October 2009, which it again failed to do.
27. Moreover, the Bank did not consent to the ownership structure and management of Telemedia being changed pursuant to the Order. This change in ownership structure and management is an event of default under clause 9(9) of the Mortgage. This event of default under the Mortgage (which is a Security Document for the purposes of the Facility) has triggered a cross event of default under clause 9(f) of the Facility.
28. As a result of this actual event of default, (and with another anticipated event of default in respect of failure to make an interest payment which was due on 10 October 2009), all indebtedness and liability of Telemedia to the Bank pursuant to the Facility and secured by the Mortgage Debenture has become immediately due and payable. Accordingly, on 14 October, the Bank wrote to Telemedia pointing out that Telemedia had failed to make two successive interest payments, and requiring payment to be made by 23 October 2009. The letter also pointed out that, by virtue of the change on Telemedia's control and management, an event of default had arisen. A copy of that letter is now produced and shown to me marked "PJ10" and is attached hereto. However, the Bank is unable to enforce its security against Telemedia because its security over Telemedia's assets had been compulsorily acquired by the Government pursuant to the Order.

**D. Background to the Bank and its security over the assets of Sunshine Holdings Limited**

29. Part 1 A of the Schedule to the Order specified shares to be acquired. These included 11,092,884 shares held by Sunshine in Telemedia, and two shares held by Dean Boyce and the Trustees of the Belize Telecommunications Limited Employees Trust in Sunshine.
30. On 19 September 2005, the Bank had agreed a Syndicated Loan Facility (the **Sunshine Facility**) in favour of Sunshine. Pursuant to the Sunshine Facility, US\$10,000,000 was made available to Sunshine on demand. A copy of the Sunshine Facility is now produced and shown to me marked "PJ11" and is attached hereto. The current principal amount outstanding pursuant to the Sunshine Facility is US \$2,616,140.96. Under the Sunshine Facility, the Bank acted as both a lender and as agent for other lenders.
31. On 19 September 2005, the Bank and Sunshine entered into a Security Agreement (the **Security Agreement**). A copy of the Security Agreement is now produced and shown to me marked "PJ12" and is attached hereto. Entry into the Security Agreement was a condition precedent to the grant of the Sunshine Facility, and the Security Agreement was comprehensive, including a first legal charge over the 11,092,844 shares which Sunshine owned in Telemedia.
32. Under clause 6.1 of the Sunshine Facility (Event of Default) "*This Security will become immediately enforceable if an Event of Default is outstanding and the Agent gives notice that this security is enforceable.*"
33. Pursuant to clause 14 of the Sunshine Facility, it is an event of default:
- "14.1            If:
- 14.1.1            [Sunshine] fails to pay any sum due from it hereunder on the due date or on demand if so payable...
- 14.1.6            any governmental authority expropriates or threatens to expropriate all or part of its assets and the result of the foregoing is, in the determination of the Majority lenders, materially and adversely to affect its financial condition or its ability to perform its obligations under this Agreement..."

34. The Bank also granted an overdraft facility to Sunshine under a letter dated 19 May 2006 (the **Overdraft Facility Letter**). A copy of the Overdraft Facility Letter is now produced and shown to me marked "**PJ13**" and is attached hereto. Pursuant to the Overdraft Facility Letter, an overdraft facility of up to US\$1,000,000 was made available by the Bank to Sunshine (the **Overdraft Amount**). The current amount which is outstanding pursuant to the Overdraft Facility Letter is US\$961,432.93. The Overdraft Amount is repayable on demand.
35. A condition precedent to the Overdraft Facility Letter was the grant by Sunshine of certain security in favour of the Bank, as set out in Clause 5 of the Overdraft Facility Letter. The security comprised a first legal charge by the Bank over the entire issued share capital of Sunshine, namely two ordinary shares, as set out in two Mortgage of Shares documents, first between Dean Boyce and the Bank dated 19 May 2006, and second between the Trustees of the Employees Trust and the Bank dated 19 May 2006 (together the **Mortgages of Shares**). Copies of the Mortgages of Shares are now produced and shown to me marked "**PJ14**" and "**PJ15**" and are attached hereto.
36. Pursuant to Clause 8 (Default and Acceleration) of the Overdraft Facility Letter:
- "All indebtedness and liability of [Sunshine] to the Bank shall become immediately due and payable, if any one or more of the following events of default occurs".*
37. Clause 7 (Covenants and Undertakings) of the Overdraft Facility Letter states:
- "During the operation of this Agreement:*
- ...
- (c) save with the consent in writing of the Bank, and other than as provided for in this Agreement and the Security Documents, [Sunshine] undertakes and covenants not to sell, grant, lease or otherwise dispose of its assets or create or permit to subsist any encumbrance, mortgage, pledge, lien, charge, assignment, hypothecation or security interest in and over its assets;*
- ...
- (e) [Sunshine] covenants that it will not make any change nor procure any change to its corporate structure or ownership, without the prior written approval of the Bank..."*

38. As a result of the Act and Order, Sunshine is therefore in default under Clause 14.1.6 of the Sunshine Facility, and under clause 7(c) and 7(e) of the Overdraft Facility Letter. On 14 October 2009, the Bank wrote to Sunshine demanding payment by 23 October 2009 of the amount outstanding under the Sunshine Facility and the Overdraft Facility Letter. If no payment is made to the Bank by 23 October 2009, a further event of default will have occurred. A copy of that letter is now produced and shown to me marked "PJ16" and is attached hereto. As far as I am aware, Sunshine does not have any assets other than the shares in Telemedia. As the Government has compulsorily acquired all of Sunshine's holding in Telemedia and the entire issued 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.

**E. The legal background to this Claim**

39. Section 3(d) of the Constitution of Belize (the **Constitution**) provides that:

*"Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right..., to each and all of the following, namely...*

*(d) protection from arbitrary deprivation of property."*

40. Section 17(1) of the Constitution provides that:

*"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 therefore 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..."*

41. Sections 3(d) and 17(1) of the Constitution are intended to provide protection against the deprivation of any and all property, save as provided in subsection 17(2).
42. Thus, the Constitution makes clear that the right to ownership and enjoyment of private property are fundamental rights of *"every person in Belize"*. While the Constitution does not prohibit the compulsory acquisition of property, I am advised that any such acquisition must comply with sections 3(d) and 17. Namely, it must be done in accordance with a law that provides for reasonable compensation and the right of any person claiming an interest in the property to go to Court to establish his interest and determine whether the acquisition was for a public purpose.
43. Further, Section 16(3) of the Constitution provides that no law can discriminate against any person on the grounds of, among other things *"place of origin"*.
44. I verily believe that an acquisition must not be discriminatory. The Government has asserted that the Act is constitutionally compliant and therefore the expropriation of certain shareholders' interests is not unlawful. I am advised and verily believe that this is false.

***The compulsory acquisition was not carried out for a "public purpose"***

45. The three public purposes stated in the Order as the basis for the decision to nationalise Telemedia and the Bank's Mortgage, and to acquire Sunshine's shares in Telemedia and the two shares in Sunshine were:
  - 45.1 the stabilisation and improvement of the telecommunications industry;
  - 45.2 the provision of reliable telecommunications services to the public at affordable prices; and
  - 45.3 to create a harmonious and non-contentious environment.
46. The Bank's securities have no effect on any of these. The Bank, as mortgagee, or lender under the Sunshine Facility, has never involved itself in telecommunications. The Bank's Mortgage and the Security Agreement and the Overdraft Facility Letter have no effect of the reliability of telecommunications

in Belize, nor on the rates for telecommunications services. Such rates are set by the Public Utilities Commission without any involvement of the Bank. The Bank's Mortgage and Security Agreement and the Overdraft Facility Letter have never affected the telecommunications environment in a negative way.

47. Further, the stated public purpose which is set out in the Order does not correspond with the Honourable Prime Minister Dean Barrow's explanation to the House of the purpose of the acquisitions when he tabled the legislation. Not only is the acquisition of the Bank's interests, and the elimination of value in the Security Agreement and the Overdraft Facility Letter, inconsistent with the stated objective in the legislation, but the Prime Minister has made clear that the Government had quite different motives for the nationalisation to the stated public purposes in the Order. Indeed, the acquisition is irrelevant to the publicly stated purpose, and other, much less far-reaching methods, such as regulatory changes, could have been adopted. In this sense, the legislation is also disproportionate.

48. I note the press release from the Belize Chamber of Commerce & Industry (the BCCI) on 24 August 2009 which commented on the Act as follows:

*"The proposed nationalization of our major telecommunication or any other company provider sets a dangerous precedent, wherein the business community at home and abroad may be more discriminatory when considering future investments in our country.*

*Notwithstanding the government's assertion that the said acquisition is for public purpose, the suggestion of future divestments again reinforces the above concerns."*

A copy of the BCCI's press release is now produced and shown to me marked "PJ17" and is attached hereto. As a member of the business community I echo this concern.

49. The Bank's loan pursuant to the Facility was provided to Telemedia for the express purpose of purchasing and installing equipment for the provision of telecommunications services in Belize and general working capital. Given the events of default, the Bank is now entitled to repayment of its loans in full. This in turn could jeopardise Telemedia's ability to provide reliable telecommunications services to the public at affordable prices. Indeed, the compulsory acquisition of the Bank's security over Telemedia's assets, and of the

shares in Sunshine, will not contribute to the stability of the telecommunications sector, the provision or improvement of telecommunications services, or have any beneficial effect on the telecommunications environment in Belize at all. In short, the compulsory acquisition will have precisely the opposite effect to the stated public purpose. Telemedia will now find it much harder to attract lenders, given that they will know that they are at risk of having their security forcibly acquired. The acquisition of the bank's security, and of Sunshine's issued shares, does not further the stated public purpose.

50. Further, the Prime Minister made it clear that the Government's true target was the Accommodation Agreement between Telemedia and the Government, which has no connection whatsoever with the Bank's Facility. There is also no connection between the Bank's security and Sunshine's issued shares (and the elimination of any value in the Security Agreement or the Overdraft Facility Letter) that has been compulsorily acquired and the public purpose stated to justify the acquisition. In truth, the acquisition appears to have been directly targeted at the Bank's association with Lord Ashcroft's interests. Further, the Government acquired for itself first ranking security over Telemedia's assets, notwithstanding the fact that it has made no loan to Telemedia or otherwise conferred an economic benefit on it.
51. I am advised and verily believe that a Government's actions will be arbitrary if they are disproportionate, unfounded and inconsistent. The Prime Minister has not explained why the security and Sunshine's issued shares were acquired, or why the Bank should have been deprived of any value in the Security Agreement and the Overdraft Facility Letter, and no reason for the acquisition of the Bank's Mortgage, or indeed of Sunshine's issued shares, was given in the stated public purpose or debates in the House. As I said above, acquisition of the security and of Sunshine's issued shares and the elimination of value in the Security Agreement and the Overdraft Facility Letter are simply wholly unconnected with any stated purpose and were unnecessary in order to achieve those stated purposes. They are therefore irrational and do not deal with any perceived problem with the telecommunications sector in Belize.

*The Act and the Order are discriminatory*

52. The Government has expropriated 94% of the shares of Telemedia as opposed to the entire issued share capital. This represents deliberate targeting of what the government wrongly believed were a single man's interests. In his speech to the House of 24 August 2009, Dean Barrow actually said "*We are only acquiring the 94% or so of the Telemedia that is controlled by the Ashcroft interests*" thus making clear that it is a discriminatory, ad hominem move. It is also arbitrary because as explained above, the Bank is a legally established, independent Turks and Caicos Islands entity. The Bank's ultimate parent company, BCB Holdings, is a publicly listed company on AIM. The Bank entered a commercial arrangement with Telemedia, on competitive terms, and the inclusion of the Bank's security and of Sunshine's issued shares in the assets that the Government has compulsorily acquired is disproportionate in that it is unnecessary to achieve any public purpose, discriminatory and arbitrary. The same applies to the elimination of value in the Security Agreement and the Overdraft Facility Letter.
53. As set out above, even if targeting Lord Ashcroft and/or only 94% of the shareholders was not ad hominem, there is no justification for including the Bank's security and Sunshine's issued shares in this grouping, in which Lord Ashcroft has no direct interest. I am advised and verily believe that they are discriminatory, and hence in breach of Section 16 of the Constitution.

#### ***Compensation***

54. The Act states at Section 65(1) that "*reasonable compensation within a reasonable time*" must be paid to the owner of property acquired under the Act. This means that the Bank is entitled to compensation for the acquisition of its interests and for its loss as a result of the Security Agreement and the Overdraft Facility Letter becoming valueless. However, inclusion of this provision is not enough, the compensation must actually be reasonable. In fact, the Act contains several rules on which the compensation must be based, which will reduce the value of the Bank's interest, thereby preventing the Bank from receiving reasonable compensation. The effect of the rules will be that the Bank will be denied its constitutional rights.
55. I note that Section 71 of the Act provides that all amounts awarded by way of compensation are to be paid out of monies voted by the National Assembly of



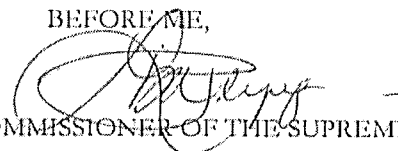
Belize. The Bank has been deprived of its property and security with no assurance that compensation will ever be paid, or that any compensation will be "reasonable". The Act and Order make no provision for ensuring that compensation will be paid if the National Assembly does not vote funds, nor does it deal with the possibility that the National Assembly may vote less compensation than the Government has agreed.

**F. Conclusion**

56. The Act and the Order do not achieve the Government's publicly stated purpose and are arbitrary, disproportionate and discriminatory. It is arbitrary to embroil the Bank, through the compulsory acquisition of its security over Telemedia's assets, Sunshine's issued shares, and the elimination of value in the Security Agreement and in the Overdraft Facility Letter, in an ongoing commercial dispute between the Government and Telemedia: a dispute with which the Bank had no involvement. The compulsory acquisition of the Bank's interests serves no purpose except to deprive the Bank of its property. Far from achieving the stated purposes, the legislation will actually make it more difficult to achieve them, since the effect will be to deter other potential lenders.
57. In light of the foregoing, I respectfully request that this Honourable Court grant the Bank the relief sought in the Fixed Date Claim Form accompanying this Affidavit.

SWORN by the above- )  
named Philip C. Johnson )  
on the 21<sup>st</sup> October 2009 )



BEFORE ME,  
  
COMMISSIONER OF THE SUPREME COURT

This Affidavit is filed on behalf of the Claimant and notice is hereby given of the intention to rely hereon at the hearing of this Claim