IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

HIGH COURT OF JUSTICE
(CIVIL)
CLAIM NO. GDAHCV 2018/0063

IN THE MATTER OF SECTION 20 OF THE ELECTRICITY SUPPLY (AMENDMENT) ACT: NO. 33 OF 2017

IN THE MATTER OF SECTIONS 1, 6 AND 16 OF THE CONSTITUTION OF GRENADA

and

IN THE MATTER OF THE SUPREME COURT (CONSTITUTIONAL REDRESS GRENADA) RULES 1968

BETWEEN:

GRENADA ELECTRICITY SERVICES LIMITED

Respondent/Claimant

and

THE ATTORNEY GENERAL OF GRENADA

Applicant/Defendant

Appearances:

Mr. Conway Blake with him Mrs. Linda Dolland and Mr. Darshan Ramdhani for the Applicant/Defendant
Mr. Sydney A. Bennett, QC instructed by Mr. Dickon Mitchell of Mitchell & Co. for the Respondent/Claimant

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2019: January 24
May 3

DECISION

[1] GLASGOW, J.: The applicant in these proceedings is the Government of Grenada ('the Government"). It has applied to the court to stay a constitutional claim filed against it by the Grenada Electricity Services Limited ("GRENLEC").

[2] In its constitutional claim, GRENLEC seeks, inter alia, the following relief from the court –

i. A declaration against the Government that section 20 of the Electricity Supply (Amendment) Act No. 33 of 2017("ESA 2017") violates or will violate GRENLEC's right to have its property compulsory acquired pursuant to section 6(1) of the Constitution of Grenada, and is therefore null and void;

ii. A declaration against the Government that the requirement set out in the ESA 2017 that every network licensee (GRENLEC being the only such licensee in the State) shall pay five percent (5%) of its pre-tax profit every financial year to the Social Fund is or will be an unlawful compulsory appropriation of GRENLEC's property without constitutional authority therefor.

[3] On 2nd May 2018, the Government filed an affidavit in response to GRENLEC's claim in which it, inter alia, denied much of the factual allegations made by GRENLEC and stated further that the 5% imposition is a levy imposed consistent with section 6 (6) (a) (1) of the Constitution.

[4] On 3rd May 2018, the first hearing of GRENLEC's claim took place before Dyer J, where both parties were represented and a case management hearing was conducted. After hearing the parties, the learned judge gave directions for trial.

[5] On 26th June 2018, the Government filed the present stay application asking the court for a stay of GRENLEC's claim pursuant to section 7 of the Arbitration Act 1989 ("the Act"), section 7(1) of the West Indies Associated States Supreme Court Act and/or Rule 26.1 (2) (q) of the Civil Procedure Rules, and/or the inherent jurisdiction of the Court until determination of Grenada Private Power Limited and WRB Enterprises, Inc. v. Grenada ICSID Case No. ARB/17/13.

[6] The Government says that GRENLEC's claim should be stayed for the following reasons –

(1) the claim is in substance a dispute between Government and GRENLEC's majority shareholders, Grenada Private Power Limited ("GPP") and WRB Enterprises Inc. ("WRB"). The matters contended are governed by a Share Purchase Agreement ("SPA") concluded between Government and the said shareholders on 14th September 1994 and thereafter amended;

(2) the parties have agreed pursuant to article 11.2 of the SPA to refer to arbitration any disputes and/or differences *"arising out of or in connection with"* the SPA;

(3) the SPA is legally binding and extends to all matters relating to, inter alia, -

(a) alleged confiscation, expropriation or nationalization of any of GRENLEC's assets;

(b) any alleged taking or exercising of acquisition powers by any State entity with respect to all or any part of GRENLEC's assets;

(c) all claims in connection with the SPA which touch and concern the Constitution of Grenada

(4) The dispute set out in GRENLEC's claim is directly connected to the SPA and the rights and obligations arising thereunder, fall within the matters to be sent to arbitration and engages matters to be determined by arbitration under the auspices of the International Centre for the Settlement of International Investment Disputes ("ICSID").

(5) Alternatively, the court can stay GRENLEC's claim further to its inherent jurisdiction, in the interest of justice and/or as an exercise of its general case management powers set out in the Civil Procedure Rules 2000 ("CPR") 26.1(2)(q). The stay should be granted in the interests of justice due to the fact that the claim has been brought for collateral purposes.

GRENLEC**'s opposition**

[7] On 6th September 2018, GRENLEC filed an affidavit in opposition to the Government's stay application. In its answer GRENLEC specifically denies that the Government is entitled to a stay of the claim. In particular it denies the assertions that –

(1) It is bound by any contractual obligation whether under the SPA or otherwise to contribute at least 5% of its net income before taxes to charities within Grenada;

(2) Its claim relates to or is a continuation of the differences or disputes between GPP, WRB and the Government regarding issues arising out of the SPA;

(3) Its claim ought to be regarded as having been brought by GPP (GRENLEC's majority shareholder);

(4) Section 7.9 of the SPA provides recourse to GRENLEC in the instance that it alleges that the Government has confiscated, expropriated or nationalized its assets; and

(5) Its claim concerning Government's expropriation of its assets without compensation could be resolved by arbitration among GPP, WRB and the Government when it (GRENLEC) is not a party to the SPA. GRENLEC asks for the stay application to be dismissed.

A background to the stay application

[8] Before proceeding to the legal arguments, this discourse may be assisted with an outline of the background to the present application. I will adopt parts of the helpful factual matrix presented by the Government. GRENLEC was formerly a Government owned public utilities company which served as the sole supplier of electricity in

Grenada. The Government divested itself of control of the company by entering into a privatization scheme in 1994. The scheme was formalized through the SPA signed by the Government, WRB and WRB's local subsidiary, GPP.

[9] WRB is a foreign registered and owned company registered and resident in Florida, United States of America. GPP is a locally registered company which has its headquarters in Florida, United States of America. As noted above, GPP is a subsidiary of WRB.

[10] The SPA delineates the shareholding of the parties thereto in GRENLEC; WRB owns 50% of the shares through its local subsidiary, GPP, and the remainder of the shares is held by the National Insurance Scheme (NIS), Eastern Caribbean Holdings Limited (ECH), citizens of Grenada and employees of GRENLEC. It is said that WRB controls the 11.3% of shares held by ECH in GRENLEC and while nothing turns on this assertion, it has not been substantiated or disputed on this application. The Government explains that while GRENLEC has a total of over 2,000 shareholders, WRB holds about 61.3% of those shares giving it, along with GPP, effective control over GRENLEC. This control, the Government continues, is further evidenced by the fact that WRB, through GPP is entitled to appoint 6 of GRENLEC's directors including the chairman of its board of directors. The chairman is allowed 2 votes at meetings of the directors in the event of a tied vote. GPP and WRB are also allowed to appoint GRENLEC's managing director.

[11] Previous to the year 2016, the electricity sector in Grenada was governed by statute styled the Electricity Supply Act No. 18 of 1994 ("ESA 1994") which was passed by the Parliament of Grenada after discourse among WRB, GPP and the then Government of Grenada. After some period of consultation and preparation, the ESA Act 1994 was repealed and replaced. The Electricity Supply Act 2016 ("ESA 2016") and the Public Utilities Regulatory Commission Act 2016 were enacted ("PURCA 2016"). GRENLEC in its affidavit in support of the claim complains about section 70 of the ESA 2016 which, inter alia, mandates tha*t 'every licensee shall ensure that it spends, in every*

financial year, at least five percent of its gross profits, in pursuance of its Corporate Social Responsibility'.

[12] GPP and WRB engaged the dispute resolution process under the SPA by instituting international arbitration proceedings against the Government on 5th May 2017. The Government explains that the arbitration proceedings includes claims for specific performances, damages including claims that Government ought to be compelled to buy back WRB and GPP's shares in GRENLEC.

[13] The ESA 2016 was amended in 2017 by the Electricity Supply (Amendment) Act No. 33 of 2017 ("ESA 2017"). By that amendment, the corporate social responsibility aspect of section 70 of the ESA 2016 was repealed. It was replaced by the requirement that *'every network licensee shall contribute five percent of its pre-tax profit every financial year to the Social Fund*'. GRENLEC's claim is that section 20 of the ESA 2017 violates section 6 of the Constitution of Grenada in that it infringes GRENLEC's right not to have its property compulsorily taken or acquired.

The arguments for and against the stay

The Government**'s** position

[14] The Government's various grounds for this application may be subsumed under the broad themes of –

(1) the Arbitration Act; and

(2) the inherent jurisdiction/case management.

The Arbitration Act ground

[15] Under this head the Government argues that section 7 (1) of the Arbitration Act, Cap. 19 of 2010 Continuous Revised Edition of the Laws of Grenada ("the Act") endows the court with broad powers '*to stay parallel and related proceedings which concern*

matters that are to be resolved pursuant to a valid and binding arbitration agreement'.[1]

Section 7 (1) of the Act states:

> *Where a party to an agreement or any person claiming through or under him or her, commences legal proceedings in the Court against another party to the agreement or any person claiming through or under him or her, in respect of any matter agreed to be referred then, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, any party to those proceedings may apply to the Court to stay the proceedings. The Court may make an order staying the proceedings if satisfied—*
>
> *(a) that the applicant was at the time the proceedings were commenced, and still is, ready and willing to do everything necessary to the proper conduct of the arbitration; and*
>
> *(b) that there is no sufficient reason why the matter should not be referred in accordance with the agreement.*

[16] The Government says that its case for a stay pursuant to section 7 (1) of the Act is very compelling. Various reasons are proffered for this view among which are –

(1) The complaints advanced on the claim should have been placed before the arbitration panel. This is not only because the two processes engage the same or similar facts and legal issues, but also since the arbitration agreement among WRB, GPP and the Government envisages a wide category of claims including those in relation to GRENLEC;

(2) As a corollary of the foregoing, GRENLEC's decision not to include the claim '*in the arbitration process is inefficient, duplicative and contrary to the clear judicial policy in favour of one shop adjudication whereby all claims capable of arbitration should be hard together in one set of proceedings instead of fragmented into multiple parallel claims*'[2]; and

[1] Paragraph 26 of Government's submissions filed on 30th November 2018
[2] Ibid at paragraphs 27 and 28

(3) There is nothing on GRENLEC's evidence or submissions to demonstrate why a stay should be refused.

[17] The Government then applies the terms of section 7(1) of the Act to its case. In this regard it is argued that while GRENLEC *'enjoys a separate legal personality from its shareholders, this is not germane to the question of whether the constitutional claim is the proper subject for a stay.'*[3] The court is said to have broad powers to grant a stay notwithstanding the fact that GRENLEC has a separate legal personality and it is not a party to the arbitration between its shareholders and the Government. The contention is that section 7(1) of the Act is crafted in language to prevent parties from sidestepping or circumventing or undermining the arbitration process by bringing court actions whether they do so themselves or through their 'privies'. This is entirely the reason why section 7(1) gives the court the power to stay proceedings initiated by a party to the arbitration agreement or '*any person claiming through or under him or her'.*

[18] The Government's case is that the courts have interpreted this phrase in a very expansive manner. The cases of Roussel-Uclaf v Searle & Co[4] and Entri Fans v NMB (UK) Ltd[5] were presented as authorities for this proposition. Accordingly, it is contended by the Government that notwithstanding the fact that GRENLEC has separate legal personality from WRB and GPP, there is strong evidence to support the view that GRENLEC, a subsidiary of WRB and GPP, is claiming 'through or under' these two entities. The claim therefore falls within section 7 (1) of the Act.

[19] The Government outlines the following facts in support of its argument that GRENLEC is claiming *'through or under'* WRB and GPP –

(1) GRENLEC is *'firmly under the control of its controlling shareholders – GPP and WRB'.*[6] This is demonstrated by the fact that –

[3] Ibid at paragraph 30
[4] [1978] 1 Lloyd's Rep 225
[5] [1987] 2 ALL ER 763
[6] Ibid at paragraph 37

(a) As majority shareholders, WRB and GPP have unrivalled power over GRENLEC's affairs;

(b) WRB and GPP control the make – up of the directorship of GRENLEC as already described above in this judgment;

(c) All 6 of the WRB/GPP directors on the board of GRENLEC have also been directors and/or executives of WRB. In furtherance of their power to appoint the chairman of the board of directors of GRENLEC, they have appointed the chairman and CEO of WRB to the chairmanship of the board of GRENLEC;

(d) The chairman's tie breaking vote is often used by WRB to '*disregard any objection raised by the local directors;*'[7]

(e) GRENLEC's board has little oversight over the company's management. WRB makes most of these decisions further to a management consulting services agreement concluded between GRENLEC and WRB dated 5th October 1994. WRB utilizes that agreement to '*discharge key functions for GRENLEC, including in areas of administration, strategic planning, accounting, financing, personnel training, engineering, data processing*'[8];

(f) The SPA itself contemplates WRB and GPP's control of GRENLEC. For instance, that agreement obligates WRB and GPP to *'cause GRENLEC to contribute at least five percent (5%) of its net income before taxes to local charities within Grenada'.*[9] Government argues that WRB and GPP could not undertake such a responsibility without *'substantial control and direction of GRENLEC...'*[10]*;*

[7] Ibid
[8] Ibid
[9] Ibid at paragraph 38
[10] Ibid

(g) GRENLEC and its majority shareholders have aligned interests in the substratum of this dispute. GRENLEC's assertion that the disagreement concerns its property rights ignores the fact that the issue also highlights WRB/GPP's contractual rights and obligations. The 5% contribution is a negotiated obligation contained in the SPA. This is the very 5% that was recited in the electricity sector reforms in 2016. WRB and GPP have a stake in any judicial and arbitral ruling regarding the 5%; and

(h) This is not the first instance where WRB and GPP have caused GRENLEC to initiate court proceedings to '*further their interests'.*[11] The Government then cites several instances where it is claimed that WRB and GPP caused GRENLEC to institute such claims.

[20] The Government then sought to demonstrate that GRENLEC's claim involves matters already referred to the arbitration process. In this regard it is alleged that –

(1) The arbitration clause in the SPA (Clause 11.2(a)) is drafted in wide enough language to cover a broad range of disputes including disputes about matters concerning GRENLEC. The clause reads –

> *any dispute or difference between the Parties (other than in connection with the Closing Balance Sheet in accordance with Section 2.6) arising out of or in connection with this Agreement (a "Dispute") shall be settled by arbitration in accordance with the Rules of Procedure for Arbitration Proceedings (the "ICSID Rules") of the International Centre for the Settlement of Investment Disputes ("the Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Convention")…*

[11] Ibid at paragraph 40

(2) Case law supports the view that arbitration clauses of this sort ought to be interpreted to span the widest possible category of claims arising under the contract. Ashville Investments v Elmer[12], L. Brown & Sons Limited v Cosby Homes (North West) Limited[13], and AMEC Group Ltd v Thames Water Utilities Ltd[14] are all provided as cases advocating this view.

(3) The Government asks the court to find that the following facts support the view that GRENLEC's claim relates to matters agreed to be referred to arbitration –

(a) The property rights which are referred to as constitutional rights in GRENLEC's claim are contractual rights which are incorporated in the SPA. The 5% contribution was therein first mentioned before it became a statutory obligation in 2016. WRB and GPP were well placed to raise their complaints in the arbitration process not least because the matters are subsumed in the SPA, but because the arbitral tribunal is empowered to consider issues related to the Constitution;

(b) Specifically, the SPA contemplates, in its article 7.9(a)(i) that the arbitral tribunal may grant remedies in cases of allegations of compulsory acquisitions of the sort claimed by GRENLEC. In this regard, article 7.9(a)(i) requires Government to repurchase the shares held by WRB and GPP in the event of –

> *Any confiscation, expropriation or nationalization by any State Entity of, or the imposition by any State Entity of a confiscation tax, levy or assessment on, all or any non-immaterial part of the Business, the Assets (including the GRENLEC System or the Real Property), the shares of GRENLEC owned by Buyer or the shares of Buyer held by Buyer's Shareholders…*

[12] [1989] QB 488
[13] [2005] EWHC 3503
[14] [2010] EWHC 419

(c) W WRB and GPP have made the Government reform of the electricity sector a specific issue in the arbitration proceedings. Their arbitration claims include the contention that:

> *Government passed a new legislative amendment that took away GRENLEC's ability to control its charitable giving, mandating instead that GRENLEC contribute that same amount to a 'Social Fund' controlled by a single Government Minister…*[15]

(d) In these circumstances, there are clear overlaps between the constitutional claim filed by GRENLEC in the courts and the arbitration instituted by WRB and GPP under the SPA. All claims capable of being dealt with by the arbitral tribunal ought to be raised within those proceedings. The Government cites Vento v Martin Kenny & Co[16] as a case on point. The Government stresses that it cannot be said that constitutional claims are precluded when the SPA expressly provides that its terms will be governed by the laws of Grenada including its Constitution, common law and any legislation.

(4) Government submits that it is ready and willing to do everything necessary for the conduct of the arbitration and that GRENLEC has shown no sufficient reason why the matter should not be referred to arbitration.

The inherent jurisdiction ground

[21] The cases of Hualon Corporation (M) SDN BHD v Marty Limited[17], Reichhold Norway ASA and another v Goldman Sachs International[18] and Ahmed Al-Naimi

[15] Supra, note 1 at paragraph 48
[16] BVIHCV2014/0061 (delivered 26th November 2014)
[17] BVIHCOM2014/0090 (delivered 8th April 2016)
[18] [20009] 2 All ER 679

(t/a Buildmaster Construction Services) v Islamic Press Agency Incorporated[19] are said to buttress the view that the court retains the broad power to grant a stay in its inherent jurisdiction even in cases where the requirements of section 7(1) of the Act have not been met. It is submitted that the court's ability to grant a stay in the exercise of its inherent jurisdiction is not precluded by GRENLEC's lack of involvement in the arbitration process. Gulf Hibiscus Ltd v Rex International Holding Ltd and another[20], Reichhold Norway ASA and another v Goldman Sachs International and Stemcor UK Ltd v Global Steel Holdings Ltd and another[21] are presented as authorities for this submission.

[22] The Government contends that while there are no prescribed tests or criteria underlying the application of the court's inherent jurisdiction to grant a stay in cases of this nature, the interests of justice and good litigation management usually inform the court's approach. The interests of justice dictate that the stay should be granted for the following reasons –

(1) It will obviate the risk that the conduct of the constitutional claim will impinge or cause undue interference in the international arbitration. The charge that there are significant overlaps in the factual and legal issues in both cases is repeated.

(2) The court does not need to venture into conjecture in this regard. It suffices that a substantive ruling in the constitutional claim could impact WRB and GPP's claim in the arbitration and the arbitrary process in the main;

(3) It is unfair for GRENLEC, WRB and GPP to bring this current claim when the issues engaged ought to have been resolved in the arbitration proceedings. Essentially, the present dispute arises in connection with the SPA. It is therefore duplicative, costly and wasteful for the 2 actions to proceed in parallel. The present state of affairs is contrary to the court's policy in favor of '*one stop*

[19] [2000] C.L.C 647
[20] [2017] SGHC 210
[21] [[2015] EWHC 363

adjudication'. The unfairness is further exhibited by GRENELC and its controlling shareholders forcing the Government to defend multiple proceedings;

(4) A stay is also warranted due to the purported motives behind GRENLEC bringing the constitutional claim. The Government complains in its evidence that the constitutional claim is a mere continuation of the dispute between the Government and the majority shareholders of GRENLEC. The constitutional claim is said to be a stratagem to put issues before the court that ought to have been raised before the arbitral tribunal;

(5) The request is for a temporary stay for a period of about 7 months. The delay should not unduly affect GRENLEC's claim for constitutional relief as it will be able to apply for a lift of the stay to proceed with its claim after the arbitration;

(6) The Government cites what it terms the court's 'pro-arbitration policy' as another basis on which the court ought to grant the stay.

Case management under the CPR

[23] The Government cited dicta from Hualon Corporation to the effect that the '*court could at least grant a temporary stay, if the other grounds supporting a mandatory and a discretionary stay did not exist*'[22] to propose that the stay ought to be granted pursuant to CPR 26.2(q). It is said that for the reasons set out above, a compelling case has been made out for the grant of the stay under CPR 26.2(q).

Closing arguments by Government

[24] The Government filed closing submissions which did not introduce fresh arguments for its request for a stay but expanded on the arguments already stated above. A few of the expansions are noteworthy.

[22] Ibid at paragraph 183

[25] In terms of the argument in respect of the overlap between the factual and legal issues in the ongoing arbitration and the constitutional claim, the Government points out that:

1. In spite of the lack of formal identity between the parties to the two proceedings, there is in fact no effective identity between the parties and the interests being pursued in both proceedings. There is sufficient evidence before the court to demonstrate that GRENLEC is a close privy of WRB and GPP. The Government repeats the evidence recited above to support this suggestion;

2. The substantial factual matrix is underscored by the fact that both proceedings are in substance a challenge to Government's legislative agenda and both are based on rights arising under the SPA. The property rights claimed by GRENLEC via its constitutional claim are contractual rights set out in the SPA;

3. The two proceedings are governed by the Constitution of Grenada. It is significant that the Constitution will be applied in the arbitration by virtue of article 11.1 of the SPA which mandates that all disputes will be governed by the laws of Grenada including its constitution;

4. In the constitutional claim GRENLEC invokes section 6(1) of the Grenada Constitution which reads:

> *No property of any description shall be compulsory taken possession of, and no interest in or right over property of any description shall be compulsory acquired, except where provision is made by a law applicable to that of possession or acquisition for the prompt payment of full compensation.*

5. The Government repeats that GRENLEC has asked the court to find that –
   (i) Its assets were compulsorily acquired by Government;
   (ii) The passage of ESA 2017 is a compulsory taking of its assets without compensation contrary to section 6 of the Constitution;
   (iii) Section 20 of ESA 2017 is not *'a levy or tax'* or *'the imposition of taxation'* and as such is an unlawful taking.

6. The foregoing complaints by GRENLEC are the identical complaints raised by WRB and GPP in the arbitration exercise. Clause 7.9 of the SPA prescribes the same. Indeed WRB/GPP have raised issues of confiscation of GRENLEC's assets in the arbitration process. There is therefore the possibility that, at the arbitration hearing, WRB and GPP may seek to rely on arguments about the confiscation of GRENLEC's assets;

7. If the arbitration panel were to consider the issues of confiscation of GRENLEC's assets, it would have to resolve this issue in accordance with the laws of Grenada, including the Constitution. Section 6 of the Constitution will have to aid in the disposal of the issues of whether there has been confiscation, expropriation or acquisition since these are not private law concepts but rather concepts of public law. The arbitral tribunal will be tasked with ruling on the threshold issues of whether the Government acted to appropriate GRENLEC's property which will be resolved in accordance with the Constitution. The tribunal will have to consider whether section 20 of the ESA 2017 is a tax. The tribunal will thereafter then proceed to determine the contractual matters under clause 7.9 of the SPA;

8. In addition to the acquisition issues, overlap can also extend to the questions of Government's capacity to enter into international contracts as well as the legitimacy of legislative reforms under consideration in particular ESA 2017.

[26] The Government's closing arguments also expanded on the submissions regarding the court's power to grant a stay pursuant to its inherent jurisdiction. The Government explains that the fact that GRENLEC is not a party to the arbitration does not prevent the court from exercising its power to grant a stay in its inherent discretion. Quoting from Gulf Hibiscus Holding Ltd v Rex International Holding Ltd and another, the Government says that –

> *[T]he inherent power is invoked to deal with situations without an express agreement between the relevant parties to the court proceedings. Furthermore, the jurisprudential basis for the exercise of the power to stay in the absence of an agreement is the wider need to control and manage proceedings between the parties for a fair and efficient administration of justice. It is not predicted on holding parties to an agreement – the absence of such an agreement is therefore irrelevant.*[23]

[27] The court is not therefore constrained to limit the exercise of its jurisdiction to grant a stay only in instances engaging parties to an agreement. Equally, the court's power to do so is not limited to prescribed circumstances. Government repeats the charge that there is no prescribed test for when the court will grant a stay utilizing its inherent jurisdiction. It is said that the '*court's discretion can and should take account of all relevant circumstances*."[24] The Government posits that the cases indicate that the courts have adopted the following approaches –

(1) Where the interests of justice warrants the exercise of the jurisdiction. In Reichhold the court observed that –

> *[T]he court's power to stay proceedings is part of its inherent jurisdiction …[and] is exercised under a wide range of circumstances to achieve a wide variety of ends. Subject only to statutory restrictions, the jurisdiction*

[23] Ibid at paragraph 59

[24] Paragraph 27 of the Government's closing submissions filed on 15th February 2019 quoting from Hualon Corporation (M) SDN BHD v Marty Limited BVIHCV (Com.) 2014/0090 at para. 185

to stay proceedings is unfettered and depends only on the exercise of the court's discretion in the interests of justice.[25]

(2) Good sense and litigation management dictates the same. In Ahmed Al-Naimi it was stated that –

> *[A] stay under the inherent jurisdiction may in fact be sensible in a situation where the court cannot be sure of those matters [the matters on which it was required to be satisfied under the statutory provision] but can see the good sense and litigation management makes it desirable for an arbitration to consider the whole matter first.*[26]

(3) Or it is exercised in favour of public policy. In Hualon Corporation the court commented that *'the inherent stay power is a valuable tool to aid in the implementation of the public policy favouring arbitration, where staying in favour of arbitration is desirable but not possible under the other provision…'*[27]

[28] Much of the material recited above is restated in support of the argument that the interests of justice, good sense and litigation management and public policy instruct that the court ought to grant a stay.

[29] The Government sought to distance itself from GRENLEC's statement that the stay ought only to be granted by the court in 'rare and compelling' circumstances as stated in Reichhold. The Government declares that the courts have not treated with the dictum in Reichhold as a 'straight jacket' or '*a substantial limitation on the power to grant a stay in appropriate circumstances.'*[28] The court is asked to consider Curtis and another v Lockheed Martin[29] in which the question of the grant of a stay was determined on the twin prongs of whether the applicant could show *'very strong*

[25] Ibid at page 683
[26] Ibid at page 26
[27] Ibid at paragraph 184
[28] Ibid at paragraph 57
[29] [2008] EWHC 2691

reasons for a stay and that the benefits which were likely to result from doing so clearly outweighed any disadvantage to the plaintiff.'[30] The court is also asked to adopt the language used in Ahmed Al-Naimi where the court of appeal stated *that 'a stay under the inherent jurisdiction may in fact be sensible in a situation where … good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first.'*[31] The dictum in Gulf Hibiscus is also proposed where the court is said to have '*declined to set the bar at the 'rare and compelling' threshold …[because] the court must in every case aim to strike a balance… the court inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The balance that is struck must serve the ends of justice.'*[32]

[30] The Government concludes the expanded arguments by stating that it would be entitled to the requested stay even if the court uses the approach suggested in Reichhold. This is since the '*rare and compelling'* standard is usually met in situations where there is a '*risk of conflicting/inconsistent decisions'.* A number of authorities are presented for this view –

(1) In Reichhold it was stated that when considering the grant of stay, it is relevant whether:

> *the existence of concurrent proceedings may give rise to undesirable consequences … [including] because the outcome of one set of proceedings may have an important effect on the conduct of the other. A situation of that kind can arise even when none of the parties are common*[33]*;*

[30] Reichhold v Goldman Sachs Int'l [2000] 2 All ER 679 at page 684
[31] Ahmed Al – Naimi v Islamic Press Agency Incorporated [2000] CLC 647
[32] Gulf Hibiscus Ltd v Rex International Holding Ltd [2017] SGHC 210 at para 61
[33] [1999] 1 ALL ER 40 at pg 47 (c) to (e)

(2) Stemcor UK Ltd v Global Steel Holdings Ltd and another where it was found that the facts of the case were '*sufficiently rare and compelling to justify the grant of a stay*' in circumstances where there a '*risk of inconsistent decisions*'[34];

(3) In Ferrexpo AG v Gibson Investments Limited & Ors[35], the court granted a stay utilizing the '*rare and compelling circumstances*' guideline in a case where it found that the power ought to be used '*to avoid inconsistent decisions'.*

[31] The Government repeats much of the points raised above to make the case that rare and compelling circumstances are apparent on this application.

GRENLEC**'s response**

Section 7 of the Act

[32] In its response, GRENLEC maintains that –

(1) GRENLEC is not a party claiming through or under a party to the SPA. GRENLEC is a subsidiary of WRB and GPP. *'A subsidiary does not claim through or under its parents by merely being a subsidiary.'*[36] GRENLEC explains that a litigant claims through or under another party to an arbitration agreement where the '*right that he seeks to enforce in the litigation or his entitlement to the relief or claimed is directly derived from the party through whom he claims'*[37]: Re Fenox (UK) Limited; J&W Sanderson Limited v Fenox (UK) Limited and others[38] and Mayor and Commonality & Citizens of the City of London v Sancheti[39] (the latter overturning Roussell **–** Uclaf v Searle[40]. There is no evidence that

[34] [2015] EWHC 363 at para 41
[35] [2012] EWHC 721 at para 199
[36] Para 3.4.1 of Grenlec's submissions filed on 15th February 2019.
[37] Ibid
[38] [2014] EWHC 4322
[39] [2008] EWCA Civ 1283
[40] Ibid

GRENLEC is seeking to enforce or claim any right pursuant to the SPA. It pursues a constitutional claims based on its rights as an individual to seek protection of its property rights from unconstitutional expropriation. Additionally, the fact that GRENLEC may be controlled by WRB and GPP does not aid Government's plea. See Re Fenox (UK) Limited; J&W Sanderson Limited v Fenox (UK) Limited per Pymont QC sitting as a deputy judge where he stated that[41] -

> *The Petitioner's claim is brought in its own right as a registered shareholder in the Company for relief afforded to shareholders by English statute: the Petitioner is not therefore bringing its claim, or any part of its claim, "under or through a party to the [arbitration] agreement". The fact that the Petitioner may be controlled by Mr. Vaganov is irrelevant since a connection of this kind is not sufficient to bind the Petitioner to the arbitration agreement (see the discussion in Sancheti at paras [30] to [34].*

(2) GRENLEC's claim does not involve matters agreed to be referred to arbitration. In fact the SPA does not preclude the Government's taking of GRENLEC's property by constitutional or other processes. The taking by Government therefore would not amount to a breach of the SPA. The SPA contemplates the taking but provides for what should happen in the circumstances. See clause 7.9 thereof recited above;

(3) Accordingly, in the event that Government takes GRENLEC's property, an arbitration panel will have to decide –

(a) Whether the taking constitutes a repurchase event; and

[41] Ibid at paragraph 10

(b) If in fact such an event has taken place, what are the terms on which the repurchase is to ensue including the price at which Government is to reacquire the shares held by WRB and GPP.

(4) The SPA is an agreement between Government and the majority shareholders of GRENLEC which seeks, not to protect GRENLEC's property, but to protect the value of the shares held by the shareholder in the event Government takes certain specified action regarding GRENLEC's property. The Government as a sovereign body is entitled to enact legislation in that regard. The remedy available to the shareholders is to seek redress pursuant to clause 7.9 of the SPA. GRENLEC's claim for the expropriation of its property must be pursued pursuant to section 6 of the Constitution and cannot be sought under the SPA. This is since the SPA has nothing to do with the validity of legislation. Such an adventure is not within the remit of the arbitration agreement and the jurisdiction of the arbitrator;

(5) It does not the aid the Government to suggest that the SPA obligates the arbitrator to resolve matters in accordance with the Constitution, the common law and the laws of Grenada. This requirement does not expand to enable the arbitrator to pronounce on the validity of legislation by which a repurchase event occurred.

[33] GRENLEC urges that the Government should not be allowed a stay because it has taken steps in the proceedings. The Government filed an affidavit in the proceedings on 2 May 2018 in which the merits of the GRENLEC's constitutional claim are extensively addressed including denials of the same. On 3rd May 2018, the Government further appeared before the court and took part in the first hearing which participation included taking directions for the trial of GRENLEC's claim without objection. These steps preclude an applicant from making a stay application: see Turner & Goudy v McConnell and Anor[42], Bawtry Timber Co. Ltd v Durham County Council[43], and Swinfen Eady J in Richardson v Le

[42] [1985] I WLR 898
[43] (UK CA, 13 March 1990)

Maitre[44] where he said *Attending this general summons for directions without objection, and without asking for an adjournment, in order to make an application to stay the action, is taking a step in the proceedings within the meaning of s.4 of the Arbitration Act, 1889.*

GRENLEC**'s opposition to the stay pursuant to the court's inherent jurisdiction**

[34] GRENLEC also strenuously opposes the Government's claim that the stay may be granted in the court's inherent jurisdiction. GRENLEC makes the following points –

(1) Where a stay is refused in exercise of its statutory powers, the courts will only in rare instances exercise its inherent jurisdiction "*to adopt a different approach and arrive at a different outcome from that which would result from an application of its statutory jurisdiction*."[45] See Etri Fans Ltd v NMB (UK) Ltd where Woolf L.J observed[46] –

> *In particular, in order to protect itself in relation to attempts to abuse the process of the court, the court has undoubtedly very wide powers of staying proceedings. However, as counsel for the appellants concedes, because here the area covered by that inherent jurisdiction has been the subject of detailed and precise Parliamentary intervention, the circumstances in which the court will grant a stay under its inherent jurisdiction in situations dealt with by the statutory jurisdiction, will be rare. The jurisdiction is truly a residual one principally confined to deal with cases not contemplated by the statutory provisions.*

(2) The only circumstances in which the court will refuse to exercise its constitutional jurisdiction in cases where redress is sought pursuant to sections 2 to 15 of the Constitution are instances where the applicant has some adequate alternative form of redress. The Government has not shown that GRENLEC has any

[44] [1903] 2 Ch.222
[45] Supra, note 37 at para 5.1
[46] [1987] 2 ALL ER 763 at page 767

alternative and adequate form of redress. GRENLEC's redress is in the court to protect its property from compulsory acquisition without compensation. It does not seek redress for breach of the SPA. The Government should not be allowed to put the burden of the arbitration on GRENLEC to seek its redress via the SPA when it is not a party thereto and is not bound by its terms;

(3) The court ought to bear in mind that section 6 of the Constitution seeks to constrain the exercise of Government's use of its executive and other powers in relation to persons subject to those powers. The court ought to carefully scrutinize Government's attempt to restrain or inhibit GRENLEC from seeking redress in respect of an alleged breach of those rights.

[35] GRENLEC also expands on the assertion that '*where a claim is brought as of right, is not tainted with abuse, oppression or any vexatious quality and no issue of forum non conveniens arises, the court will only stay such an action for case management reasons in rare and compelling circumstances*.'[47] See Abraham v Thompson[48] where Potter L.J noted that[49] –

> *where a stay is sought in circumstances which are not provided for by statute or rules of court, the starting point is the fundamental rule that an individual who is not under a disability, a bankrupt or a vexatious litigant, is entitled untrammeled access to a court of first instance in respect of a bona fide claim based on a properly pleaded cause of action.*

[36] GRENLEC further disputes that the proposed tests for the court's exercise of inherent jurisdiction as stated by the Government are applicable to this case of Al-Naimi **–** (t/a Buildmaster Construction Services v Islamic Press Agency Inc. GRENLEC explains that the case concerned '*the exercise of the court's inherent jurisdiction in*

[47] Supra, note 37 at para 5.3
[48] [1997] 4 ALL ER 362
[49] Ibid at page 374

cases where there is a dispute as to whether there was an arbitration agreement and if so whether the matters in controversy between the parties fell within its scope."[50]

[37] GRENLEC concludes that Al-Naimi establishes that:

> *[T]he circumstances in which the court would find it appropriate to stay proceedings in a situation in which the court cannot be sure of these matters but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first are strictly circumscribed.*"[51] GRENLEC says that the court "*would exercise such power only in circumstances where it was of the view that detailed inquiry would very likely establish that the matters in dispute fell within the scope of an applicable arbitration clause (although it could not be sure without hearing oral testimony) and that having established its jurisdiction the arbitration tribunal would be able to shortly decide the relevant issues*[52].

[38] GRENLEC submits that this court could hardly reach the conclusion that GRENLEC's claim fell within the scope of the arbitration agreement. For one thing, the SPA does not address the protection of GRENLEC's property or indeed GRENLEC itself from Government action. GRENLEC's rights as a legal person cannot be vindicated by the arbitrator since that tribunal cannot grant the constitutional redress which GRENLEC seeks. Accordingly, the principles in Al-Naimi have no application to GRENLEC's claim.

[39] GRENLEC similarly dismisses the view that the learning in Gulf Hibiscus applies to this case. GRENLEC points out that Gulf Hibiscus is a Singaporean case which marks a departure from the learning in the English authorities. The court is urged to adopt the approach that the English cases are the ones to be applied in our jurisdiction. In any event, GRENLEC submits, the Singapore courts granted a '*stay*

[50] Supra, note 37 at para 5.4.2
[51] Ibid at para 5.4.4
[52] Ibid art para 5.4.4 and see El Nasharty v J Sainsbury PLC [2003] EWHC 2195 (Comm)

only after the most careful scrutiny of a wide range of factors and competing interests'[53] among which were –

(1) Whether the claims in the court proceedings were derived from the claims subject to arbitration. GRENLEC repeats its submission that the claims are different;

(2) Whether there was an overlap between the claims in the arbitration and the court proceedings. GRENLEC repeats the charge that there are no commonalities of issues and that the Government has failed to demonstrate the same;

(3) Whether there was anything to bar claims in the court proceedings from being pursued in the arbitration. GRENLEC states that its claim is not related to the repurchase of the shareholders' shares but rather to the constitutionality of Government's taking of GRENLEC's property which is an issue that cannot be pursued on the arbitration; and

(4) Equally, all other issues of whether the findings made in the arbitration would bind the parties to the court proceedings, the risk of inconsistent findings between the arbitral tribunal and the court, duplication of witnesses and evidence and whether there was agreement between the parties to resolve disputes by arbitration would all have to be answered in the negative.

[40] GRENLEC challenges the basis for the Government's conclusion that the stay can be granted pursuant to the court's inherent jurisdiction. GRENLEC response is that –

(1) In order to meet the burden placed on a defendant who seeks a stay of a claim properly before the court, the Government must place before the court '*substantive evidence which will enable the court to carry out a careful analysis of all relevant considerations and to weigh the competing interests and factors so as to determine whether the circumstances are sufficiently rare and compelling to*

[53] Supra, note 37 at para 5.4.9

justify a stay.'[54] GRENLEC argues that this application is a paradigm example of the sort of case to which the court's policy is applied. In this regard it is said that the judicial policy enunciated in Reichhold is designed to '*avoid opening the door to a flood of applications by defendants seeking to persuade the court to exercise its inherent jurisdiction to stay proceedings being brought against them in circumstances where they might not otherwise be entitled to such a stay of proceedings. The point is to deter the making of such applications by ensuring that stays were granted in exceptional cases only and not normally.'*[55]

(2) In the absence of evidence of the basis on which the court can conclude that there is a clear and compelling case for stay of proceedings in favor of arbitration, the court should decline to even consider the granting of a stay of proceedings in the exercise of its inherent jurisdiction. GRENLEC argues that it is not sufficient for Government to point to an "indeterminate risk of inconsistent decisions" in the two proceedings. It must identify specific issues in relation to which a risk may arise and it does no aid to advert to potential estoppel in this regard. Pymont QC's comment in Re Fenox (UK) Limited; J & W Sanderson Limited v Fenox (UK) Limited are recited above.

(3) There is no compelling reason to grant a stay in this case. GRENLEC says that Government has not identified a single constitutional issue that is common to the constitutional claim and the arbitration. The Government has failed to provide substantive material to satisfy the court of the *'…issues in the arbitration that might be affected by the court proceedings, and of any evidence which would enable a court to determine the event of such a risk'*[56];

(4) There is also no duplication or inefficiency arising from the conduct of both proceedings. GRENLEC's claim is in respect of its proprietary rights over pre-tax

[54] Ibid at para 6.2
[55] Supra, note 37 at para 6.2.1; see Amlin Corporate Member Ltd v Oriental Assurance Corp [2012] EWCA 1341; and Gulf Hibiscus Ltd v Rex International Ltd and another [2017] SGHC 210
[56] Ibid at para 6.4

profits. The arbitration concerns WRB and GPP's contractual rights regarding GPP's shareholding in GRENLEC;

(5) There is no evidence of or possibility that differing conclusions will be reached. The court is concerned with legislation the text of which is not being disputed. The court is tasked with resolving whether the legislation deprives GRENLEC of its property without compensation contrary to the Constitution. No questions of differing estimates of damages or other inconsistent outcomes exist;

(6) The view is repeated that the Government is not entitled to have the court decline the exercise of its constitutional jurisdiction to vindicate the rights of citizens. Findings made by the court as to the scope and effect of the legislation will only assist the arbitral process and the parties amenable thereto.

[41] GRENLEC says that no case management objective will be achieved by the stay. In support of this contention it states –

(1) A decision at the arbitral tribunal as to whether or not Government is obliged to repurchase the shares of WRB and GPP will not decide the issues as to the alleged unconstitutional expropriation of GRENLEC's property;

(2) Even if its claim was stayed, GRENLEC would not be bound by the outcome of the arbitration. In the event that the court ruled on the scope and effect of ESA 2017, that was different from the arbitrator, it would be bound to give effect to its own view of the law and not that of the arbitrator;

(3) A stay in this case would directly impinge on the requirement that the court ought to deal expeditiously with claims for constitutional relief CPR 56.7(8). The present application for stay, filed 3 weeks after the directions for the trial of the

constitutional claim '*is designed to frustrate that policy by deferring indefinitely the hearing of the claimant's constitutional claim.*'[57]

[42] GRENLEC also answers the charge that it would be unfair to the Government for WRB and GPP to be allowed to bring these proceedings after initiating arbitration proceedings when it is apparent that GRENLEC's claim ought to have been made in the arbitration. GRENLEC responds to the effect that –

(1) The claim for constitutional redress does not arise under the SPA and could not have been made in the arbitration. It could not have been part of a process for repurchase of its shares;

(2) The ESA 2017 was passed after the arbitration commenced. The rules of court required GRENLEC to immediately approach the courts to the safe guard its interests;

(3) The Government's concerns about the motives behind GRENLEC's moves to the courts should not prevent the court from exercising its constitutional jurisdiction;

(4) As a person who has suffered an '*uncompensated compulsory acquisition of its property*'[58], GRENLEC should be considered to be a person who has suffered prejudice from the *'indefinite deferment of its claim to constitutional redress.*'[59]

Discussion

Stay pursuant to section 7 of the Arbitration Act

[43] The following questions emerge on this part of the discourse –

[57] Supra, note 37 at para 6.5
[58] Supra, note 37 at para 6.8.1
[59] Ibid

(1) Is Government precluded from complaining about GRENLEC's actions on this claim because it (the Government) has filed the stay application after taking steps in the proceedings;

(2) If not, whether GRENLEC is a party claiming through or under WRB and/or GPP which are parties to the arbitration agreement with the Government; and

(3) If the answer to question 2 is yes, whether GRENLEC's claim is a matter agreed to be referred to arbitration.

[44] Section 7 of the Act has been recited above. In it, the section stipulates that a stay may be sought only at such time '*after appearance and before delivering any pleading or taking other step in the proceedings*.'

[45] GRENLEC complains that the Government has taken steps in the proceedings. In particular, it is observed that the Government filed an affidavit in response to GRENLEC's constitutional claim in which it vigorously opposed the claim and sets outs specific defences. Government also appeared at the first hearing of the claim and participated in the case management hearing session held by Justice Dyer. I note that there is no response by the Government to the objection raised by GRENLEC that Government has taken steps in the proceedings. In Turner & Goudy v McConnell and another[60], a writ was issued against the defendants for balance of payments due on a building contract. The claimants filed an application seeking summary judgment. The defendants acknowledged service of the claim and indicated their intention to defend the same. They also filed an affidavit in which they contested the claim and asked the court to consider whether arbitration would be a more appropriate course. The defendant appeared at the hearing of the summary judgment application. Thereafter the defendant filed a stay application. The master granted the stay. The claimant appealed unsuccessfully to a judge in chambers. The claimant then appealed to the Court of Appeal which allowed the appeal on the ground that the defendants

[60] [1985] 2 All ER 34

had taken a step in the proceedings by filing an affidavit contesting the summary judgment application and by appearing before the master. The Court of Appeal concluded that the step taken in the proceedings does not have to be a positive application made by the defendant; '*it is sufficient if the defendant concurs in an application to the court which is made by the plaintiff*.'[61] This finding is relevant to the present proceedings where the Government has –

(1) filed an affidavit outlining extensive reasons for resisting GRENLEC's claims; and

(2) appeared at, acquiesced to and participated in the case management proceedings before Dyer J.

[46] I was also referred to the case of Bawtry Timber Co. Ltd v Durham County Council[62]. In that case it was found that the defendants had taken steps in the proceedings by acceding to the directions proposed for trial and to the order setting directions for trial. Taking steps in the proceedings precluded the grant of an application for a stay pursuant to section 4(1) of the Arbitration Act 1950. That section mirrors section 7 of the Arbitration Act. This ruling is also apposite to our present circumstances.

[47] I find that by filing an affidavit opposing the claim, appearing at the first hearing of the fixed date claim filed by GRENLEC and by its active participation therein without objection or a request for an adjournment to file the present stay application, the Government has taken steps in the proceedings and is thereby precluded from asking for a stay under section 7 of the Act. I will borrow from the words of Mr. Justice Swinfen Eady in Richardson v Le Maitre[63] where he said *'attending this general summons for directions without objection, and without asking for an adjournment, in order to make an application to stay the action, is taking a step in the proceedings'.*

[61] Ibid at page 37
[62] Ibid
[63] [1903] 2 Ch. 222 at page 225

[48] The foregoing ought to be sufficient to dispose of the Government's section 7 arguments. However for completeness I will shortly consider the other issues arising thereunder.

Whether GRENLEC is a party claiming through or under a party to the arbitration agreement

[49] The arguments have been set out extensively above. Again I must disagree with the Government. The question to be determined by the court has little to do with GRENLEC's shareholding or the extent of the control and influence held over the company by the shareholders. In the case of Mayor and Commonality & Citizens of London v Sancheti this question was addressed frontally. Several pronouncements made in that case lead me to the conclusion that I have formed –

> *Nor is it sufficient for there to be a mere connection between the claimant and another person who is bound by the arbitration agreement. For Mr. Sancheti, reliance was placed on a case in which a subsidiary of a party to an arbitration agreement was held entitled to a stay because of an arbitration agreement with its parent company. In Roussel-Uclaf v GD Searle & Co. Ltd [1978] 1 Lloyd's Rep 225, 231-232, Graham J held (in relation to the stay provisions of section 1 of the Arbitration Act 1975) that a wholly-owned subsidiary company could claim to be a party to an arbitration where the arbitration agreement was between the parent company and a third party on the basis that the parent and subsidiary were "so closely related " that it would be said that the subsidiary was "claiming through or under" the parent….*[64]
>
> *Roussel-Uclaf v GD Searle & Co. Ltd [1978] 1 Lloyd's Rep 225 was a case in which the subsidiary was seeking a stay of court proceedings brought against it and claiming the benefit of an arbitration agreement to which it was not a party. Here Mr. Sancheti seeks a stay of proceedings*

[64] Ibid at paragraph 30

brought against him by the Corporation of London and thereby seeks to impose upon the corporation the burden of an arbitration agreement to which it is not a party. But even without such a distinction I do not consider that Roussel-Uclaf v GD Searle & Co. Ltd assists Mr. Sancheti. In my judgment, it was wrongly decided on this point and should not be followed. A stay under section 9 can only be obtained through or under such a party and a mere legal or commercial connection is not sufficient …[65]

[50] Thus the mere fact of the shareholding and legal relationship between GRENLEC and its majority shareholders do not assist the Government's argument that GRENLEC is claiming through or under WRB/GPP who are parties to the SPA. Additionally, in Re Fenox (UK) Ltd: J&W Sanderson Ltd v Fenox (UK) Ltd and others, the point was made that the fact that the company is controlled by another individual or as in this case, another company is of no consequence. GRENLEC is not a party to this arbitration. It is acting in its own right as a separate legal individual. The observation of Pymont QC, J in the case of Sanderson has been set out above in this Judgment.

Whether GRENLEC**'s claim relates to matters agreed to be referred to** arbitration

[51] On this point I also disagree with the Government. Again, the various arguments on this issue have been set out above. Giving the clause its widest interpretation does not aid the view held by the Government. The Government's conflates GRENLEC's obligation to pay 5% of its pre-tax profit to the social fund with the shareholder's obligation to see to it that GRENLEC contributes 5% of its net income before taxes to local charities within Grenada (clause 6B.1(a)) of the SPA). In Government's view GRENLEC can raise arguments in the arbitration regarding this obligation since the arbitral tribunal is well placed to give remedies for the taking of GRENLEC's property. It must be conceded that the arbitrator will have to consider whether there has been a confiscation, among other things, as contemplated by clause 7.9(a) (i) of the SPA.

[65] Ibid at paragraph 34

[52] One may more than surmise that the arbitrator may be constrained to determine this issue in accordance with the laws of Grenada. On the claim, the court will have to decide on the validity of the legislation and whether there has been an acquisition of GRENLEC's property in accordance with section 6 of the Constitution. But if there is any convergence of issues here (and I see no such convergence) it ends on further scrutiny of what is to be sought to be achieved on both the claim and the arbitration. GRENLEC's seeks relief for (1) its property being compulsorily acquired; and for (2) adequate compensation for the said acquisition. On the other hand, the SPA and in particular clause 7.9 (a) (i) affords the shareholder the occasion to demand that Government repurchases its shares. It fails to follow, in my assessment, that the vindication of GRENLEC's individual proprietary rights can be addressed in the context of the SPA. Bluntly put, if the shareholders are successful on the arbitration then they get the value of their shares and walk away from their engagements with the Government of Grenada. Such an outcome on the arbitration cannot resolve GRENLEC's complaints on its claim and in particular its complaint that the law which authorizes the taking of its assets violates the Constitution and the requirement that it pays 5% of its pre-tax profits to the social fund is similarly '*without constitutional authority.*'

The inherent jurisdiction and/or case management ground

[53] The starting point on this part of the discussion is the question of the court's approach to the grant of a stay pursuant to its inherent jurisdiction. In particular, the grant of a stay in instances where the applicant has not met the threshold set out in section 7 of the Act. The Government cited Hualon Corporation where Leon J made the following observation 'e*ven if a court is not in a position of being required to "refer the parties to arbitration" under the Act …, it has a discretion to do so under its inherent jurisdiction to stay proceedings before it …'*[66]

[66] Ibid at paragraph 174

[54] The learned judge found the guidance in the case of Al-Naimi to be sufficiently persuasive of the approach to be adopted when determining the court's approach to granting a stay under its inherent jurisdiction. Lord Justice Waller said the following -

> *But a stay under the inherent jurisdiction may in fact be sensible in a situation where the court cannot be sure of those matters [the matters on which it was required to be satisfied under the statutory provision] but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first.*

[55] The question to be answered in Al-Naimi was whether the parties had concluded an arbitration agreement or whether the dispute on the proceedings fell within the terms of the arbitration agreement. For the reasons that will follow below, I agree with GRENLEC when it argues that -

> *"The circumstances in which the court would find it appropriate to stay proceedings "in a situation in which the court cannot be sure of these matters but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first …" are strictly circumscribed. The court would exercise such power only in circumstances where it was of the view that detailed inquiry would very likely establish that the matter in dispute fell within the scope of an applicable arbitration clause, (although it could not be sure without hearing oral testimony) and that having established its jurisdiction the arbitration tribunal would be able to shortly decide the relevant issues.*

[56] Gulf Hibiscus is also presented as authority offering guidance to the court on this issue. In Gulf, among other things, the court had to consider whether it should exercise its inherent jurisdiction to grant a stay to defendants who were not parties to a shareholder's agreement which included an arbitration clause. The court in that case followed the guidance provided by the Singapore Court of Appeal in Tomolugen

Holdings Ltd and another v Silica Investors and other appeals[67]. Significantly, the Court of Appeal in Tomolugen declined to follow the threshold set by the court in Reichhold. Indeed the court in Tomolugen concluded that –

> *We would not set the bar for the grant of a case management stay at the "rare and compelling" threshold that the English and the New Zealand courts have adopted. We recognize that a plaintiff's right to sue whoever he wants and where he wants is a fundamental one. But, that right is not absolute. It is restrained only to a modest extent when the plaintiff's claim is stayed temporarily pending the resolution of a related arbitration, as opposed to when the plaintiff's claim is shut out in its entirety: Reichhold Norway (HC) ([165} supra) at 491 per Moore-Bick J. In appropriate cases, that right may be curtailed or may even be regarded as subsidiary to holding the plaintiff to his obligation to arbitrate where he has agreed to do so. The strength of the plaintiff's right of timely access to the court will therefore vary depending on the facts of each case …This does not mean that if part of the dispute is sent for arbitration, the court proceedings relating to the rest of the dispute will be stayed as a matter of course. The court must in every case aim to strike a balance between three higher-order concerns that may pull in different considerations: first, a plaintiff's right to choose whom he wants to sue and where; second, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and third, the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The balance that is struck must ultimately serve the ends of justice. In this regard, we consider that the court's discretion to stay court proceedings pending the resolution of a related arbitration, at the request of parties who are not subject to the arbitration agreement in question, can in turn be made subject to the agreement of those parties by the arbitral tribunal …"*[68]

[67] [2015] SGCA 57
[68] Ibid at paragraph 187

[57] The court in Tomolugen identified the following factors as principles to indicate whether a stay ought to be granted –

> *(a) whether the claims in the court proceedings were derived from the claims subject to arbitration;*
> *(b) whether there was overlap between the claims in the arbitration and the court proceedings;*
> *(c) whether there was anything to bar claims in the court proceedings from being pursued in the arbitration;*
> *(d) whether the findings made in the arbitration would bind the parties to the court's proceedings;*
> *(e) the risk of inconsistent findings between the arbitral tribunal and the court;*
> *(f) duplication of witnesses and evidence; and*
> *(g) whether there was agreement between the parties to resolve disputes by arbitration.*

[58] Etri Fans Ltd also gives some insight into the exercise. In that case, the appellants had failed in their efforts to have a stay put in place pursuant to section (1) (1) of the Arbitration Act, 1975 (UK) which is in similar terms to section 7 of the Act. In considering whether they were entitled to the grant of a stay under the court's inherent jurisdiction in circumstances where they had failed to do so under section (1) (1) of the 1975 Act, Woolf LJ observed that –

> *In particular, in order to protect itself in relation to attempts to abuse the process of the court, the court has undoubtedly very wide powers of staying proceedings. However, as counsel for the appellants concedes, because here the area covered by that inherent jurisdiction has been the subject of detailed and precise Parliamentary intervention, the circumstances in which the court will grant a stay under its inherent jurisdiction in situations dealt with by the statutory jurisdiction, will be rare.*

The jurisdiction is truly a residual one principally confined to deal with cases not contemplated by the statutory provisions.[69]

[59] Reichhold formed much of the debate between the parties on this application. Reichhold, a Norwegian company contracted with Jotun AS (Jotun) for the purchase of the shares in Jotun's subsidiary, Jotun Polymer Holding AS (Polymer). Goldman Sachs International provided financial advice to Jotun in respect of the sale of Polymer. The sale agreement between Jotun and Reichhold incorporated warranties to the effect that (a) the business was operated in the usual manner; (b) there had been no material adverse change in the financial or trading position of Polymer since the last financial period; (c) there had been no material reduction in assets or increase in liabilities; and (d) the business had not been materially and adversely affected by the loss of any important customer or source of supply.

[60] In due course it became evident that the information supplied by Jotun to Reichhold was not entirely accurate since Polymer had in fact reported a significant decrease in profitability in the previous financial year. Reichhold discovered this fact after the sale of Polymer was finalized. Reichhold then commenced arbitration proceedings in Norway against Jotun for the breach of the warranties. Reichhold also sued Goldman Sachs in England on the grounds of negligent misstatements regarding the financial advice given by Goldman Sachs to Reichhold about the financial health of Polymer. This action was grounded in a duty of care allegedly owed by Goldman Sachs to Reichhold. Goldman Sachs sought a stay of the litigation pending the outcome of the arbitration action in Norway. The stay was granted by his Lordship Moore-Bick who opined that it could be so granted further to the court's inherent jurisdiction.

[61] His Lordship reasoned the following-

(1) The court retains an inherent jurisdiction to grant a stay '*under a wide range of circumstances to achieve a wide variety of ends. Subject only to statutory*

[69] Ibid at page 767

restrictions, the jurisdiction to stay proceedings is unfettered and depends only the exercise of the court's discretion in the interests of justice[70];

(2) A litigant who is claiming against a number of persons is entitled to decide for himself whom to sue and whom not to sue. Subject only to the court's need to prevent abuse of its process, the court will not concern itself with the reasons for the claimant's choices and his underlying motives;

(3) However, the claimant's choice of the party to sue does not restrict or remove the court's ability to manage the order in which proceedings are to ensue against different parties especially when related claims are being pursued concurrently; and

(4) The court should only exercise its inherent power to grant a stay of proceedings pending the outcome of proceedings in arbitration or before a foreign court in instances where there are strong reasons to do so and where the benefits resulting from such a course are likely to outweigh any disadvantages to the claimant.

[62] After weighing the seemingly strong reasons in favour of a stay, his Lordship found that a grant was warranted no doubt considering, among other things, cost, convenience and the interests of justice. The claimant, Reichhold appealed the order. The Court of Appeal upheld the learned judge's order recognising the apparent difficulties that a flood of such similar applications might produce. The court however observed that judges will be alive to such risks and outlined the criterion that stays of this kind are to be granted only *'in rare and compelling circumstances.'*[71]

[70] Ibid at page 683

[71] See Konkola Copper Mines PLC v Coromin [2006] I.L.Pr 46 where it was observed that *"Reichhold lays down the relevant test… that it requires rare and compelling circumstances."*

Should the inherent jurisdiction be invoked in this case?

[63] I will not attempt on this part of the discourse to rehash all the points highlighted by the parties. I commence the discussions with the salutary observation made by Woolf LJ in Etri Fans to the effect that '*because … the area covered by that inherent jurisdiction has been the subject of detailed and precise Parliamentary intervention, the circumstances in which the court will grant a stay under its inherent jurisdictions in cases dealt with by the statutory provisions, but where it could or would not do so in the exercise of its statutory jurisdiction, will be rare'.* These comments are, in my view, more than apposite to these set of circumstances where, like in Etri Fans, the court is confronted with a request that it deliberates on whether it ought to invoke the use of its inherent jurisdiction in circumstances where the specific requisites of the statutory jurisdiction to grant a stay have not been met.

[64] I am equally persuaded that for those reasons and for the reasons to follow below, the approach adopted in Reichhold is applicable to these circumstances. I would posit that where Parliament has clearly outlined statutory prescriptions for the grant of a stay pending arbitration, the court should not lightly approach the question of whether it ought to permit a stay where the litigant has failed to secure the same pursuant to the specified parliamentary prescriptions for the grant of the same. While it is correct to say, as did the court in Reichhold that the circumstances in which a court can exercise its inherent jurisdiction to grant a stay are wide ranging, strong reasons ought to subsist before the power is exercised in cases of this nature. Indeed I may venture a step further and proffer the view that a successful invocation of the court's inherent jurisdiction to grant a stay in such cases ought to occur only in rare and compelling circumstances.

[65] But I am prepared to go even a step further and say that even if it can be said that this is not a case in which the Etri Fans line of reasoning applies, I have still concluded that the Government is not entitled to the grant of a stay either on the approach

adopted in Gulf Hibiscus or on the test propounded in Reichhold for the following reasons –

(1) I do not find that there is a substantial and complex overlap between the constitutional claim proceedings and the arbitration proceedings as claimed by the Government. For instance, I cannot see how the Government's insistence that there is an overlap between the parties aids their request. See the points discussed above on the section 7 question as to whether GRENLEC is claiming through or under its shareholder parties to the arbitration agreement. The legal position that the court may grant the stay pursuant to the exercise of its inherent jurisdiction even if the applicant is not a party to the arbitration agreement is accepted by both sides. However this assessment has to be looked at in the round in light of all the factors which may lead the court to conclude that the stay is necessary. In this case, much of what the Government cites as instances to show that GRENLEC's claim is aligned to the interest of WRB/GPP's interests on the arbitration borders on the speculative. Besides demonstrating that WRB/GPP have controlling shareholder interest and influence on the management of the board of GRENLEC, this court has nothing before it to lead it to the conclusion that there are overlapping parties and/or that *'WRB and GPP are likely to have caused GRENLEC to institute this action'*[72]*.*

(2) As I have intimated above, it may be the case that the shareholders are incensed at the actions of Government regarding GRENLEC's assets. So be it. But this court can hardly arrive at the view propounded by Government that the interests of the parties are necessarily aligned to the extent that they ought to be directed to resolve their grievances before the arbitral tribunal. Such a case has not been made out;

(3) There is a seeming confusion on the part of Government that must be addressed here. The Government makes much of the contention that the arbitrator will be

[72] Paragraph 6 of Government's closing submissions filed on 15th February 2019

required to utilise the Constitution of Grenada to resolve the threshold issue of whether there has been a confiscation or acquisition of GRENLEC's assets as contemplated by clause 7.9(1) of the SPA. The fear is, the Government says, that the court may come to different view of the law than the arbitrator. In light of the matters contended on the constitutional claim and at the arbitration, I do not see how the fear of a difference of views on the law amounts to a viable concern. For one thing, the court is not bound by any position taken by the arbitrator on the law. Any view taken by the arbitrator on the law or any issues under the SPA will result in a determination of the matters set out in the SPA, that is to say, whether Government is to repurchase the shares held by WRB/GPP and at what price. On the constitutional claim, the court is constrained to look at the claim of an alleged acquisition, take its own view of the law and decide whether GRENLEC's alleged rights have been violated and are to be vindicated. The one thing has nothing to do with the other. As such, this complaint cannot avail Government in its press to have a stay. I must add that this assessment also leads me to conclude that the likelihood of conflicting outcomes contemplated by Government is, additionally, not a meritorious complaint. A stay will not '*be appropriate if the other proceedings will not even bind the parties to the action stayed, let alone resolve all the issues in the case to be stayed.*[73]

(4) The parties spent a great deal of their debate on whether or not there is an overlap of issues, whether the arbitrator would be affected by a ruling of the court on the constitutional claim and/ or the possibility of inconsistent outcomes. I see this matter as fairly straightforward on the facts and I repeat the view that what transpires at the arbitral tribunal and indeed any outcomes at that tribunal will not have any significantly beneficial or detrimental effect in relation to the constitutional claim or vice versa. The SPA, in its clause 7.9 (c) obligates the Government and WRB/GPP to resort to arbitration to resolve any disputes as to

[73] Klöckner Holdings GmbH and another v Klöckner Beteiligungs GmbH [2005] EWHC 1453 (Comm) at paragraph 21 (v)

whether a repurchase event has arisen. A repurchase event is described in clause 7.9 set out above.

(5) As I have stated above, the questions for the arbitrator will be whether a repurchase event has occurred, whether the Government is obligated to repurchase the shares and at what price.. The issue for the court is whether Government has passed legislation which will acquire GRENLEC's assets without compensation and is thus contrary to section 6 of the Constitution. Importantly, the court will have to consider GRENLEC's claim that section 20 of the ESA 2017 is a not "levy or tax" or the "imposition of a tax" and as such an unlawful taking of its assets. I cannot see commonality of issues here. There is, for instance, no question that damages may be differently assessed in either forum. If the arbitrator decides that Government must repurchase the shares of WRB/GPP, it will not resolve the question of whether GRENLEC's assets were unlawfully acquired without compensation. GRENLEC's claim is not aided by the shareholders receiving an award for the value of their shares. As such, the substance of GRENLEC's complaint cannot be advanced on the arbitration or vindicated by what transpires there.

(6) Significantly, the Government seeks a temporary stay of the arbitration proceedings. Such an approach would delay the outcome of the litigation rather prevent the multiplicity of proceedings. This is since, as I have found, the outcome on the arbitration will have little or no impact on the approach that the court ought to adopt in resolving whether GRENLEC's claim that its assets were compulsorily acquired without compensation. As correctly stated by GRENLEC, the court is not constrained by any view formed by the arbitrator on the validity of legislation which is passed in Parliament. I find that the grant of a stay in this case will only serve to delay the conduct of GRENLEC's litigation without foreseeable benefits.

[66] In my assessment, for the reasons set out above, it makes neither good litigation sense nor case management to grant a stay in this case. Equally, the facts and legal

issues, as discussed above, do not exhibit rare and compelling circumstances which a stay is warranted. The request is denied. The conduct of the constitutional claim has been somewhat delayed by the stay application. I will hear the parties on directions for the conduct of the constitutional claim. Costs to be costs in the cause.

Raulston L.A. Glasgow
High Court Judge

By the Court

Registrar