

**IN THE SUPREME COURT OF BELIZE A.D. 2015
(CIVIL)**

CLAIM NO. 104 of 2015

BETWEEN

VIABLE BELIZEAN PROPERTIES LTD CLAIMANT

AND

**THE ATTORNEY GENERAL
MINISTER OF NATURAL RESOURCES
MARLYN PARIENTE**

**1ST DEFENDANT
2ND DEFENDANT
Interested Party**

Before: The Honourable Madame Justice Griffith

Date of hearing: 28th May, 2015

Appearances: Mr. Eamon Courtenay SC and Ms. Pricilla Banner of Courtenay Coye LLP for the Claimants; Mr. Nigel Hawke, Deputy Solicitor General on behalf of the 1st and 2nd Defendant; Mr. Jarad Ysaguirre of Barrow & Co. for the Interested Party.

DECISION

Introduction

1. The Claimant, Viable Belizean Properties Ltd. is a Belizean company carrying on business as a hotelier in Caye Caulker, Belize. The Attorney-General is sued as legal representative of the Government and the Minister of Natural Resources as the Minister with responsibility for lands is also sued, and they are the Defendants. Marlyn Pariente is a lobster fisherman joined in the claim as an interested party by virtue of a licence issued to him by the Minister in respect of the land which forms the subject matter of the claim.

Permission having been granted, the claim is for the Court to review the following decisions of the Minister of Natural Resources:-

- (i) The cancellation of a licence issued to the Claimant to manage existing reclamation and sea wall of an area of the seashore consisting of 573.067 square meters adjacent to parcel 882 Caye Caulker Registration Section, Belize, and the issue another licence in its place; and
 - (ii) The issue of a licence in respect of a portion of the same seashore area to Marlyn Pariente for the purpose of storage of lobster traps.
2. The claim for judicial review seeks orders to declare the decisions for the cancellation and re-issue of licences to the Claimant and the issue of the licence to Mr. Pariente void and consequentially to quash the said decisions. The grounds of the claim are that the actions of the Minister were done in breach of the principles natural justice and in breach of the Claimant's legitimate expectation that the terms of his licence would be complied with. The Defendants resist the claim on the basis that the decisions and actions of the Minister in cancelling, re-issuing and grant of the licences to the Claimant and the Interested Party, are not amenable to judicial review as they were done pursuant to a private contractual undertaking and not in public law.

Issues

3. The issues which arise for determination are as follows:-
 - (i) Are the Minister's actions in granting and cancelling the licences amenable to judicial review?

- (ii) If so, have the grounds for review of breach of natural justice and breach of legitimate expectation been established?
- (iii) If so, what if any relief is to be granted to the Claimant?

Background

4. The subject property of this claim comprises land adjacent to that registered as parcel 882 Block 12 in the Caye Caulker Registration Section. The property is seafront property which is alleged to have been used and occupied by successive proprietors of parcel 882 for over 12 years. In January, 2014 the Claimant purchased the hotel from the previous owner of the land Mr. Genario Guizar. At the time of the agreement for purchase, Mr. Guizar had been awaiting the issue of a licence in respect of the management of the seafront property from the Government.
5. The licence was issued to Mr. Guizar after the sale to the Claimant took effect but the Claimant as owner of the property, paid the fees and took over the benefit of the licence. In April, 2014 the Ministry wrote to the Claimant advising that Mr. Guizar had failed to notify them of the transfer of the property and as the approval for the licence was granted before the transfer was made, the licence did not apply to the Claimant. This notification by the Ministry also made mention of complaints to the Ministry by Mr. Pariente, of attempts by the Claimant to evict him off an area of the reserve adjacent to the property. The Claimant was advised to desist from any further attempts to evict Mr. Pariente until the matter of the licence was resolved.
6. At the end of July, 2014 the Claimant met with the Minister and Mr. Pariente at the site of the disputed property with a view to settling differences.

There was no agreement reached but the Claimant states that there was an understanding that both parties would submit applications for occupation of the disputed area and such occupation would reflect how the property was previously used and occupied. Meaning, that Mr. Pariente would occupy that portion of land which he previously occupied through oral permission from Mr. Guizar for the purpose of access to and from his fishing boats and upkeep the area. The Claimant alleges that there was no agreement for Mr. Pariente to store lobster pots on the area. The Claimant had submitted its application for a licence on 17th July, 2014.

7. In October, 2014 the Ministry communicated in writing that the Claimant's application was placed on hold pending receipt by the Ministry of scaled drawings of the area as well as the application from Mr. Pariente. The Ministry stated its intention to process both applications together. Mr. Pariente was advised by the Ministry to submit his documentation and should he fail to do so within a certain time, that the Ministry would proceed to process the Claimant's application in the absence of his application. Mr. Pariente did not submit his application and on 22nd December, 2014 the Ministry granted approval to the Claimant to manage the seafront property in front of parcel 882.
8. The licence in respect of this approval was issued on 6th January, 2015. The licence was granted for a period of 3 years subject to certain terms and conditions including that the licence was granted as a privilege only to use national land and did not confer ownership or interest in the land. An annual fee was payable and non-compliance of any of the licence's stipulated conditions was stated as a ground for its revocation.

9. By letter dated 3rd February, 2015 the Claimant's licence was cancelled and a second licence issued in its place. The second licence was approximately 55 square meters less in area than the first, and in this regard, the Minister also issued a licence to Mr. Pariente for approximately 180 square meters including that portion of the area previously granted by licence to the Claimant, for purpose of storage of his lobster pots. Mr. Pariente proceeded to occupy the area for which he obtained a licence and commenced storage of his lobster pots and carry out aspects of his lobster fishing business.
10. The Claimant states that a nuisance has been created in the form of a stench and unsightliness of Mr. Pariente's use of the area to store his lobster pots, which adversely affects its business of operating a hotel. In the face of the discussions and understanding between the parties and the Minister in July, 2014 and having had no notice of or opportunity to make representations regarding the cancellation of its licence and reissue for a reduced area and the corresponding issue of a licence to Mr. Pariente for a portion of the original area, it is against this background, that the Claimant has sought the judicial review of the Minister's cancellation, re-issue and grant of the licences involved.

Issue (i) - Amenability to Review

11. The Claimant alleges that the Minister's grant of the licences is done pursuant to the Private Works Construction Act, Cap. 337 of the Laws of Belize and as such is reviewable as per exercise of a statutory duty. The Defendants deny the applicability of the Private Works Construction Act and contend that the beach area as national lands, short of being disposed of as provided under the

National Lands Act, the licences granted by the Minister were ordinary contractual licences governed by private law and had no statutory underpinning to render the Minister's actions subject to judicial review.

12. Learned Counsel for the Defendants cited several cases as illustration of treatment by the Courts of decisions or actions of public authorities which were held as amenable or not amenable to judicial review, having regard to the nature of the functions or actions of the public bodies involved. These authorities were - **R (Broadway Care Center Ltd) v Caerphilly County Borough Council**¹; **R (Bevan & Clarke LLP et or) v Neath Port Talbot County Borough Council** ² ; **R (Data Broadcasting International Ltd et anor) v Office of Communications**³
13. Particularly, with reference to the authorities of **Bevan & Clarke** and **Ofcom**, learned Counsel for the Defendants urges upon the Court a distinguishing feature of both cases as against the case at bar, which was the requirement for the public authority to follow statutory guidance (*Bevan & Clarke*) and the issue of licences pursuant to a comprehensive statutory scheme governing the relations of the parties (*Ofcom*). The Defendants' case is that such a situation does not obtain in the current case as there is at worst no statutory underpinning or at best only a general statutory power which does not stipulate any policy or framework within which the power must be exercised. In this regard, the Claimant's remedy is advocated as existing in private law for breach of a contractual licence and it ought to pursue that right.

¹ [2012] EWHC 37

² [2012] EWHC 236

³ [2010] EWHC 1243

The Court's consideration.

14. In the first instance, the Court examines whether the licences issued are so issued by the Minister pursuant to section 2 of the Private Works Construction Act, Cap. 337 as asserted by the Claimant. Section 2 of the Act provides:-

"The Minister may in such form and subject to such conditions, agreements, limitations, provisos and restrictions in all respects as he thinks fit and proper in each case, grant a licence or permission to any person who may make application therefor to construct any wharf, bridge, pier, bathing or other kraal or other erection whatever upon, and to enclose, stake in or fill up any land on the shore of the sea or bank of any river in any part of Belize other than Belize City."

15. The licence which the Minister is empowered to grant under section 2 above is in respect of '*any land on the shore of the sea or bank of any river in any part of Belize other than Belize City*'. The work such a licence authorises is - *to construct* any wharf or further defined structure upon, or *to enclose, stake in or fill up the land on the shore of the sea or bank of a river*. In the case of the Claimant, the licence issued by the Minister to 'manage the existing land reclamation, sea wall and deck' can fall within the purpose of the licences which the Minister is empowered to grant under section 2 of the Act.
16. The grant of a licence to store lobster pots certainly does not fall within the ambit of section 2. Thus the licence issued to Mr. Pariente could not be considered as having been issued pursuant to that statutory authority. This notwithstanding, the disputed area being beach land, which is classified as national lands under section 4 of the National Lands Act, the grant of a licence for use of beach lands, can fall under section 6 of the National Lands Act,

Cap. 191, where the Minister may deal with, inter alia, certain national land, for purposes of public convenience or enjoyment. Even if there is any interpretation of the National Lands Act to the contrary, the grant of a licence for use of Government lands falls within the scope of Executive power at common law and can be considered on this basis.

17. The starting point of the Court's consideration on the question of amenability, which will remain the same regardless of the source of power identified above, is the proposition that the existence of a statutory source of power does not in all cases render a public authority's action or decision amenable to review. Conversely, the absence of such a statutory basis does not in all cases exclude the public authority's action or decision from review. The Court will now consider a number of authorities and thereafter come to its conclusion. The Court firstly refers to Sir John Donaldson MR in **R v Panel on Take-overs and Merges, ex parte Datafin plc**⁴ who having referred to a number of different situations in which the court had asserted its jurisdiction in relation to amenability, said (emphasis mine):

'In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from a jurisdiction of bodies whose sole source of power is a consensual submission to jurisdiction.'

⁴ [1987] QB 815 @ 838

18. The Court also refers, in its consideration of this issue of amenability, to **Leech v Deputy Governor of Parkhurst Prison**⁵ per Lord Oliver of Aylmerton to the effect that

"the susceptibility of a decision to the supervision of the courts must depend, in the ultimate analysis, upon the nature and consequences of the decision and not upon the personality or individual circumstances of the person called on to make the decision."

19. In **Hampshire County Council v Supportways Community Services Ltd**⁶ per Neuberger LJ (Court of Appeal) with respect to the question of amenability as it arose in relation to the refusal of the County Council to renew the supply service contract held by the Claimant therein in alleged breach of a review clause of the agreement, it was stated by Neuberger LJ that *'the fact that a contractual obligation was framed by reference to a statutory duty did not render that obligation a public duty'*. Neuberger LJ went on to state that where the claim was fundamentally contractual in nature, short of fraud, improper motive or some other reason, it would only in an exceptional case, attract a public law remedy. Further, that a claimant should not be afforded a public law remedy, merely because his private law remedy is insufficiently attractive. In this case Mummery LJ also observed⁷ whilst concurring with Neuberger LJ that the requisite public element in the case had not been established:-

"...in order to attract public law remedies, it would be necessary for the applicant for judicial review to establish, at the very least, a relevant and sufficient public nexus between the aspect for the contractual situation of which

⁵ [1988] AC 533

⁶ [2006] EWCA 1035 @ paras 37-38

⁷ Ibid @ paras 56-57

complaint has been made and an alleged unlawful exercise of relevant public law powers.”

20. On the other hand, the Court considers **Trafford v Blackpool Borough Council**⁸ where the Administrative Court considered whether or not and if so, in what circumstances would a public body acting under statutory powers in deciding whether or not to enter into, renew or terminate a contract, be exercising public duties. Davies J., made reference to a long line of authorities, in particular *R v Bolsover DC ex Pepper*⁹ per Keene J and extracted therefrom the following passage, with which the Court also finds favour:

Normally a decision by a local authority to sell or not to sell land which it owns is to be seen as a private law matter unless a public law element is introduced into the decision making process by some additional factor. That is because the starting point is that the local authority, in so deciding, is simply acting as a landowner in such cases and is not performing any public function. There may sometimes be some additional factor present; for example, if the authority has a policy which relates to the retention or disposal of certain types of land, that may make a decision a public law matter...”

21. Davies J, also made reference to *Molinaro v Kensington & Chelsea BC*¹⁰ per Elias J, who examined the *Bolsover* case in the context of his consideration of a claim for review of a Borough Council’s refusal to consent to a change of use under a user clause in a commercial lease. A defence of the Defendant therein was that their decision was not amenable to review as it was a matter of private law in contract.

⁸ [2014] EWHC 85

⁹ 3 October, 2000 (Unreported)

¹⁰ [2001] EWHC Admin 896

Elias J. found that the decision was amenable to review and in paragraphs 65 through 71, set out his views which are found to be helpful in articulating the Court's consideration of the instant circumstances. In particular, the Court extracts paragraph 71 as follows:

"...However, in other cases, including some I have cited, public law principles have been superimposed upon the private law relationships. The two are not necessarily incompatible. The facts of each case will need to be carefully considered to determine whether they can properly coexist."

22. What is clear, at least in the Court's view, from the above authorities, is that where a power is exercised pursuant to statute, it is per se amenable to review, but there must also be some public element as distinct merely from the exercise of a private function from which the capacity so to do is derived from statute, which renders the action appropriately reviewable. On the other hand, where the actions of a public authority derive from contract, this fact presupposes that remedies are available only in private law, unless there is similarly some public element which attracts remedies in public law. In either case, what is most important, is that the nature of the power, the nature of the act and its consequences be examined, to ascertain the exercise of the Court's jurisdiction to review, as opposed to an unbending classification one way or the other.
23. With this position in mind, the Court now considers the facts of the instant case. The Court is of the view that the licences issued are not merely derived from the power of the Minister to contract, whether by statute or at common law.

The Minister is by grant of these licences, authorizing and regulating the use of Government land – beach land, in a situation where the citizen would ordinarily not have a right to use this land. The terms and conditions of use are not subject to negotiation by private bargain, and as stated by the licence itself, no estate or interest in the land is conveyed by virtue of the licence with the effect that there is very limited territory in private law for the licensee to enforce. More particularly, an action by the licensee against the Government for breach of the licence, cannot provide any adequate remedy for being deprived of the benefit the licence confers. Further, an action in private law, most obviously in this case for nuisance, by the Claimant against Mr. Pariente, would be met by the position that Mr. Pariente has been authorized by Government to do the very thing which is the subject of the complaint.

24. In granting or revoking licences for any member of the public to use the seashore or seabed, such an exercise by the Minister must necessarily be based on considerations and policies which go beyond the exercise of mere contractual obligations. Additionally, in furtherance of whatever policies or objectives it chooses to implement, the Government is entitled to change its position in relation to the terms and conditions upon which and to whom it issues licences to use beach lands. Because of the terms of the licence, (that it confers no estate or interest in the land), there is no adequate private remedy that can offer redress to the Claimant for a revocation or alteration of the licence. The check on the exercise of the Minister's power in these circumstances, thus must be, review by the Courts as a matter of public law.

Issue (ii) The Grounds of Review

25. The case for the Claimant had been advanced on two grounds – that of a breach of natural justice in the failure by the Minister to afford the Claimant an opportunity to make representations prior to revoking and re-issuing its licence for a reduced area; and breach of the Claimant’s legitimate expectation that its licence for 3 years would not be revoked other than in accordance with its terms and conditions. At the onset of the hearing, learned Senior Counsel for the Claimant abandoned the argument of legitimate expectation and proceeded solely on the failure of the Minister to give the Claimant an opportunity to make representations prior to acting to its detriment.
26. Evidence was filed by the Claimant which was not disputed by the Defendants and which having been accepted by the Court, established without contradiction, that the licence issued by the Minister to the Claimant on 6th January, 2015, was revoked and re-issued for a reduced area on 3rd February, 2015 without further notice to the Claimant, and on that day the licence to Mr. Pariente was issued for a portion of the land previously held by the Claimant. Additionally, the evidence, not contradicted by the Defendants, established the course of dealing whereby the Claimant’s first licence was issued after joint representations had been made with respect to use of the area by both parties; that Mr. Pariente had failed within the time stipulated by the Ministry, to submit his application for a licence; and that the licence issued to Mr. Pariente in February did not accord with the discussions the parties had previously had with the Minister.

27. The Defendants provided no evidence which offered any explanation for the Minister's actions, thus the decision of the Minister was not explained or sought to be justified in any way. The Defendants' failure to assist the Court in this regard has not gone unnoticed. Learned Counsel for the Defendants conceded that the revocation and re-issue of the Claimant's licence was effected without notice or opportunity to make representations but the Court still has to consider whether the Claimant was entitled to be afforded such an opportunity, and if so, the effect of having been deprived of that opportunity. The Claimant's case is that it was so entitled and based this submission on a number of authorities.
28. The case of **Deep Fried Enterprise Ltd v The Attorney General et al**¹¹ per then Chief Justice Conteh was cited as an authority on similar facts. Inasmuch as the facts of the decision bear similarity in terms of the Minister's exercise of power under the Private Works Construction Act and a failure to give an opportunity to be heard prior to making a decision adverse to the Claimant therein, the decision was not extensively reasoned thus it can be regarded as no more than a useful reference rather than a decisive authority.
29. Another decision cited for the Claimant, was **Attorney General et al v Samuel Bruce**¹² per Morrison JA which established that where a decision will cause particular prejudice to a particular individual or group of individuals, the person has a right to be heard. The Court of Appeal's decision in **Bruce** related to the compulsory acquisition of land, and the dicta of Morrison JA was

¹¹ Belize Supreme Court Action No. 585 of 2005

¹² Belize Civil Appeal No. 32 of 2010

made with reference to that Court's decision in **British Caribbean Bank & Boyce v Attorney General**¹³ which also was decided with respect to the application of the right to be heard in respect of the protection of property rights under the Constitution. The right to be heard however is of wide application and in the instant case the Court accepts that it applies to give effect to what then CJ Conteh remarked as the elementary fairness of being heard in the face of a decision adversely affecting any person.

30. The Court considers that the Minister's action in revoking the licence and re-issuing it for a reduced area ought to have been preceded by notice to the Claimant and an opportunity to make representations for the following reasons:

- (i) The area licenced to the Claimant was significantly reduced;
- (ii) The Ministry issued the first licence to the Claimant after giving fair warning to Mr. Pariente to submit his application within a certain time which he did not do, and this meant that the Minister granted the licence to the Claimant on the basis of being satisfied with the Claimant's application;
- (iii) The Minister and the Claimant and Mr. Pariente partook in discussions wherein the concerns of both parties were made known and without notice to the Claimant the issue of the licence to Mr. Pariente was done for a purpose not addressed in those discussions which meant that the Claimant cannot be said to have made representations before hand on the same issue;

¹³ Belize Civil Appeals Nos. 30 & 31 of 2010

- (iv) Given the adverse effect of the licence issued to Mr. Pariente on the Claimant's business which does cater to members of the public, no suggestion has been made to the contrary that damages would not be an adequate remedy for the Claimant
- (v) The terms and conditions of the licence are not subject to bargaining or negotiation as per ordinary terms of a contract.

In the circumstances it is considered that the Claimant ought to have been heard before its licence was revoked and replaced for an area less than that originally granted. In addition, having regard to the course of dealings between the Minister and the two licencees, the Claimant should also have been heard in relation to the grant of the licence to Mr. Pariente, in respect of the purposes for which that licence was granted.

Issue (iii) - The Relief

31. Having successfully established the ground of review against the Minister's decision to revoke and re-issue the licences, the remaining issue concerns what relief should be granted to the Claimant. The Claimant abandoned its claims for injunctive relief and for damages and seeks only declarations and orders of certiorari with respect to the revocation and issue of the licences. It is the case that the grant of the relief sought is discretionary but the Court in this case, particularly having regard to the circumstances, considers that the relief sought should be granted. The Court therefore grants the declaratory relief and orders of certiorari sought pertaining to the revocation and reissue of the Claimant's licence and the issue of Mr. Pariente's licence. The

grant of relief however nonetheless acknowledges the right of the Minister to take any lawful action pertaining to the licences after affording opportunity to the Claimant and Mr. Pariente to be heard.

Final Disposition

32. The Claim for Judicial Review is granted and the following declarations and orders are made:-

- (i) A declaration is granted that the revocation of the licence issued to Viable Belizean Properties Ltd on the 6th day of January, 2015 is invalid;
- (ii) A declaration is granted that the issue of licences dated the 3rd February, 2015 to Viable Belizean Properties Ltd and Marlyn Pariente respectively, is invalid;
- (iii) An order of Certiorari is granted to quash the Minister's decision to revoke the licence issued to Viable Belizean Properties Ltd on 6th January, 2015 and to re-issue and issue licences to Viable Belizean Properties Ltd and Marlyn Pariente on 3rd February, 2015;
- (iv) A declaration is granted that the licence issued to Viable Belizean Properties Ltd on the 6th day of January, 2015 remains valid and in effect but is subject to the Minister taking any further decision according to law and the rules of natural justice.

- (v) Costs are granted to the Claimant against the Defendants to be assessed if not agreed. No order for costs is made against the Interested Party.

Dated the day of July, 2015

Shona O. Griffith
Supreme Court Judge.