

**IN THE SUPREME COURT OF BELIZE, A.D. 2014**

**CLAIM NO: 369 of 2014**

**BETWEEN**

**MICHAEL FEINSTEIN**

**CLAIMANT**

**AND**

**ATTORNEY GENERAL OF BELIZE  
BELIZE TOURISM BOARD  
FORT STREET TOURISM VILLAGE LTD.**

**1<sup>st</sup> DEFENDANT  
2<sup>nd</sup> DEFENDANT  
3<sup>rd</sup> DEFENDANT**

**Keywords:** Commercial Agreements with Government of Belize;  
Nature of fees charged to Cruise Ship passengers visiting Belize; Section 114(1) of the Belize Constitution; Taxes as Revenues Payable under a Statue or Law into a Public Fund Established for a Specific Purpose.  
Consolidated Revenue Fund of Belize.  
The Cruise Ship Passenger Tax Act;

**Before the Honourable Mr. Justice Courtney A. Abel**

**Hearing Dates:** 11<sup>th</sup> June 2015  
17<sup>th</sup> June 2015  
24<sup>th</sup> June 2015  
25<sup>th</sup> June 2015  
26<sup>th</sup> June 2015  
16<sup>th</sup> July 2015  
22<sup>nd</sup> September 2015  
16<sup>th</sup> October 2015  
20<sup>th</sup> October 2015.

**Appearances:**

Mr. E. Andrew Marshalleck SC, for the Claimant

Mr. Nigel Hawke, Deputy Solicitor General, for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Mr. Rodwell R. A. Williams SC, and Lissette Staine for the 3<sup>rd</sup> Defendant.

**JUDGMENT**  
**Delivered on the 20<sup>th</sup> October 2015**  
(Corrected Under CPR Part 42.10(1))

**Introduction**

- [1] This is a somewhat complex claim brought by the Claimant in respect of the terms, effects and possible enforceability of various commercial agreements between the Defendants and in which the claimant claims to be commercially interested; and which he claims affects his commercial interests.
- [2] The Claimant, a businessman, brought the present claim against the Defendants, including the Government of Belize (“GOB”) for declarations as to the constitutionality, lawfulness, (or legality) and enforceability of a number of clauses of a written Contract/Agreement entered into between the Defendants and in which the Claimant was not a party.
- [3] The Defendant, Belize Tourism Board (“BTB”), a creature of the **Belize Tourism Board Act** (“the BTB Act”)<sup>1</sup>, was created or formed with the expressed statutory purpose to develop the tourist industry of Belize<sup>2</sup>.
- [4] The Defendant, Fort Street Tourism Village Limited (“FSTVL”) is now the owner and operator of a prime waterfront property at Fort Street in Belize City, Belize (“the Fort Street Property”) which in 2000 was owned by the GOB, and is used for the entry into Belize of tourists and for tourist amenities, known as ‘the Tourism Village’. FSTVL is also a principle beneficiary of the above Contract/Agreement governing the operations of the Tourism Village.
- [5] The Claimant is arguing, in the present claim, that certain clauses in the agreement is adversely affecting his business interests in and concerning a major development within Belize, on Stake Bank Island, as a potential competing cruise ship docking facility, and as a result that he is entitled to bring the present claim in public, as opposed to private law, for the various reliefs claimed.

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<sup>1</sup> Chapter 275, Revised Edition 2000, Laws of Belize.

<sup>2</sup> Ibid Section 11(a) of the BTB Act.

[6] The Defendants are contesting the present claim on a number of bases including that the Claimant is not entitled to bring the present claim against them and that the claim is wholly misconceived and without legal basis.

[7] The claim was dramatically sought to be impacted by legislation<sup>3</sup> which ostensibly attempted to shift the centre of gravity of the overall claim. This legislation has now to be considered.

### **Background**

[8] In about 2000, as a result of the work undertaken by the BTB, and in order to facilitate the development of Belize as an eco-tourist destination, the GOB decided to work with the private sector to create a 'Tourist Village' in the Fort area of Belize City.

[9] The Claimant represented to GOB that he and his company, the Belize Tourism Village Limited, had the capability to create the Tourist Village in Fort Street.

[10] By a written Agreement dated 20<sup>th</sup> December 2000 ("the 2000 Agreement"), between the Claimant, the GOB, the Belize Tourism Village Limited and the BTB, it was agreed to establish "the tourism village" with docking facilities and other facilities for cruise ship passengers along with facilities for the sale of goods and services to such tourists. The 2000 Agreement did provide for and was designed to regulate this project which was to be administered under its terms.

[11] The 2000 Agreement also provided that the Claimant (as the 'Investor') and the Belize Tourism Village Limited would pay the GOB for the Fort Street Property, on which the Tourism Village would be developed, as well as provide, at its expense, all the required facilities (including a customs and immigration checkpoint and timetable) on the terms set out in the agreement.

[12] Clause 6 of the 2000 Agreement included the following terms under the heading "COLLECTION AND DIVISION OF "HEADTAX":

- (1) *In recognition and discharge of their statutory responsibilities, the BTB and the Registrar of Hotels will continue to be responsible for establishing the*

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<sup>3</sup> The Cruise Ship Passenger Tax Act.

*rate of the head tax and collecting cruise ship taxes, granting permission for cruise ships to call on Belize and for regulating the cruise industry in general. The BTB will remain responsible for the formulating and ensuring compliance with a national cruise ship policy. No responsibility currently carried out by the Registrar and the BTB is delegated to the Investor or the Company unless expressly laid out in this agreement.*

- (2) *Subject to sub-clause (4) below, the BTB will collect the current cruise ship passenger tax (“the head tax”), which presently stands at US\$5.00 per passenger, from all passengers visiting and stopping in the Belize District, and of this amount, pay US\$1.00 in Belize currency to the Protected Areas Conservation Trust (PACT) and pay, in the currency in which the BTB receives payment, the sum of US\$4.00 or Bz\$8.00 per passenger, to the Company.*
- (3) *By the 15<sup>th</sup> of every month, the BTB shall pay to the Company its (Company’s share) of the head tax calculated in accordance with sub-clause (2) above, in respect of the preceding month. In the event the payment is not made by the BTB by the said date, the BTB will add thereto interest at the prime lending rate charged by commercial banks in Belize from time to time. For the avoidance of doubt, it is expressly declared that this provision for the payment of interest shall not be construed as a licence to delay payment.*
- (4) *The payment to the Company of its portion of head tax under this Clause shall commence from the 1st February, 2001.*

[13] Under Clause 9(6) of the 2000 Agreement the GOB covenanted that the Government would:

*“take all steps necessary to designate the tourism village as the official port of entry of cruise ship passengers to the Belize District and make it mandatory, for the duration of this Agreement, for all cruise ships visiting the Belize District to use the tourism village in order to gain for its passengers, who desire to come ashore, entry into and exit out of the Belize District”,*

- [14] GOB under clause 9(6) of the 2000 Agreement also covenanted:  
*“not for the duration of this Agreement in order to assist the Investor to recoup his investment and make a return thereon, solicit, assist or facilitate the construction or operation of any other tourism village in the Belize District apart from the tourism village to be constructed and operated by the Investor”.*
- [15] Thus the GOB purported to give the Belize Tourism Village Limited an exclusive right to operate a cruise port in Belize District for the term of the Agreement.
- [16] The agreement was to remain in force for a period of 15 years from 15<sup>th</sup> January 2001.
- [17] On or about the 9<sup>th</sup> September, 2003, the Claimant and his company, Belize Tourism Village Limited, sold their interest in the Tourism Village, then known as Fort Street Tourism Village (“FSTV”) to a group involving Diamonds International and Royal Caribbean Cruise Lines which caused the formation of FSTVL as a joint venture company, to effect the purchase and undertake the operations of the Tourism Village.
- [18] The Claimant sold FSTV in order to progress the development of the Stake Bank Island, in the Belize District, as a Cruise Ship docking facility within this District as he apparently felt that the docking facility at this Island was needed to eliminate the need for tendering which was viewed as potentially dangerous and costly.
- [19] The Claimant also felt that Stake Bank Island also allowed for more physical space as well as offered better aesthetic qualities for tourism development.
- [20] Clearly Stake Bank would have had to be designated a port of entry into Belize if this goal of the Claimant was to be realized; and at the time of the 2000 Agreement, and of the said sale of the Tourism Village, all parties were well aware of the Claimant’s intention to develop Stake Bank in that way.
- [21] The sale of FSTV was effected on the 9<sup>th</sup> September, 2003, by an option agreement of the same date by which the Claimant also granted a right of pre-emption to FSTVL and White Sand Inc., (respectively corporate vehicles of Diamonds International and Royal Caribbean Cruise Lines) to acquire an interest in the Stake

Bank cruise ship island infrastructure project if and when the Claimant wished to sell the same.

- [22] On the 9<sup>th</sup> September, 2003, at the time of the sale, GOB, BTB and FSTVL also entered into a written Amended and Restated Agreement (“Amended and Restated Agreement”) under which the GOB and BTB consented to the transactions, the assignment of Initial Documents to FSTVL and the acquisition, as well as to the Amended and Restated Agreement generally (apart from any liabilities of the Claimant), and provided that FSTVL “shall continue to provide, at its own cost, facilities in the Tourism Village for customs and immigration<sup>4</sup>”.
- [23] The Amended and Restated Agreement replaced the Concession agreement which the GOB and BTB had entered into with the Claimant and reflected some of its terms including those provisions relating to the “head tax”.
- [24] GOB and BTB in the Amended and Restated Agreement acknowledged that the Claimant had performed his obligations to them under the 2000 agreement for the establishment and operation of the Tourism Village, including the Concession Agreement, and agreed directly with FSTVL on terms as to how FSTV was to be operated for the duration of the agreement going forward.
- [25] The Amended and Restated Agreement also generally provided:
- (a) For FSTVL to pay to the BTB an annual fee;
  - (b) For BTB to appoint one director to the Board of Directors of FSTVL;
  - (c) For the GOB to grant to FSTVL concessions for duty free importation of supplies, exemptions from taxes and concessions to open and operate duty free shops within the Tourism Village;
  - (d) For the GOB to work with the Central Bank to have FSTVL serve as an authorized foreign exchange dealer;
  - (e) For the GOB to designate FSTV as the official port of entry for cruise ship passengers visiting the Belize District and make it mandatory for the

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<sup>4</sup> Paragraph 4 (4) of the Amended and Restated Agreement.

duration of the agreement for all cruise ships visiting the Belize District to use the FSTV for entry into and exit out of Belize;

(f) For FSTVL to keep the mouth of the Belize River dredged to permit tendering of cruise ship passengers to the village.

[26] Under the Amended and Restated Agreement, FSTVL was also granted virtually the same concessions and privileges as had been granted to the Claimant under the 2000 Agreement and pursuant to the terms of this Agreement it provided for the operation of the Tourist Village going forward: which not only included an exclusive right to operate a cruise port in Belize District for the term of the Agreement but also expressly recognised the Claimant's intention to engage in the development of the "Stake Bank" project as an exception to the exclusivity granted to FSTVL<sup>5</sup>.

[27] For all legal and practical purposes, Clause 6 of the Amended and Restated Agreement contained the same provisions as Clause 6 of the 2000 Agreement under an identical heading.

[28] Under Clause 9 of the Amended and Restated Agreement, apart from GOB covenanting that the Government would take all steps necessary to designate FSTV as the official port of entry of cruise ship passengers to the Belize District for all cruise ships visiting the Belize District; and it also covenanted not to solicit, assist or facilitate the construction or operation of any other tourism village in the Belize District apart from FSTV to be constructed and operated by the Claimant.

[29] Specifically by clause 9(7) of the Amended and Restated Agreement it was expressly provided that this sub clause 7 would not prevent the Claimant from engaging in the development of the "Stake Bank" project (thereby acknowledging the existence of the Claimant's plans to develop Stake Bank).

[30] The Amended and Restated Agreement was to remain in force until 14<sup>th</sup> January 2021.

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<sup>5</sup> Paragraph 3 (7) of the Amended and Restated Agreement.

- [31] In 2004 a rival cruise line, Carnival Corporation, expressed an interest in constructing a cruise ship port at Port Loyola, Belize City. Such a venture obviously conflicted with the undertakings given by GOB to FSTVL in the Amended and Restated Agreement. Nevertheless negotiations were held with FSTVL to find a way to accommodate Carnival Corporation's proposed cruise ship port at Port Loyola.
- [32] This negotiation resulted in a further written agreement in April 2004, which was later amended as a Further Amended Agreement ("Further Amended Agreement") between GOB, FSTVL and BTB and which was entered into on the 14<sup>th</sup> September 2004 (all of such Agreements will be collectively referred to as the "Agreements"). It is to be noted that the Further Amended Agreement did not include the Claimant as a party.
- [33] Under the terms of paragraph 2 of the Further Amended Agreement, under heading "CONSENT TO SECOND CRUISE PORT", GOB, FSTVL and BTB agreed that FSTVL would consent to the operation and development of the Second Cruise Port and waive and release its rights under the previous contract to insist that FSTV continue as the only port of entry for Cruise Ships to the Belize District on a number of terms and conditions including that:
- (a) The second cruise port was only to be used by Carnival Cruise Lines and was to be limited to two berths;
  - (b) Access to retail duty free shopping was to be restricted to cruise passengers stamping at the second port;
  - (c) There was to be no more concessions granted allowing for duty free shopping in the Belize District; and
  - (d) All cruise ship passengers to be tendered to shore must still use the Tourism Village.
- [34] With regard to the development of Stake Bank specifically the Further Amended Agreement stipulated at paragraphs 2(E) and 2(F), as further conditions for the consent and waiver that:



*“(E) When berths for ships are developed on the “Stake Bank” island, approximately four miles off the coast of Belize City (the “Stake Bank Island”), passengers on cruise ships calling at Stake Bank Island shall be required to tender to the Tourism Village and use it as a port of entry into the Belize District mainland, or, if a bridge is built connecting Stake Bank Island to the mainland, the point of entry into the Belize District mainland for all passengers coming off the bridge shall be the Tourism Village.”*

*“(F) Subject to reaching agreement on the commercial terms with the applicable property owner(s), RCL shall have the right at its option to build a dock with two berths in the Belize District, either within the property of the Second Cruise Port, on Stake Bank Island or at some other location mutually acceptable to RCL and the Government (such dock, if and when build, is hereinafter referred to as the “Royal Caribbean Dock”)”*

[35] The Further Amended Agreement further went on to provide at paragraph 3 that FSTV and Royal Caribbean were fully supportive of the Claimant’s efforts to develop Stake Bank and undertook to enter into discussions with the Claimant to explore a possible role by Royal Caribbean in the development of Stake Bank, and by the terms of paragraph 4 went on to agree on the charge and sharing of head taxes.

[36] Subparagraph 4 of the Further Amended Agreement, under the heading “COLLECTION AND DIVISION OF HEAD TAX” provides as follows:

*“(A) Subclause (2) of Section 6 of the Agreement, which pertains to the portion of the head tax payable to the Company, is hereby deleted in its entirety, and the following new subclause (2) is inserted in its place:*

*“(2)(i) The BTB will collect the head tax, which presently stands at Five Dollars (US\$5.00) per passenger, from all passengers calling in the Belize District and of this amount, pay the equivalent of One Dollar (US\$1.00) in Belize currency to the Protected Areas Conservation Trust (PACT) and subject to paragraph (ii) of this*

*subclause (2), pay Four Dollars (US\$4.00) in the currency in which the BTB receives payment, to the Company in accordance with subclause (3) below. Notwithstanding anything to the contrary set forth in this Agreement, the amount payable to the Company by the BTB in connection with the head tax shall be, subject to the limitation of paragraph (II) of this subclause (2), a guaranteed Four Dollars (US\$4.00) per passenger. Subject to subclause (1) above and to subclause (8) of this Section 6, BTB may increase the head tax from time to time, and the BTB shall have the right to retain any additional amounts collected as a result of such head tax increase.*

.....  
*(iii) Whenever this Agreement refers to “passengers that call in the Belize District” it shall be deemed to mean those passengers listed on the passenger manifests of all cruise ships that actually call in the Belize District during the relevant period. For purposes of this Agreement, passengers that call in the Belize District shall include, without limitation, passengers on cruise ships that call at the Second Cruise Port or that call for docking and/or tendering of passengers to either the Tourism Village, any future port and/or tourism village that may be developed at Stake Bank or any future Royal Caribbean dock.”*

[37] Thus this Further Amended Agreement expressly provided that BTB is still to collect head taxes in respect of passengers listed on passengers’ manifests for cruise ships, including for cruise ships calling at Stake Bank, and pay the same over to the Protected Areas Conservation Trust and FSTVL, for their own use and benefit.

[38] Further under the provisions of paragraph 5(7) of the Further Amended Agreement the Government agreed to refrain from soliciting, endorsing, assisting, facilitating or permitting the construction or operation of any other tourism village and/or cruise ship terminal in the Belize District apart from FSTV’s operation by the

Company, except a Royal Caribbean Dock or the Stake Bank Project or BTB developing up to 5,000 square feet of retail space on the Militia Hall Property<sup>6</sup>.

[39] No second cruise port facility was in fact developed at the Belize Port Free Zone pursuant to the Further Amended Agreement, and none is now contemplated.

[40] It is generally accepted by all parties that all of the head taxes have, since the Further Amended Agreement, been collected by BTB and distributed by them, but not in accordance with the BTB Act but rather in accordance with this Agreement; and have not been paid into and have never formed part of the Consolidated Revenue Fund.

[41] By letter dated 13<sup>th</sup> April 2007 the Claimant sent a letter to the then Prime Minister of Belize informing him that he (the Claimant) had now spent \$8,000,000.00 of his own money and arranged financing to complete the Stake Bank project; was ready to start building the actual docks for the cruise lines at the same project; and, was seeking an assurance (from GOB) that he (the Claimant) would be granted Port status, which he felt was agreed; and that he would be entitled to all port fees.

[42] By letter dated 17<sup>th</sup> April 2007 from the legal advisor of the GOB the Claimant was advised that:

*“The Government would lend its full support to the project and would ensure that with the completion of the cruise port facility, Stake Bank is granted Port status” [subject to certain (3) expressed conditions] and confirmed, “..that your port would be entitled to the applicable dues and charges in respect of all ships calling at or using your port facility”.*

[43] The GOB at present, in principle, apparently, supports the Claimant’s Stake Bank Project, and in furtherance of that support procured (it is to be assumed by sponsoring a Bill) the legislature on the 7<sup>th</sup> February, 2014, to duly enact the **Stake Bank Cruise Docking Facility Development Act, 2014**<sup>7</sup> (“the Stake Bank Act”) granting certain tax concessions for the development at Stake Bank and designating

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<sup>6</sup> See Clause 5(7) of the Further Amended Agreement.

<sup>7</sup> No. 10 of 2014.

a docking facility to be there constructed as a port of entry into Belize as well as introducing a new charge for the use of the facilities and the sharing of the proceeds of the charge between the Government and the Developer.

- [44] The Stake Bank Act, however, requires Executive action to bring it into force on the understanding that certain issues with FSTVL under the various agreements are to be satisfactorily resolved or that the Claimant and his company are able to provide the GOB and BTB, in the public interest, with acceptable indemnities against any claim by FSTVL.
- [45] The Stake Bank Act has not been brought into force because the GOB and the Claimant have been unable to finalize the terms of an investment agreement governing the development of Stake Bank Island. This is because of the GOB's concern that the Stake Bank Act may result in GOB being in breach of commitments to FSTVL under the Further Amended Agreement by the designation of Stake Bank as a port of entry into Belize and of the provision in the Stake Bank Act of new charges for the use of the facilities.
- [46] The GOB considers that it would be against the public interest to sign such an investment agreement with the Claimant unless the agreement contained proper indemnities to hold the GOB and BTB harmless against any litigation or claim arising from the Amended and Restated Agreement or otherwise. GOB also considers that it is perfectly entitled to require the Claimant to provide acceptable indemnities before any consideration could be given to signing such an investment agreement.
- [47] The Claimant considers that the GOB is refusing to finalize the investment agreement unless he (the Claimant) agrees to indemnify GOB against any claims by FSTVL arising therefrom, and is therefore imposing conditions for the designation of Stake Bank as a port of entry into Belize, which the legislature itself does not see fit to impose.
- [48] The Claimant has refused to provide the indemnity requested because he considers that the indemnity effectively guarantees to FSTVL payment of the agreed share of head taxes for cruise ship passengers visiting the Belize District and using the Stake

Bank facility, and not the Tourism Village; and that such a guarantee effectively undermines the financial viability of the Stake Bank Project; and is otherwise completely unearned by FSTVL.

- [49] Further, the Claimant considers that he had no part whatsoever in the Further Amendment Agreement and refuses to be burdened by it particularly since no second Cruise Port has ever been constructed or operated in the Belize Port Free Zone which was the consideration provided by Government for the commitment in the first place.
- [50] The Claimant also considers that the requirement of an indemnity from him is a marked departure from the GOB's previous position communicated to him by the above letter dated 17<sup>th</sup> April, 2007, from its Legal Counsel, in which, he alleges, the GOB assured him that Stake Bank would be granted port status, and, that it would be entitled to all applicable dues and charges in respect of all ships calling at or using the port facility - upon which assurance the Claimant is entitled to rely.
- [51] The GOB maintains, however, that the letter of the 17<sup>th</sup> April 2007 did not say that the GOB would sign an investment agreement with the Claimant, but merely sets out the conditions under which Stake Bank would be granted port status; and that the Claimant had not taken any action on reliance or in pursuance of said letter.
- [52] The Claimant has sought advice as to the legality of the provisions of the Further Amended Agreement giving rise to the concerns of the Government and has, apparently, been advised that the provisions are unlawful and void; as creating unlawful fetters on future executive action required for the development of Stake Bank, and as violating the provisions of section 114 of the Constitution of Belize.
- [53] On the 29<sup>th</sup> July 2015 the Legislature passed the '**Cruise Ship Passenger Tax Act**<sup>8</sup>' ("the Act") purporting to legislate for a 'cruise ship passenger tax' and purporting to validate, retroactively, the imposition, collection and distribution of the head tax; and which Act came into force on 1<sup>st</sup> August 2015 and therefore very likely and significantly affects the present proceedings and will have to be considered.

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<sup>8</sup> No. 7 of 2015

### **The Court Proceedings**

[54] The Claimant, in an attempt to resolve the present impasse between himself and GOB, by the present Fixed Date Claim Form, Originating Motion, filed on the 16<sup>th</sup> July 2014, now seeks the following reliefs from this court:

- 1) A declaration that the provisions of sub paragraphs 2(E), 2(F) and 5(7) of the [Further] Amended Agreement between the GOB, the BTB and FSTVL dated the 14<sup>th</sup> September, 2004 are unlawful and unenforceable, as it is incompatible with the proper discharge of public responsibilities and/or as ultra vires the powers of the Executive;
- 2) A declaration that the proceeds of “head taxes” charged to and collected from Cruise Ship passengers visiting Belize are moneys raised or received by Belize in accordance with section 114(1) of the Belize Constitution;
- 3) A declaration that the proceeds of “head taxes” charged to and collected from Cruise Ship passengers visiting Belize must be paid into the Consolidated Revenue Fund and can only be lawfully withdrawn therefrom pursuant to a law enacted by the National Assembly in accordance with the provisions of section 114 of the Belize Constitution;
- 4) A declaration that the provisions of Paragraph 4 of the [Further] Amended Agreement between the GOB, the BTB and FSTVL dated the 14<sup>th</sup> day of September, 2004 are ultra vires the powers of the Executive, in breach of the provisions of Section 114 of the Belize Constitution, and inconsistent with the discharge of public responsibilities.
- 5) An injunction restraining the Defendants or any of them whether by themselves, their servants or agents, from in any way acting in pursuance of or in furtherance of any of the provisions of clauses 2(E), 2(F), 4 and/or 5 of the [Further] Amended Agreement dated 14<sup>th</sup> September, 2004 between the GOB, the BTB and FSTVL;
- 6) Such further or other relief as the Court considers just; and

7) Costs.

- [55] The present Claim has been brought under Part 56 of RSC which deals with applications for an administrative order<sup>9</sup> including: “*for relief under the Constitution*”<sup>10</sup>, “*for a declaration in which a party is the Crown ... or any other public body*”<sup>11</sup> and in “*addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant – (a) an injunction...*”<sup>12</sup>.
- [56] The Claim form herein was supported by an Affidavit of the Claimant sworn to and filed herein on 16<sup>th</sup> July 2014.
- [57] Acknowledgments of Service were filed by the Attorney General’s Ministry for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively on the 29<sup>th</sup> July 2014 and 6<sup>th</sup> August 2014; and an Acknowledgment of Service was filed for the 3<sup>rd</sup> Defendant by Courtenay Coye LLP on the 11<sup>th</sup> August 2014.
- [58] The GOB in defence of the Claim, filed the First Affidavit of Joseph Waight, the Financial Secretary of the GOB, on the 28<sup>th</sup> August 2014.
- [59] FSTVL in defence of the Claim, on the 21<sup>st</sup> October 2014, filed the First Affidavit of Elad Aharon, its Director of Finance and Operations.
- [60] On the 3<sup>rd</sup> November 2014, at the 1<sup>st</sup> Hearing, by consent of the parties, directions were given for the trial of the Claim herein which included the filing and serving of an Ancillary Claim Form by FSTVL, for Disclosure, a Pre-Trial Memorandum by the parties with legal Submissions and authorities, and fixing a date for trial on the 11<sup>th</sup> and 12<sup>th</sup> February 2015.
- [61] On the 20<sup>th</sup> November 2014 FSTVL/Ancillary Claimant filed its Ancillary Claim Form supported by an Ancillary Statement of Claim. According to the Ancillary Claim if the Amended and Restated Agreement is found by this Court to be invalid and unconstitutional, then the Ancillary Claimant claims damages for breach and/or

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<sup>9</sup> Part 56.1(2) RSC 2005.

<sup>10</sup> Part 56.1(1)(b) RSC.

<sup>11</sup> Part 56.1(1)(c) RSC.

<sup>12</sup> Part 56.1(4)(a) RSC.

false and/or negligent representations and warranties in private law under certain agreements.

- [62] On the 23<sup>rd</sup> January 2015 further directions were given by the Court in the management of the case for trial, which included the amendment of the Ancillary Claim, and the fixing of a new trial date.
- [63] On the 24<sup>th</sup> March further directions were given extending time for the filing and serving of the Pre Trial Memoranda and fixing the trial date of the claim to 11<sup>th</sup> June 2015. Directions were also given for the ancillary claim and fixing the trial date for this Ancillary claim to the 12<sup>th</sup> June 2015 immediately following the trial of the claim.
- [64] At the trial of the claim the applications proceeded without the need to cross-examine the deponents of the Affidavits filed, admitted as evidence, who were therefore the uncontested witnesses in the case and from whom the above background facts have been derived. The case was adjourned to 17<sup>th</sup> June for oral submissions, at the conclusion of which the claim was further adjourned.
- [65] On the 16<sup>th</sup> July 2015, the date to which the hearing was adjourned, I shared with Counsel for the parties a draft judgment very much on the terms of the present judgment without reference to submissions on the Act, which had not yet been passed. The parties requested an adjournment of the case for them to consider the draft judgment and to await the outcome of proposed legislation which was about to be enacted into law which might impact the present proceedings. The court acceded to the parties' request for an adjournment and this case was adjourned to 22<sup>nd</sup> September 2015.
- [66] At the adjourned hearing, on the 22<sup>nd</sup> September 2015, the court was informed that the Act came into force on 1<sup>st</sup> August 2015 and very likely affects the present proceedings.
- [67] On the 7<sup>th</sup> October 2015, based on the Draft Judgment, the Ancillary Claimant filed a Notice of Discontinuance of its Ancillary claim.



[68] The parties requested an opportunity to make further submissions of the effect on the present proceedings of the Cruise Ship Passenger Tax Act. The case was adjourned to the 16<sup>th</sup> October to permit this and for further oral arguments on the likely effects of the Act on the present claim.

### **The Issues**

[69] Generally:

- (a) What is the purpose and legal status of the present Claim?
- (b) What is the standing (legal status) of the Claimant to bring the present claim?
- (c) What is the legal status of the parties in the claim (particularly BTB and FSTVL)?
- (d) Is FSTVL a public body?
- (e) What is the legal status of the Agreements and of the relevant provisions of the Further Amended Agreement?

[70] Whether the following provisions in the Further Amended Agreement are lawful, enforceable and compatible with the proper discharge of GOB's public responsibilities or are ultra vires the powers of the Executive to make:

- (a) requiring all passengers on cruise ships calling at Stake Bank Island to be required to tender to FSTV and to use it as a port of entry into the Belize District mainland [clause 2(E)]
- (b) granting to RCL a right, at its option, to build a dock with two berths in the Belize District, within the property of the Second Cruise Port of Stake Bank Island [Clause 2(F)]
- (c) requiring BTB to collect, and distribute the head tax<sup>13</sup> [clause 4]
- (d) requiring GOB to refrain from soliciting, endorsing, assisting, facilitating or permitting the construction or operation of any other tourism village and/or cruise ship terminal in the Belize District apart from FSTV's operation by the Company, except a Royal Caribbean Dock or the Stake

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<sup>13</sup> As set out in paragraph 35 above.

Bank Project or BTV developing up to 5,000 square feet of retail space on the Militia Hall Property [clause 5(7)]

- [71] Whether the “head tax” contained in the provisions of Paragraph 4 of the Further Amended Agreement is within the powers of the Executive to make, and/or compatible with the provisions of Section 114 of the Belize Constitution and/or are consistent with the discharge of public responsibilities of the Executive.
- [72] Whether the proceeds of “head taxes” charged to and collected from Cruise Ship passengers visiting Belize, and received and distributed by BTB are moneys raised or received by Belize in accordance with section 114(1) of the Belize Constitution, and ought to have been paid or are payable into the Consolidated Revenue Fund? Alternatively could the head tax only be lawfully withdrawn from the Consolidated Revenue Fund pursuant to a law enacted by the National Assembly in accordance with the provisions of section 114 of the Belize Constitution?
- [73] Whether the Claimant is entitled to an injunction restraining the Defendants from acting in pursuance or in furtherance of the provisions of the Further Amended Agreement and whether the Claimant is entitled to any equitable relief, he having enjoyed and benefited from the same clauses under the 2000 Agreement.
- [74] Assuming that the above clauses do offend legal or constitutional provisions as claimed; whether the Claimant can seek to rely on those unlawful clauses.
- [75] Alternatively even if the provisions of the subject clauses are found to be offensive, whether the benefit and value of the Further Amended Agreement to the cruise ship industry of Belize outweighs the private interest of the Claimant so as to operate in favour of this court refusing relief; or whether as a matter of operation of law and in maintaining the rule of law that it is of necessity that the status quo remains?
- [76] What is the impact on the present claims/proceedings of the recently passed Cruise Ship Passenger Tax Act?

**Generally what is the purpose and legal status of the Claim, the Parties, the Agreements and of the relevant Provisions contained in the Further Amended Agreement?**

**What is the Purpose and Legal Status (Nature) of the Present Claim?**

[77] There appears to have been some confusion as to what the objective of the Claimant is with respect to the present claim and whether any useful business, commercial or public interest purpose can be served by it.

[78] It was made to appear to the Court that there had arisen in the present case significant conditions for doubt existing around the Agreements, particularly the subject clauses of the Further Amended Agreement (which now need to be resolved so as to enable the parties to know in what business and legal direction<sup>14</sup> they may proceed).

[79] In particular, the Claimant and the GOB appear to need to know what are the legal benefits and/or the necessity and value of any indemnity which the Claimant might give. The Claimant also needs to know, what are the legal and business risks involved in giving any such indemnity, or in working out the terms of any investment agreement between the Claimant and the GOB based on the commitments which GOB gave in the Agreements. Further and specifically, whether the clauses which the Claimant seeks to impugn, are legal and enforceable against the GOB.

[80] Thus it is as well to consider at the outset of this case what this court may consider to be the limits imposed by the present public law claims by the nature of the present proceedings. For instance, this court may pronounce upon the legal relationship of the parties but may not be in a position to enforce any such determination against the Defendants – particularly the GOB. This court may also provide a legal shield to the GOB in relation to any future action.

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<sup>14</sup> Including in relation to FSTVL by its Ancillary Claim filed in the present proceedings.

- [81] The question has been raised whether the types of questions, which this court has been asked to determine in the present claims for administrative orders, are within the power of this court to grant by way of declaratory judgments.
- [82] It seems to me that this court by the present applications for administrative orders is merely being asked to consider, determine and pronounce upon the existence or non-existence of a legal state of affairs in relation to the Agreements. Whether these are things, which this court is entitled to do, and, whether such things are entirely permissible<sup>15</sup>. Also whether a consideration of these questions in this way may even have an impact on the application for an injunction which the Claimant has made against all of the Defendants - including GOB.
- [83] But this court has to be convinced that there is a real, and not a hypothetical dispute<sup>16</sup>; and of course, that this claim in public law has been properly brought (which I will consider later). Finally whether this court is able to perform a useful function, not being belligerent or indeed any actor within the proceedings, in considering the application for declaratory relief, and may provide such function as a "*diplomatic*"<sup>17</sup> agency with a result which will put less strain upon "*the friendly relations of the parties*"<sup>18</sup>.
- [84] After careful consideration I satisfied that by the present claim the court is being asked to consider a real commercial and public law dispute and is asked to serve a useful purpose and function which could result in relieving the strain on the parties. That it will allow them to resolve an outstanding and possibly otherwise insoluble dispute, mediated by the diplomatic and necessary intervention of the court, all in the interest of the commercial impasse in which the parties have found themselves.

### **Standing of the Claimant to Bring the Present Claim in Public Law**

- [85] It has been submitted by Counsel for FSTVL, as a preliminary objection, that the Claimant does not have sufficient standing to bring the present claim for two

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<sup>15</sup> See, the Declaratory Judgment 3<sup>rd</sup> Edition By The. Hon., The Lord Wolf and Jeremy Woolf Chapter 1 paragraph 1.02.

<sup>16</sup> Ibid Section 3 Paragraph 1.09.

<sup>17</sup> Ibid Paragraph 1.10 Pages 5 - 6.

<sup>18</sup> Ibid Page

reason: first that the Claimant does not have *locus standi* (any legal standing) to bring this claim; and secondly, FSTVL is not a public body and as such the claim is wholly misconceived against it and therefore ought to be struck out.

[86] Counsel for BTB submits:

- (a) That BTB is a separate and autonomous statutory body and not a Government Department.
- (b) That as such, and as a consequence, under the BTB Act, the BTB would have had authority to impose the statutory fee, improperly known as the “head tax”, which was not a tax.
- (c) That as a fee the “head tax” is not required to go to the consolidated fund.
- (d) That if, contrary to its position, that BTB is considered an organ of the State of Belize and the “head tax” is not paid into the consolidated fund, then the provisions of the BTB Act would apply and it would have to be accounted for under its terms as a public fund established for a specific purpose – including the development of tourism in Belize.

[87] It was brought to the attention of Counsel for the GOB and BTB, by this Court, which he quite rightly accepted, that when the claim was first filed that an acknowledgment of service, and thereby an appearance, was entered by the Attorney’s General Ministry of the Government, for both GOB and BTB and that perhaps he ought not to have done so. Counsel accepted that he was “between a rock and a hard place” in relation to this point – but ingeniously, and unconvincingly refused to accept that he had thereby and throughout the case, held or argued a common cause as between GOB and BTB which tends to undermine his argument that the BTB is indeed a separate and autonomous body.

[88] Frankly, I do not consider that it now lies in the mouth of Counsel for GOB and BTB, while representing both parties, to suggest that BTB is an autonomous and independent body from GOB; but I will later give additional reasons for this court arriving at this particular conclusion.

[89] In any event this court having carefully considered the question of the appropriateness of considering the present application for declaratory relief, I have concluded that, based on the evidence of the parties, and on the basis of the facts which I have already found, I am, entirely satisfied, indeed convinced, that there is indeed a real dispute between the parties; while recognizing, as indeed the position appears to be, that there is no legal obligation on GOB to enter into any investment agreement with the Claimant. But that there does exist for GOB, based on all that has happened over the years in terms of the different contractual obligations into which it has entered, as a matter of logic and expedience, the question to be answered; whether GOB has unlawfully fettered itself, and that as a consequence it is now necessary for this court to determine and pronounce on whether GOB, as a matter of public, as opposed to private law, ought to be constitutionally disentangled and unfettered from such constraints, and freed to act in the public interest (which ought to be at all times its constitutional obligation).

[90] The Claimant is also confronted with a real dilemma whether to give the indemnity sought by GOB, and of its value. That based on the doubts which arise in the consideration of the questions raised in the present applications for declarations, and no doubt on the advice from his legal advisors (based on the arguments which have been presented), as to the legality of the Agreements, whether the Claimant should be exposed to the risk of incurring penalties or damages arising from administrative and contractual interference with his interests<sup>19</sup>.

### **The Procedural Law**

[91] In designating who may apply for judicial review, which has not been sought in the present claim, the CPR 2005 provides that an: “*application for judicial review may be made by any person.... which [or who] has a sufficient interest in the subject matter of the application*”<sup>20</sup>.

[92] The CPR 2005 also expressly includes, in relation to such applications for judicial review, which admittedly does not arise in the present applications, that:

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<sup>19</sup> Ibid. Paragraph 1.12

<sup>20</sup> Part 56.2(1) RSC.

- (a) Any person who has been adversely affected by the decision which is the subject of the application<sup>21</sup> ; or,
- (b) Any other person ...who has a right to be heard under the terms of any relevant enactment or the Constitution<sup>22</sup>

is deemed to have a sufficient interest in the subject matter of such application.

[93] CPR 2005, however, makes no such specific provision in relation to the standing of an applicant for the applications which have been sought in the present claim: namely for relief under the Constitution, and declarations, and an injunction.

[94] In relation to applications for relief under the Constitution, other than for judicial review, this may not detain us as the Constitution of Belize does make such specific provisions. For instance Section 20(1) of the Constitution provides:

*“If any person alleges that any of the provisions of section 3 to 19 of the Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.”*

[95] Part 56.8 (1) of CPR 2005 also provides:

*“The general rule is that, where permitted by the substantive law, an application may include in any application for an administrative order a claim for any other relief or remedy that:*

*(a) arises out of; or*

*(b) is related or connected to*

*the subject matter of an application for an administrative order”*

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<sup>21</sup> Part 56.2(2)(a) RSC.

<sup>22</sup> Part 56.2(2)(f) RSC.

- [96] The court may however, according to CPR 2015, at any stage direct that any claim for other relief be dealt with separately from the claim for an administrative order; or direct that the whole application be dealt with as a claim and give appropriate direction under Parts 26 and 27; and in either case make any order it considers just as to cost that have been wasted because of the unreasonable use of the procedure under this part<sup>23</sup> .
- [97] In relation to a procedural application during a claim for an administrative order (including to take preliminary objections on any matter such as standing) CPR 2005 provides that: “*the judge may allow any person which appears to have sufficient interest in the subject matter of the claim to make submissions...*”<sup>24</sup>
- [98] What therefore is the applicable rule in relation to the standing of a claimant in relation to applications for declarations?
- [99] This has been the subject of recent judicial reflection by the Belize Court of Appeal in the case of **The Belize Bank Limited et al v The Association of Concerned Belizeans et al**<sup>25</sup>. In this case the question was considered whether a claim pursued only on the basis of an alleged breach of public law rights, must be made by way of judicial review proceedings; and whether a failure to do so is an abuse of process and should be struck out.
- [100] Carey JA, delivered the reasoning of the majority of the Court of Appeal as it was concurred in by Sosa, JA<sup>26</sup>.
- [101] Carey, JA felt that a litigant who seeks a declaration under Part 56 must have standing, which he considered was “sufficient interest” in the matter under challenge, which is no different for the purpose of an administrative application, such as the present applications for declarations, as is set out in Part 56.13(1); and included that found in Part 65.2(2)<sup>27</sup> which in relation to the present case includes part 56.2(2)(a) as follows:

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<sup>23</sup> Part 56.8(3) RSC

<sup>24</sup> Part 56.12 & 13 RSC

<sup>25</sup> Civil Appeal No. 18 of 2007

<sup>26</sup> Ibid. See paragraph 11 at page 10.

<sup>27</sup> Ibid See paragraph 9 page 7.



*“any person who has been adversely affected by the decision which is the subject of the application.”*

[102] Carey, JA also considered that the Rule in **O’Reilly v. Mackman**<sup>28</sup> does not apply.

[103] The rule in **O’Reilly v. Mackman** to which Carey, JA referred was stated as follows:

*“as a general rule it would be contrary to public policy, as such an abuse of process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provision of Ord. 53 for the protection of such authorities”.*

[104] Carey JA, authoritatively opined, which this court considers it ought to and will follow, that the rules in Part 56 of RSC is designed to give the court great flexibility in dealing with administrative orders and should be liberally, rather than restrictively interpreted to allow parties who have a real interest in the Fixed Date claim to have issues between them decided without prejudice to either<sup>29</sup>.

### **This Court’s Conclusions on Standing**

[105] The present applications for administrative orders is for relief under the Constitution and for declarations in which a party, GOB, is the Crown and thereby a public body; and possibly BTB is a public body (which I will deal with later).

[106] In my view, on a clear reading of the provisions of Part 56, it is sufficient if the Claimant brings an application for administrative orders against a party which is the Crown or a public body; even if the other parties to the application are not the Crown or a public body, provided that such application in relation to the other bodies includes a claim or application for relief which arises out of or is related or connected to the subject matter of an application for an administrative order.

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<sup>28</sup> [1981] A.C. 237 at 285.

<sup>29</sup> The Belize Bank Limited et al v The Association of Concerned Belizeans et al, Civil Appeal No. 18 of 2007 at paragraph 10 pages 8-9.

- [107] Further, it is my view that even if I am wrong about this, then any preliminary objection ought to have been made at the 1<sup>st</sup> hearing or at a stage prior to the trial, not as occurred in relation to the present applications – at the trial.
- [108] On the evidence before me, including the unchallenged Affidavit evidence of Joseph Waight (filed by GOB and BTB), the Claimant was closely identified as being part of a group (including a company) who had an interest in the Agreements, the subject matter of the present applications. The same can be said of the First Affidavit of Elad Aharon filed by the FSTVL. As such, the evidence, in the view of this court, discloses that the Claimant has a real interest in and is thereby sufficiently interested in and is entitled to bring the present Claim against FSTVL; and that FSTVL is amenable particularly to reliefs sought in public law by the Claimant against them.
- [109] The evidence also discloses that the Claimant is a person who claims to have been, and is likely to have been adversely affected by the decisions, as contained in the Further Amended Agreement entered into by the Defendants, which is the subject of the present applications.
- [110] I therefore have no hesitation in finding, which I do, that the Claimant is indeed a litigant seeking declarations and Constitutional relief under Part 56 and has a real interest and legal standing which is, or may be considered, “sufficient interest”, in the matter under challenge, and that the applications on this basis ought not to be struck out.

**Legal status of the Parties – Particularly the BTB and FSTVL**

- [111] I have carefully looked at and considered the **BTB Act**<sup>30</sup> which created the BTB, and I have also carefully considered the submissions of Counsel for BTB: (a) BTB is an autonomous statutory body and not therefore a Government Department; and as such it has the authority to impose the fee which has been improperly called a “head tax”; and (b) as a fee the “head tax” does not have to go to the consolidated fund.

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<sup>30</sup> Chapter 275, Revised Edition 2000, Laws of Belize

[112] I have concluded that based on the applicable and relevant provisions of this Act<sup>31</sup> BTB is not an autonomous body but is part of the Crown and a public body.

[113] Specifically in arriving at this last conclusion I attach significance to the following provisions of the BTB Act:

- (a) BTB is a statutory body created by an Act of the Legislature<sup>32</sup> with a statutory duty to carry out Governmental functions to do with tourism<sup>33</sup>. In particular “*to secure the most favourable arrangements for the entry of tourist into Belize*”) and has power to do “*anything and to enter into any transaction to facilitate the proper discharge of its functions*”, etc.<sup>34</sup>.
- (b) The Minister responsible for Tourism is responsible for deciding how many members (such numbers being 5-8 apart from the Permanent Secretary of the Ministry responsible for Tourism, who is a statutory member) should sit on the governing Board of BTB<sup>35</sup>; and the same Minister is also responsible for appointing any temporary member<sup>36</sup>, the tenure of office of each member; and may, for good and sufficient cause, revoke the appointment of each such member<sup>37</sup>.
- (c) That the Minister annually appoints the Chairperson of the BTB<sup>38</sup>.
- (d) The Minister has to approve the appointment of the chief executive officer (to be called the “Director of Tourism”) along with the secretary of the BTB; and fixes the remuneration and terms and conditions of such officers<sup>39</sup>. The Minister also has to approve the offices and appointments involving a salary of more than \$8,000 per annum as well as the schemes for pensions, gratuities or other benefits of officers, agents or servants<sup>40</sup>.

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<sup>31</sup> See specifically Sections 21- 27.\*

<sup>32</sup> See Section 3 of the BTB Act.

<sup>33</sup> See Section 11 of the BTB Act.

<sup>34</sup> See Section 12(b) of the BTB Act.

<sup>35</sup> Section 3(2) of the BTB Act.

<sup>36</sup> Section 3(3) of the BTB Act.

<sup>37</sup> Section 5(1) of the BTB Act.

<sup>38</sup> Section 4(1) of the BTB Act.

<sup>39</sup> Section 14(1) of the BTB Act.

<sup>40</sup> Section 14(2) of the BTB Act.

- (e) The Minister approves all regulations made by the BTB<sup>41</sup>.
- (f) The Minister approves all remuneration, and allowances of non-official members of the BTB as well as for the Chairperson and Deputy Chairperson<sup>42</sup>.
- (g) The Minister may give to the BTB policy directions (albeit of a general character) to be followed, which appears to the Minister to touch and concern the public interest; and the Board is required to give effect to such directions<sup>43</sup>, including in the specific disposal of capital assets and the application of proceeds of such disposal<sup>44</sup>.
- (h) Borrowing by the BTB has to be approved by the Minister<sup>45</sup> who may approve the writing off bad of debts<sup>46</sup>.
- (i) The BTB has to submit annual budget estimates to the Minister for approval by the National Assembly<sup>47</sup>.
- (j) The accounts kept by the BTB has to be audited to the satisfaction of the Minister and the audit is to be conducted by the Auditor-General or by an auditor appointed by the Minister<sup>48</sup>.

[114] Based on a review of the **BTB Act**, the specific provisions to which I have referred, and the facts of this case, I do not consider that the authorities, including **Chue and another v. Attorney General of Guyana**<sup>49</sup>, **Griffith (Brent) v. Guyana Authority and Another**<sup>50</sup>, and **Tamlin v Hannaford**<sup>51</sup>, which Counsel for GOB and BTB submitted, provide any assistance to this court; and I consider that such

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<sup>41</sup> Section 15 of the BTB Act.

<sup>42</sup> Section 18 of the BTB Act.

<sup>43</sup> Section 19 of the BTB Act.

<sup>44</sup> Section 20 of the BTB Act.

<sup>45</sup> Section 22 of the BTB Act

<sup>46</sup> Section 23 of the BTB Act

<sup>47</sup> Section 22 of the BTB Act

<sup>48</sup> Section 24 of the BTB Act.

<sup>49</sup> (206) 72 WIR 213

<sup>50</sup> [2006] CCJ (AJ)

<sup>51</sup> [1950] 1 KB 18.

authorities may be distinguished and is distinguishable from the facts of the present case.

**Is FSTVL a public body?**

[115] In the Belize case of **Fort Street Tourism Village Ltd v. The AG et al**<sup>52</sup>, the proceedings was brought by certain claimants against FSTVL, along with other Defendants, including the AG, for declarations that the Defendants contravened the rights of the Claimants guaranteed under Section Sections 6(1) and 15(1) of the Constitution. Claims were also made for an order and an injunction under the enforcement provisions of the Constitution of Belize.

[116] The claim in the **Fort Street Tourism Village Ltd v. The AG et al**, concerned the erection of a wall along the Fort Street Property on the boardwalk, which prevented cruise ship passengers, who came ashore, from having direct access to the claimant's business premises. The wall thereby deprived the claimants of the opportunity to earn a living under section **159(1) of the Constitution**. The CJ had ruled that on the facts of the case, that even though FSTVL was a private entity, and not ordinarily amenable to an action to enforce the fundamental rights provisions of the Constitution, that by virtue of its role and functions as a port of entry and port facility operation clothed with public power, that makes it amenable to public law.

[117] Mottley, P determined, in this last mentioned case, that the evidence in the case demonstrated that the duties and function of the customs and immigration departments were indeed at all times performed by the customs and immigration departments of the GOB; and were not in any way delegated or transferred to FSTV. Also that the fact that FSTVL was to be consulted before the head tax had to be changed did not give FSTVL any coercive power, and nor could it be said that the receipt of part of the head tax by FSTVL changed its nature and gave it any coercive powers making it amenable to the fundamental rights and freedoms of the constitution<sup>53</sup>; and the fact that it annually reported to the Minister to his

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<sup>52</sup> Civil Appeal No. 4 of 2008.

<sup>53</sup> Ibid paragraph 32.

satisfaction and provided audited accounts, did not give it coercive powers making it satisfy this essential requirement of a body amenable to public law.

- [118] Mottley, P also expressed the view that the CJ might have been correct in his approach if he was dealing with the judicial review of an administrative decision, but that for the Fundamental Rights provisions as guaranteed under Chapter 2 of the Constitution, the CJ ought to have been guided by what was said in the line of authorities leading up to the case of **Maharaj v. Attorney General**<sup>54</sup> and reaffirmed in **Thornhills v. Attorney General**<sup>55</sup>.
- [119] Mottley, P finally used and adopted the test, which he considered appropriate, to determine whether FSTVL, as a private entity, was, on the facts of the case, in fact performing a public function, namely: the “combination of features” test as set out in **Poplar Housing and Reservation Community Association Ltd v Donoghue**<sup>56</sup>.
- [120] Carey, JA agreed with Mottley P, that FSTVL was not a body endowed by law with the essential ingredient of possessing coercive powers which made it liable in the circumstances of that case, to a Constitutional action.
- [121] Morrison, JA after reviewing the authorities came to a similar conclusion “*that the protection against abuse of the rights and freedoms is also intended to be protection against the actions of the state*”<sup>57</sup>; and more particularly that “*for a body to be amenable to constitutional redress it must be a body endowed with the functions, duties and powers of a public nature and clothed for the purpose of carrying out those functions with coercive powers*”<sup>58</sup>.
- [122] The case of **Fort Street Tourism Village Ltd v. The AG et al**<sup>59</sup>, even though it concerns FSTVL is not directly relevant to the present case as the applications in that case concerned the fundamental rights provisions of the Constitution, which do not arise in the present case, and in my view, thereby, raises different considerations

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<sup>54</sup> (No. 3) [1079 A. C. 385

<sup>55</sup> [1980] 2 WLR 510.

<sup>56</sup> [2001] 4 All ER 604 as followed in the case of *Wade v Maria Roches*, Civil Appeal No 5 of 2004.

<sup>57</sup> Belize case of *Fort Street Tourism Village Ltd v. The AG et al*; paragraph 124

<sup>58</sup> *Ibid* Paragraph 132

<sup>59</sup>

to the present claim; particularly that the question of whether FSTVL possess coercive powers does not as a result arise.

**What is the legal status of the Claim?**

[123] Consideration of this aspect of the claim is not dependent on my conclusion that FSTVL is not a public body as it is nevertheless unarguably and abundantly clear to me that the GOB is a public body, and was a party to the Agreements.

[124] Further it is also clear to me that the applications for declarations are premised on the subject agreement (as well as specific clauses within it), being unlawful and unenforceable in public law.

[125] Also I consider that the Claimant is seeking relief under the Constitution on the basis of which it is being alleged that the Agreements, specifically the Further Amended Agreement (together with the specific clauses in question which are being impugned by the claimant as unlawful and unenforceable), are explicitly in breach of Section 114 of the Belize Constitution (and none of which involve alleged breaches or contraventions of the fundamental rights and freedoms provisions of the Constitution).

[126] Despite all of the above considerations I have determined that the claim is a public law claim, seeking public law remedies, contrary to the submission of Counsel for FSTVL, who submits that the present claim against the FSTVL, not being a public body, and in fact being a wholly private body performing no public function, and being named as a Defendant, and not an Interested Party, is bad as FSTVL is not amenable to public remedy.

[127] I cannot agree with the submission of Counsel for FSTVL as it is abundantly clear to me that BTB and FSTVL were parties to the agreements, and that a significant, if not substantial, part of the claim against the GOB and BTB are properly public law applications for administrative orders. I have also concluded that as such the Claimant is, and were, entitled to bring the present claim in public law against the GOB and BTB. Further that if the Claimant was to succeed on his claim such reliefs sought would directly and negatively impact BTB and FSTVL and that as a consequence they ought to be, not only interested parties, but full parties to the

claim with power to take a full and unrestricted part, and participation, in defence of the claim.

[128] Counsel for FSTVL submits that the Claimant does not have standing to bring the claim against FSTVL as he has sold and transferred his rights, interest and obligations in the 2000 Agreement to FSTVL, and as a result is not adversely affected in any way by the 2004 Agreement; but, however, on the contrary, that a third party, Stake Bank Enterprises Ltd, not a party to the present proceedings, may arguably have a public interest right or claim in the Stake Bank project by virtue of Act No. 10 of 2014. That as a result, if the Claimant had an interest, then it may be by way of judicial review (not being claimed) or may seek judicial review, if he (the Claimant), was alleging that his private rights have been infringed.

[129] What is the applicable rule to the present claim assuming that FSTVL is not a Public Body?

**The legal status of the Agreements and of the relevant Provisions in the Further Amended Agreement.**

[130] All of the Agreements in the present case can properly be described as commercial agreements as they seek primarily by contractual agreements, as opposed to legislation or statutory enactment, to transfer to private bodies, land previously vested in the Crown, and to privatise and regulate, by such written agreements, the docking facilities for tenders needed to carry passenger from cruise ships to the shores of Belize.

[131] The commercial Agreements expressly make provision for port facilities; and to make and upgrade arrangements for welcoming cruise ship passengers to Belize; as well as for commercial arrangements for local craftsmen, vendors, merchants and operators to adequately display, and sell, their goods and services to such passengers.

[132] In my view the role of legislation by the GOB has largely been subsidiary to the various commercial Agreements which it has entered into in order to effect its governmental objectives.



[133] The Claimant as a businessman, and the GOB and BTB, have accepted, by the testimony of a Government official, the Financial Secretary of the GOB<sup>60</sup>, that the Claimant is properly interested in the present claim; and by the commercial agreements, including the Further Amended Agreement, continues to be affected by it. The GOB and BTB, having accepted that the Claimant has such interest cannot now, and ought not to be allowed by this court, to resile from this position; and this court will not therefore allow the GOB and BTB to resile from it.

**Whether the provisions of sub paragraphs 2(E), 2(F), 4 and 5(7) of the Further Amended Agreement are lawful and enforceable and compatible with the proper discharge of GOB public responsibilities or are ultra vires the powers of the Executive?**

[134] The Claimant submits that the GOB has unlawfully fettered future executive action directly relating to the Claimant's proposed development of Stake Bank Island and runs counter to the provisions of section 114 of the Belize Constitution.

[135] Relying on the English case of **Rederiaktieblaget Amphrite v. R**<sup>61</sup>, and following the recent Belize case of **Ports of Belize Limited and Belize Ports Limited v Attorney General of Belize**<sup>62</sup>, the Claimant submits that the power of the executive to contract in relation to future executive action is not unlimited:

*“that it is not competent for the government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the Sate”<sup>63</sup>.*

[136] I have carefully examined both cases and consider that the just mentioned proposition, largely advanced by Counsel for the Claimant, and challenged by Counsel for GOB, is indeed the settled law at this time.

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<sup>60</sup> To the effect that he is “the senior-most officer outside the Judiciary” with responsibility for financial matters of the Government.

<sup>61</sup> (1921) All E R 542

<sup>62</sup> Claim No 404 of 2007:

<sup>63</sup> Rederiaktieblaget Amphrite v. R, (1921) All E R 542 at page 3

- [137] I have carefully reviewed the written submissions of Counsel for GOB and BTB, as well as Counsel for FSTV, and I could find no helpful submission on the question whether the provisions of sub paragraphs 2(E), 2(F), 4 and 5(7) of the Further Amended Agreement are lawful, enforceable and compatible with the proper discharge of GOB's public responsibilities. Most of their substantive submissions related to procedural matters, such as standing etc., of which I have already disposed.
- [138] I have heard nothing which has even begun to engage, much less persuade, me that the provisions or clauses sought to be impugned by the Claimant in the Further Amended Agreement, do not attempt to fetter or effectively disable or even bind the Executive, and all future Governments, as opposed to the Legislature, by the use of the specific language in the subject clauses of this Agreement, in relation to the prerogative powers and discretions vested in it.
- [139] I am satisfied that the prerogative powers and discretions, do relate to the commercial contracts entered into by or on behalf of the Executive branch of GOB, entrusted with powers to enter into tendering arrangements relating to, and for, the entry into the Belize District mainland, of cruise ship passengers, and for making port arrangements and providing facilities and other allied services for such passengers.
- [140] The Executive powers and discretions to which I have just referred, are undoubtedly to meet the policy and tourism needs and future welfare of the State of Belize and of the Belize community, and for the public good; and to achieve the GOB's general purposes in encouraging and facilitating cruise ship tourism into Belize with the manifold benefits which are presumed to result from this type of tourism.
- [141] I accept that the Executive can, in appropriate circumstances, enter into binding commercial agreements restricting the exercise of its powers or discretions; but the question which arises is whether these provisions have gone too far and are, or are not, compatible with the proper discharge of its public responsibility. Moreover the question which arises is whether the present clauses effectively disabled or fettered the Government or its officers from continuing to perform its Executive

discretions and responsibilities, by binding itself or its future officers, not to perform its duty. Finally, the question which arises is whether the present clause effectively disable or fetter the Government's exercise of its discretion in a particular way in the future.

[142] I have carefully considered all of the just mentioned questions and I have generally concluded, that the answer to all of the above questions is that the subject clauses are all unlawful, unenforceable and incompatible with the proper discharge of GOB's public responsibilities; and are ultra vires the powers of the Executive to make.

[143] It seems to me that the following provisions in the Further Amended Agreement, being a commercial agreement between the parties (excluding the Claimant), respectively are all, each of them, unlawful, unenforceable and incompatible with the proper discharge of GOB's public responsibilities; and are ultra vires the powers of the Executive to make. These provisions are:

- (a) requiring all passengers on cruise ships calling at Stake Bank Island to be required to tender to FSTV and use it as a port of entry into the Belize District mainland [clause 2(E)]
- (b) granting to Royal Caribbean Cruise Line a right at its option to build a dock with two berths in the Belize District, either within the property of the Second Cruise Port on Stake Bank Island [Clause 2(F)]
- (c) requiring BTB to collect and distribute the head tax [clause 4]
- (d) requiring GOB to refrain from soliciting, endorsing, assisting, facilitating or permitting the construction or operation of any other tourism village and/or cruise ship terminal in the Belize District apart from FSTV's operation by the Company, except a Royal Caribbean Dock or the Stake Bank Project or BTV developing up to 5,000 square feet of retail space on the Militia Hall Property [clause 5(7)]

- [144] I consider that clause 2(E) is clearly seeking to mandate that Stake Bank is not to be designated as a port of entry for cruise ship passengers. This is so because all passengers using the Stake Bank facility, are required to and must continue to enter Belize via the Tourism Village, being the only designated port of entry for such passengers. This is clearly tying the Government's hands in its future consideration and decision making relating to the most suitable port of entry for cruise ship passengers going forward; even with their being no specific application having been made to Government; and without any information or consideration affecting the community being considered which could conceivably inform such a decision making process.
- [145] I also consider that clause 2(F) seeks to pre-approve the construction of berths by Royal Caribbean even before a site was identified, or any relevant consideration affecting the community, having been put before the Government. In my view it is a wholly unnecessary and unacceptable fetter on GOB's future actions without any time limit being imposed on such fetter and without any mechanism for being released from such a fetter. This is not only commercially imprudent and unwise but in my view constitutionally disproportionate and wholly incompatible with the proper consideration and discharge of a public responsibility.
- [146] It is also my view that the provisions of clause 4 is seeking to bind the Government to the imposition of a "head tax" at a fixed rate in the future without any provision for adjusting it in accordance with the social, community or public needs; or the needs of the tourist industry. It also seeks to regulate the use of this "head tax" into the future regardless of the needs of the community as it may, or can, arise in the future. This provision accordingly, and undoubtedly, seeks to be a contractual fetter, entered into by or on behalf of the Executive, on any future executive action in relation to the collection and use of taxes - in so far as the executive has powers over such matters (which I will considered later).
- [147] Further clause 5(7) is seeking to regulate how government is to decide whether or not the construction of any cruise ship terminal in the Belize District can, or should, be undertaken in the future; even before any application for permission to undertake

such construction has been made; and any relevant consideration affecting the community is advanced or identified.

[148] The extent to which GOB's hands appear to be tied by the just mentioned clauses of the Further Amended Agreement, irrespective of the needs of the community, is manifest by the difficulty that GOB appears in at the present time, by the expressed intention of the legislature, as contained within the provisions of the Stake Bank Act. Also of its inability or disability to move forward without seeking to extract an indemnity from the Claimant, as a means of protecting or unfettering itself, from the encumbering provisions and specific language of the subject clauses. Specifically this Act, passed by the legislature, already provides for the designation of Stake Bank as a port of entry for cruise ship passengers, in direct contravention of the provisions of sub clause 2(E); and GOB appears to be somewhat encumbered and disabled by this clause moving forward; and even appears, somewhat absurdly and unconstitutionally, to be stultifying and fettering, the intent of even the legislature.

[149] This clearly cannot, constitutionally, be permitted to occur; and this court is obliged to declare that it is incompetent for GOB to be fettered in this way, as it is incompatible with the needs of the community. Further that this question has clearly arisen, this court finds that it ought to, and does, pronounce, that such provisions may even be void as being incompatible with the proper discharge of public responsibility and the will of the legislature to legislate for the peace order and good government of Belize.

[150] It is not competent for the Executive to have sought to regulate the development by prior commercial contract, notwithstanding the legislature's later endorsement of the Stake Bank project in the terms set forth in the Stake Bank Act.

[151] The GOB, in my view of the law (as contained in the case of **Rederiaktieblaget Amphrite v. R**<sup>64</sup> and the **Ports of Belize Limited and Belize Ports Limited v Attorney General of Belize case**) must be free to take appropriate executive action

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<sup>64</sup> (1921) All E R 542

in relation to its discretionary powers to enter into tendering arrangements; and for the entry into the Belize District mainland of cruise ship passengers; and of making port arrangements and providing facilities and other allied services for such passengers.

[152] It is my view that in order for the Government to be constitutionally functional, effective, constitutional and competent, in the interest and for the general welfare of the Belize community, any agreement, such as that contained in the specific clauses which are being challenged, ought to be overridden by this court, in relation to their enforcement, based on any contractual rights claimed, such that they must be rendered unenforceable. Any such agreement ought to be held at best unenforceable and may at worst, be held to be void, depending on whether it is incompatible with the discharge of a public responsibility, which I consider they do satisfy this worst case scenario.

[153] As has been noted the Government can no doubt properly bind itself by an appropriately couched and constitutionally proportionate and balanced commercial contract; and it, the GOB, may be held to be bound to such contract as a result for any breaches of such contract; and as a result may have to pay damages. But such a finding will always turn on the facts, terms and circumstances of the individual case, and of the commercial contract in question; and whether it is unenforceable or worst, void, as being fundamentally at odds with the Government's constitutional and other responsibilities.

[154] I consider the provisions of sub paragraphs 2(E), 2(F) and 5(7) of the Further Amended Agreement are unlawful and unenforceable as ultra vires the powers of the Executive; and so void.

**Whether the “head tax” is within the powers of the Executive, compatible with the provisions of Section 114 of the Belize Constitution and are consistent with the discharge of public responsibilities of the Executive?**

The Law

[155] Section 114(1) of the Belize Constitution establishes the Consolidated Revenue Fund into which:

*“All revenues or other moneys raised or received by Belize (not being revenues or other moneys payable under this Constitution or any other law into some other public fund established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund”*

[156] It is well established by the recent CCJ case of **BCB Holdings, The Belize Bank Limited v. AG of Belize**<sup>65</sup>, that the power to tax and spend revenues is vested by the Constitution in the legislature; and in the absence of express delegation by the legislature, there is no power to impose taxes or determine its use. It is also the case that a tax may only be lawfully imposed by way of a money bill duly presented and passed in accordance with the provisions of the Constitution<sup>66</sup> and revenues once realized, must be dealt with in accordance with the provisions of section 114.

[157] Mr. Justice Saunders in delivering the leading decision of the CCJ in **BCB Holdings, The Belize Bank Limited v. AG of Belize** in relation to the constitutional position of the imposition of taxes, authoritatively had this to say:

*“[46] ... The Belize Constitution, like other Anglophone CARICOM Constitutions, places a specific and extremely high value on legislation dealing with taxation. Any Bill dealing with the imposition, repeal, remission, alteration or regulation of taxation is in the Constitution referred to as a “Money Bill”<sup>29</sup>. Money Bills are not enacted in the ordinary way. Sections 77, 78 and 79 of the Constitution contain special provisions with respect to the enactment of a Money Bill. In our view, given the extraordinary value the Constitution attaches to Money Bills, whenever the legislature delegates authority that touches on the powers contained in a Money Bill, the instrument containing the delegation should be construed strictly, narrowly, and the delegation should be accompanied by adequate safeguards to control arbitrary, capricious or illegal conduct. Further, if the power conferred is to be validly*

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<sup>65</sup> CCJ Appeals No CV7 of 2012 and BZ Civil Appeal No 4 of 2011.

<sup>66</sup> Section 117.

*exercised, the accompanying safeguards must be scrupulously observed.*<sup>67</sup>”

.....  
“[51] Finally, as the Constitution clearly suggests, there is a distinction between the imposition, repeal, remission, alteration or regulation of taxation.<sup>30</sup>

*Even if one assumes that the Minister was entitled, by section 95, to remit tax in respect of future business activity; if one is prepared to assume further that the exercise of “remitting tax payable” includes excusing statutory obligations to pay tax, the jurisdiction exercised by the Minister exceeded each of these dubious ways of exercising the power delegated. The Deed purported to alter and regulate the manner in which the Companies should discharge their statutory tax obligations. The Deed impacted on a host of filing, administrative and other obligations imposed by Parliament’s revenue laws. In essence, the framers of the Deed conceptualised and designed a whole new tax policy for the benefit of the Companies. This policy was then embodied in the Deed, executed by the parties and implemented with the objective of overriding all current and any future statutes enacted by the National Assembly<sup>68</sup>.*

*[52] It is not the Court’s function in this case to assess the wisdom of this special tax policy. The Government does of course have the power to settle, and to settle in confidence if it so desires, and on terms it considers prudent, claims made against it. But transforming the policy conceived here, effectively into the status of a Money Bill, necessitated the intervention of the National Assembly so that legislation consistent*

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<sup>67</sup> **BCB Holdings, The Belize Bank Limited v. AG of Belize** at paragraph 46

<sup>68</sup> Ibid Paragraph 51



*with the imperatives of the Constitution could be enacted to give force to it.*<sup>69</sup>”

- [158] The BTB, as an organ of the State of Belize, undoubtedly had the statutory duty and function to secure the most favourable arrangements for the entry of tourists into Belize<sup>70</sup> and also the general statutory power for the purpose of the execution of its duty and the discharge of its functions to “*enter into transactions which in its opinion is calculated to facilitate the proper discharge of its functions or is incidental or conducive thereto*”<sup>71</sup>.
- [159] But the BTB was not expressly given authority, under delegated regulation made under the BTB Act, or any other Act, or under any other law, to impose any tax in relation to any arrangement for the entry of tourist into Belize; or even to charge a fee in relation to any such arrangement. But the BTB was authorised to have funds and resources, including sums or property which may in any manner become payable to or vested in the Board in respect of any matter incidental to its powers and duties<sup>72</sup>, and to account for such sums or property<sup>73</sup>.
- [160] Thus such an authority, to impose a “head tax” or fee, may be implied from provisions in the BTB Act. But in my view such implied authority is not sufficient to confer on BTB the power to charge such a “head tax” or fee – because as a taxing or punitive provision it would have to be expressly authorised.
- [161] As noted above<sup>74</sup> since the filing of the present claim, and indeed after I shared with Counsel for the parties a draft judgment in the present case, the Act has been passed and is in force, and purports to impose and authorise the collection and distribution of a ‘cruise ship passenger tax’; and retroactively to validate from December 20, 2000, onward, its collection and distribution, so as to bring the same into compliance with the Constitution.

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<sup>69</sup> Ibid Paragraph 52

<sup>70</sup> See Section 11(d) of the BTB Act.

<sup>71</sup> See Section 12(b) of the BTB Act.

<sup>72</sup> Section 21(d) of the BTB Act.

<sup>73</sup> Section 23 of the BTB Act

<sup>74</sup> See Paragraph 63 above.

- [162] This may have dramatically changed the previous position that there was not any expressed proper statutory basis in law, or a statutory enactment by, or under a regulation, for the “head tax” referred to in the Agreements, as a tax. That previous to **the Act** if any such “head tax” arose then, under the facts and circumstances of the present case, it had to have been done by or under some provision of an Agreement which would not have entitled it to be properly called a tax. It would indeed have had to have been some sort of contractual “fee” as submitted by the Counsel for GOB and BTB and Counsel for FSTVL.
- [163] After hearing and considering the submissions of Counsel for the parties I had indeed concluded that prior to the enactment of **the Act**, the 2000 Agreement, of which the GOB was a party, along with the Claimant and his company Belize Tourism Village Limited, and BTB where “the head tax” first appears in any Agreement, as far as was made to appear to me. That none of its provisions or terms, purported to create or to authorise the creation of “the head tax”. I have also considered that the 2000 Agreement had rather seem to have presumed, or presupposed the prior existence of such a “head tax”, with the result that the “head tax”, even as a ‘fee’ was wholly unsupported, even by any contractual agreement, of which GOB was a party, or indeed BTB as an organ of GOB, was also a party.
- [164] I also considered that the presence of the GOB as a party to the Agreements may have lent some spurious authority or legitimacy to the existence of the “head tax” as a tax or fee. But that apart from the presence of the GOB as a party to the Agreements there was not any basis whatsoever for the right of GOB or BTB to charge, collect and distribute the “head tax” as a tax or a ‘fee’ in accordance with the Agreements. That I had considered that the payment and collection of the “head tax”, as a tax, or fee, was wholly without legal basis (as if suspended in the air with nothing to support it).
- [165] It was then submitted by Counsel for the Defendants that in this situation a total disruption to the tourism industry would result and that this court, as a matter of necessity, should therefore follow the Supreme Court of Canadian case of **Re.**

**Manitoba Language Rights**<sup>75</sup>, and temporarily deem the “head tax” or “fee” a tax or fee, valid and effective from the date of the judgment to the expiry of a stated minimum period (to be determined by the court) necessary to correct any defect. That I should thereby allow all rights, obligations and any other effects which have arisen under such a tax or fee, and the acts of public officials relating thereto, on the assumption of its legal validity, to be enforceable and forever beyond challenge under a ‘de facto’ doctrine.

[166] In the case of **Re. Manitoba Language Rights**, the Supreme Court of Canada was faced with a situation where a statute of the Manitoba Legislature, purporting to pass a law for unilingual enactments (in the English Language) was of no force and effect because it was contrary to a Constitutional provision which required that the manner and form of such legislation ought to have been in both English and French, with a corresponding constitutional duty to do so. Such mandated manner and form of the legislation having been breached for nearly a hundred years, would have resulted in a legal vacuum being created, with consequential legal chaos in the Province ensuing. This was found to have deprived Manitoba of its legal order; and to have caused the transgression of and undermining of the very existence of the rule of law.

[167] It was therefore held in this dire situation, by the Supreme Court, that all such Acts of the Manitoba Legislature would be deemed temporarily valid and effective from the date of the judgment to the expiry of the minimum period necessary to correct the defect (to enable the translation, re-enactment, printing and publishing of the laws in conformity with the Constitution). All with the result that all rights, obligation and any other effects which may have arisen under the then current laws by virtue of reliance of acts of public officials, or on their assumed legal validity, were enforceable and forever beyond challenge under the ‘de facto doctrine’<sup>76</sup>.

[168] Having reviewed the facts and circumstances of the case of **Re. Manitoba Language Rights**, I did not consider that the situation created by my provisional

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<sup>75</sup> [1985] 1 SCR 721

<sup>76</sup> Ibid Paragraph 109

ruling would have had the same kind of dire consequences to the rule of law and the legal order, such that it was necessary to have resort to such a doctrine to prevent anarchy.

[169] I indicated that the effect of any such ruling could be easily fixed by the legislature by an appropriate amendment having retrospective effect; despite the obvious odium of such retrospectivity in relation to taxes. I arrived at this conclusion primarily because it would only have affected persons who had already laboured under the mistaken assumption that such taxes had in fact been due and payable, and as a consequence had, in good faith, paid it. Also that there was no evidence that the “head tax” had been used in ways other than how it was declared that it would be used by the Government.

[170] It was in this circumstance that the Government and Legislature indeed took the decision to pass an amendment to deal with the situation which this court had found to have arisen; and that the “Cruise Ship Passenger Tax Act<sup>77</sup>” was duly passed and came into force on August 1<sup>st</sup>, 2015.

[171] This amendment does not purport, on its face, to conform with the provisions of Section 69 of the Belize Constitution to alter the said Constitution as a constitutional amendment, as it does not purport to be passed by a special majority of the National Assembly (i.e. two-thirds of the House of Representatives and ninety days interval between the introduction of the Bill in the House of Representatives and the beginning of the proceedings in the House on the second reading of the Bill).

[172] The question for determination now arises for consideration is: what is the impact on the present claim of the Cruise Ship Passenger Tax Act?

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<sup>77</sup> No. 7 of 2015

**What, if any, is the impact on the present claims/proceedings of the Cruise Ship Passenger Tax Act?**

**The Cruise Ship Passenger Tax Act**

[173] The Act specifically defines a “*cruise ship*”, a “*cruise ship passenger*”, FSTV, FSTVL, a “*manifested cruise ship passenger*”, a “*passenger*”, a “*passenger ship*”, a “*resident passenger*” and a “*ship*”<sup>78</sup>.

[174] The Act applies to each manifested cruise ship passenger on a cruise ship entering and leaving Belize and which tenders its passengers to the FSTV<sup>79</sup>.

[175] Section 4 of the Act provides:

*“(1) Subject to the provisions of this Act, a tax to be known as the “cruise ship passenger tax” is hereby imposed, which shall be levied and charged on, and paid by, each manifested cruise ship passenger on a cruise ship entering and leaving Belize and which tenders its passengers to the Fort Street Tourism Village.*

*(2) The rate of tax payable under subsection (1) and any variation thereof, shall be determined by the Belize Tourism Board.*

*(3) A determination made under subsection (2) shall be made by Order published in the Gazette.”*

[176] Thus Section 4, as rightly submitted by Counsel for the Claimant, creates for the first time moving forward (prospectively) the legislative basis for a ‘cruise ship passenger tax’ on the terms of the Act. However a determination of the rate of the tax payable has not been made.

[177] The Act also provides that an Order made shall be laid before the House of Representatives, and be subject to negative resolution; and for certain specified persons (not relevant) be exempt from paying such a tax<sup>80</sup>.

[178] Section 5 of the Act then provides:

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<sup>78</sup> At Section 2 of the Act.

<sup>79</sup> See section 3 of the Act.

<sup>80</sup> See Section 4(2) – (5).

*“The cruise ship passenger tax levied, charged and payable under section 4 shall be collected by the Belize Tourism Board and may be shared between the Fort Street Tourism Village Limited and the Government of Belize in a ratio to be determined between the parties.”*

[179] Section 5, again as rightly submitted by Counsel for the Claimant, for the first time, moving forward (prospectively) legislated for the collection by BTB and of the sharing with FSTVL, of the cruise ship passenger tax under the terms of the Act.

[180] I agree with Counsel for the Claimant in its last mentioned submission that as section 5 of the Act is not a constitutional amendment, any attempt by ordinary statute to amend the Constitution have not been met, and is therefore of no effect in this regard.

[181] Section 6 of the Act finally provides:

*“Without prejudice to the generality of the foregoing provisions or any other law to the contrary, the purported imposition, and collection, in good faith and in the absence of statutory provision therefor, of a cruise ship passenger tax during the period commencing on the 20th December, 2000 and immediately preceding the commencement of this Act, and the distribution of the purported tax collected between the Fort Street Tourism Village or its predecessor and the Government of Belize or its nominees are hereby validated and all such taxes levied or collected and distributed during that period are hereby declared to have been validly, properly and lawfully levied or collected and distributed as if done lawfully and in accordance with this Act.”*

[182] Section 6 thus seeks to validate the purported collection and distribution of the head tax retrospectively from 20<sup>th</sup> December 2000. It does not, and cannot, in my view, impose, retrospectively, the head tax; as it is only by Section 6 that the Act expressly, unambiguously and unequivocally purports to have retrospective effect, and so can legally achieve this objective.

[183] Following the case of **Bata Shoe Co. Guyana Ltd. et al v Commissioner of Inland Revenue**<sup>81</sup>, this court notes that there is good judicial authority not to doubt the efficacy of the retroactive validation of the cruise ship passenger tax under the Act, as there is no constitutional restraint, other than in any penal aspect, and that there is no power in the court, to derogate from the Act, once it unequivocally expresses itself, as it does in the present case, to operate antecedently. This is wholly within the discretion and competence of the Legislature to enact in a taxing statute.

[184] The Act in relation to the purported collection and distribution of ‘the cruise ship passenger tax’ was stated to take effect on the 20<sup>th</sup> December 2000, with the result that such purported collection and distribution of the purported ‘head tax’ collected between FSTV and GOB was validated and deemed to have been validly, properly and lawfully collected and distributed. But this does not and cannot impose such a tax, as found by this court, as there was no purported imposition of such a tax or ‘head tax’ under the Agreements.

#### **Submissions of Counsel for the Parties on the Cruise Ship Passenger Tax Act**

[185] Counsel for the Claimant makes the following submissions:

- (a) The relief Number 1 claimed in the Fixed Date Claim form is unaffected by the Act as the Act does not purport to affect the Agreements per se, merely by its provisions to provide for the imposition, collection and distribution of ‘the cruise ship passenger tax’ (and thereby possibly the ‘head tax’ contained therein).
- (b) Reliefs Numbers 2, 3 & 4 directly concern the ‘head tax’ and therefore such reliefs may be directly affected by the Act if the courts construes the cruise ship passenger tax as including the head tax (which this court has so done). That in any event, that assuming the court finds (which it has) that the ‘head tax’ is retroactively validated as a ‘tax’ properly so-called, then such taxes are governed by Section 114 of the Belize Constitution, and has to be paid either into the Consolidated Fund or a public fund established for a specific

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<sup>81</sup> GY 1976 CA 39.

purpose pursuant to the Constitution (and to be withdrawn from either under a law), which was not done. That therefore the Claimant is entitled to the reliefs claimed in these reliefs (Numbers 2, 3 & 4). Also that absent a statutory fund for a specific purpose (which the BTB Act is not expressly, and cannot by implication be found to be inferred), the proceeds of the ‘head tax’ should have been paid into the consolidated fund. Finally that the BTB Act, unlike other statutory funds for a specific purpose, does not conform in its expressed language to the required to create such a statutory fund.

(c) That in view of the provisions of the Act the Injunction claimed (relief No 5) has ceased to be applicable.

[186] Counsel for the 3<sup>rd</sup> Defendant submits that the Act (and all of its provisions), being retrospective, must be deemed to have been in force from December 20<sup>th</sup> 2000, and as a consequence that the reliefs claimed therefore be addressed in light of the intervening Act. Also that as a result of the fetter clauses, now put on a statutory footing for the levying, charging and distribution of the ‘head tax’; and all the declaratory reliefs sought, ought not to be granted and the whole, in a broad-brush way, have been rendered “academic, theoretical and without basis for the grant of the declaratory reliefs sought”.

[187] Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants generally agrees with the Submissions of Counsel for the 3<sup>rd</sup> Defendant in relation to the present issue. In addition he submits:

- (a) The Act fundamentally cures the problems raised in relation to the imposition, collection and distribution of the ‘head tax’ under the Agreements.
- (b) That no special language is required within the BTB Act to authorise the BTB to collect and distribute the ‘head tax’ or ‘cruise ship passenger tax’ such that such collection and/or distribution would be considered a statutory fund or law established for a specific purpose under Section 114 of the Constitution of Belize. That it is simply a matter of construction to determine the plain meaning of the statute in question.



- (c) That the Act is merely a re-confirmation that the taxes could be imposed, collected and distributed in a particular way

**Analysis and Conclusion on the Cruise Ship Passenger Tax Act**

[188] I wholly agree with Counsel for the Claimant that the Claimant is entitled to the 1<sup>st</sup> declaration claimed; to the effect that the provisions of sub-paragraphs 2(E), 2(F) and 5(7) of the Further Amended Agreement between the GOB, the BTB and FSTVL dated the 14<sup>th</sup> September, 2004, are unlawful and unenforceable as incompatible with the proper discharge of public responsibilities and/or as ultra vires the powers of the Executive. This is as a result of the fact that, in my view, the Act does not purport to, and neither does it in any way impact paragraphs 2(E), 2(F) and 5(7) of the Amended Agreement, and nor does it impact any of my findings in paragraphs 143 above, that such paragraphs are so unlawful, unenforceable and incompatible with GOB's public responsibilities and are ultra vires its powers.

[189] I have carefully reviewed and considered the submissions of Counsel for the parties, and the definition and meaning of the 'head tax' under the Agreements and the 'cruise ship passenger tax' under the Act. In relation to this aspect of the case I have, however, concluded, and I so determine, that as a matter of construction, that 'head tax' under the Agreements, and the 'cruise ship passenger tax' under the Act, although they are not necessarily coterminous or identical in their terms, nevertheless the latter is certainly contained within the former. I have therefore determined that, given the retroactive and validating nature of Section 6 of the Act, reference to the 'head tax' in the Agreements may be considered as having been captured by the 'cruise ship passenger tax' as defined in the Act.

[190] As such I have determined that the 'collection' and 'distribution' of the proceeds of the 'head tax' under the Agreements (but not of the Agreements themselves in which they are mentioned), is indeed validated by the enactment of the Act. This is so prospectively (and not retroactively) in relation to the 'imposition' of the 'head tax', as the cruise ship passenger tax, as in my view, there was not any prior statutory or contractual basis for the imposition and existence of such 'head tax' prior to its enactment; and there is no retroactive validation by way of 'the cruise

ship passenger tax’ as contained in the Act. I have found that the Act for the first time as a matter of fact and law imposed, prospectively, and not only retroactively, the ‘cruise ship passenger tax’ and thereby a ‘head tax’ as defined in the Agreements.

[191] The Act, in my view, essentially thus unequivocally validates the collection and distribution (but not the imposition) of the “head taxes” from December 20, 2000, onward so as to bring the same in compliance with the Constitution and laws of Belize. Thus far I am in agreement with the submissions of Counsel for the Claimant. Therefore the ‘imposition’ of the head tax is not retroactively validated, but the payment, collection and distribution of the head tax is so validated by the enactment of the Act, prospectively, from the commencement of the Act.

[192] The Act, also in my view, effectively supersedes, but does not displace, the Agreements, by establishing a proper legislative basis going forward from the commencement of the Act, for the imposition, charging, collection, payment and distribution of the ‘head tax’ under the Agreements as set out above for the time being in accordance with the Act.

[193] The Act applies to each manifested cruise ship passenger on a cruise ship entering and leaving Belize which tenders its passengers to FSTV<sup>82</sup>.

[194] The question then arises whether the “head tax” or indeed the “cruise ship passenger tax” is required by section 114(1) of the Belize Constitution, to be paid into the Consolidated Revenue fund; or whether there is some other public fund established for a specific purpose, as required by Section 114(1) of the Belize Constitution, into which it is payable under some other law?

[195] I do not agree with Counsel for the Claimant in his submission that to the extent that the provisions of Sections 5 and 6 of the Act can be construed to retroactively validate the collection and distribution of the proceeds of the head tax, otherwise than by way of the Consolidated Revenue Fund (as there is no other specific statutory fund which qualifies for the payment into and out of such public fund

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<sup>82</sup> Section 3 of the Act.

under Section 114 of the Belize Constitution), entitling the Claimant to the reliefs contained in 2, 3 and 4 of the Claim Form; and that any such payment in and out of such fund would therefore be unconstitutional, void and therefore without effect.

[196] I have concluded that indeed the BTB Act is indeed a statute (or law) constituting or creating a public fund (of a statutory public body) established for a specific purpose of securing “*the most favourable arrangements for the entry of tourists into Belize*<sup>83</sup>” and to “*do anything and to enter into any transactions.....to facilitate the proper discharge of its functions or is incidental or conducive thereto*<sup>84</sup>”

[197] In arriving at this latter conclusion I rely on facts and circumstances as well as the factors enumerated in paragraphs 111 above in support of my conclusion that the BTB Act is not an autonomous body; but is part of the Crown, and a public body.

[198] Also I do not agree with Counsel for the Claimant that some special form of words or special drafting formulation was required to establish or create a public fund established for a specific purpose - but that the court simply has, as a matter of construction of the statutory provisions, to determine whether the Act or law in question creates “a public fund established for a specific purpose”.

[199] This I have done and it has been shown to me, and I am quite satisfied, that there has been established under Section 21 of the BTB Act, some special fund into which the ‘head tax’ under the Agreements and/or ‘cruise ship passenger tax’ under the Act, has been or will have to be paid; and that therefore ought to have been and ought to be paid, in order for it to comply with the Constitution of Belize.

[200] As a result I have concluded that the “head tax” or indeed the “cruise ship passenger tax” is indeed required by section 114(1) of the Belize Constitution, to be paid into some public fund established for a specific purpose, as required by Section 114(1) of the Belize Constitution, into which it is payable under some other law; but that the BTB Act is such a public fund.

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<sup>83</sup> See Section 11(d) of the BTB Act.

<sup>84</sup> See Section 12(b) of the BTB Act.

[201] As a result of my last finding, that by reason only of the enactment of the Act by the Legislature, but not otherwise, the Claimant is not entitled to the Declarations which he claimed in paragraphs 2 and 3 of the Reliefs claimed in his Fixed Date Claim Form.

[202] I have determined that the Claimant may be entitled to a modified version of the relief claimed in No 4 of the Reliefs in his Fixed Date Claim Form. The modification will have to take into account this court's finding that the BTB Act is a public fund established for a specific purpose, as required by Section 114(1) of the Belize Constitution.

[203] The relief to which the Claimant is therefore now entitled, as I have determined, is as follows:

*“A declaration that the provisions of Paragraph 4 of the Further Amended Agreement between the Government of Belize, the Belize Tourism Board and Fort Street Tourism Village Limited dated the 14<sup>th</sup> day of September, 2004 are ultra vires the powers of the Executive and inconsistent with the discharge of public responsibilities in so far as the imposition collection and distribution of the ‘head tax’ was concerned.”*

**Whether the Claimant's is entitled to the Injunction Claimed**

[204] In respect of the injunction claimed to restrain the Defendants (including GOB) from acting in pursuance or in furtherance of the provisions of the Further Amended Agreement, I do not consider that it is appropriate to grant this remedy – certainly not against the GOB as this court considers that in accordance with well-established principles, appropriate declarations ought to suffice.

[205] In any event I would also determine, in view of all my findings, that the Claimant is not entitled to the 5<sup>th</sup> Relief claimed in his Fixed Date Claim Form, namely, the injunction against the Defendants.

[206] Further the Claimant having enjoyed and benefited from the same clauses under the Further Amended Agreement dated 14<sup>th</sup> September, 2004, it would be inequitable to now grant this relief in favour of the Claimant against the BTB and FSTVL.

**Whether the Claimant can seek to rely on the unlawful clauses**

[207] The Claimant having benefited in the past from the clauses which I have now ruled upon in the way that I have, I can see no difficulty in principle, whether by estoppel or any other equitable principle, why the Claimant is prevented from bringing the present claim and maintaining the position that he has.

[208] If the clauses in the Further Amended Agreement now offend the legal and constitutional principles which this court has found, then the same, it seems to me, such must have been the case when the Claimant benefited from them, with any and all consequences which arise and flow from such determination.

**Whether the public interest in maintaining the rule of law outweighs the private interest of the Claimant**

[209] For the reason which I have already given, I do not consider that there is any public interest consideration, over and above the construction of the terms and effect of the Act, which dictates that the status quo should remain and a finding reached by this court that the ‘head tax’ should remain.

**Costs**

[210] Because of the way in which the whole claim has developed, in particular the fact that much of the Claimant’s claims have been rendered nugatory by the Act, and passed after the commencement of the present proceedings, in order to nullify the force and effect of such claims, I have determined that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should pay the costs of the Claimant and the 3<sup>rd</sup> Defendant assessed by me respectively in the sum of \$25,000.00 and \$10,000.00.

**Disposition**

[211] For the reasons given above, the orders of this court are as follows:

- 1) A declaration that the provisions of sub paragraphs 2(E), 2(F) and 5(7) of the Amended Agreement between the GOB, the BTB and FSTVL dated the

14<sup>th</sup> September, 2004 are unlawful and unenforceable as ultra vires the powers of the Executive;

- 2) A declaration that the provisions of Paragraph 4 of the Further Amended Agreement between the GOB, the BTB and FSTVL dated the 14<sup>th</sup> day of September, 2004 are ultra vires the powers of the Executive and inconsistent with the discharge of public responsibilities in so far as the imposition, collection and distribution of the 'head tax' was concerned.
- 3) The Claimant's and the 3<sup>rd</sup> Defendant's costs of the present claim should be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants which I have assessed respectively in the sum of of \$25,000.00 and \$10,000.00.

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**The Hon. Mr. Justice Courtney A. Abel**