

IN THE SUPREME COURT OF BELIZE, A.D. 2008

CONSOLIDATED

CLAIM NO. 28 OF 2007

BEDECO LIMITED
BROWN SUGAR MARKET PLACE LTD. Claimants

AND

THE ATTORNEY GENERAL
BELIZE PORT AUTHORITY
BELIZE CITY COUNCIL
BELIZE TOURISM BOARD
FORT STREET TOURISM VILLAGE LIMITED Respondents

CLAIM NO. 29 OF 2007

MARITIME ESTATES LIMITED
EUROCARIBE SHIPPING SERVICES
LIMITED dba MICHAEL COLIN GALLERY
DUTY FREE SHOP Claimants

AND

THE ATTORNEY GENERAL
BELIZE PORT AUTHORITY
BELIZE CITY COUNCIL
BELIZE TOURISM BOARD
FORT STREET TOURISM VILLAGE LIMITED Respondents

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BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Fred Lumor S.C. with Mrs. Samira Musa-Pott for claimants.
Mrs. Andrea McSweeney McKoy with Miss Priscilla Banner for the 1st and 2nd
defendants.
Dr. Elson Kaseke for the 4th defendant.
Mr. Dean Barrow S.C. for the 5th defendant.

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JUDGMENT

Introduction

These proceedings relate to consolidated Claims Nos. 28 and 29 of 2007. There are two sets of claimants in each case, viz: i) **BEDECO LTD.** and **BROWN SUGAR MARKET PLACE LTD.** (Claim No. 28 of 2007); and ii) **MARITIME ESTATES LTD. and EUROCARIBE SHIPPING SERVICES LTD.**, doing business as Michael Colin Gallery Duty Free Shop (Claim No. 29 of 2007).

2. Each set of claimants occupies a part of the boardwalk on the northern frontage of the Haulover Creek in the Fort George area in Belize City.
3. Sandwiched between the claimants' parts of the boardwalk are an establishment called the "Wet Lizard" and the 5th defendant, the Fort Street Tourism Village (referred to hereafter as the "Tourism Village" or simply the 5th defendant). The Wet Lizard is not a party to these proceedings but is adjacent to the 5th defendant and like the claimants, they both have parts of the boardwalk on this part of the Haulover Creek.
4. It is this boardwalk (although it is a concrete platform in places) and in particular, the concrete walls and other structures constructed thereon by the Tourism Village (the 5th defendant), that are at the heart of this case. The walls and structures are on either side of the boardwalk leading to the premises and properties of the claimants.

The boardwalk itself is along the shoreline of the claimants' properties and that of the 5th defendant's, as well as that of the "Wet Lizard". It is situated within the Belize City Port area. It is common ground between the parties, I think, that the boardwalk although on the shoreline of their respective

properties, is constructed on the seabed of the port area. This makes the substratum on which it is constructed part of national land as defined in the National Lands Act – Chapter 191 of the Laws of Belize, Rev. Ed. 2000. By the provisions of this Act permission of the Minister responsible for national lands is required to build on it.

5. By section 19 of the Belize Port Authority Act – Chapter 233 of the Laws of Belize, Rev. Ed. 2000, the second defendant, the Belize Port Authority, is vested with certain powers and duties including being *“empowered to provide a coordinated and integrated system of ports ... and port services”* in accordance with the Act and any regulations made under it. And by Statutory Instrument No. 69 of 1980, the area where the boardwalk is situated is defined as a part of the Belize City Port area: **Definition of Limits of Ports Order 1980.**
6. On 1st June 2004, **The Port Facility Security Regulations – S.I. No. 104 of 2004**, were issued. In the Interpretation section in Part I of the Regulations a “Port facility” is defined as meaning *“a location as determined by the Belize Port Authority, or elsewhere by the relevant governmental authority, where the ship/port interface takes place. This includes areas such as anchorages, waiting berths and approaches from **seaward**”* as appropriate (emphasis added). The Regulations also define a “port facility operator” as meaning *“any person operating a port facility or such other person as may be designated for the purposes of this Part as port facility operator for one or more port facilities by the Belize Port Authority.”*
7. The Regulations in Part II contain detailed provisions for **Special Measures to Enhance Maritime Security** and incorporate provisions of the *International Code for the Security of Ships and of Port Facility* (the ISPS Code) as adopted on 12 December 2002, by resolution 2 of the

Conference of Contracting Governments to the International Convention for the Safe of Life at Sea, 1974.

8. The Belize Port Authority, the second defendant, is the designated authority for Belize for the purposes of superintending the implementation of and compliance with the ISPS Code and other Codes mentioned in the Regulations.

The Matrix of the case

9. The case itself concerns in a material sense the burgeoning tourism industry in Belize. The country is increasingly becoming a popular destination with international tourists. This case however is related to an aspect of the industry that has seen, in a relatively short space of time, a tremendous growth in the number of cruise ship passengers who visit Belize City and its vicinity when their cruise ship drop anchor offshore of the City. So far, there are no facilities to enable these cruise ships to pull alongside a port or land in Belize City. Instead, they anchor out at sea, within sight of the City and their passengers are ferried from and back to the ships on boats called tenders.
10. There is no doubt that cruise ship tourism is growing rapidly and that there are great pickings to be had from it. This has not unnaturally attracted investors and operators including the claimants and the 5th defendant. The cruise-ship tourism is evidently lucrative not only to the tender operators, but also to tour operators who take the visiting tourists on tours to various sites and places of interest during their short stay on land. It is also profitable to shop owners, restaurateurs, hair braiders and local craftsmen who all ply their trade and do brisk business when the cruise ships drop anchor outside the City and their passengers are ferried on to land in Belize City.

11. The cruise-ship tourists are however, landed on the boardwalk I had described earlier. The nub of the claimants' complaint in this case, is that the 5th defendant has built the cement concrete walls and other structures on the boardwalk that do not allow for access to their own properties by the cruise-ship tourists so brought in by the tenders. And that they have been denied the protection of the law and discriminated against because, at the same time the 5th defendant allows unimpeded access from the boardwalk by tourists to the establishment of the West Lizard which, like them, own properties abutting on to the boardwalk.

Relief sought by the complainants

12. It is against this backdrop that the claimants, relying on section 20(1) of the Belize Constitution, have approached this court seeking the following relief:
 1. *A Declaration that the Defendants contravened the rights of the Claimants guaranteed under Section 6(1) of the Constitution of Belize when they caused or allowed the Fort Street Tourism Village Limited to discriminate against the Claimants or subject the Claimants to unequal treatment by depriving the Claimants access to the cruise ship passenger market at the Belize Tourism Village located in the Fort George Area of Belize City*
 2. *A Declaration that the Defendants contravened the rights of the Claimants to gain a living by work guaranteed under Section 15(1) of the Constitution of Belize when they caused or allowed the Fort Street Tourism Village Limited to deprive the Claimants access to the cruise ship passenger market at Belize Tourism Village located in the Fort George Area of Belize City.*
 3. *An order directing the Defendants to remove within 7 days all the obstructions placed at different locations on the boardwalk erected and*

existing along the north bank of the Haulover Creek including the shoreline of the Fort Street Tourism Village Limited.

4. *An injunction restraining the Defendants and each of their directors, officers, employees and servants from further contravention of the said rights of the Claimants as guaranteed under the Belize Constitution.*
5. *Damages.*
6. *Costs.*

The evidence

13. Both claimants filed copious affidavits together with exhibits in support of their claim:

Mrs. Greta Martha Williams filed two affidavits on behalf of the claimants in Claim No. 29 and Mr. Hector Rivera filed one affidavit on behalf of the claimants in Claim No. 28.

In opposition to the claims, Mr. James Nisbet, the operations manager for the 5th defendant, filed an affidavit and Mr. Lloyd Jones, the Ports Commissioner of Belize, also filed an affidavit.

He also gave live testimony during the hearing. Mr. Dean Barrow S.C. applied to have him cross-examined on his affidavit. Mr. Fred Lumor S.C., the learned attorney for the claimants joined in this application. At the end of his cross-examination, Mrs. Andrea McSweaney-McKoy, attorney for the first and second defendants, re-examined him.

14. I must confess that precious little, if any, light was shed on the issues in this case by the live testimony of the Ports Commissioner. I was however, left with the impression that the walls on the 5th defendant's part of the boardwalk are not the **only** means to make the entire boardwalk, including the parts in front of the claimants' properties, ISPS Code-complaint for the safety of cruise ship tourists. Their security and safety are no doubt important, if the tourism industry is to continue to benefit from their patronage.

Basis of claimants' case

15. I now turn to an examination of the claimants' claims before this court. The basis for this is premised on section 20 of the Belize Constitution. This provides in subsection (1) as follows:

20.-(1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him ... 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.

16. And sub-section (2) provides in terms:

(2) The Supreme Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, (which is not material for the purposes of this case)

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19 inclusive of this Constitution.

17. In these proceedings, the claimants have come to this court for redress asserting that two of their fundamental rights protected by sections 6(1) and 15(1) of the Constitution, have been violated by the defendants.
18. I have in paragraph 11 above set out the express terms of the claimants' complaints and the redress they seek from this Court.
19. Section 16(1) of the Constitution provides in terms:

“6(1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

And section 15 (1) states:

“15(1) No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business or otherwise.”

20. In truth, however, this case really is about access to the cruise-ship passenger market in the Tourism Village in the Fort George area of Belize City.

Visit to the Locus

21. At the start of the hearing of this case, Mr. Fred Lumor S.C., the learned counsel for the claimants applied for the Court to visit the area in question.

This the Court did in company with the representatives of the parties and their attorneys. From the inspection, I was greatly assisted to get a better feel of the case and the contentions in this case.

Can the claimants' claims be maintained against the 4th and 5th defendants?

22. However, during the course of the hearing strenuous objections were taken as to whether the claimants could maintain their claims against the 4th and 5th defendants.
23. I should add here, if only in parenthesis, that the 3rd defendant, the Belize City Council, did not contest the claimants' claim and its attorney, through Mrs. Andrea McSweeney McKoy of counsel for the 1st and 2nd defendants, informed the Court that no papers would be filed on its behalf.

The Position of the 4th defendant

24. Dr. Elson Kaseke, the learned attorney for Belize Tourism Board, the 4th defendant however, maintained that on the facts of the case there could be no constitutional claim against his client. And that the only reference to his client was in paragraph 13 of Ms. Greta Williams' first affidavit. This states:

"13. The Fourth Defendant, Belize Tourism Board ("BTB"), is a statutory body established under the provisions of Section 3 of the Belize Tourism Board Act, Chapter 275. The Belize Tourism Board is a party to a Restated and Amended Agreement dated 9th September, 2003 by virtue and under which the Fort Street Tourism Village was designated as an official port of entry and departure and a representative of the BTB is required to sit as a director on the Board of Directors of the Fort Street Tourism Village Limited."

25. Dr. Kaseke however, stated that even though the BTB (the 4th defendant) is a director of the board of the 5th defendant, this should not be a ground for the claimants to pursue it. And that in any event, the 4th defendant was not responsible for any alleged breach of the claimants' constitutional rights, and it should be struck out of the case.
26. Mr. Lumor S.C. for the claimants however, maintained that the 4th defendant was a necessary party to his clients' claim. He submitted that BTB, as a director of the 5th defendant, ought not to act in contravention of its statutory duties, in particular, section 11(d) of its parent Act – **The Belize Tourism Board Act – Chapter 275 of the Laws of Belize, Rev. Ed. 2000**. This section enjoins the BTB among other things *“to secure the most favourable arrangements for the entry of tourists into Belize.”* I got the clear impression that, at the very least, the claimants feel that BTB was complicit, if not actively involved in the breaches they claim of their constitutional rights.
27. After listening to both Dr. Kaseke and Mr. Lumor S.C., I ruled that the 4th defendant should not be struck off from the claim. It is still my view that on the facts, the 4th defendant, a statutory body charged with, among other things, the duty to secure the most favourable arrangements for the entry of tourists into the country has, nonetheless in successive agreements with the 5th defendant, together with the participation of the Government of Belize (the 1st defendant, the Attorney General being the constitutionally designated party for the Government of Belize in litigation), granted it the status of the exclusive port of entry and exit of cruise ship passengers – see in particular clause 9(6) of the Agreement between the 5th defendant, the **4th defendant** and the Government of Belize dated 9th September 2003, **Exhibit GMWB**; and clause 2(D) of **Exhibit GMWC**. These exhibits also state that the 4th defendant shall collect the head tax from all cruise ship passengers' entry through the 5th defendant.

28. After due consideration, I find that it is not easy to dissociate the 4th defendant from the claimants' complaint. It is after all the purported designation of the 5th defendant as the sole port of entry and exit of cruise ship tourists to Belize, that has led to the construction of the walls by it on the boardwalk. This is what, it is fair to say, that has agitated this case. I am not persuaded therefore, that, on the evidence, the 4th defendant is simply an unwitting, innocent or unwilling observer. It sits, after all, on the 5th defendant's board of directors. I am accordingly satisfied that the 4th defendant's presence in these proceedings is necessary.

The position of the fifth defendant

29. On behalf of the 5th defendant however, Mr. Barrow S.C. submitted that no relief as prayed for by the claimants could lie against it. This is so he urged on the court, because the 5th defendant is a **private** company and would not therefore be susceptible to constitutional redress.
30. In a material sense, in so far as the position of the 5th defendant is concerned, it raises the horizontal effect or application of the fundamental rights provisions of a Constitution. That is, the extent to which third parties other than purely public officials or authorities are impacted by a Constitutional provisions regarding fundamental rights – see **The Constitution in Private Relations – Expanding Constitutionalism**; Edited by Andràs SerjÓ and Renáta Uitz (Eleven International Publishing 2005).
31. Although the prohibitory provisions guaranteeing fundamental rights and freedom in Part II of the Belize Constitution are not addressed to anyone in particular, conventional wisdom and legal orthodoxy regard the Government, its agencies and departments – every Minister, public officer

or authority, as the ready and obvious candidate for amenability to public law for the purposes of redress.

32. In these proceedings however, without doubt, the 5th defendant which is the real protagonist with the claimants is, like the claimants themselves, a **private** entity. Does this fact therefore, immunize it from the prohibitory provisions of the Constitution such as non-discrimination and the non-denial of the opportunity to anyone to gain a living ... by engaging in a trade of business?
33. It is the basis of the claimants' case that its private entity or form notwithstanding the 5th defendant is bound by and therefore not immune from the prohibitory provisions they aver that, in the circumstances of this case, have been breached in relation to them. Mr. Barrow S.C. however, vigorously contended for the 5th defendant that as a **private** entity it is not so bound and that claimants' case raises no constitutional issue.
34. After some anxious reflection, I find myself unable however, to accede to Mr. Barrow's contentions and submissions on this score. In my view, the fact that the offending act is done by a **private** entity, such as the 5th defendant, does not in and of itself confer, as it were, some kind of talismanic immunity from constitutional challenge as being in breach of a guaranteed right, and therefore susceptible to judicial oversight or control – **R v Panel on Takeovers and Mergers, ex parte Datafin Plc (1987) QB 815; (1987) 1 All ER 565; L. J. Williams v Smith and Attorney General (1980) 32 WIR 395.** Indeed, the case law demonstrates that different factors have been considered by the courts in deciding whether an entity is susceptible to judicial review and constitutional redress. There is however, no one single factor or test for determining whether an entity or body is amenable to judicial review: see generally **Halsbury's Laws of England** 4th ed (2001) Reissue Vol. 1(1) at para. 661 and the host cases

cited therein on this issue. I therefore adopt with respect, in this regard, the statement by the learned author of **Judicial Review Handbook**, by Michael Fordham, 4th ed. 2004 at para. 34.2 at p. 673: **The Principles of reviewability**. *The mass of case-law can be seen to provide a host of working examples applying a series of interrelated principles regarding reviewability, with perhaps these main lessons: (1) treat no single factor as determinative; but (2) focus particularly on (a) statutory or governmental underpinning and (b) the substances and effects of the functions being discharged.*”

This, in my view, is a more preferable formula and does not emphasize the element of a body being “*endowed with coercive power*” in order to be held a public body for the purposes of redress. And as Professor Albert Fiadjoe correctly, in my view, with respect, states in his work **Commonwealth Caribbean Public Law** 2nd ed. at p. 84 (Cavendish Publishing Ltd.) that this “*is wholly unnecessary and can be misleading.*” In my view, the absence or presence of “coercive power”, whatever this may mean, is not necessarily determinative of the issue whether the body or authority in question is amenable to public law.

35. Applying these considerations to the facts of this case, I am inclined to the view that the designation of the 5th defendant as the sole port of entry and exit for cruise ship passengers has, both a statutory and governmental underpinning, such as to make it amenable to public law challenge. I am fortified in this view by the fact that the power to designate any place as a port of **entry into** or **exit from** Belize is **statutory**: - see section 39 of the Immigration Act – Chapter 156 of the Laws of Belize, Rev. Ed. 2000. This section grants the Minister responsible for immigration the power to make regulations prescribing **ports** or places of entry into Belize. I am therefore of the view that it matters not that it was by contract (the agreements between the 5th defendant and the Government of Belize and the 4th

defendant already referred to in para. 26 above) that the 5th defendant was purportedly designated the sole port of entry for cruise ship tourists. This much is admitted on the 5th defendant's behalf. Mr. James Nisbet, its Operations Manager, states in paragraphs 5 and 6 of his affidavit filed on its behalf:

“5. *It is true that the 5th defendant's FSTV has been designated an official port of entry for a limited category of visitors to Belize, i.e. those visitors that are passengers on cruise ships that make one day stops in Belize*

6. *It is also true that to date the FSTV is the only officially designated port of entry for such one day cruise ship visitors.”*

Surely, every officially designated port of entry or exit is part of the immigration and emigration paraphernalia of every sovereign state, which perform, must have a considerable element of public law. I am persuaded that the designation of the 5th defendant as the sole port of entry and exit for cruise ship passengers, assimilates it for that purpose, to a public body or authority amenable to public law.

36. Moreover, the duties and obligations derived from the ISPS Code and devolving upon the Government of Belize and whose implementation and compliance therewith are entrusted to the second defendant, as the “designated authority”, thereby enabling it to make the 5th defendant a port facility operator, evince to my mind, strong element of some governmental underpinning, which by designating the 5th defendant, as the sole port of entry for cruise ship passengers, would affix it with certain public duties and authority. Thus, even though it is a private entity, the 5th defendant is, in my view, by virtue of its role and function as a port of entry, and a port

facility operator, clothed with public power, that makes it amendable to public law.

37. It is for all these reasons that I find and hold that the 5th defendant is a necessary party to these proceedings which raise clear public law issues concerning the alleged breaches of the claimants' constitutional rights.
38. I now turn to the Declarations sought by the claimants.

On first Declaration sought

39. In so far as the 1st Declaration sought by the claimants is concerned, it relates to the equal protection of the law for everyone without discrimination – section 6(1) of the Constitution.
40. In my view, what this section seeks to protect is the equality of everyone before the law and the entitlement, without any discrimination, to the law's equal protection.
41. On the facts of this case, I am not persuaded that rights guaranteed to the claimants by section 6(1) are engaged to the level of their being denied equal protection of the law.
42. Yes, from the evidence it is manifest that the 5th defendant has, through some accommodation, come to terms with Carlos Romero and Ms. Laura Thompson, the owners of the "Wet Lizard". As a result of this there is no wall or obstructive structure between their property and 5th defendant's. From the evidence, they had sued the 5th defendant when it had attempted to extend its boardwalk on to the frontage of their property – see paras. 27, 28 and 31 of Hector Rivera's affidavit where at para. 31 he states: "... the FSTV (the 5th defendant) settled its dispute with its

neighbours ...”. See also paras. 29, 30, 31, 32, 33, 35, 36, 37; in particular Exh. GMW 12 A & B at **para. 6** of Exh. GMW 12, of Ms. G. Williams’ 1st affidavit.

43. The unimpeded access to the boardwalk enjoyed by the Wet Lizard Restaurant does not, in my view, rise to the level of a breach of claimants’ right to the equal protection of the law. It may be unfair that as neighbours on either side of the 5th defendant the claimants do not enjoy the same unimpeded access from the boardwalk to their properties. But this is not a denial of the equal protection of the law that would engage their constitutional rights as provided for in section 6(1).
44. I apprehend a conflation of the right to equality before the law and the entitlement, without any discrimination, to the law’s equal protection with the prohibition against any discrimination by Mr. Lumor for the claimants. The former right, equal protection of the law, is essentially a **procedural** guarantee of equality before the law. This I think, is borne out by the subsections that follow the statement of the guarantee in 6(1).
45. The prohibition against discrimination in section 16 on the other hand, is **description-specific**, that is to say, affording different treatment to different persons attributable wholly or mainly to their **respective description** by sex, race, place of origin, political opinions, colour or creed.
46. On the facts of this case, and on the evidence, there has not been any allegation or even an allusion that the claimants have been denied the benefits (unimpeded access to the boardwalk on 5th defendant’s part) because of their **description by any of the criterion specified in subsection (3) of section 16.**

47. The treatment the Wet Lizard is accorded by the 5th defendant, may be, when compared to that accorded to the claimants, “discriminatory” or unfair to them. But it does not in my view, rise up to the level of discrimination for the purposes of either sections 6 or 16 of the Constitution. In my view, absent any of the description specified in section 16 as the reason for the seemingly unfair or unequal treatment of the claimants by the 5th defendant or the other defendants, I find it difficult to hold that they have been denied equal protection of the law. Inequality of treatment may be a synonym for discrimination, but it is not necessarily always a transgression of the constitutional ban on discrimination.
48. I am afraid I am unable to agree with the claimants’ learned counsel’s able but unavailing arguments and submissions that their constitutional right to equal protection of the law without discrimination has been violated because of the seemingly preferential treatment accorded to the Wet Lizard Restaurant or the 5th defendant nor I find for that matter, that they were discriminated against in the constitutional sense.
49. Section 6 of the Constitution is really a guarantee of **due process** to everyone, and should not, in my view, be confused with the prohibition against **discrimination** on the grounds of the descriptions stated in section 16 of the Constitution.
50. I cannot find that on the facts of this case, the claimants have been denied due process of law by any of the defendants.
51. Instructive as the case of **Mohantal Bhagwandeem v Attorney General (2004) 64 WIR 402**, relied upon by Mr. Lumor SC may be, I find it however, not on all fours with this case before me. That was an appeal from Trinidad and Tobago decided by the Privy Council concerning a claim for inter alia, unequal treatment and discrimination. But the

Constitution of that country contains a prohibition against discrimination by public officials (section 4(d) of its Constitution). Belize's Constitution has no such provision although its section 6(1) is similar to section 4(b) of Trinidad & Tobago's Constitution concerning equal protection of the law. The Board advised that on the facts of that case, there was no discrimination.

52. I do not, in any case, understand the claimants before me to be saying that they were denied due process by the defendants. The treatment they received may or may not be fair. In my view, unfair treatment to engage the Constitution's prohibition must be such as to amount to treatment in a discriminatory manner. And sub-section (3) of the anti-discrimination provision in section 16 states that -

“... the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinion, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.” (emphasis added)

53. In the result, I therefore refuse the Declaration the claimants seek on account of section 6(1) of the Constitution as I find that the defendants did not deny them equal protection of the law nor discriminated against them in terms forbidden by the Constitution.

On the 2nd Declaration sought

54. This concerns the right of every person not to be denied the opportunity to earn his or her living by work which that person freely chooses or accepts. In the context of this, it is clear that it is the right to trade or do business that is engaged.

55. There is no denying that the presence of the walls and other structures immediately next to the claimants' properties abutting that boardwalk effectively prevents cruise ship passengers from patronizing, if they so desire, the establishments in those properties. This much was evident from a visit by the Court to the boardwalk and the premises of the claimants and the 5th defendant. At the moment, once cruise ship passengers are tendered on to the boardwalk (and then only to the part in front of the 5th defendant bit) they can only be funneled out to the streets of Belize City through the 5th defendant's premises. The cruise ship passengers have no direct access from the boardwalk to the claimants' properties. Once out on the streets, they may, of course, if they so wish, visit the claimants' own premises which are at the rather extreme of the street; but this would be after having first to run the gauntlet of myriad other vendors such as tour and taxi operators, local craftspeople plying their wares and trade like hair-braiders and other assortment of vendors including food sellers. But direct access from the boardwalk to the claimants' properties is effectively unavailable because of the walls and other structures placed thereon next to the claimants' properties by the 5th defendant.

56. In these proceedings, the claimants have therefore, complained that they are thereby, contrary to section 15(1) of the Belize Constitution, being denied the opportunity to earn their living.

Determination

57. On the evidence, it is clear that it is the construction of the walls by the 5th defendant on the boardwalk next to the claimants' part of it that blocks access to the claimants' establishments – see **Exhibit HR 12** of Mr. Hector Rivera's affidavit and paragraphs 32 and 38 and **Exhibit HR 16** with the rather grainy photograph attached; and **Exhibits GMW 3A, B and C** of Ms. Williams' first affidavit.
58. Again, on the evidence, it is also clear as well that the permit of the Ministry in the government is necessary for the construction of any boardwalk on the sea bed, which is part of national lands: see **Exhibits GMW 14A and B** of Ms. Williams' first affidavit and **Exhibit GMW 19** of the same and para. 29 of Rivera's affidavit and **Exhibit HR 10** being a copy of the Belize Gazette granting permission to the 3rd defendant to build a boardwalk. From these, it is clear that the invariable practice of the Ministry is to include in its permission to build a boardwalk conditions that state that **no gates or barrier shall be placed on the boardwalk** and that the public shall have access to the boardwalk at all reasonable times. These conditions evidently are standard in every permission given by the Ministry for the construction of any boardwalk, breakwater or dock – see for example **Exhibit GMW 27** granting the 5th defendant permission to construct a breakwater/dock.
59. I therefore conclude that these same conditions apply to **all parts** of the boardwalk in this case. That is a condition for its construction was that no gates or barriers should be placed thereon.
60. I am therefore persuaded that any walls, barrier or other structures on the boardwalk that are obstructive of free movement on it would be in breach of the permission granted to construct the boardwalk. The walls on the

boardwalk in contention here, are ingenuously camouflaged behind structures on either end of it. This, in my view, is no doubt to attenuate their presence as impediment to access to the claimants' properties that cruise ship passengers would otherwise see as they come in by the tenders to the boardwalk. In fact, from the evidence the 5th defendant subsequently acquired from the 1st and 3rd defendant the premises (the Old Vegetable Market) adjacent to the first claimant's property and like it having a common shoreline on the Haulover Creek. The 3rd defendant had in 2003 received permission to build a boardwalk (see para. 29 of Rivera's affidavit and **Exhibit HR 9 and its attachment**, an affidavit from Mr. Michael Feinstein in Supreme Court Action No. 259 of 2003); and **Exhibit H.R. 10** being the Gazetted copy of the permission to 3rd defendant to build the boardwalk but with the stipulation against gates or barriers on it.

61. On the other hand however, it has been strenuously contended for the 5th defendant, in particular, that the walls/fence on its part of the boardwalk were constructed principally for security purposes but also as an expression of its "**sovereign rights**" over its property, including the right to fence its property. There is, of course, no denying the right of a property owner to do as it pleases on its property, subject of course, to the rider that the rights and interests of others are not adversely affected.
62. In this case, however, the boardwalk is not just an ordinary form of property. It is built on the sea bed which is part of national lands and therefore permission to construct on it is necessary – see paragraphs 4, 58 and 59 above.
63. It is undeniable that the walls were constructed contrary to the permission granted to the 5th defendant and its predecessors in title, the Belize City Council (the 3rd defendant) see: **Exhibit HR 10**, the permission granted to

the 3rd defendant to build the boardwalk and **Exhibit HR 9**, the affidavit of Mr. Feinstein exhibiting the purchase/lease of the property abutting the area for which permission to build the boardwalk had been given. The same is put in evidence as **Exhibit GMW 6** of Ms. Williams' first affidavit.

64. In my view, the walls on the boardwalk cannot in law be equated to a party wall. I find that they are unilaterally constructed by the 5th defendant, albeit, in its purported discharge of its obligation to make its premises ISPS Code-compliant stemming from its supposed designation by the 1st and 4th defendant as the “**sole port of entry for cruise ship passengers**” into Belize. Nor can the walls I find, be regarded as a *wallia* – they offer no protection against the sea; but rather impede access by cruise ship passengers and others from the boardwalk to the claimants' establishment.
65. Moreover, as a fence, for that is what they really are, permission from the 3rd defendant, the Belize City Council, is by S.I. No. 336 of 2002 – **Belize City Council (Fences Control) Regulations**, is necessary. There is no evidence in these proceedings that this was obtained and Mr. Lumor SC for the claimants so contends. There is no rebuttal from the defendants on this.
66. Furthermore, although the 5th defendant is regarded as purportedly designated the “**the sole port of entry**” for cruise ship passengers, the **whole** of the boardwalk, however, including the parts abutting the claimants' properties as well as the 5th defendant's, is, by the **Definition of Limits of Ports Order 1980**, and the **Immigration Regulations** – S.I. No. 61 of 1998, made pursuant to section 39 of the **Immigration Act** – Chapter 156 of the Laws of Belize, Rev. Ed. 2000, formally prescribed in Regulation 3(2)(c) as a “**port of entry and exit**”.

67. As a facility for entry into Belize, by cruise ship passengers, the **whole** of the boardwalk to which these passengers are brought, should, in compliance with the Immigration Regulations and the Port Facility Regulations be made ISPS Code-compliant as well. In my view, it is not just enough to single out the 5th defendant's premises for special solicitude in terms of cruise ship passengers' entry and safety. It is this fact, I find, that has enabled the 5th defendant, contrary to relevant laws and regulations, to construct the walls and other structures on the boardwalk in the name of security. And in so doing, effectively impede cruise ship passengers direct access to the claimants' establishments abutting on to the boardwalk thereby, I find, denying them the opportunity they would otherwise have to earn a living contrary to section 15(1) of the Constitution.
68. This fact, I find, materially denies the claimants the opportunity to have a share of the patronage of the passengers who are discharged on to the boardwalk by the tenders. In short, they are being denied the opportunity to earn their living. These passengers, because of the walls and other structures on the boardwalk, cannot directly access establishments in the claimants' part of the boardwalk.
69. This, I find, is not in consonance with the claimants' rights as provided for in section 15(1) of the Belize Constitution. Section 15 of the Constitution is in my view, an affirmation of the work ethic and a validation of this as a fundamental right. No one, subject to the express exceptions mentioned in sub-sections (2) and (3) should be denied this right. I therefore find and hold that in the circumstances of this case, the construction and maintenance of the walls and other obstructive structures on the board deny the claimants the opportunity to gain their living by engaging in trade or business with cruise ship tourists who lack direct access from the boardwalk to the claimants' establishments. The denial of this opportunity

is, I find, in the context of this case, a breach of the claimants' constitutional right.

70. I find as well therefore, that the defendants cannot be absolved from responsibility for this albeit, in varying degrees.
71. From the evidence, it is the construction of the walls and other structures on the boardwalk by the 5th defendant, that prevents access to the claimants' premises. But I find that this was facilitated by the indulgence and inaction of the other defendants who clearly had a duty to act.

In the case of the **first defendant**, in effect the Government of Belize, it allowed the 5th defendant to ignore or disregard the conditions of the permit to build the boardwalk, especially, not to place gates or barriers on the boardwalk; and it purported to grant the 5th defendant “**sole port of entry**” status. In separate agreements together with the 4th defendant, they purportedly conferred that status on the 5th defendant: see **Exhibits GMW B and C**, in particular Clauses 9(6) and 2(D) respectively. I say “purportedly” because these provisions in a private contract with the 5th defendant were never published or expressed to have modified the provisions of the **Definition of Limits of Ports Order 1980**, or the Immigration Regulations which had declared the whole of the area where the boardwalk is situated as part of the Belize City Port and by the Immigration Regulations a prescribed port of entry (see para. 66 above). To its credit however, the first defendant did try to go in and put down the walls rather rashly; but was stopped by an order of this court in Action No. 576 of 2006 when it had to give an undertaking not to do so. If the 1st defendant felt that the 5th defendant was in breach of its conditions, appropriate legal action should have been the recourse and not an attempted self-help. The 1st defendant however, cannot in these proceedings be absolved of responsibility in facilitating and even indulging

the 5th defendant in denying the claimants' right not to be denied the opportunity to earn their living in the circumstances of this case.

72. In the case of the **second defendant**, the Belize Port Authority, I find that through its agent and servant, Mr. Lloyd Jones, the Ports Commissioner and Harbour Master, there was a failure to supervise the 5th defendant in such a manner that it would not have placed or continued to have in place obstacles (the walls and other structures) on the boardwalk that would impede and in fact prevent cruise ship passengers landed thereon access to the claimants' establishments. It is to be noted that these as well as those of the 5th defendant's are all within the Belize City Port area as statutorily defined.
73. It is perhaps understandable that the 2nd defendant, through its agent, the Port Commissioner, was pre-occupied with issues of security. This is, of course, vital. But the whole of the boardwalk including the parts on the claimants' side, was its remit, and should have been factored in arrangements to make the whole area ISPS Code-complaint. This, in my view, is so, because of the nature and facilities for cruise ship tourism that are presently available in Belize. I have, at paragraphs 9, 10 and 11 of this judgment, tried to describe these. I am fortified in this view by the definition of a "**port facility**" as stated in **The Port Facility Security Regulations** – S.I. No. 104 of 2004, which I have reproduced at paragraph 6 above of this judgment. It is, of course, not the duty or role of this court to tell the second defendant or its agents what details they must have or insist upon to make port facilities safe. But on the facts of this case, I believe that much more could have been done, with the goodwill and cooperation of all the parties to make the whole area where the boardwalk is, ISPS Code-compliant, without seemingly favouring or focusing only on the 5th defendant, simply because, as I find, it had been purportedly granted a "**sole port of entry**" status. The whole area where

the boardwalk is situated is part of the Belize City Port and in law, a prescribed port of entry and exit into and from Belize.

In this regard, I will direct the defendants to bring to fruition the efforts echoed in paragraph 9 of Mr. Jones' affidavit:

“The 1st and 2nd defendants have also been involved in good faith discussions for some time with the FSTV and the claimants with a view to devising a solution that would allow access to the boardwalk while ensuring that the security of the Port is maintained.”

74. The second defendant, I find, however, failed to understand or apply the relevant legal provisions and thereby failed to supervise the 5th defendant such as not to place walls and other obstacles on the boardwalk that would impede access by cruise ship passengers to the claimants' establishments abutting that boardwalk.
75. The **3rd defendant**, the Belize City Council, as I have stated earlier, did not contest the claimants' case. But the combination of the following factors persuades me that, in the circumstances of this case, it is not without some share of the responsibility for the breach of the claimants' rights in issue here:
- i) It was the predecessor in title of the permission purportedly pursuant to which the 5th defendant built the part of the boardwalk adjoining the 1st claimant's premises. This had expressly forbidden the construction of gates or barriers on the boardwalk – see Exhibit GMW 19 which had also prohibited a transfer of the licence it granted. The 5th defendant however later acquired the land to which the

licence related from the 1st defendant and 3rd defendant – see Exhibits GMW B and C of Williams’ second affidavit.

- ii) It is statutorily responsible for the construction of fences and buildings in Belize City. It failed to take action or superintend the 5th defendant, who without permission, constructed the walls and other structures on the boardwalk and thereby prevented access to the claimants’ adjoining establishments.

76. In so far as the **4th defendant** is concerned, I had earlier ruled that it was a necessary party to these proceedings. The 4th defendant, jointly with the Government of Belize (the 1st defendant), executed **Exhibits GMW B and C** which purportedly conferred “**sole port of entry**” status on the 5th defendant which, consequently, facilitated the latter’s construction and maintenance of the walls and other obstructing structures on the boardwalk that prevent access to the claimants’ establishments on either side of it. The 4th defendant is additionally responsible for collecting the head tax from cruise ship passengers landed on the boardwalk and pass through the establishment of the 5th defendant. It also sits on the board of directors of the 5th defendant.
77. For all these reasons, the 4th defendant cannot be absolved of a share of the responsibility for the breach of the claimants’ rights.
78. The **5th defendant**, is of course, with the claimants, the real protagonists in this case. It constructed the walls and other structures that effectively prevent access by cruise ship passengers via the boardwalk to the establishments of the claimants on either side of it.

I must at this juncture, record the refreshing candour of Mr. Dean Barrow SC, the 5th defendant’s attorney. This is in keeping with his rank as a

Senior Counsel of this court. He candidly admitted that in a sense, this case is about the commercial interests of the real or main protagonists, that is, the claimants and the 5th defendant. The latter must have been peeved by the fact that the claimants on either side of it had as well, acquired duty free concessions for their establishments from the authorities. Therefore, it was perfectly logical or expected for the 5th defendant to impede and if possible, prevent access by the cruise ship passengers who are landed on the boardwalk to the claimants' establishments. Hence the construction of the walls on the boardwalk.

79. Much was however, made of security considerations and the need for ISPS Code compliance during the hearing by the defendants, to justify the walls. But as I have found in relation to the second defendant, which is responsible for safety of ports in Belize, the walls as they presently stand on the boardwalk impair the claimants' constitutional rights and from the testimony of the Ports Commissioner himself, I was, as I stated in paragraph 14 above, left with the impression that they are not the **only** means to make the port area secure or ISPS Code-compliant.
80. The fact however, is that from the evidence, as the walls and other structures constructed by the 5th defendant stand, they interfere with the claimants' constitutional rights not to be denied the opportunity to earn their living by having cruise ship passengers landed on the boardwalk gain direct access to their establishments. From the evidence, it is also manifest that the claimants, like the 5th defendant, have expended quite some sums of money to develop their respective establishments. In my view, therefore, they should all be able to compete directly for the custom of the cruise ship passengers tendered on to the boardwalk without questionable obstructions put in the way.

Conclusion and Relief

81. This is in many ways a troublesome case and as Mr. Barrow SC in his reply on behalf of the 5th defendant recognized, this Court is being asked to make a decision that might hold far-reaching consequences for the cruise ship tourism industry in Belize. It is, of course, the lot of Courts to make decisions even in difficult cases. And this case is no exception.

However, in fashioning a remedy or relief, as I must in this case, having determined that the claimants' section 15(1) constitutional rights were impaired by the defendants, I bear in mind that the principal relief sought is a **declaration** from this Court. Section 20(2) of the Constitution grants this court the power to *"make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement ..."* of any of the provisions on fundamental human rights in the Constitution.

82. In the circumstances of this case and in view of my finding on section 15(1) of the Constitution, I **declare** that the claimants are entitled to the right guaranteed in this section of the Constitution. That is, to have the opportunity to earn their living in the circumstances of this case by having direct access by cruise ship passengers tendered on the boardwalk to the claimants' establishments.

I further **declare** that the continued existence or maintenance of the walls and other structures on the boardwalk which impede or prevent access by cruise ship passengers landed thereon to the claimants' establishments constitute an infringement of the said right of the claimants.

I further **declare** that in the interests of the cruise ship industry, arrangements be put in place by the 1st and 2nd defendants, in consultation with the claimants and the 5th defendant, that will ensure the

security and safety of that part of the Port of Belize City involved in the cruise ship passengers activities and to make the said part ISPS Code-compliant.

Accordingly, I **order** that the boardwalk be cleared of the walls and other structures thereon that presently impede access from it to any of the properties of the claimants abutting thereon.

83. Although damages were claimed in these proceedings, none was pleaded or proved. I am however, satisfied that the vindication of the claimants' rights in this judgment should itself be enough recompense. I therefore make no award as to damages in the circumstances of the case.
84. The costs of these proceedings fit for two counsel are awarded to the claimants and these are to be agreed or taxed.

A. O. CONTEH
Chief Justice

DATED: 11th March 2008.