

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

CLAIM NO. 49 OF 2009

**TRAVELLERS REST LODGE
BELIZE LTD.
DONNA YOUNG**

**First Claimant
Second Claimant**

AND

**DIANE HAYLOCK
(President of NICH)
NATIONAL INSTITUTE OF
CULTURE AND HISTORY
CRUISE SOLUTIONS**

**First Defendant
Second Defendant
Interested Party**

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Dr. Elson Kaseke along with Mr. Godfrey Smith for the claimants.
Mr. Eamon Courtenay SC along with Mr. Michel Chebat for the first defendant and Interested Party.
Ms. Lois Young SC for the second defendant.

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JUDGMENT

Introduction

This case is in truth, about access to one of the natural wonders of Belize: a series of caves through which the Caves Branch River flows. The main attraction in the stretch of the river and the caves which has given rise to this case is cave tubing, an activity which is very popular with tourists. It consists in the main, of participants in this activity floating on inflated inner tire tubes and riding down a river, in this case through the caves.

Downstream on Branch River is a cave popularly referred to as “Jaguar Paw”, perhaps because of the resemblance of this cave to the open mouth of a jaguar. The cave in contention in this case is the **No Hoc Chen Cave** which abuts the claimants’ property eponymously called “**Jaguar Paw Resort.**”

2. The 1st claimant in this case, is **Travelers Rest Lodge Belize Ltd.** It carries on business as Jaguar Paw Resort and is a licenced hotel and tour operator. Jaguar Paw Resort is situated in Frank’s Eddy Village at Mile 37 on the Western Highway. The location of the Resort and access to the **No Hoc Chen Cave** are central to this case, as will become apparent later in this judgment. The second claimant, **Ms. Donna Young** is a director and shareholder actively involved in the management of the Resort.

The first defendant, **Ms. Diane Haylock** is the president and chairperson of the Board of Directors of the **National Institute of Culture and History (NICH)**, the second defendant in these proceedings. **The interested party, Cruise Solutions (Belize) Ltd.**, is also in the tourism industry as a tour provider.

3. The interested party initially had a business relationship with the first claimant by which it subcontracted various aspects of its cave-tubing tour business operation at Cave Branch where the first claimant is located, to the first claimant. This relationship unraveled later and was terminated in December 2008. It is manifest from the materials put before the Court that it is the unraveling of this business relationship between the first claimant and the interested party that provided the spark that has ignited the present litigation.
4. The first claimant, Jaguar Paw Resort, uses **No Hoc Chen Cave** as a tourist destination for its customers. It offers its tourist clientele and others tubing trips through the **No Hoc Chen Cave**. This was the basis of the

business relationship between it and the interested party. However, a disagreement between the claimants and the interested party led to a rupture in their business relationship.

5. On 9th October 2008, the interested party wrote to the first claimant advising it that it had signed an agreement with NICH that would allow it to set up independent infrastructure at Caves Branch, and that this would provide it with facilities for its future role as a leading provider of cave tubing at Caves Branch and would no longer use the facilities of the first claimant.
6. The interested party's infrastructure on which construction commenced shortly after 9th October 2008, is situate very near the first claimant's Resort and it is being built on NICH's property.
7. The arrangement between the interested party and NICH that allowed the formerto operate its own cave tubing facilities at the site very close to the claimant's Resort had, unknown to the claimant and unannounced, been formalized in a written contract between NICH and the interested party dated 28 August 2008.
8. The claimants learnt of this contract on 24 December 2008 through a television news broadcast.
9. The contract itself received extensive media coverage and it embroiled the management of NICH in a firestorm of controversy. This resulted in the Board of the second defendant denouncing the contract and later attempted to terminate the employment of the first defendant. This later led to the temporary suspension of the first defendant as President of NICH by Cabinet.

10. But even before the execution of this contract, the Institute of Archaeology, a department of the second defendant, had acquired lands adjacent to the claimant's property. On a portion of this land leading to the claimants' Resort, it had erected a barrier just before the area where the structure constructed by the interested party is situated. At this barrier, a charge of \$10.00 per person, was collected for and on behalf of the Institute of Archaeology as entrance fee to "**No Hoc Chen Archaeological Reserve.**"
11. The barrier was erected on lands the Institute of Archaeology had purchased in 2002 and 2005. However, to access Jaguar Paw Resort, visitors and tourists and the general public have to pass through the barrier the Institute of Archeology had erected. This is manned by its personnel as was evident when the Court, in the company of the parties and their attorneys, paid a locus visit on 13 May 2009. The interested party and its attorney, Mr. Eamon Courtenay SC, did not however attend.
12. It is averred by Dr. Jaime Awe, the Director of the Institute of Archaeology that since 2002 when the properties adjacent to the claimants' Resort were bought and the barrier erected, Jaguar Paw Resort, the first claimant, had paid this \$10.00 entrance fee to access NICH's property in order to visit the **No Hoc Chen Cave** next to the claimant's Resort. The main road access to the Jaguar Paw Resort is through NICH's property. It is averred as well for NICH that it had always allowed Jaguar Paw free and unimpeded access to their property and that it is only patrons and visitors of Jaguar Paw who are not visiting the caves for cave tubing that are not charged the \$10.00 fee to pass through NICH's property. Anyone else visiting the **No Hoc Chen Cave** for cave tubing has to pay the \$10.00 fee at the barrier erected by the Institute of Archaeology.

13. It is however, the execution of the contract between NICH and the interested party and the subsequent disclosure of the existence of this contract that promoted the claimants to launch this action. The claimants felt that allowing the interested party to construct and operate the structure on NICH's land would enable the interested party to compete adversely for the business of cave tubing.
14. As a consequence of all this, the claimants sought and were given permission to seek judicial review of the contract between NICH and the interested party and the payment of \$10.00 per person for their patrons to access **No Hoc Chen Cave**.
15. **Relief Claimed by Claimants**
 - (a) *A Declaration that the contract entered into and executed on the 28th day of August 2008 by or on the instructions of the First Defendant on behalf of the Second Defendant purporting to grant to Cruise Solutions (Belize) Ltd. certain rights to construct and operate tourist facilities on the No Hoch Chen Archeological Reserve was unlawfully executed and null and void ab initio.*
 - (b) *An order of Certiorari to quash the said contract.*
 - (c) *A Declaration that the No Hoch Chen is not an Archeological Reserve and all the archaeological fees charged and collected by the*

2nd Defendant for entry thereto or for the use of the caves adjacent thereto (which caves are not owned by the 2nd Defendant) are unlawfully and illegally charged and collected.

(d) An order that the Second defendant pay damages or immediately refund the monies unlawfully collected by the 2nd Defendant from the 1st Claimant and its guests as archaeological entrance fees or as fees to use the said caves and not NICH's facilities at No Hoch Chen from the year 2002 when the Claimants and its guest began paying the said fees until the present.

(e) Any other order which the Court thinks just in the circumstances including an order that the Defendants or any of them pay the costs of these judicial review proceedings.

Issues in the case

16. In this action the claimants seek to impugn the validity of the execution of the contract and to challenge the propriety and lawfulness of the \$10.00 fee charged by the Institute of Archaeology for entrance to the “**No Hoc Chen Archeological Reserve.**”

The Contract between NICH and the Interested Party signed on 28 August 2008

17. Although this contract was signed on 28th August 2008, there was no announcement of its conclusion and it was not until 24th December 2008 that its existence was made public through a broadcast on Channel 7 nightly news. Evidently, the Board of NICH itself did not know of the conclusion of the contract. In a Press Release dated 31 December 2008, the Board of NICH denounced the contract as not having authorized, approved or ratified it. The Board went so far as attempting to terminate the employment of the first defendant as President of NICH. But this was subsequently substituted by Cabinet of a month suspension.
18. However, the contract itself was predicated on the “**No Hoc Chen Archeological Reserve**” as being in existence at the time of its conclusion. A major objective of the contract was to enable the parties to it (NICH and the Interested Party) to “*work in cooperation for the protection, management and safe use of **the Reserve** for tourism and related activities SPECIFICALLY pertaining to the construction and operation of a concession facility within **the Reserve**.*”
19. The validity of the contract and its execution by the second defendant were the subject of two legal opinions which were annexed to the first affidavit of the second claimant in these proceedings. However, in the light of developments during the hearing of this case it is no longer necessary for me to pronounce on the validity of the contract, save to declare that NICH shall execute any contract in accordance with the provisions of its governing statute: the National Institute of Culture and History Act – Chapter 331 of the Laws of Belize, Revised Edition 2000 (the “Act” hereinafter).

20. Specifically, the first defendant at the hearing put in evidence in her second affidavit excerpts from a resolution of the Board of Directors of NICH at a meeting held on 18th February 2009, directing the first defendant to inform the Court that the Board would re-execute the contract with the interested Party in accordance with the provisions of the NICH Act.
21. Mr. Eamon Courtenay SC for the first defendant and the Interested Party, confirmed to the Court that the Board of NICH of which the first defendant is the president, will execute the contract in keeping with NICH's Act.
22. I accordingly declared during the hearing that in the light of this development the contract between the second defendant and the interested party must be executed in accordance with the provisions of Chapter 331 – the NICH Act, that is the governing Act for NICH.
23. I hereby so declare, again.
24. Therefore, in so far as the substratum of the contract is concerned, as I have pointed out, it was predicated on the basis that there was a **No Hoc Chen Archeological Reserve**. By the provisions of section 59 of NICH Act only the Minister of Culture can, on the recommendation of the Board of Directors of NICH, declare by an order published in the *Gazette* an **Archaeological Reserve**.
25. There was no such Order by the Minister put in evidence declaring **NO HOC CHEN** an Archeological Reserve. Therefore, absent such an Order, even with the ratification by or consent of the Board of NICH, the substratum of the contract between NICH, the second defendant and the interested party, does not in law exist.

26. I however do not in the circumstances, feel compelled to pronounce on the validity or invalidity of the contract, save to say that as a statutory body, any contract entered into by NICH must, perforce, be in accordance with its statute.

The Position of the First Defendant as a Party to these Proceedings

27. Before I turn to a consideration of the issue of the charge of \$10.00 per person for entry to the “**NO HOC CHEN ARCHEOLOGICAL RESERVE**” it is perhaps necessary to consider the position of Ms. Diane Haylock, the President of NICH, as the first defendant in these proceedings.
28. I cannot see how the claimants can, in the face of the statutory provisions of section 88 of the Act, institute or maintain their claims against the 1st defendant Ms. Diane Haylock, the president of NICH. This section provides in terms:

“88. No action, suit, prosecution or other proceedings shall be brought or instituted personally against any member of the Board in respect of any act done bona fide in pursuance or intended execution of this Act.”

29. This section confers statutory immunity against suit, prosecution or other proceedings brought personally against any member of the Board of NICH. This provision of course, includes the president of NICH, who by section 7(1)(a) of the Act is a member of the Board of NICH.
30. In my view, it is no answer that Ms. Haylock is sued **qua** president of NICH. The protection against suit will still attach. In fact the claim against her is that she authorized or caused the agreement between NICH and the Interested Party to be executed. There has been no charge of *mala*

fides made against her; what she might have done, no doubt, was in the purported execution of the provisions of the Act. I am however satisfied that from the evidence, the contract was executed by a former Director of the Institute of archaeology and a former Administrator of the second defendant and not Ms. Haylock (see paras. 17 and 18 of Ms. Haylock's first affidavit).

31. In the circumstances therefore, I find that the 2nd defendant, NICH, is a sufficient and proper party to these proceedings and not Ms. Haylock, its president.
32. In the event, however, the bulk of the substantive hearing of this case was devoted to the legality or otherwise of the \$10.00 charged as entrance fee to the **"Caves Branch Archaeological Reserve"** or **No Hoc Chen Archaeological Reserve** and the refund of monies so collected from the first claimant. To this I now turn.

The charge of \$10.00 per person to enter "No Hoc Chen Archaeological Reserve" or "Caves Branch Archaeological Reserve"

33. The claimants have argued and submitted that the charge of \$10.00 per person exacted at the barrier by the Institute of Archaeology for entrance to the **"No Hoc Chen Archaeological Reserve"** or the **Caves Branch Archeological Reserve** is illegal as it has no basis in law and that the monies paid over the years since the erection of the barrier by patrons of Jaguar Paw be refunded by the defendants. The claimants say that they in fact paid these monies.
34. The claimants have claimed that for the years 2006 through to 2008, the sum of \$118,718.65 was paid to NICH as entrance fees on behalf of its patrons to Jaguar Paw Resort as entrance fee to **No Hoc Chen Archeological Reserve** (see para. 13 of the third affidavit of Donna

Young). But the exact amount the claimants say they paid to NICH in respect of the entrance fee is not from the evidence clearly stated with any precision, nor is the sum stated in their Statement of Case, that is their Application to move the Court for judicial review. For example in her third affidavit in respect of the entrance fee paid to NICH for the years 2006 through to 2008 was \$118,733.65; in her fourth affidavit at para. 6 she states as follows:

“6. According to the accounting records of Jaguar Paw, in 2003, Jaguar Paw paid NICH \$65,770.00 as entrance fees to No Hoch Chen for 6,577 guests at \$10.00 per guest. In 2004, Jaguar Paw paid NICH \$74,970.00 as entrance fees to No Hoch Chen for 7,497 guests at \$10.00 per guest. In 2005, Jaguar Paw paid NICH \$236,010.00 as entrance fees to No Hoch Chen for 23,601 guests. The amounts paid over the other years are contained in my earlier affidavit. Between 2003 and 2008, Jaguar Paw therefore paid NICH a total of \$376,750.00, and Jaguar Paw is requesting this Honourable Court to order NICH to refund Jaguar Paw all the monies paid as entrance fees.”

35. In her sixth affidavit she states at para. 2:

“There is now produced and shown to me marked DY1.1 a copy of the ticket issued by NICH to Jaguar Paw when Jaguar Paw paid the monies referred to in my previous Affidavits to NICH for its guests, who

passed the NICH-controlled barrier gate at No Hoch Chen. Each time Jaguar Paw paid the said monies, it would be issued with tickets like the one at DY1.1. Jaguar Paw paid the said monies from its own monies. Jaguar Paw honestly but mistakenly believed it was complying with the NICH Act provisions relating to archeological reserves in paying the money, and that likewise NICH was lawfully levying demand for such payment pursuant to the NICH Act.”

Exhibited to this affidavit are two copies of the ticket issued by NICH to visitors at the barrier. These clearly show the logo of the second defendant **NICH** above the “**The Institute of Archaeology**”, with the statement “\$10.00 (BZ) valid for one visit” to “**Caves Branch Archaeological Reserve.**”

36. This sum of \$10.00 is what the claimants say they have had to pay for each of their patrons who in order to access their Resort, must perforce have to go through the barrier installed on the second defendant's property adjoining the claimants'
37. The receipt of this payment is not denied by the defendant; it contends however, that it is only guests or visitors of the claimants who pass through its barrier for the purpose of going cave tubing that are required to pay this \$10.00 fee.
38. In order to estimate the force of the claimants' arguments, I think, it is necessary to analyze the provisions of the Act relating to **Archaeological Reserves, Ancient Monuments and Antiquities** and the power of NICH

(including the Institute of Archaeology, one of its Departments) to charge fees to the general public.

The Statutory Scheme on Ancient Monuments and Antiquities and Archaeological Reserves

39. The Act makes, in my view, a distinction, though not expressly stated, between **Ancient Monuments** and **Archeology Reserves**. It is undoubted however that together they form part and parcel of the historical and cultural heritage of Belize.
40. **Ancient monument** is defined in the Act to mean *“any structure or building erected by man or any natural feature transformed or worked by man, or the remains or any part thereof, whether upon any land or in any river, stream or watercourse or under the territorial waters of Belize, that has been in existence for one hundred years or more”*: section 33 of the Act. I need not reproduce the definition of **“Antiquity”** here as it is not material to this case. Section 37 of the Act however, vests in the State *“all ancient monuments and antiquities wherever situate whether upon any land or in any river, stream or watercourse, or under the territorial waters of Belize.”* Section 38 prohibits, except under a license in writing granted by the Director of Archeology, any person from having in his possession or custody any ancient monument or antiquity. The possession or custody without the Director’s written licence is made an offence and the forfeiture to the State of such ancient monument or antiquity in question.
41. Section 39 of the Act provides for a **register** of **ancient monuments and antiquities** and incorporates in this register, the register kept under

section 6 of the Ancient Monuments and Antiquities Act (Chapter 330 repealed).

42. There is no evidence in this case before me that the area in contention, the **No Hoc Chen Cave**, is in any register kept for the purposes of ancient monuments and antiquities.
43. There is evidence however, that the area is **an ancient monument**. This is deposed to in the several affidavits of Dr, Jaime Awe, the Director of the Institute of Archeology. I accept Dr. Awe as an expert given his credentials and expertise: see paras. 5, 2 and 15 of his third, fourth and fifth affidavits respectively.

“5. It is with this considerable experience that I have also conducted investigations on Caves Branch also known as Nohoch Che’en and I have identified considerable remains within these caves of ancient Maya activity.”

“2. As stated before in paragraph 6 of my third affidavit, Nohoch Che’en is an ancient monument. There is evidence of the activities and working of the Maya within the caves. This includes the modification of some areas of the cave, as for example, by the leveling of ledges and the floor within the cave. There are also carvings on the walls. Antiquities were also found in the caves.”

“15. At the river’s bank, the river itself flows out the cave. The exit is like the open mouth of a jaguar replete with stalactites. This is the magnificent Nohoch Che’en cave. Nohoch Che’en is an ancient monument.”

44. I am not however persuaded that there is any provision in the Act to charge or exact fees for visiting ancient monuments or antiquities, except of course, if they are in a museum or form part of an exhibition as part of the collection of the Institute of Archaeology. This is expressly provided for by section 35(k) of the Act.
45. **No Hoc Chen Cave** however, is *in situ* and the object of visitors who go there from the evidence, is to enjoy the sport of cave tubing. This particular form of activity which has proved an attraction for visitors, was from the evidence pioneered by the claimants, soon after they commenced operating the Jaguar Paw Resort in the early 1990s before the second defendant purchased its properties in the vicinity of the **No Hoc Chen Cave** and the claimants’ Resort in 2002 and 2003.
46. It is not easy to accept that NICH (and by extension the Institute of Archaeology), can charge admission fee at all, whether for cave tubing or other purposes, for entrance to **No Hoc Chen Cave**. To charge entrance fee to the public for example, to visit **Archaeological Reserve**, an Order of the Minister and published in the Gazette is necessary: see sections 67 and 68 of the Act. It would follow therefore, in my view, that to charge entrance fee to visit **Ancient Monument** such as **No Hoc Chen**, a similar Order would be necessary. That this is not expressly stated in the Act does not exclude it. It should however be remembered that the principal objective of the Act in relation to **Ancient Monuments** is to secure their registration and vesting them in the State. It is not contemplated in the Act

that **Ancient Monuments** would, like **Archaeological Reserve**, be readily visited by the public for which purpose admission fee could be charged.

47. It would therefore, in my view, be reading far too much into section 35(k) as the warrant for charging entrance fee to **No Hoc Chen Cave**, as contended for by NICH. This provision, in my view, enables the Institute of Archaeology to charge for services and admission in the context of the other activities specified in section 35 as the objects and functions of the Institute. These would include the publication of the results of the Institute's research, (d): to provide facilities to permit qualified individuals to study its collection – (e): for such services the Institute can charge fees. Also, the Institute may organize, sponsor, arrange for and participate in exhibitions, including travelling exhibitions in Belize and internationally. By sub paragraph (k) of section 35 the Institute can levy an admission fee for those events. Paragraph (k) of section 35 is not therefore a free standing provision on its own that would permit the Institute to charge fees to persons going cave tubing.
48. I cannot find any warrant for the Institute of Archaeology to charge for entrance to **No Hoc Chen** for the purposes of cave tubing. Of course, if the Institute provides inner tubes for persons going cave tubing, parking facilities and use of the bathroom and any other facilities on its property, it may charge for the provision of such services, but they are unrelated to **Ancient Monuments**.
49. In my view, the spirit and intention of the Act in relation to **Ancient Monuments and Antiquities**, is to vest these in the State (section 37) and to prohibit their possession by anyone except under a licence in writing granted by the Director of Archaeology in the prescribed form (section 38), and to provide for the registration of all ancient monuments and antiquities. Sections 39, 40 and 41 provide for the acquisition by the

Director of any ancient monument and antiquity registered under section 39 and for the payment of compensation for the person who had registered possession, custody or control of the ancient monument or antiquity. Section 45 of the Act imposes a duty on any person who finds an ancient monument or antiquity, to report it within fourteen days of the details of such finding to the Director of Archeology. And section 46 makes it an offence to fail to comply with the obligations to report such finding.

50. I find, however, no provision in the Act for the charging of fees to visit or view ancient monuments.
51. To be sure this does not necessarily preclude NICH from charging persons who utilize services or facilities it provides for persons who use its own facilities in and around **No Hoc Chen Cave**. But to charge persons who do not use any services or facilities provided by NICH and whose destination is the claimants' Resort for any purpose, including cave tubing, would not in my view fall within section 35(k) of the Act. This latter section allows the Institute of Archeology *“to charge for services and admission and use the revenue thereof for its purpose.”* Section 35 only states the object and functions of the Institute of Archaeology.
52. In my view, I do not think this provision can warrant NICH to charge persons who do not use any of its facilities in the area for the purpose of cave tubing.
53. In so far as an **Archaeological Reserve** is concerned, there is no definition provided in the Act. However, the Minister of Culture is given power by section 59 of the Act to declare one. This section provides in terms as follows:

“59. The Minister, on the recommendation of the Board, may by

Order published in the Gazette declare -

(a) any area of unalienated national land containing or adjacent to an ancient monument to be an Archaeological Reserve;

(b) any area of alienated national land, title to which has reverted to the State;

(c) any ancient monument acquired by the Director or the Minister pursuant to section 40(1) or (2) or to section 43(3) or to section 47, together with any land adjacent thereto, to be an Archaeological Reserve.”

54. It is common ground between the parties that the **No Hoc Chen Cave** is not an **Archeological Reserve**.

55. From the evidence it is only necessary to quote para. 10 of Dr. Jaime Awe’s fifth affidavit to ground this conclusion:

“10. I became the Director of Archaeology in April 2003. I always knew for sure that Nohoch

Che'en was not a declared archaeological reserve. I do not know why the NICH ticket or the chart say that it is the Caves Branch archaeological site (sic)."

56. There are legal consequences flowing from the declaration of an Archaeological Reserve: section 67 of the Act enables the Minister after consultation with the Director of Archaeology, to specify in an Order published in the **Gazette**, the Archaeological Reserve or any parts of it which shall by the order be entrusted to the care and control of the Minister responsible for tourism for the purpose of having such reserves visited by the public. The Minister of Tourism is given power under section 68 to make rules governing the reserves entrusted to him in respect of when and under what conditions as to **charges** or otherwise they shall be open to the public; he may also make regulations relating to sanitation and safety measures, the appointment and duties of wardens and caretakers.
57. No such Order declaring **No Hoc Chen** an Archaeological Reserve has been made or at least put in evidence. Nor is there in evidence an Order entrusting it to the Ministry of Tourism or that any regulations as to access or charges in respect thereto have been made.
58. *A fortiori*, therefore, there can be no basis in law, for the charge for entrance fees collected from patrons of the claimant's Resort. The evidence is clearly that the payment is in respect of visit to "**Cave Branch Archeological Reserve.**" See the exhibits to Donna Young's sixth affidavit already referred to at para. 34 of this judgment.

59. From my analysis of the statutory scheme relating to **Archeological Reserves** and **Ancient Monuments and Antiquities**, I can conclude that the receipt (or demand as the claimants argued) of \$10.00 per person from the claimants' guests at NICH's barrier, who want to go cave tubing in the **No Hoc Chen Cave**, can find no justification as payment for visit to an **Archeological Reserve**: **No Hoc Chen** is clearly not a declared Reserve and no regulations have been made by the responsible Minister in respect of when and under what conditions as to charges or otherwise, it shall be open to the public.
60. In so far as the status of **No Hoc Chen** as an **Ancient Monument** is concerned, it is not easy to justify the payment by persons who do not use any facilities provided by NICH at its site in the **area**. **The clear power of NICH under the Act is to provide a register for Ancient Monuments** and if needs be their acquisition by the Director of Archaeology on behalf of the State. NICH can only properly charge admission fees if such **Ancient Monuments** have been declared to be **Archeological Reserve** which can be done under paragraph (c) of section 59 of the Act, and a further Order made by the Minister of Tourism under section 68 to that end.
61. I therefore find no basis in law for the moment for the charge of \$10.00 per person for admission to **No Hoc Chen**, whether as an **Ancient Monument** or an **Archeological Reserve**.

Are the claimants entitled to a refund?

62. The issue of refund of money paid by a citizen to a public authority when there was no legal basis for the demand or payment in the first place is now part of the wider law of restitution.

The facts of this case and the relief for refund sought by the claimants raise in a stark relief whether the payments, over a period of time, made by the claimants to NICH for admission to **No Hoc Chen** should, in view of my conclusions in this case on the status of the No Hoc Chen Cave, be refunded.

63. I must confess to some difficulties in this regard; difficulties that stem from the particular facts of this case.
64. But the principle that a citizen is entitled to a refund where the public authority, had in law no right to demand or receive the payment is now established, although the parameters of this principle are not very clearly marked out or settled.
65. This principle as Dr. Elson Kaseke for the claimants correctly argued, has been affirmed by the courts as the **Woolich principle** after the name of the case in which the principle was restated and reaffirmed by the English House of Lords: **Woolich Building Society v Inland Revenue Commissioners (No. 2) (1992) 3 All E.R. 737, (1993) A.C. 70; (1992) 3 WLR 366 H.L.** In that case, it was held that money paid by a subject to a public authority in the form of taxes or other levies pursuant to an *ultra vires* demand by the authority, that money was prima facie recoverable forthwith by the subject as of right at common law together with interest thereon, regardless of the circumstances in which the tax was paid, since common justice required that any tax or duty paid by the citizen pursuant to an unlawful demand be repaid, **unless special circumstances or some principle of policy required otherwise.**

In that case, the appellant, **Woolich Building Society**, had paid, following a demand by the Revenue tax on interest and dividends pursuant to Regulations which the appellant successfully challenged on judicial

- review. It was eventually held by the House of Lords that Woolich was entitled to a repayment plus interest on the sum it had paid on the impugned Regulations.
66. Dr. Kaseke put much store on this principle in urging the court to order a refund of the monies paid by the claimants to NICH. Ms. Young SC has stoutly objected to this, one of the reasons being that **Woolich** was a case of tax or other levy, whereas in this case the payment was in respect of cave tubing in **No Hoc Chen Cave**.
67. I do not however, accept that the **Woolich** principle is limited to only cases of tax or levy. In my view, I think the principle is applicable to other cases where a public authority has demanded or received *ultra vires* payment. For only thus would common justice require and ensure that any payment by a citizen pursuant to **an ultra vires demand or receipt by a public authority should be repaid, unless special circumstances or principle of policy require otherwise.**
68. In a later case, **Kleinworth Benson Ltd v Lincoln City Council (1998) 4 All ER 513; (1998) WLR 1095**, the House of Lords abolished the distinction between mistake as to facts and mistake of law. Under the latter, up until 1998, recovery or refund of money paid under a mistake of law was problematic if not impossible. In that case it was held, among other reasons, that it was no defence to a claim for the restitution of money paid or property transferred under a mistake of law, that the defendant honestly believed when he received the money or learnt of the transfer, that he was entitled to retain the money or the property. However, **the proper course would be to identify particular sets of circumstances which, as a matter of principle or policy, that would lead to the conclusion that the recovery should not be allowed.**

69. Therefore, though on the **Woolich** principle as reiterated in **Kleinworth Benson**, the claimants are entitled to a refund of the payments NICH received in respect of the claimants' guests who went cave tubing in **No Hoc Chen Cave**, there being no legally justifiable basis to ground such payments, I find myself however, in the light of the facts of this case, unable to order such a refund as the claimants have urged me to, I am constrained by the following considerations to come to this conclusion.
70. In the first place, the claimants have not exactly quantified the amount they want refunded. This is nowhere stated in the Statement of Case of the claimants (Application for judicial review). Instead varying sums are stated in the affidavits of Donna Young on behalf of the claimants. See for example her third affidavit at para. 13 where she states that *“For the years 2006 through 2008 the (claimant) has paid the sum of \$118,713.65 to NICH as entrance and park fees on behalf of its guests for visiting the caves and or cave tubing ...”*

It is to be noticed that this sum included “Park and Entrance fees” as appears clearly on **Exhibit DY 3** of Donna young’s affidavit. It is reasonable therefore to conclude that the payments were not all in respect of admission fees.

In my view, it would have been necessary to state in the Application after permission for judicial review was granted, the exact sum being sought as a refund of payment for admission. Also, contrary to Order 56.7(3) and (4) of the Supreme Court (Civil) Procedure Rules 2005, the claimants did not file with their claim form the evidence on affidavit of the details of the sums they want refunded. They only filed affidavit evidence in respect of this much later, when the date of the hearing of the case was already fixed: see third and fourth affidavits of Ms. Donna Young filed on 10th February and 29TH April, 2009.

That the claimants failed to do so may perhaps be understandable and this leads me to the second consideration, why they should not have a refund ordered in their favour. The original objective of the claimants when they launched these proceedings by seeking permission for judicial review, was to impugn the contract between NICH and the interested party. The claim for a refund of payments seems to have been arrived at as an after thought, an adventitious claim as it were.

Thirdly, there is no doubt that NICH has improved the access road in the locale: the road leading almost to NICH's property line with the claimants' is improved and paved. The guests of the claimants traverse this road to get to Jaguar Paw Resort after NICH's property. It is reasonable to infer that NICH contributed to or paid for this improvement, probably with some of the monies collected from the claimants' guests at the barrier before proceeding to Jaguar Paw Resort.

Most significantly, I am not convinced or satisfied from the evidence that though the claimants paid the \$10.00 per person entrance fee to NICH in respect of their guests, that these monies came from the claimants' own pocket. There is evidence in Ms. Donna Young's affidavits that the claimants did pay to NICH sums of monies representing the entrance fees for their guests. But there is evidence that the claimants advertised their tour operations, including cave tubing, to prospective customers, with prices that include entrance fees, where applicable. It would in my view, take a grandly generous and hospitable hotel proprietor or tour operator who would pay on behalf of its guests or clients, entrance fees to activities as the claimants want me to believe. I am therefore of the view that even though there is evidence of payments by the claimants to NICH, they would have included these payments in the prices their guests had to pay. In other words, they would have passed on the entrance fees to their patrons.

71. I am not convinced that in the light of the foregoing considerations this is a proper case in which I should exercise my discretion to order a refund of any sum to the claimants in respect of payments they claim to have made to NICH on behalf of their guests who went cave tubing.

Conclusion

72. In the light of all the foregoing I conclude as follows:
- i) I declare that any contract entered into by NICH must be in compliance with its parent Act, namely the National Institute of Culture and History Act.
 - ii) I declare that **No Hoc Chen** is not an **Archeological Reserve** and that there was no basis for the collection by NICH of \$10.00 per person entrance fee for “**Caves Branch Archaeological Reserve**” as there is in law no such **Archaeological Reserve**.
 - lii) I do not feel able however, for the reasons stated in this judgment, to order a refund of monies NICH collected in respect of entrance fees to **No Hoc Chen**.
 - iv) The claimants shall pay the costs of the first defendant which I award at \$10,000.00.

In the result however, I award the costs of these proceedings to the claimants, fit for two counsel, to be taxed if not agreed.

A. O. CONTEH
Chief Justice

DATED: 17th June 2009.