

IN THE SUPREME COURT OF BELIZE, A.D. 2007

Claim No. 404 of 2007

	(PORTS OF BELIZE LIMITED	1st CLAIMANT
	(BELIZE PORTS LIMITED	2nd CLAIMANT
	(
BETWEEN	(AND	
	(
	(ATTORNEY GENERAL OF BELIZE	DEFENDANT

BEFORE: The Honourable Madam Justice Minnet Hafiz Bertram

Appearances: Mr. Eamon Courtenay S.C., along with Mrs. Ashanti Arthurs-Martin appearing for the Claimants
Mr. Denys Barrow S.C., along with Ms. Naima Barrow and Ms. Magalie Perdomo appearing for the Defendant

JUDGMENT

Introduction

1. This claim arises out of the privatization by the Government of Belize of the Port facilities situated in Port Loyola, Belize City and Commerce Bight, Dangriga Town.
2. Port of Belize Limited (“PBL”), the first Claimant, is a limited liability company which the Government of Belize incorporated on the 15th November, 2001. It was formed for the purpose of succeeding to the operational business of the Belize City Port which was previously the responsibility of the Belize Port Authority.
3. Belize Ports Limited (“BPL”), the second Claimant acquired over 99% of the issued shares in PBL.

4. The Attorney General, the Defendant is the legal representative of the Government of Belize.
5. On 18th January, 2002, PBL was granted a contractual licence (“Licence”) for the management and operation of the Belize City Port. PBL was also granted on the same date a Lease over the Commerce Bight Port. On the said day, after PBL had been issued the Licence and Lease, the Government of Belize offered its shares in the company to the public for purchase. The offer was contained in a Government of Belize Prospectus dated 18th January, 2002.
6. The second Claimant, BPL offered to purchase the shares in PBL and was selected by the Government of Belize as the strategic investor to acquire a majority of the shares in PBL.
7. By a Share Purchase Agreement dated 28th March, 2002, BPL bought 99.55% of the Government shares in PBL. On 1st February, 2003, BPL acquired control of the Ports. The Government of Belize thereafter entered into several agreements with PBL and BPL to implement and regulate the privatization. This includes the Cruise Terminal Agreement dated 29th April, 2004 and the Privatization Cooperation Agreement dated 7th December, 2005.

The Claim

8. In a claim filed on 11th September, 2007, PBL and BPL claim a number of declarations that the Government has breached the various agreements and as a result they suffered damages. The Claim is for the following:

1. A Declaration that the Defendant is in breach of a Prospectus dated 18th January 2002 in which was contained an offer by the Defendant to sell the Defendant's shareholding in the 1st Claimant.
2. A Declaration that the Defendant is in breach of the several Agreements set out below, namely:
 - a. A Share Sale Agreement made the 28th March 2002 between the Defendant and the second Claimant;
 - b. An Agreement made the 29th April 2004 between the Defendant, Belize Cruise Terminal Limited, Carnival Corporation and the second Claimant;
 - c. A Privatisation Cooperation Agreement made the 7th December, 2005 between the Defendant, and the first and second Claimants;
3. A Declaration that the Defendant is in Breach of a license dated the 18th January 2002 issued pursuant to section 105 of the Belize Port Authority Act granted to the 1st Claimant.
4. A Declaration that the Defendant is in Breach of a Lease dated 18th January 2002 issued pursuant to section 107 of the Belize Port Authority Act granted to the first Claimant.
5. Damages for breach of the License, the Lease and the Agreements.
6. Damages for breach of warranties made by the Defendant to the first and second Claimants which the Claimants relied upon to their detriment.

7. Damages for misrepresentations made by the Defendant to induce the Claimants to enter into the above mentioned agreements, the License and the Lease knowing and/or being negligent as to whether the material representations and statements were false.
8. Further or other relief and costs.

The Various Agreements

Share Purchase Agreement

9. The Share Purchase agreement was made on 28th March, 2002 between the Government of Belize and BPL. This Agreement was signed for the Government by the Minister at the time, of Budget Management, Investment and Public Utilities. The Directors at the time signed for BPL.
10. Clause 3 of the said Agreement provides for “Taxation and Foreign Exchange Matters”. Clause 4 provides for “Matters Relating to Future Operations and Corporate Governance of PBL”. The Claimants say that the Defendant failed to honour clauses 3.1 3.2 and 4.3 of the Agreement by not providing the necessary tax and duty exemptions as agreed therein.

Cruise Terminal Agreement

11. The Cruise Terminal Agreement is dated 29th April, 2004 and made among the Government of Belize, Belize Cruise Terminal, Carnival Corporation and BPL. This was signed by the Prime Minister at the time for the Government of Belize, Vice-President for Carnival Corporation, Director for Belize Ports Limited and Director for Belize Cruise Terminal Limited.

12. The claimants say that the Defendant is in breach of Clause 8 of the Agreement which provides for an option for a third party to build a port for cruise ships in Stake bank only, subject to BPL's existing and continued rights to all revenue streams of the PBL.

Privitization Cooperation Agreement

13. The Privitization Cooperation Agreement ("PCA") is dated the 7th December, 2005 and executed by the Prime Minister at the time, and the Chairman for PBL and BPL.
14. The Claimants say that pursuant to the PCA the parties agreed to take certain steps to implement the privatization and to enable the Claimants to more effectively and legally manage and operate the Port operations but they failed to do so.

License

15. On 18th January, 2002 the Defendant issued a License to PBL pursuant to section 105 of the Port Authority Act. The Licence was issued by the then Minister of Works, Transport and Communications, Citrus and Banana Industries. The Claimants say at paragraph 22 of the Claim that the Defendant failed or refused to discharge its obligations under the License which has undermined PBL's ability to manage and operate the Port and has caused the Claimants to suffer loss and injury. The particulars of the breach are that the Defendant has failed to allow the Claimants to collect the charges as set out in clause 6.5 of the Licence and/or has refused to enact the necessary legislation required to enable the Claimants to legally collect the said charges.

Lease

16. On 18th January, 2002 the Defendant issued a lease to PBL pursuant to section 107 of the Belize Port Authority Act. At paragraph 25 of the Claim, the Claimants say that the Defendant has failed to allow the Claimants to collect the charges as set out in Clause 6.5 of the Lease and/or has refused to enact the necessary legislation required to enable the Claimants to legally collect the charges. The provisions of Clause 6.5 of the Lease is identical to Clause 6.5 of the License.

Defence

17. The Government of Belize disputed the claim on factual and legal basis.
18. As a matter of fact, the Defendant says that in some instances, the relevant agreement created no obligation to do the things the Claimant avers. In other instances, the Defendant says that it performed the obligations the Claimants say were not performed. Further, by virtue of a Settlement Agreement they settled all outstanding issues. Also, that there has been no misrepresentation.
19. As a matter of law, the Defendant says that the Share Purchase Agreement, the Privatization Cooperation Agreement and the Cruise Terminal Agreement and any amendments thereto are subject to the implied term that all promises and or undertakings made by the Government are subject to all relevant statutory requirements and/or statutory or executive approvals being properly and lawfully met and obtained.

20. The Defendant further says, that in so far as the Share Purchase Agreement, the Privatization Cooperation Agreement and the Cruise Terminal Agreement, the License and the Lease and any amendments thereto purport to fetter the exercise of statutory duties and powers, those clauses are unenforceable.
21. Further, that if there is an obligation by the Government to enact legislation, this would be unenforceable in that it purports to fetter the power of the legislature to legislate for peace, order and good government of Belize.

Witnesses

22. The Claimants' witness is Mr. Arturo Vasquez, who is the Receiver of the Claimants and was so appointed on the 4th January, 2012. He was not cross-examined by the Defence. The Defendant in their written submissions submitted that Mr. Vasquez's evidence is limited to what is contained in his witness statement and the attached supporting documents. That beyond producing relevant documents there is no weight to the evidence of Mr. Vasquez, since he was appointed as a Receiver about a decade after the execution of the agreements, hence the reason he was not cross-examined.
23. The witness for the Defence is Mr. Joseph Waight, Financial Secretary. He was cross-examined. Although Mr. Waight was not involved in the execution of any of the Agreements, he was involved in implementing several elements in the Privatization Cooperation Agreement.

Objection on pleadings

24. An objection was raised by the Claimants in relation to pleadings in their written submissions. I will first deal with this preliminary issue first.
25. The Defendant in their written submissions contended that any provision in any agreement by which the Government purported or might have been understood to undertake to pass legislation is *ultra vires* the Executive Government, contrary to public policy and usurpation of the functions of the legislature.
26. The Claimants at paragraph 70 of their written submissions in response to this argument contended that the Defendant has not pleaded the defence that the Government was not competent to enter into any agreement to enact legislation as it is *ultra vires* the Executive Government, contrary to public policy and usurpation of the functions of the legislature. As such, the Defendant cannot rely on this pleading.
27. The Defendant in reply submitted that this argument is not true. They referred to paragraphs 7 and 13 (b) of their defence which state:

Further, the Defendant states that Clauses 3.1, 3.2 and 4.3 of the Share Purchase Agreement are unenforceable as clauses which fetter the exercise of statutory duties and powers and prevent the exercise of those duties for public purposes.

The Defendant avers that the PCA did not impose upon the Defendant an obligation to enact legislation required to grant duty and tax free status to the Claimants. The Defendant further aver that if there is such an obligation (which it is

not admitted) such an obligation would be unenforceable in that it purports to fetter the power of the legislature to legislate for the peace, order and good government of Belize.

28. The Defendant submitted that these paragraphs above shows that it was always an express contention of the Defence that if these agreements obliged the Defendant to enact legislation it was an unenforceable agreement. That unenforceability goes further than fettering the power of the legislature to legislate. Further, that such an agreement is beyond the power of the executive to legislate and that the Executive cannot bind the legislature.
29. It is clear from paragraphs 7 and 13(b) that a defence of unenforceability has been raised in so far as the Agreements fetter the exercise of statutory duties and purports to fetter the power of the legislature to legislate. I agree with the Defendant that unenforceability goes further than fettering the power of the legislature. The court could, where it finds that the agreements purported to fetter future power of the legislature to legislate, arrive at a conclusion that the undertaking to enact legislation is unenforceable because it is *ultra vires* the Executive Government, contrary to public policy and usurpation of the functions of the legislature. As such, I respectfully disagree with Learned Counsel for the Claimants that the Defendant cannot rely on this argument because it was not pleaded.

Issue: 1

Whether Clauses 3.1, 3.2, and 4.3 of the Share Purchase Agreement are enforceable.

30. The Claimant seeks a Declaration that the Defendant is in breach of the Share Sale Agreement made the 28th March 2002 as they failed to honour clauses 3.1 3.2 and 4.3 of the Agreement by not providing the necessary tax and duty exemptions as agreed therein. The Defendant in their Defence states that Clauses 3.1, 3.2 and 4.3 of the Share Purchase Agreement are unenforceable as clauses which fetter the exercise of statutory duties and powers and prevent the exercise of those duties for public purposes.
31. The Defendants also say that the Share Purchase agreement among other agreements are subject to the implied term that all promises and or undertakings made by the Government are subject to all relevant statutory requirements and/or statutory or executive approvals being properly and lawfully met and obtained.
32. Both Mr. Vasquez and Mr. Waight exhibited the Share Sale Agreement which is headed 'Share Purchase Agreement'. See Exhibit "AV 5". Clauses 3.1, 3.2 and 4.3 of the Agreement state:

Taxation and Foreign Exchange Matters

3.1 The Government shall take such steps as may be necessary to ensure that no Belize Taxes of any nature or kind (including stamp duties, if any, withholding taxes or similar taxes), on dividends, interest, debt obligations, management fees, or fees for professional and technical

services made or paid by PBL shall be levied, payable or applicable by or to the Government, its agencies, departments and political subdivisions as well as all local, regional and municipal governments on such payments by PBL.

3.2 The Government shall take such steps as may be necessary to ensure that no Belize foreign exchange restrictions, stamp duties, taxes or other Government charges of a similar nature, shall be levied, payable or applicable, on any payments of dividends, interest, repayment of principal, or other debt obligations, management fees, or fees for professional and technical services by PBL to the Government, its agencies, departments and political subdivision

4.3 The Government shall take such steps as may be necessary to ensure that PBL shall continue to be exempt from:

- (1) Belize import duties, excise taxes or other similar duties or Taxes (collectively "Duties") on goods obtained by PBL from outside Belize;*
- (2) Belize sales taxes or value-added taxes or any similar taxes (collectively "Sales Taxes") and Duties on fuel and lubricants; and*
- (3) any Duties or Sales Taxes on goods or services acquired for purposes of building any Government approved capital projects.*

The evidence

33. Mr. Vasquez's evidence is that the Defendant has not provided PBL the tax and duty exemptions as agreed and therefore, they are in breach of the Share Purchase Agreement. Mr. Waight's evidence which has not been disputed is that PBL and BPL have

been receiving tax and duty exemptions on a per request basis. See paragraphs 19, 20 and 21 of his witness statement. Mr. Waight at Exhibit J.W. '5' exhibited seventy one letters from the Ministry of Finance which showed that BPL was given exemptions from 2002 to 2010. In cross-examination, Mr. Waight testified that the Government cannot waive the stamp duties but sometimes forgoes the collection of the said stamp duties. But, in relation to import duties, Mr. Waight testified that the Government routinely granted and continue to grant waivers for import duties on operating items for the Port of Belize. The evidence also showed that over the years PBL imported boats, pick-up trucks, sport utility vehicles, motor cycles, tractors, excavators, cement, steel and other things without paying any duties.

Submissions for the Claimants

34. The Claimants contended that Mr. Waight, under cross-examination could not point to any steps that had been taken by GOB to ensure that the exemptions stated in the Share Purchase Agreement were granted to PBL. They referred to Mr. Waight's evidence which showed that duty exemptions were granted on a case by case basis and that in some cases exemptions had been refused. Also, they submitted that PBL and BPL were required to pay General Sales Tax and Environmental Tax and duty on foreign exchange transactions.

Submissions for the Defendants

35. The Defendant submitted that Clauses 3.1, 3.2 and 4.3 amount to a fetter on future executive action because the said clauses sought to bind the Minister of Finance to exercise his discretion as to the granting of exemptions in a certain manner. Learned Senior Counsel Mr. Barrow and Ms Barrow in their written submissions for

the Defence, relied on the case of **Rederiaktiebolaget Amphitrite v R (1921) All ER Rep 542**, and submitted that it is settled law 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.”*

Claimant's reply

36. The Claimants in reply to this argument submitted that the covenants made by the Government in the various agreements do not fetter the Executive's discretion. That the rule laid down in **The Amphitrite** case is that the Executive cannot fetter future executive action by contract in relation to matters which concern the future welfare of the state. Further, it has not been demonstrated by the Government that any of the covenants relate to the future welfare of the state.
37. The Claimants further contended that the rule in **The Amphitrite case** does not apply to commercial contracts. That the various contracts between the Claimants and the Government were commercial contracts related to the privatization of the Belize City and Commerce Bight Ports and there is no law preventing the Crown from privatizing the Ports.
38. The Claimants argued that **The Amphitrite case** had been criticized by Lord Denning in **Robertson v Minister of Pensions (1949) KB 227**. Further, that the rationale for the decision in **The Amphitrite case** was based on the fact that the Crown servants are dismissible at will.
39. The Claimants relied on the judgment of Mason J in **Ansett Transport (Operations) Pty Ltd. v Commonwealth (1977) 139**

CLR 54 where he highlighted the criticisms of the **Amphrite case**. They submitted that on the interpretation of the rule by Mason J, none of the covenants seek to prevent any public body from performing a statutory duty or exercising a discretion. That the Government of Belize agreed to take the steps necessary to ensure certain fiscal exemptions were granted and they failed to do so.

40. The Defendant in response submitted that the **Amphrite case** has not been reversed and remains good law. Further, the **Ansett case** affirms the principle in the **Amphrite case**.

Fettering of future executive action

41. The question that arises for consideration is whether Clauses 3.1, 3.2 and 4.3 of the Share Purchase Agreement are clauses which fetter the exercise of statutory duties and powers and prevent the exercise of those duties for public purposes.

Criticisms

42. I will commence with the criticisms of the **Amphrite case**. The Claimants made extensive submissions on the criticisms of this case and I acknowledge that the principle in the case has been criticized. However, as submitted by learned Senior Counsel, Mr. Barrow in oral submissions, this case remains good law. I am in agreement with this submission. This case has not only been criticized but has been acknowledged also and applied in other cases. One such case is, **Revere Jamaica Alumina Ltd v Attorney General (1977) 26 WIR 486, at page 490**, where Smith CJ had this to say:

There is no doubt that this principle, called the doctrine of executive necessity, is still valid today, though it has been criticized and questions have been raised regarding its precise scope and effect. It is acknowledged by text-book writers. In ***Wade and Phillips' Constitutional Law (8th edn)*** the learned authors, basing themselves on **the *Amphitrite (1921) All ER 542, (1921) 3 KB 500***, said (at p 680): “There is, moreover, a rule of law, the exact extent of which it is not easy to determine, that the Crown cannot bind itself so as to fetter its future executive action.” It is also acknowledged in the cases. Devlin LJ (as he then was) cited **the *Amphitrite case*** ... among others, in support of his statement in ***Commissioner of Crown Lands v Page (1960) 2 QB 274 (1960) 2 QB 274*** at p. 291 that:

When the Crown, or any other person, is entrusted, whether by virtue of the prerogative or by statute, with discretionary powers to be exercised for the public good, it does not, when making a private contract in general terms undertake (and it may be that it could not even with the use of specific language validly undertake) to fetter itself in the use of those powers, and in the exercise of its discretion.

Smith CJ then went on to say that, “*Whatever doubt exist as to the precise limits of the principle, it is clear that on the grounds of public policy, it allows freedom*

of executive action in matters fundamental for effective government and for the general welfare of the community (see J D B Mitchell's Contracts of Public Authorities (1954), p 56). It is also clear on the authorities that when the principle applies it overrides existing, and conflicting, contractual rights and renders them unenforceable in an action against the government for their breach.

43. The **Amphitrite case** is also cited by the authors of **Halsbury's Laws of England** in relation to contracts made by the Crown. In **Halsbury's Laws of England (Volume 1(1) (Reissue)) para 33** it states:

33. Undertaking not to exercise a power

Public bodies cannot disable themselves by ..contract from fulfilling their obligations to exercise their powers and duties for public purposes; and an agreement or undertaking which purports to impose or would have the effect of imposing such a fetter is void. This is not to say that in no circumstances can a public body enter into a binding contract restricting the exercise of a statutory discretion; the contract will be void only if it is incompatible with the proper discharge of a public responsibility.

The Ansett case

44. The Claimants relied on the **Ansett case** to show that the **Amphitrite case** was criticized. I agree with the Defendant that the **Ansett case** in fact supports the principles in the

Amphitrite case. The Claimants say that Mason J highlights at page 74 the extensive criticism and seems to agree that the rule expressed in **The Amphitrite** is too general. The paragraph relied on is at page 74 which states:

Public confidence in government dealings and contracts would be greatly disturbed if all contracts which affect public welfare or fetter future executive action were held not to be binding on the Government or public authorities. And it would be detrimental to the public interest to deny the government or public authority power to enter into a valid contract merely because the contract affects the public welfare. Yet on the other hand, the public interest requires that neither the government or a public authority can by contract disable itself or its officer from performing a statutory duty or from exercising a discretionary power conferred by or under a statute by binding itself or its officer not to perform the duty or to exercise the discretion in a particular way in the future. (emphasis added)

45. This passage in my view does not show that the rule in the **Amphitrite case** is too general but, in fact, as shown in the last sentence, it supports the principle.

Rationale for the decision in the **Amphitrite case**

46. The Claimants contended that the rationale for the decision in the **Amphitrite case** was based on the fact that Crown servants are dismissible at will. I respectfully disagree with the Claimants argument. The rule that the Crown cannot deprive itself of the power of dismissing a servant at will is only part of the wider principle that the Crown cannot by contract fetter its future executive action. See **Halsbury's**

Laws of England (Volume 8(2) (Reissue)) para 387

where it states:

.....it remains the technical position that in the absence of special statutory provisions, all contracts of service under the Crown are terminable without notice on the part of the Crown. This is so even if there is an express term to the contrary in the contract, for the Crown cannot deprive itself of the power of dismissing a servant at will, and that power cannot be taken away by any contractual arrangement made by an executive officer or department of state. It has been held that this rule is only part of the wider principle that the Crown cannot by contract fetter its future executive action. (emphasis added)

47. The learned authors at footnote 6, cites the **Amphitrite case** as authority for the principle. It says that the case was distinguished and criticized by Denning J in **Robertson v Minister of Pensions**, but that his judgment was itself criticized in **Howell v Falmouth Boat Construction Ltd. (1951) AC 837 at 845.**

Do Clauses 3.1, 3.2, and 4.3 of the Share Purchase Agreement relate to the future welfare of the state?

48. Learned Counsel for the Claimants submitted that it has not been demonstrated by the Government that any of the covenants relate to the future welfare of the state. In my view, these Clauses

without a doubt relate to the future welfare of the state. Taxes and duties are payable by law to the Executive which goes into the Consolidated Revenue for public purposes. See **section 114(1) of the Belize Constitution, Chapter 4**. The undertaking by the Minister to grant exemptions from payment of future tax and duties would frustrate the objects of many statutes, including the **Customs and Excise Duties Act, Chapter 48, Income and Business Tax Act, Chapter 55 and Stamp Duties Act, Chapter 64**. The whole purpose of these Acts is to generate revenue for public purposes, hence the reason exemptions of future taxes and duties relate to future welfare of the state.

Does the doctrine of executive necessity or the fettering of future executive action applies to commercial contracts?

49. The Claimants contended that the rule in the **Amphitrite case** does not apply to commercial contracts. That the various contracts between the Claimants and the Government were commercial contracts in relation to the privatization of the Belize City and Commerce Bight Ports. Further, there is no law preventing the Crown from privatizing the Ports. The Claimants relied on **Halsbury's Laws of England 4th Edition, Volume 1 (1) paragraph 179** but only in relation to the sentence which says:

..... A public body cannot by contract fetter its right or duty to exercise a discretion vested in it by law, although this principle appears to be limited to contracts which are incompatible with the discharge of its functions and so will not normally include commercial contracts.

50. I think to get a clearer understanding of what the Learned authors are saying, the sentences before and after this quote are important. Paragraph 179 speaks about Crown contracts and restitution. The relevant portion states:

Contract and Restitution

179. General Principles

Although the ordinary principles of the law of contract are relevant to contracts made with the Crown and public authorities, certain special considerations attach to the contractual capacity of the Crown and other public bodies. A public body cannot by contract fetter its right or duty to exercise a discretion vested in it by law, although this principle appears to be limited to contracts which are incompatible with the discharge of its functions and so will not normally include commercial contracts..... Public bodies cannot enter into contracts which are beyond their powers and the manner in which a public body enters into a contract may be controlled....

51. The learned Authors cites the **Amphitrite case** as the authority for the fettering of discretion.
52. See also ***Halsbury's Laws of England (Volume 9(1) (1) (Reissue)) para 720*** which states:

(ii) Commercial Agreements

720. The general rule.

.... Further, it is not within the competence of the Crown to make a contract which would have the effect of limiting its power of future executive action.

53. *The words “and so will not normally include commercial contracts”,* in my view, cannot and do not mean that the principle will not apply to commercial contracts at all. The undertakings in commercial contracts which purports to fetter future exercise of statutory powers or future executive action must be considered. The privatization of the Port is not the problem as the Government has the power to enter into such commercial contracts. However, the clauses which fetter the future exercise of statutory powers or other future executive action are unenforceable. Clauses 3.1, 3.2 and 4.3 are not clauses which are normally found in ordinary commercial contracts. These are clauses concerning an agreement by the Minister to grant tax and duty exemptions in advance to the Claimants. These matters fall within statutory regulations. As such, it is my view that the principle applies to commercial contracts in so far as the clauses therein fetter the future exercise of statutory powers or other future executive action.

Determination

54. The undertaking given by the Minister on behalf of the Executive is to grant general exemptions of future taxation and duties as shown in Clauses 3.1, 3.2 and 4.3 of the Share Purchase Agreement. The Minister by doing so, has disabled himself by contract to collect the said taxes and duties. The collection of taxes is vested in the Executive for public purposes and to give an undertaking not to exercise this power is incompatible with the proper discharge of a public responsibility. As such, applying the **Amphitrite case**, the undertakings given by the Minister in the Share Purchase Agreement not to exercise this power to collect taxes and duties in the future from the Claimants, have the effect of imposing a fetter on future exercise of statutory powers or other future executive action and is void. Accordingly, I find that

Clauses 3.1, 3.2 and 4.3 of the Share Purchase Agreement are unenforceable.

Issue : 2

Whether the Defendant has breached Clause 6.5 of the Licence and Clause 6.5 of the Lease.

55. The Claimants claim is that the Defendants undertook to take certain legislative and other steps which were required to enable PBL to legally manage and operate Port Loyola. The particulars of the breach being that the Defendant has failed to allow the Claimants to collect the charges as set out in Clause 6.5 of the License and Clause 6.5 of the Lease and/or has refused to enact the necessary legislation required to enable the Claimants to legally collect the said charges.

56. The evidence of Mr. Vasquez as shown in his witness statement is that that PBL has been statutorily authorized to collect cargo dues. **By Statutory Instrument No. 12 of 2008, Belize Port Authority (Tariff) (Amendment) Regulations 2008**, the Government statutorily empowered PBL to collect cargo dues from all freight or commercial vessels (excluding cruise ships) callings at its facilities at Port Loyola and at Commerce Bight. See Annex 8 to Mr. Vasquez Witness Statement.

57. Mr. Vasquez in his oral testimony said that the Government has not implemented the legislative framework to enable it to collect port dues and that it is the Belize Port Authority that collects port dues.

Clause 6.5 of the Licence states:

The “Service Charges” accruing to the Licensee including those charges for general cargo as prescribed by the Authority from time to time shall be:

- (i) Berthage*
- (ii) Cargo Handling ...*
- (iii) Storage charges ...*
- (iv) Provision of Utilities ...*
- (v) Running Lines*
- (vi) Pilotage*
- (vii) Dock*
- (viii) Cranes*
- (ix) Opening and closing of hatches ...*
- (x) Cargo Control*
- (xi) Land transportation within port premises ...*
- (xii) Cargo classification*
- (xiii) Stripping of containers ...*
- (xiv) Cargo Packing ..*
- (xv) Cargo repair ...*
- (xvi) Weighing ...*
- (xvii) Lashing supplies ...*
- (xviii) Garbage collection ...*
- (xix) Warehousing ...*
- (xx) Container repairs ...*
- (xxi) Tugs*
- (xxii) Licence Fees ...*

Clause 6.5 of the Lease is identical to Clause 6.5 of the License as shown above and need not be repeated.

58. The Claimants failed to adduce any evidence as to which of the charges they were not collecting under Clause 6.5. of the Lease and Clause 6.5 of the License. Mr. Vasquez’s evidence is in relation to Port dues. He said that they were not collecting port dues and that it is the Port Authority that is collecting Port dues. Learned Counsel for the Claimant in written submissions submitted that while PBL has so far not made any claim in

relation to its ability to collect other service charges listed at clause 6.5 of the Lease and License, the evidence is that the Government has not implemented the legislative framework to enable it to collect port dues.

59. The evidence of Mr. Vasquez shows that PBL has been statutorily authorized to collect cargo dues as shown by Statutory Instrument No. 12 of 2008. An examination of Clause 6.5 of the Lease and License does not show that there was an agreement for the Claimants to collect port dues. Clause 6.5 speaks only of “Service charges” and no claim was made for the collection of Service charges. As such, there was no obligation for the Defendant to enact legislation for the collection of Port dues. Accordingly, I find that there was no breach by the Defendant of Clause 6.5 of the Lease and Clause 6.5 of the Licence.

Issue: 3

Whether the Defendant is in breach of Clause 8 of the Cruise Terminal Agreement

60. The Claimants at paragraph 15 of their claim say that the Defendant is in breach of Clause 8 of the Cruise Terminal Agreement because they failed to honour the option therein contained and has failed to make the arrangements necessary to ensure the revenue flow to PBL as required.
61. The Defendant denies the breach and said that there has been no operational cruise ship port at Stake Bank and no cruise ships have docked there.

62. Clause 8 of the Cruise Terminal Agreement states:

8. Stake Bank Port

BPL will offer “no objections” for a third party to build a port for cruise ships in Stake Bank only, subject always to BPL’s existing and continued rights to all revenue streams of the Port of Belize Limited including but not limited to pilotage and port dues, as currently assessed and administered by BPL as of the date hereof.

63. The Claimants contended that the Government has failed to implement the necessary legislation to enable PBL to collect pilotage and port dues from ships that call at Stake Bank Port and therefore remains in breach of the Cruise Terminal Agreement.

64. The Defendant submitted that Clause 8 of the Cruise Terminal Agreement imposes no obligation on the Government but rather provides a conditional assurance by the Claimants. Further, that the Claimants have wrongly interpreted Clause 8 to mean that the Government has assured BPL of a right to receive all revenue streams of the Port of Belize and that it would implement the necessary legislation to enable PBL to collect dues at Stake Bank Port.

65. I agree with the Defendant that Clause 8 provides a conditional assurance by the Claimants. The words *“BPL will offer “no objections” for a third party to build a port for cruise ships in Stake Bank only subject always to BPL’s existing and continued rights to all revenue streams.....”* are clearly conditional and there is no obligation under this clause for the Defendant to enact legislation.

Further, the evidence shows that there is no operational cruise ship port at Stake Bank and no cruise ships have docked there. Accordingly, I find that Clause 8 of the Cruise Terminal Agreement has not been breached by the Defendant.

Issue: 4

Whether the Defendant made false and or negligent statements, representations and warranties in the Prospectus causing the Claimants to suffer loss and damage

66. The Claimants say at paragraph 26 of the Claim that in the Prospectus dated January, 2002, the Defendant made material statements, representations and warranties which the second Claimant relied upon in purchasing the shares. At paragraph 27 they say that the Defendant knew and/or ought to have known that the statements and warranties were false and/or negligently made by the Minister of Finance and who in the Prospectus expressly accepted responsibility for the said statements, representations and warranties. The Claimants say this caused them to suffer loss and damage. These allegations have been denied by the Defendant and they put the Claimants to strict proof that they have suffered loss and damage.

67. Mr. Vasquez in his witness statement at paragraphs 104 – 107 stated:

104. BPL relied on the statements in the Prospectus when it decided to purchase the shares in PBL from the Defendant.

105. The Defendant knew, or ought to have known, that several of the statements in the Prospectus were not

true. In the Prospectus, the Minister of Finance expressly accepted responsibility for the statements, representations, and warranties contained therein. These statements include the following:

(a) The port facility at the Big Creek port in the Stann Creek District, is privately operated and owned. The Big Creek Port is dedicated to the banana Industry and has 154 meters of berthing face and 6.7 meters in draught.

(b) Almost all containerized cargo imported into Belize is handled at BCP. The only exceptions are containerized empty banana boxes which are imported through the port at Big Creek.

(c) In addition, under special permission, occasional shipments of agricultural equipment are handled by ro-ro facility at Big Creek.

106. BPL only discovered after it acquired the shares in PBL that the aforementioned statements in the Prospectus are not true. In fact, the Big Creek Port handles cargo aside from bananas.

107. In consequence of the misrepresentation set out in the Prospectus, BPL and PBL have suffered loss and damages.

68. The Defendant contended, and I am in agreement with them, that the Claimants have not proven which of the statements are false. Mr. Vasquez who is the Receiver and who was appointed on 4th January, 2012 has not proven to this court as a matter of fact, that the Big Creek Port handles cargo aside from bananas. Also, it has not been proven that the Claimants have suffered loss and

damage. Accordingly, the finding of the court is that the Claimants have not proven that the Defendant made false and or negligent statements, representations and warranties in the Prospectus causing them to suffer loss and damage.

Issue: 5

Whether the Defendant is in breach of the Privatization Cooperation Agreement

69. The Claimants at paragraph 18 of their claim stated that the parties agreed to take certain steps to implement the privatization and to enable the Claimants to more effectively legally manage and operate the Port. That the Defendant failed to:
- a. *Execute a promissory note in respect of the amount owed by the Defendant to 1st and 2nd Claimant.*
 - b. *Enact the legislation required to grant duty and tax free status to the Claimants and all matters connected therewith.*
 - c. *Regularize the income tax position in respect of the debts acknowledged in the PCA.*
 - d. *Amend the License to reflect the revised license fee.*
 - e. *Make Payments to the Claimants in respect of the debts acknowledged in the PCA.*
 - f. *Procure the appointment of a representative of the Claimants to the Board of the Belize Port Authority.*
 - g. *Restrict the operations at the Big Creek Port as agreed.*
 - h. *Complete the sale of the San Pedro port facility to the Claimants as agreed.*
 - i. *To issue freehold title to the Commerce Bight Port to the Claimants as agreed.*
 - j. *Enact legislation to facilitate the development of the free zone in the area of Port Loyola.*
70. Mr. Waight, the Financial Secretary under cross-examination said that several of the elements in the PCA were implemented by him. He testified some of the elements could not be done

because it required changes in the law. However, the Government settled whatever they could have done. Learned Senior Counsel, Mr. Courtenay walked him through the PCA and he pointed out to the court the elements of the agreement that were completed and those that were not completed. The court will look at the alleged failures as laid out in paragraph 18 of the claim.

Execute a promissory note in respect of the amount owed by the Defendant to 1st and 2nd Claimant (paragraph (a) and (e))

71. The Claimants in their claim alleged that there was a failure to execute a promissory note in respect of the amount owed by the Defendant to the Claimants. This however, is no longer an issue as the evidence proves that PBL on its behalf and on behalf of BPL entered into a Settlement Deed dated 18th December, 2007 which settled all indebtedness between the Claimants and the Defendant. This has not been disputed. Mr. Arturo Vasquez, for the Claimants at paragraph 53 of his witness statement said that PBL has complied with the terms of the settlement and as such, the absence of a promissory note is no longer an outstanding issue between the Government and PBL. Paragraphs (a) and (e) above, are therefore no longer in issue to make payments in respect of debts acknowledged in the PCA.

Enact legislation (paragraphs (b) and (j))

72. The Claimants claimed that the Defendant failed to enact legislation for:
- (i) duty and tax exemptions for the port operations; and

(ii) to facilitate the development of the free zone in the area of Port Loyola;

73. The Defendants say that if there is an obligation to enact legislation to grant duty and tax free status and also to facilitate the development of the free zone, this is unenforceable as it purports to fetter the power of the legislature to legislate for the peace, order and good government of Belize and is unenforceable.

74. I agree with the Defendant that the undertaking by the Minister to enact legislation purports to fetter the power of the legislature to legislate. The Minister cannot validly enter into a contract which fetters the power of the legislature to legislate. Further, the agreement is beyond the powers of the executive to legislate. The rule against fettering applies to a clash between a contract and future legislation. It is not possible for a Government to bind itself by contract either to legislate or not to legislate on a particular matter in the future. See **Ansett Transport (Operations) Pty Ltd. v Commonwealth (1977) 139 CLR 54 at 71** where Mason J cited **William Cory and Son Ltd. v London Corporation (1951) 2 KB 476**. Accordingly, the court finds that the agreement to enact legislation for duty and tax exemptions for the port operations and to facilitate the development of the free zone in Port Loyola, is unenforceable.

Regularize the income tax position in respect of debts acknowledged in the PCA (paragraph (c))

75. The Defendant in their defence said that the Commissioner of Income Tax has confirmed by Memorandum dated 12th

December, 2007 that the first Claimant has no outstanding taxes for the period up to 1st August 2004. This issue was therefore settled. See also Annex 24 and 25 to the Witness Statement of Mr. Vasquez for confirmation that PBL's taxes were paid and prior assessment withdrawn.

76. Nevertheless, Mr. Vasquez's evidence at paragraph 68 to 70 is that notwithstanding the confirmation that the taxes were paid, in late 2009 or early 2010, PBL was assessed approximately \$67,000.00 for penalties and interest for the period 1st August, 2004 to 31st December, 2004. That in 2010, PBL's return from the Department of General Sales Tax was seized and applied towards the outstanding debt. As such, he says that the assessment has been a direct failure of the Defendant to regularize PBL's tax situation.

77. The documentary evidence, Annex 25 to the witness statement of Mr. Vasquez shows that the Commissioner of Income Tax has confirmed that *"the Port of Belize has no taxes outstanding for the period prior to 1st August 2004 and any assessments issued prior to that period has been withdrawn."* The penalties and interest assessed, which is in contention, were for the period 1st August 2004 to 31st December, 2004 and this is outside of the period that was withdrawn. As such, there has been no failure by the Defendant to regularize the income tax position.

Amend the License to reflect the revised license fee.

(paragraph (d))

78. The Government agreed by the PCA to reduce the Licence Fee from 1% of gross revenue to an annual fee of \$ 2,000.00. Mr.

Vasquez evidence is that that the Minister of Ports, signed a Statutory Instrument reflecting a change to the licence fee to the said terms and the Government agreed to process the instrument. He exhibited a document which shows a reduction in the licence fee. See Annex 32. This is signed by the then Minister of Ports, but it is not dated and has no date from which the amendment would take effect. It is obvious that this amendment was never published in the gazette in the form of a statutory instrument.

79. The evidence from Mr. Vasquez is that on 16th April, 2008, PBL sent payment to Belize Port Authority for license fees for the period February 1, 2003 to December 31, 2008 for the sum of \$19,833.33 which was calculated using the formula in the amended licence. See Annex 33 for letter. The Port Authority however, refused to accept the payment as it was not 1% of gross revenues as stated in the original licence and demanded payment of the sum of \$897,984.03. Mr. Vasquez evidence is that in consequence of PBL's failure to pay the assessed licence fees, the Belize Port Authority issued claim No. 89 of 2009 against them. Mr. Vasquez at paragraph 95 stated that the Government breached the PCA as they failed to take the necessary steps to ensure that the licence fee of \$2,000.00 per annum is accepted from PBL.

80. There is no evidence before the court as to the outcome of the Claim No 89 of 2009. The necessary steps to be taken by the Government seems to be the passing of legislation. The power to grant licences for Port operations is given to the Minister responsible for Ports under the **Belize Port Authority Act, Chapter 223**. The power is exercised after consultation with the

Belize Port Authority. In my view, the agreement by the Government to reduce the Licence Fee from 1% of gross revenue to an annual fee of \$ 2,000.00, require executive and statutory approval. There is no evidence that such approvals were obtained. Therefore, this agreement by the Minister to regularize the licence fetter the future exercise of statutory powers or future executive action and is void. For this reason, the court finds that the agreement is unenforceable.

Procure the appointment of a representative of the Claimants to the Board of the Belize Port Authority.(paragraph (f))

81. Mr. Vasquez evidence is that by the PCA agreement, PBL would have been entitled to have a person nominated to sit on the Board of the Belize Ports Authority. That on 12th, December, 2007 the Government wrote the former Commissioner of Ports and directed that PBL be granted 'Oberver Status' on the board of the Belize Ports Authority and that one, Mr. Guerro had been nominated to PBL. Despite this letter, the evidence is that no representative of PBL has been able to attend and participate in meetings.

82. The Defendant has not denied this agreement but put the Claimants to strict proof that they have suffered loss as a result of not having a representative on the Board of the Belize Port Authority. The Claimants have not proven the loss suffered as a result of this failure. As such, the Defendant is not liable to pay damages.

Restrict the operations at the Big Creek Port (paragraph (g))

83. Mr. Vasquez's evidence is that the Government represented in the Prospectus that the licence issued to Toledo Enterprises Limited ("TEL") of the Big Creek Port was restricted to the export of bananas and the importation of goods related to the banana industry. Further, by the Privatization Cooperation Agreement, the Government agreed to restrict the licence of TEL.
84. In my view, this clause in the PCA undertaking to restrict the licence relating to the Big Creek Port purports to fetter the statutory power of the Minister responsible for Ports and seeks to prevent him from exercising that power for public purposes. Accordingly, the court finds that the agreement is void and unenforceable. See **paragraph 33 of Halsbury's Laws of England** discussed above.

Complete the sale of the San Pedro port facility to the Claimants (paragraph (h))

85. Mr. Vasquez evidence is that the Government agreed to sell the Port in San Pedro to PBL pursuant to the Share Sale Agreement. The Defendant in their defence said that it was required by statute to put to tender the San Pedro Port facility and in so far the PCA intended to and purported to bypass the statutory process it is unenforceable. Mr. Waight's evidence for the Defendant shows that PBL participated in a public tender in February 2008 for the purchase of the San Pedro Port but their bid was rejected by the tender's panel. I have no reason to doubt Mr. Waight's evidence. As such, I find that the Government cannot complete the sale if the tender was rejected.

Further, in so far as the Minister intended to bypass the statutory process, it is unenforceable as all executive and statutory approvals must be obtained.

To issue freehold title to the Commerce Bight Port to the Claimants (paragraph (i))

86. The evidence of Mr. Vasquez is that the Defendant agreed to convert the lease of all the properties at Commerce Bight, comprised under the Lease to PBL dated 18th January, 2002, into freehold title. By letter dated 31st July, 2006 PBL offered to purchase the property comprised under the lease for \$200,000. See Annex 26 for letter dated July 31st 2006 from Chairman of PBL addressed to the then Prime Minister which states:

.....

In connection with the Privatization Cooperation Agreement/Belize Ports Limited herein submit a price of BZD \$200,000.00 to convert our lease land property in the Port, to freehold at Commerce Bight.

Our value at the Port at Commerce Bight at this time is some 4.4 million.

\$4,000,000.00 paid to GOB and \$400,000.00 in land improvement fencing and connecting water to the pier head. As we expand we see no validity in investing further without our tenure position being more permanently secured.

87. Mr. Vasquez's evidence is that in breach of the PCA, the Defendant on 16th April, 2007 agreed to sell the said land to the Belize Ports Authority for \$33,377.53. See Annex 27 for a copy of the Land Purchase Approval Form in favour of Belize Ports Authority.
88. The Defendants in their Defence relied on the implied term that all relevant statutory requirements and/or statutory or executive approvals have been properly and lawfully met and put the Claimant's to strict proof that they applied for freehold title to Commerce Bight Port and met all requirements.
89. The Claimants have not proven that they met all the requirements but adduced evidence which showed that on 25th March, 2008, PBL received a letter from the Minister of Public Utilities, Transport, Communications and NEMO by which the Minister gave notice of his intention to cancel the said Lease as a result of alleged breaches of the lease. See **Annex 28** for letter dated 19th March, 2008 addressed to PBL from the then Minister responsible for Ports which states:

.....

**Re: Commerce Bight Port – Notice of
Intention to Revoke Lease**

We refer to the Lease granted to Port of Belize on 18th January, 2002 to operate, manage and provide port-related services in respect of Commerce Bight Port..

Port of Belize ("PBL") has breached the terms and conditions of the Lease in the following respects:-

- (a) **Clause 14.1** PBL has failed to submit a development plan or to carry out any development works at the Port as required by this Clause.
- (b) **Clause 4.1.** PBL has failed to operate and manage the Port or carry out the necessary dredging of the approach channel and the dock basin, as required under this Clause.
- (c) **Clause 10.** PBL has failed to pay the lease rental in accordance with this clause.
- (d) **Clause 8.2.** PBL has failed to appoint a representative of the Belize Port Authority to the Board of Directors of PBL as required by this Clause.

By reason of the above-noted breaches of the terms and conditions of the Lease by PBL, it is my intention to revoke the Lease in accordance with Clause 16. Please treat this letter as the requisite one month's notice of my intention to do so.

- 90. As a result of the above notice of intention to revoke the Lease, this court on 14th April, 2008, on application by the Claimants, restrained the Minister from cancelling the Lease. In compliance with the order, the Lease was never cancelled by the Defendant.
- 91. There is no evidence before this court as to whether there is compliance with the alleged breaches of the Lease. The court therefore, is not in a position to conclude that the Claimants met all the requirements of the lease giving them the right to the freehold title. As such, I find that the Claimants failed to prove that there was a breach of the Privatization Cooperation Agreement to convert the lease to freehold title.

92. I must say, that there is absolutely no doubt however, that the Claimants have an interest in the Commerce Bight Port. The evidence is that they spent over \$4,000,000.00 on the Port. If the freehold title is not granted to the Claimants, bearing in mind that they are in receivership, whoever takes the Port takes same subject to the Claimants' interest in Commerce Bight Port. This court however, is not required to make a determination on this issue.

The discharge of the Injunction

93. On 20th July, 2012, this matter was set down for hearing of closing arguments. On that day, Learned Senior Counsel, Mr. Barrow requested the court to hear him in relation to the injunction which was granted on 14th April, 2008 in this matter. The court heard Learned Senior Counsel Mr. Barrow and Learned Senior Counsel Mr. Courtenay and discharged the injunction. I promised to put my reasons in writing. I do so now in this judgment.

94. Mr. Barrow submitted that when the injunction was granted a defence had not been filed nor an affidavit in reply to the injunction, so it was appropriate for the court to do so at the time. Learned Senior Counsel further submitted that the said injunction was to restrain a threatened proposed termination of the lease, however, in the case at bar, the issue of terminating the lease does not arise and so the court should not make any pronouncement in relation to the termination or continued validity of the lease. As such, there is no basis for the injunction to continue and further, there is no reason for the discharge to await the determination of this claim for breach of contract.

95. Learned Senior Counsel, Mr. Courtenay in response submitted that the court should not discharge the injunction at this point of the proceeding because one of the issues for determination by the court is whether or not the Government is in breach of its agreement to convert the lease of Commerce Bight to freehold title.

96. Learned Senior Counsel, Mr. Barrow in reply submitted that the court is not in a position to grant a permanent injunction restraining the Defendant from cancelling the lease as the case before the court is for damages for breach of contract.

97. The court is in agreement with Learned Senior Counsel, Mr. Barrow that there is no basis for the injunction to continue as the matter before the court is for damages for breach of contract. The court further agrees with Learned Senior Counsel, Mr. Barrow that the issue of termination of the lease does not arise in this claim. As such, the court was of the view that there was no reason for the discharge to await the determination of this claim for breach of contract. On that basis, the court discharged the injunction which was granted on 14th April, 2008.

98. **Conclusion**

The findings of the court are:

1. There was no breach by the Defendant of the following agreements:

- 1) Share Sale Agreement dated 28th March, 2002;
- 2) Cruise Terminal Agreement dated 29th April, 2004;

3) Privatization Cooperation Agreement dated 7th December, 2005;

2. There was no breach of the Licence dated 18th January, 2002 and the Lease dated 18th January, 2002.

3. The Claimants have not proven that the Defendant made false and or negligent statements, representations and warranties in the Prospectus dated 18th January, 2002, causing them to suffer loss and damages.

99. Accordingly this is the order of the court:

Order

The Declarations sought are refused.

The Claimants to pay \$12,500.00 in cost to the Defendant.

Dated this 27th day of September, 2012.

Minnet Hafiz-Bertram
Supreme Court Judge.