

IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 571 of 2021

BETWEEN

RECOLOGICAL SYSTEMS LTD.

CLAIMANT

AND

THE BELIZE PORT AUTHORITY

1st DEFENDANT

**THE MINISTER OF PUBLIC UTILITIES
& LOGISTICS**

2nd DEFENDANT

THE ATTORNEY GENERAL

3rd DEFENDANT

BEFORE The Honourable Madam Justice Geneviève Chabot

Date of Hearing: December 9th, 2022

Date of Last Written Submissions: January 30th, 2023

Appearances

Rt. Hon. Dean O. Barrow, S.C. and Adler Waight, for the Claimant

Douglas Mendes, S.C. and Iliana N. Swift, for the Defendants

**JUDGMENT
(Liability)**

Introduction

1. In early November 2020, the Claimant entered into a Rental Agreement with the Belize Port Authority, and into a Lease Agreement with the Minister of Transport and National Emergency Management Organization, allowing the Claimant to take possession of, develop, and operate the Commerce Bight Port as a cargo port facility.

2. On November 11th, 2020, general elections were held in Belize. Upon coming into office, the new Administration placed the Rental and the Lease Agreements, which had been executed only a few days before the elections, under review. In May 2021, the House of Representatives disapproved the Rental and the Lease Agreements, and on June 6th, 2021, both Agreements were declared a nullity by the Defendants. The Claimant seeks damages for loss and damage caused by what it alleges was the wrongful termination of the Rental and the Lease Agreements.
3. The Defendants are liable for the wrongful termination of the Rental and the Lease Agreement. The *Finance and Audit (Reform) Act*¹ does not apply to the Rental or the Lease Agreement. Sections 18(1) and 22(1) of the *FARA* do not apply to the Rental Agreement because these sections regulate the Government, not statutory bodies. Two of the three parcels comprising the property subject to the Rental and the Lease Agreements are not public assets. As for the remaining parcel, it is national land and is governed by the *National Lands Act*, not the *FARA*. No breach of the *National Lands Act* has been pleaded in the Defendants' Defence. This Claim will now move to an assessment of damages.

Background

4. On November 5th, 2020, the Claimant entered into a written agreement with the Belize Port Authority for the rental of the "physical space" of the Commerce Bight Port, South of Dangriga in the Stann Creek District of Belize (the "Rental Agreement"). The "physical space" is described and delineated in the Schedule to the Rental Agreement. It is not disputed that the Rental Agreement covers an area of 50.37 acres.
5. The Rental Agreement had a commencement date of November 9th, 2020 and a termination date of November 8th, 2045. It contains several provisions describing the rights and obligations of each party under the Rental Agreement. Under the "Termination" section of the Rental Agreement, the Port Authority could validly terminate the Rental Agreement if the Claimant breached any of its terms.
6. On November 9th, 2020, the Minister of Transport and National Emergency Management Organization, as the Minister responsible for Ports (the "Minister") granted a 25 year lease to the Claimant for the Commerce Bight Port pursuant to its statutory authority under section 107 of the *Belize Port Authority Act*² (the "Lease Agreement"). Under the Lease Agreement, the Claimant was to operate and manage the leased port at Commerce Bight subject to the terms, conditions, and stipulations in the Lease Agreement. Under Clause 18.4 of the Lease Agreement, the Minister could suspend or terminate the lease if the Minister was satisfied that there had been a breach of the terms and conditions of the Lease

¹ Cap. 15 of the Substantive Laws of Belize ("*FARA*").

² Cap. 233 of the Substantive Laws of Belize.

Agreement, or any contravention to any laws, regulations, or by-laws upon written notice of his intention and after giving an opportunity to the Claimant to make representations.

7. On November 11th, 2020, general elections were held in Belize. A new Administration came into office. In early 2021, the new Minister informed the Claimant that the Rental and the Lease Agreements were under review. On May 28th, 2021, the Minister took a motion to the House of Representative seeking a disapproval by the House of the Rental and the Lease Agreements. The motion passed and on June 6th, 2021, the Rental and the Lease Agreements were declared a nullity by the Defendants.
8. The Claimant seeks damages for loss and damage caused by what it alleges was the wrongful termination by the Defendants of the Rental and the Lease Agreements. The Claimant alleges that the Agreements were entered into by the parties after extended discussions and negotiations with the Government of Belize and the Belize Port Authority officials, which resulted in several MOUs and in-principle understandings before finalization of both Agreements. Upon paying the requisite fees and satisfying other preconditions, the Claimant entered into possession and occupation of the Commerce Bight Port and commenced operations. The Claimant alleges that it was never in breach of the Rental or the Lease Agreements. It argues that the Defendants' declaration of the voidness of the Agreements, the cancellation of the Agreements, and the Claimant's eviction from Commerce Bight Port is unlawful, wrongful, and in violation and repudiation of the Claimant's valid contractual rights.
9. The Defendants argue that the Rental and the Lease Agreements were not duly executed. According to the Defendants, the Commerce Bight Port is a public asset with an aggregate value in excess of \$2 million dollars. In breach of sections 18(1) and 22(1) of the *FARA*, the comments of the Contractor General and the approval of the National Assembly were not sought or obtained prior to the execution of the Agreements. Thus, the Belize Port Authority and the Minister lacked the requisite authority to execute the Agreements. In addition, on May 28th, 2021 the Minister moved a Motion disapproving the Lease Agreement, and the House resolved to disapprove the Lease Agreement. As a result, the Rental and the Lease Agreements are void and of no legal effect.
10. In Reply, the Claimant asserts that the sections relied upon by the Defendants in the *FARA* do not apply to lease and rental agreements. The Claimant also argues that the Motion passed by the House on May 28th, 2021 disapproving the Lease Agreement was incapable of voiding the Rental and the Lease Agreements *ab initio*.
11. At a Case Management Conference held on April 8th, 2022, the Court decided to bifurcate the issue of liability from the issue of damages. This Judgment therefore only addresses the issue of the liability of the Defendants.

Preliminary Procedural Issues

12. Pursuant to a Court Order made on March 31st, 2022, the parties were to file and exchange their witness statements by June 17th, 2022. That date was varied by consent of the parties. The parties filed and exchanged their witness statements on June 24th, 2022.
13. On June 27th, 2022, the Defendants filed a Notice of Application for Relief from Sanction and requested an extension until July 1st, 2022 to file an additional witness statement. The Application was amended on July 12th, 2022 to include two witness statements. The Court heard and granted the Application on July 20th, 2022. On July 22nd, 2022, the Defendants filed the Second Witness Statement of Maj. (Ret'd) H. Gilbert Swaso and on July 25th, 2022, the Witness Statement of Talbert Brackett.
14. The witness statements of Maj. (Ret'd) Swaso and Mr. Brackett included facts raising an issue in relation to the ownership of part of the land subject to the Rental and the Lease Agreements. On July 26th, 2022, the Defendants filed a Notice of Application for Leave to Amend their Defence. The Application was denied on October 5th, 2022. This Judgment is therefore rendered on the basis of the Defence as originally filed.

Questions for Determination

15. The questions for determination by this Court are the following:
 - a. Does the *FARA* apply to the Rental and/or the Lease Agreement?
 - i. Do sections 18(1) and 22(1) of the *FARA* apply to the parties to the Agreements?
 - ii. Do sections 18(1) and 22(1) of the *FARA* apply to rental or lease agreements?
 - b. If the *FARA* applies to the Rental and/or the Lease Agreement, are the Agreements void for failure to comply with their provisions?
 - c. If the *FARA* does not apply to the Rental and/or the Lease Agreement, are the Defendants liable for the termination of the Agreements?

Analysis

Does the FARA apply to the Rental and/or the Lease Agreement?

16. The *FARA* does not apply to the Rental or the Lease Agreement. Sections 18(1) and 22(1) of the *FARA* do not apply to contracts made with statutory bodies. In addition, two of the three parcels comprising the property subject to the Agreements are not public assets. As for the remaining parcel, it is national land and is governed by the *National Lands Act*, not

the *FARA*. No breach of the *National Lands Act* has been pleaded in the Defendants' Defence.

Do sections 18(1) and 22(1) of the *FARA* apply to the parties to the Agreements?

17. Sections 18(1) and 22(1) of the *FARA* do not apply to agreements entered into by a statutory body. The *FARA* therefore does not apply to the Rental Agreement.
18. Section 18(1) of the *FARA* provides that the "Government" must seek the comments of the Contractor General before disposing of any public assets above the value specified in section 22(1) of the *FARA*. Section 18(1) reads as follows:

18.-(1) The Government shall, before disposing of any public assets of or above the value specified in section 22(1) of this Act, seek the written comments of the Contractor General, which shall be submitted to the National Assembly before the disposal of the assets is effected.

19. Section 22(1) provides that the "Government" must obtain the approval of the National Assembly before disposing of any public asset with an aggregate value of at least \$2 million:

22.-(1) The Government shall, before disposing of any public assets with an aggregate value of or above two million dollars, obtain the approval of the National Assembly, to be signified by a resolution made in that behalf and published in the Gazette.

20. The Rental Agreement was concluded between the Claimant and the Belize Port Authority. The Belize Port Authority is constituted as a statutory body under section 3 of the *Belize Port Authority Act*. The term "Government" as used in the *FARA* does not include a statutory body. This is evidenced by the fact that section 2(1) of the *FARA* specifically defines "statutory body" as meaning "a body established by virtue of an Act to perform public functions, but does not include a town, city or village council". While the *FARA* does not define "Government", this term is defined in the *Interpretation Act*³ as meaning "the Government of Belize". "Government" and "statutory body" are not used interchangeably in the *FARA*. Where the *FARA* is intended to apply to statutory bodies, it expressly says so.⁴ By using "Government", sections 18(1) and 22(1) of the *FARA* must be interpreted as applying to the Government of Belize, to the exclusion of any statutory body as defined by section 2(1). These sections do not apply to the Belize Port Authority. The Rental

³ Cap. 1 of the Substantive Laws of Belize.

⁴ See for example section 7 of the *FARA*.

Agreement was therefore not subject to the requirements in sections 18(1) and 22(1) of the *FARA*.

21. It is not disputed that the Lease Agreement was granted to the Claimant by the “Government”, as represented by the Minister of Transport and National Emergency Management Organization. This Court must therefore consider whether the Government needed approval from the National Assembly before entering into the Lease Agreement with the Claimant.

Do sections 18(1) and 22(1) of the FARA apply to rental or lease agreements?

22. Sections 18(1) and 22(1) of the *FARA* do not apply to the transactions at issue in this matter.
23. The evidence introduced into these proceedings through the witness statements of Maj. (Ret’d) Swaso and Mr. Brackett shows that the 50.37 acres of land leased by the Claimant was originally leased by the Belize Port Authority in 2006. In June 2007, these 50.37 acres of land were divided into three parcels: Parcel 1 (25.517 acres), Parcel 2 (23.235 acres), and Parcel 3 (17.375 acres).⁵ The Belize Port Authority was granted approval to purchase those three parcels, but never completed the steps necessary to purchase them. Parcels 1 and 2 were granted by Minister’s Fiat to private persons in 2020 and 2008, respectively. It is not disputed that the Lease Agreement was intended for all 50.37 acres, that is to say Parcels 1, 2, and 3.
24. According to the Defendants, because it was never purchased by the Belize Port Authority, Parcel 3 remains national land under the *National Lands Act*.⁶ Pursuant to section 12(a) of the *National Lands Act*, a lease of national land approved by the Minister is deemed to include the condition that the lease is granted subject to all powers, provisos and clauses contained in the *National Lands Act*. Under section 8 of the *National Lands Act*, a lessee must obtain the prior written permission of the Minister before transferring or subletting a lease:

8.–(1) No lessee shall transfer or sublet his lease without the prior written permission of the Minister and on the payment of such fees and on compliance with such conditions as may be specified.

(2) If any lessee transfers or sublets his lease except in the manner provided in sub-section (1), the lease shall be liable to cancellation and in every such case, the

⁵ Witness Statement of Talbert Brackett dated July 22nd, 2022 at para. 4.

⁶ Cap. 191 of the Substantive Laws of Belize.

lessee shall not be entitled to any payment or compensation for development of the leased property.

25. The Defendants argue that the Minister's written permission to sub-lease to the Claimant was therefore a necessary prerequisite to the disposal of the three parcels by way of lease to the Claimant. According to the Defendants, in this case the "Minister's written permission [...] has taken the form of his own 'lease' to the Claimant to operate the Port. He is to be taken to have known of the Rental Agreement between the Port and the Claimant and his express grant of the lease to the Claimant constitutes that written permission". The Defendants argue that this Court must consider whether the Minister's permission to sub-lease is in accordance with section 22(1) of the *FARA*.
26. The three parcels and the pier on Parcel 3, according to the Defendants, are "public assets" within the meaning of section 22(1) of the *FARA* because they belong to the State of Belize, albeit leased to the Belize Port Authority. Approval by the National Assembly was therefore required before they could be disposed of. Section 22(2) of the *FARA* imposes the additional requirement of compliance with the *National Lands Act*.
27. According to the Defendants, the Government actively disposed of the parcels because its written permission was legally required to effect a lawful sub-lease of national land to the Claimant. The sub-lease of the land and the lease of the pier constitute a disposal of public assets for the purpose of the *FARA*. Relying on *Carter v Carter*,⁷ the Defendants define the words "dispose of" as meaning "all acts by which a new interest (legal or equitable) in the property is effectually created". In this case, the Claimant was vested with a leasehold interest in the three parcels and the pier. That constituted a disposal of the parcels and pier for the purpose of section 22(1) of the *FARA*. A valuation done by Mr. Glenroy M. Ferguson and admitted into evidence without objection puts the value of the three parcels at \$3,747,050.00, with Parcel 3 (inclusive of the pier) being valued at \$2,468,750.00. The approval of the National Assembly was therefore required.
28. The Claimant, for its part, argues that sections 18(1) and 22(1) of the *FARA* expressly exempt disposals or any dealings or transactions relating to national land from the ambit of the *FARA*, unless the area being disposed of exceeds 500 acres or involves a caye, which is not the case here. The transaction is outside the purview of the *FARA*.
29. The Claimant rejects the notion that the Minister gave permission to the Belize Port Authority to sub-lease the parcels via the Rental Agreement, thereby creating a government transaction which violated the *FARA*. While pointing out that the Defendants cannot allege a lack of ministerial permission under the *National Lands Act* because that argument has not been pleaded, the Claimant goes on to note that the allegedly invalid permission the

⁷ [1896] 1 Ch 62, 67.

Defendants identify to set up their breach of *FARA* argument was a permission by the Minister of Public Utilities and Logistics,⁸ not the Minister of Lands as required by the *National Lands Act*.

30. As noted above, the *FARA* does not apply to the Belize Port Authority as a statutory body. It does, however, apply to the Minister responsible for Ports. According to the Claimant, the Defendants seek to transform the action of the Belize Port Authority into an action of the Minister responsible for Ports. However, no Minister's permission to sub-lease is before the Court, and therefore no issue can arise concerning compliance under the *FARA*.
31. The Claimant denies that a lease for the provision of Port services, as opposed to one for land, constitutes a public asset. Even if it did, there is no evidence before the Court that such a lease has an aggregate value of \$2 million or above. The Defendants' evidence is confined to valuation of the physical property of the Port. The lease from the Minister responsible for Ports is more akin to a licence. The Rental Agreement gave the Claimant permission to occupy and use the Port land, and the Lease Agreement granted the Claimant permission to develop, manage, and operate Port services. That lease, or licence, from the Minister responsible for Ports cannot constitute a public asset of the sort the *FARA* regulates.
32. In addition, the Claimant argues that because Part IV of the *FARA* relates to "Government Procurement and Sale Contracts", the "disposal" of assets under the Part IV provisions means the final alienation of such assets. The tenant and lessee rights granted to the Claimant over the Port and the land on which it sits do not amount to a disposal of the Port, as control of the Port is returned to the Belize Port Authority upon the conclusion, cesser, or breach of the Rental Agreement. As for the Lease Agreement, section 107 of the *Belize Port Authority Act* empowers the Minister to grant a lease of a "leased port" to any person, provided the lease does not exceed 30 years. Such a lease does not transfer ownership, and does not constitute a disposal.
33. Finally, it is the Claimant's position that the value of the Port does not exceed \$2 million. Parcel 3, which is under the control of the Belize Port Authority and upon which the Port sits, is valued at \$868,750.00. The asset value triggering the *FARA* is absent.
34. The Court is in agreement with the Claimant and finds that the *FARA* does not apply to either the Rental or the Lease Agreements.

⁸ To avoid any confusion, the Court notes that the Claimant uses a former title used to designate the Minister responsible for Ports. The current Minister responsible for Ports is the "Minister of Public Utilities, Energy, Logistics & E-Governance". The Lease Agreement was signed by the "Minister of Transport and National Emergency Management Organization (NEMO)". For the purpose of this Judgment, the Court will use "Minister responsible for Ports".

35. Although this Court denied the Defendants' Application to Amend their Defence to plead the Belize Port Authority's lack of authority to enter into the Rental Agreement, the Court allowed the Defendants' Application for Relief from Sanction and admitted the witness statements of Maj. (Ret'd) Swaso and Mr. Brackett into evidence. As mentioned above, that evidence shows that Parcels 1 and 2 were owed by private persons at the time the Rental and the Lease Agreement were executed. Parcels 1 and 2 cannot be considered public assets for the purpose of the *FARA*, regardless of what the Belize Port Authority or the Government believed their status to be at the time. The status of these parcels is a matter of fact, not of belief. Sections 18(1) and 22(1) of the *FARA* do not apply to Parcels 1 and 2.

36. As for Parcel 3, on which the pier sits, it is considered national land under the *National Lands Act*. Section 2 of the *National Lands Act* defines "national lands" as follows:

"national lands" means all lands and sea bed, other than reserved forest within the meaning of the Forests Act, including cayes and parts thereof not already located or granted, and includes any land which has been, or may hereafter become, escheated to or otherwise acquired by the Government of Belize;

37. Albeit leased to the Belize Port Authority, Parcel 3 is owned by the Government of Belize. Section 22 of the *FARA* expressly removes national land from the ambit of the *FARA*. Indeed, the Court reads subsection 22(2) of the *FARA* as an alternative, not as an addition, to subsection 22(1) requiring the approval of the National Assembly. For ease of reference, section 22 of the *FARA* is reproduced in its entirety below:

22.-(1) The Government shall, before disposing of any public assets with an aggregate value of or above two million dollars, obtain the approval of the National Assembly, to be signified by a resolution made in that behalf and published in the Gazette.

(2) The disposal of national land, or any dealing or transaction relating to national land, shall continue to be dealt with under the procedures specified in, and the provisions of the National Lands Act, Cap. 191 and Regulations made thereunder,

Provided that the sale or lease of any national land in excess of five hundred acres, or any caye of whatever size, by Government shall first be authorized by a resolution of the National Assembly.

38. Subsections 22(1) and (2) are mutually exclusive. Pursuant to subsection 22(1), the Government must obtain the approval of the National Assembly before it can dispose of any public assets worth more than \$2 million. Under subsection 22(2), if that asset is national land, then its disposal (or any other dealing or transaction) is exclusively regulated

by the procedures set out in, and the provisions of, the *National Lands Act* and any regulations made thereunder, unless the national land in question falls within the categories specified in the proviso. The sale or lease of national land falling into the categories specified in the proviso is subject to both the requirement to obtain approval of the National Assembly, and the procedures and provisions of the *National Lands Act*.

39. This Court’s conclusion that national land is excluded from the requirements of the *FARA*, except in defined circumstances, is supported by the *FARA*’s definition of “contract” or “government contract”. Sections 18(1) and 22 of the *FARA* are included in Part IV of the *FARA* dealing with “Government Procurement and Sale Contracts”. The words “contract” and “government contract” are defined in section 2 of the *FARA* as excluding “anything regulated under the *National Lands Act*”:

“contract” or “government contract” means a written or oral agreement for the procurement or sale by the Government of goods or services, or a combination of goods and services, setting out the conditions of the contract, the specification or description of the goods or services, or the goods and services, procured or sold under the contract, but does not include anything regulated under the National Lands Act, Cap. 191 or Regulations made there under, which shall subject to the provisions alibis Act to the contrary, continue to be regulated by the procedures specified in, and the provisions of, the National Lands Act, Cap. 191 and Regulations made there under to the exclusion of this Act [emphasis added].

40. The Court’s interpretation is also supported by section 5(1) of the *National Lands Act*, which confirms that “National lands shall not, save as is excepted by section 6, be dealt with or disposed of, except in the manner hereinafter provided”. Section 6 empowers the Minister responsible for lands to exempt land to be reserved for certain usage from the procedure provided for in the *National Lands Act*. The Court has been provided with no evidence showing that Parcel 3 was thus exempted and would therefore fall outside of the regular procedure provided for in the *National Lands Act*.
41. This Court’s interpretation is also fortified by sections 7 and 13(1) of the *National Lands Act*, which empower the Minister to grant leases or sell national lands on such terms and conditions as the Minister thinks fit, regardless of the value or the size of the land leased or sold, without the need for prior approval by the National Assembly.
42. As for the pier which sits on Parcel 3, the Court agrees that it constitutes a public asset and is not national land within the meaning of section 2 of the *National Lands Act*. However,

from the Defendants' own evidence, the pier itself is valued at \$1,600,000.00,⁹ below the \$2 million threshold triggering the application of sections 18(1) and 22(1) of the *FARA*.

43. Finally, and as noted by both parties, the *FARA* does not define the verb "dispose of". Both parties provided definitions which support their respective positions that a lease "disposes of" an asset or not. Given this Court's finding on the applicability of the *FARA* to the Parcels at issue, it is not necessary to delve into this question with much depth. For the sake of completeness, this Court will however note that it does not consider that the Lease Agreement at issue in this matter led to the disposal of the Parcels. The Lease Agreement did not affect legal title to the Parcels, which remained with their respective owners (in the case of Parcel 3, the Government of Belize). Possession was to automatically revert to the Government of Belize after a period of 25 years, or earlier in the case of a breach of the terms and conditions of the Lease Agreement. Significantly, under the Lease Agreement the Government was to exercise significant control over the activities on the leased lands. This is apparent notably from Clause 7, which allowed the Ports Commissioner to issue directives, orders, or requests to the Claimant in relation to its activities, Clause 9, which required the Claimant to obtain the Minister's approval before it could set tariffs, charges, and conditions for the users of the Port, and Clause 15, which set out stringent reporting requirements on the Claimant. In this Court's view, the degree of control given to the lessor over the lessee under the Lease Agreement is incompatible with the notion of "disposal" as it is commonly understood.
44. Having found that the *FARA* does not apply to the Rental or the Lease Agreement, no breach of the *FARA* can arise by virtue of the Minister's alleged permission to sub-lease Parcel 3. It may well be that the Government failed to comply with the requirements of the *National Lands Act* in granting the lease to the Claimant. However, the Defendants did not plead a breach of the *National Lands Act* in their Defence. As it is not pleaded, this defence is not properly before the Court.

If the FARA does not apply to the Rental and/or the Lease Agreement, are the Defendants liable for the termination of the Agreements?

45. The Defendants are liable for the termination of the Rental and the Lease Agreement.
46. The Belize Port Authority is liable for the termination of the Rental Agreement. Under Clause 7 of the Rental Agreement, the Rental Agreement could be terminated by the Belize Port Authority in case of an ordinary (upon notice) or a material (immediately) breach of the Rental Agreement. The Defendants have not alleged any breach of the Rental

⁹ Valuation Report of Glenroy M. Ferguson, Exhibit HGS -3 to the Witness Statement of Maj. (Ret's) H. Gilbert Swaso dated June 24th, 2022.

Agreement by the Claimant. The Rental Agreement was terminated in breach of its provisions.

47. The Government, as represented by the Minister of Public Utilities & Logistics (or by the Minister responsible for Ports, if titles have changed since the filing of this Claim), is liable for the termination of the Lease Agreement. Under Clause 18.4 of the Lease Agreement, the Minister could terminate the Lease Agreement in case of a breach of the terms and conditions of the Lease Agreement, or of any contravention to any provision of the Laws or regulations of Belize, after giving an opportunity to the Claimant to make representations. The Defendants have not alleged any breach of the Lease Agreement or any breach of any law or regulations. The Lease Agreement was terminated in breach of its provisions.
48. As a result, this Claim will now move to an assessment of damages.

IT IS HEREBY DECLARED AND ORDERED THAT

- (1) The First Defendant is liable for the wrongful termination of the Rental Agreement.
- (2) The Second Defendant is liable for the wrongful termination of the Lease Agreement.
- (3) The Court shall proceed to an assessment of damages.
- (4) Costs in an amount to be determined following the assessment of damages are awarded to the Claimant.

Dated June 12th, 2023

Geneviève Chabot
Justice of the High Court