IN THE COURT OF APPEAL OF BELIZE, AD 2014
CIVIL APPEAL NO 8 of 2011

YA'AXCHÉ CONSERVATION TRUST

Appellant

AND

WILBER SABIDO (Chief Forest Officer)
THE ATTORNEY GENERAL OF BELIZE
BELIZE HYDROELECTRIC DEVELOPMENT AND MANAGEMENT COMPANY LIMITED

Respondents

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Douglas Mendes	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal

Ms M Marin Young for the appellant.
Mr H Panton and Ms I Swift for the first and second respondents.
Mr N Ebanks for the third respondent.

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20, 21 June 2013, 14 March 2014.

SOSA P

[1] I concur in the reasons for judgment and orders proposed in the judgment of Mendes JA, which I have read in draft.

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SOSA P

MENDES JA

[2] The Bladen Branch Natural Reserve, as the name suggests, is a nature reserve, having been so declared by the Nature Reserve Reservation (Bladen Branch) Order made by the Minister of Industry and Natural Resources pursuant to section 3 of the National Parks System Act Chap. 215 ("the Act"). This appeal concerns an authorisation purported to have been granted by the Chief Forest Officer, the first respondent on this appeal, to the third respondent, pursuant to section 6 of the Act ("the Authorisation"). Section 6 prohibits a number of activities within a nature reserve, such as permanently or temporarily residing in or building any structure of whatever nature, whether as a shelter or otherwise, damaging, destroying or removing any species of flora, hunting any species of wildlife, and quarrying, digging or constructing roads or trails. However, these activities may nevertheless be carried out if authorised, inter alia, by the Administrator. The Administrator is that person appointed by the Public Service Commission under section 10 of the Act for each nature reserve to perform the functions and exercise the powers assigned to him or her by the Act or any regulations made thereunder.

[3] The Chief Forest Officer is charged by section 10(2) of the Act with responsibility for the administration of the Act. The Authorisation is dated 13 October 2009 and it permits the third respondent to enter the Bladen Branch Nature Reserve "for the purpose of conducting longitudinal and topographical surveys and acquiring hydrologic data." It is subject to a number of conditions which will be examined in due course, but the one which is relevant for immediate purposes is that it was to expire on 30 August 2010.

[4] The appellant is a non-governmental conservation organisation duly appointed by the first appellant to co-manage the Bladen Nature Reserve. Being concerned that the activities which the third respondent was authorised to engage in would cause irreparable harm to the Reserve, it launched judicial review proceedings on 26 January 2010 seeking a declaration that the Authorisation was ultra vires the Act and an order

quashing it for that reason. Damages to compensate for the damage caused to the Reserve was also sought.

[5] The trial came up before Legall J on 24 September 2010. By this time, the Authorisation had already expired. Legall J delivered his written judgment on 1 December 2010. He records that the “heart” of the appellant’s claim was that, in authorising the third respondent to clear an area of prime forest, to cut tracks and to build structures, irreparable harm was done to the Reserve, contrary to the intention and purpose of the Act as a whole, as stated in the preamble and in sections 4 and 6. Holding that there was no breach of any provisions of the Act, the trial judge reasoned (at para 10):

> "Section 6 of the Act generally prohibits certain acts mentioned in the section from being done in a nature reserve. But these same acts may be done with the written authorization of the Administrator. Parliament has enacted that, though the acts mentioned in paragraphs (a) to (m) of section 6 are generally prohibited, the Administrator is authorized by writing to permit those same acts. Parliament has empowered the Administrator to authorize the acts in section 6, and once the administrator has complied with the dictates of parliament, and authorized those same acts in writing, there is no legal basis for holding that the Administrator did not act within the four corners of the section – that the Administrator did more than the section authorized, or exceeded his jurisdiction."

[6] What was therefore important, to his mind, was to determine whether or not the Authorisation authorised any acts not mentioned in Section 6. Only if it did could it be held to be ultra vires. Having examined the provisions of the Authorisation in some detail, and having not discovered any activity authorised therein which did not fall within activities for which authorisation can be given under section 6, he concluded that the Authorisation was not ultra vires and accordingly dismissed the claim.

[7] The appellant is concerned about the uncompromising way in which Legall J. described the powers of the Administrator. Ms. Marin Young argued that the passage

quoted above could be interpreted as authorising the Administrator to permit activities which, while falling strictly speaking within the confines of section 6, may be carried out in such a way as to completely deprive the Reserve of its character as a nature reserve. As it turns out, her fears were not unfounded since Mr. Panton felt himself emboldened to submit that even a permission granted under section 6 which authorised the denuding of the entire Reserve was intra vires section 6, even though there would be nothing left which would be worthy of the designation 'nature reserve'. He drew support for this from the way Awich J (as he then was) had earlier described the ambit of the powers of the Administrator under section 6 in ***Sarstoon–Temash Institute for Indigenous Management (SATIM) v Forest Department et al*** (Claim No. 212 of 2006, 29 September 2006). Awich J said on that occasion (at para 44):

> "It is my view that in addition to declaring its intention to create, protect and preserve a national park, Parliament intended by the express words used, to authorise the activities in subsections 6(a) to (m), although some of the activities are not consistent with the protection and preservation of the character of a national park. I see no absurdity or inconvenience in Parliament creating subsections 6(a) to (m) as exceptions to the main intention of creating, protecting and preserving national parks and their character, so that the court may give meanings other than the literal meanings of words and the natural and grammatical meanings of the provisions in the subsections."

[8] Ms. Marin Young was also concerned that the Authorisation was issued by the Chief Forest Officer, not the Administrator for the Bladen Branch Nature Reserve, as is envisaged by section 6. Legall J. shared her concerns. He pointed out that, on the evidence before him, no Administrator had been appointed under section 10 and that the Chief Forest Officer had been performing the duties of Administrator for all nature reserves. He recalled the general rule that "where the legislature confers power on an authority or person, the exercise of that power should be exercised by that authority or person stated in the legislation, except in cases where it can be reasonably inferred that the power can be delegated to some other person" (para 32). But there was no question

of delegation in this case, since no Administrator had been appointed. He was urged to follow the judgment of Awich J in the ***SATIM*** case who held that the Chief Forest Officer may, lawfully, in place of the Administrator, issue written authorisations under section 6. Expressing much doubt as to whether he should adopt the view expressed in ***SALIM***, he nevertheless stopped short of declaring that the Chief Forest Officer was not empowered to issue written authorisations under section 6 since to do so would be a useless formality, the Authorisation being already spent with the passage of time.

[9] It is against this backdrop that the appellant asks us to reverse the trial judge's decision and to declare the Authorisation to have been issued ultra vires the Act. The appellant also appeals against the award of costs made against it.

Appeal Academic?

[10] The respondents' first salvo in response is to ask this court not to entertain the appeal on its merits, given that the Authorisation has already expired, the third respondent has ceased the activities complained of, and therefore no purpose would be served by pronouncing upon the validity of the Authorisation, one way or the other.

[11] For his part, Mr. Panton says that the appellant is unable to show how deciding this appeal on its merits would affect its rights as co-manager. There is no evidence of any similar cases in existence or anticipated which may have rendered a determination of the issues on this appeal in the public interest. He says further that Awich J's decision in ***SALIM*** has stood for 7 years and there are no conflicting decisions. There is accordingly no compelling need to clarify the law.

[12] Joining with Mr. Panton, Mr. Ebanks points out that the first respondent, as the primary decision-maker, does not seek the guidance of the Court on his powers under the Act. Further, he submits, the provisions of the Act on which the appellant seeks guidance are clear and unambiguous and there is therefore no need to utilise the court's time and resources to render what can only be an advisory opinion.

[13] The parties are not in dispute as to the principles which are to be applied in these circumstances. The relevant authorities have been examined on at least two occasions by this Court – see ***Belize Bank Ltd v Central Bank of Belize*** (C.A. 25 of 2008, 19 March 2010); ***Attorney General of Belize v Barry Bowen*** (C.A. 7 of 2009, 19 March 2010). The general principle in that academic appeals will not ordinarily be entertained. Courts decide live issues between parties. They do not pronounce upon abstract questions of law when there is no dispute to be resolved. But there is no absolute rule to this effect. Whether an academic appeal will be entertained is a matter within the discretion of the Court to be decided on the facts of the particular case. The question is not one going to jurisdiction. Furthermore, a distinction is to be drawn between disputes concerning private law rights between private parties, and public law cases, such as this one. The correct approach to public law cases has been accepted by this Court to have been set out in the judgment of Lord Slynn in ***R v Secretary of State for the Home Department, ex parte Salem*** [1999] AC 450, 456-457:

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the Sun Life case and *Ainsbury v Millington* (and the reference to the latter in rule 42 of the Practice Directions applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.
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> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[14] Lord Slynn did not think that the case before him was one which should be heard because the facts were by no means straightforward and the resolution of the particular issue may depend on the precise factual context of each case. Further, the question was likely to arise in only a few instances. In ***Attorney General v Bowen***, this Court declined the invitation to pronounce upon the constitutionality of a Bill which had been withdrawn, given that there was no indication of the existence of other similar cases before the Court or ones which were expected to be launched.

[15] On the other hand, in the recent case of ***Antigua Power Company v Attorney General of Antigua and Barbuda*** [2013] UKPC 23, the Privy Council held that it was appropriate to grant a declaration that, in giving instructions to the Commissioner of Police to stop the landing and installation of electricity generators, the Prime Minister acted in excess of his powers, even though the only function a declaration would serve would be to record that a wrongful action had been taken in the past, as the dispute had ceased to have any practical significance between the parties. Their Lordships came to this view, firstly, because the issue whether the Prime Minister, or any other Minister, could instruct the Commissioner, or any other member of the police force, to take a particular action, is one of substantial public importance. Secondly, they felt that while the facts of the case before them were very unusual, the issue of a Minister's powers over the police might well recur. Thirdly, they were concerned that the Prime Minister, supported by the Attorney General, had maintained before the Board that he was entitled to tell the police what to do. Their Lordships considered it significant that, at every stage of the proceedings, the Prime Minister effectively asserted that he did not act in excess of his powers in giving the instructions which he gave to the Commissioner. This was a factor which reinforced the Board's view that a declaration was appropriate "in order to record what is potentially an important constitutional point" (para 60).

[16] We have not been referred to any other pending case or ones which are likely to brought before the Supreme Court any time soon which raise similar issues as the ones which the appellant wishes us to decide on this appeal. Mr. Panton has informed us that

since the Authorisation issued in this case, the Chief Forest Officer has not exercised the power vested in the Administrator under section 6 of the Act and an Administrator has now been appointed. It is therefore unlikely that the question whether the Chief Forest Officer is permitted in law to exercise the Administrator's power under section 6 will arise again, making it unnecessary to resolve the difference of opinion between the judges of the Supreme Court on this point. For these reasons, I agree that this aspect of the appeal ought not to be entertained.

[17] However, there are compelling features of this case which call for a resolution of the other more substantive issues which have been raised. Those who represent the Chief Forest Officer and the Attorney General's department have apparently interpreted the previous rulings of Awich J and Legall J in relation to section 6 as bestowing absolute power on the Administrator. As noted, Mr. Panton did at one time submit that the Administrator could authorise activities under section 6 which could empty a nature reserve of its essential statutory features. Even though, under pressure from the Court, he eventually conceded that the Administrator's power under section 6 could not be exercised for an improper purpose, he did not entirely resile from his initial position, and the fact that such an alarming proposition has been entertained by those advising the relevant officials is disturbing. The problem is that the way in which both Awich and Legall JJ expressed themselves does justifiably give rise to the extreme position which Mr. Panton initially put forward, even though I am certain that they too would be alarmed by the conclusions which have been drawn from their statements. Even though we were not told of any similar case on the horizon, the possibility that the power under section 6 will be exercised at some time in the future cannot by any means be ruled out and the danger is that this extreme approach to the Administrator's powers may infect future decision making to disastrous effect. As Ms. Marin Young pointed out, authorisations granted under section 6 are usually of a temporary nature, making it likely that, as happened in this case, by the time the issue is brought to court, the question is once again academic.

[18] The other consideration is that the notion that the Administrator might possess unfettered powers is contrary to the deeply ingrained principle of the rule of law that power always has limits. The possibility, therefore, that the approach which the Supreme Court has taken thus far to the Administrator's power under section 6 may be interpreted as permitting him or her to bring about the destruction of a nature reserve which the Minister by his Order has determined should enjoy protection under the Act, calls for a careful review of the principles of law applicable to the construction of section 6 in order to determine whether that approach is in fact correct. The determination of this issue will not require detailed consideration of facts beyond an examination of the terms of the permission granted by the Chief Forest Officer and will involve a discrete point of statutory interpretation. For these reasons, it is in my view clearly in the public interest that this appeal be entertained.

The Administrator's power under section 6

[19] Under section 6, the Administrator is empowered, in writing, to authorise any person to carry out any of the activities set out in the ensuing sub-paragraphs. There is no provision stipulating what matters the Administrator is to take into account in determining whether to grant permission. The Administrator therefore enjoys what is frequently referred to as an uncontrolled discretion. But this by no means signifies that the discretion he enjoys is absolute. Ever since the House of Lords rendered its decision in ***Padfield v Minister of Agriculture, Fisheries and Food*** [1968] AC 597, it has been commonplace to treat an otherwise uncontrolled discretion as being exercisable in accordance with law, to be used to advance the purposes for which it is conferred and to promote and not defeat the policy and objects of the statute in which it is contained – see ***R v Home Secretary ex p. Brind*** [1991] 1 AC 696, 756, per Lord Ackner. No matter how wide the terms in which it is expressed, therefore, it is a fundamental principle of public law that no discretion is treated as being unfettered or unlimited. Exactly what are the extent of the powers conferred and the scope of the discretion vested in the public authority is to be determined on a proper construction of

the Act in question – see ***R v Environment Secretary, ex p. Spath Holme*** [2001] 2 AC 349, 381, 404, 412.

[20] In ***R v Tower Hamlets London Borough Council, ex p. Chetnik*** [1988] AC 858, 872, Lord Bridge adopted the following passage from ***Wade on Administrative Law***, 5th ed., 355-356, as a correct statement of law:

> "The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.
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> The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.... Unreviewable administrative action is just as much a contradiction in terms as is unfettered discretion, at any rate in the case of statutory powers. The question which has to be asked is what is the scope of judicial review. But that there are legal limits to every power is axiomatic."

[21] In order to determine whether, in this case, the Chief Forest Officer exercised the discretion under section 6 to permit the third respondent to enter the Reserve to carry out the activities detailed in the Authorisation, the Act must be construed as a whole. It

may be that the discretion conferred by section 6 is so wide that it can only be challenged if shown to be exercised irrationally or in bad faith. On the other hand, it may be that if the purpose which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose - see per Lord Bridge in ***ex p. Chetnik*** (at 873). It is necessary therefore to ask two questions. The first is: what are the objects of the Act? And the second is: why has the legislature chosen to give the Administrator a discretion to authorise the activities set out in detail in section 6 – see ***R v Westminster Magistrate's Court, ex p. Electoral Commission*** [2011] 1 AC 496, 509, per Lord Phillips.

[22] The Minister is empowered by section 3 of the Act to declare that any specified area of land shall for the purposes of the Act be a nature reserve. A nature reserve is defined as

> "any area reserved as a scientific reserve in accordance with the provisions of section 3 for the protection of nature be it biological communities or species and to maintain natural processes in an undisturbed state in order to have ecologically representative examples of the natural environment available for scientific study, monitoring, education and the maintenance of genetic resources"

[23] No doubt with a view to maintaining the specified area of land designated as a nature reserve for these purposes, section 4 is careful to provide that no one is entitled to enter a nature reserve or in any way disturb the fauna and flora found there and that no animal shall be hunted, killed or taken and no plant shall be damaged, collected or destroyed. Similarly, section 6 prohibits the long list of activities set out in its sub-paragraphs, which include among them those already prohibited by section 4. It is therefore not at all a controversial proposition that the object of the Act, in so far as the creation of nature reserves is concerned, is, broadly speaking, to protect biological communities or species and to maintain natural processes in an undisturbed state.

[24] However, section 4 is expressly declared to be subject to any provision of the Act and is accordingly subject to the grant of permission by a prescribed officer under

section 5 to any person to enter or remain within a nature reserve in accordance with the terms of any such permit. It is subject as well to the activities which may be authorised under section 6. It is also subject to the power of the Minister under section 7, in his discretion, to issue permits to bona fide organizations and scientific and other qualified professionals or specialists for "for cave exploration, collection of specimens of particular species of flora or fauna, group education activities, archaeological or paleontological exploration, scientific research and related activities." And it is further subject to the power of the Minister under section 9(4) to grant licences for the provision of visitor facilities and services.

[25] The protection afforded under section 6 is also not absolute. In fact, while prohibiting the activities specified in its sub-paragraphs, it proceeds expressly to empower the Administrator to authorise those very activities. Thus, the Administrator may authorise a person to damage or destroy any flora in a nature reserve, or hunt any species of wild life, or to quarry, dig or construct roads or trails, or introduce organic or chemical pollutants into any water, or clear land for cultivation, or introduce exotic species of flora or fauna, or catch fish. Each of these activities has the potential to undermine the purpose for which a piece of land is declared a nature reserve. Damaging or destroying flora and hunting species of wildlife is the antithesis of the protection of nature or the maintenance of natural processes in an undisturbed form. This is no doubt why Ms. Marin Young adopted the extreme position that, despite the express words used in section 6, the Administrator could not authorise, for example, the destruction of flora or the clearing of trails. But the fact is that section 6 does empower the Administrator to authorise these very activities, despite the obvious detrimental effect they could have on the purpose for which a nature reserve is created. And this is no doubt why Mr. Panton adopted the other extreme position that the Administrator could authorise the razing of all plant life in a nature reserve, even if there were no representative samples of the natural environment left thereafter for scientific study, monitoring or education.

[26] It is clear that neither of these extreme positions is tenable. There would be no point empowering the Minister to create a nature reserve, if the Administrator could authorise its destruction. And it would be no point empowering the Administrator to authorise the destruction of flora on a nature reserve, if it is a power which in practice he could never exercise. The legislature has no doubt recognised that it would not serve the public interest to keep a nature reserve forever in its pristine form. Life goes on. There may be other pressing uses to which the tract of land designated a nature reserve might be put, without jeopardising the purpose for which it was created in the first place. For these reasons, no doubt, the Administrator was empowered to authorise the activities set out in section 6. What the Administrator can do, therefore, falls somewhere between the two extremes put forward by counsel on either side of the debate. Whether the Administrator has acted outside of his remit will therefore necessarily have to be determined on a case by case basis.

[27] In this case, while authorising the first respondent to enter the Bladen Nature Reserve to conduct studies, to clear forest under-story, to install hydrological gauging stations, to construct or erect structures for temporary equipment and to safely perform studies, the Chief Forest Officer was at pains at the same time to impose conditions and establish a system of regular monitoring designed to ensure that the character of the nature reserve would be preserved. Thus, the Authorisation provided that i) the clearing of forest under-story would be minimised; ii) the third respondent would not set any fires (other than camp fires), or cut any hardwood seed trees or any primary hardwood trees, or hunt, fish or disturb any wildlife, or collect or remove any species of flora, or camp in the reserve (except for conducting and expediting the studies), or disturb any archaeological monuments or artefacts or nature features, or bring into the reserve any pets or other domesticated animals, or introduce any species of flora or wild fauna, or do any act which in the opinion of Chief Forest Officer may cause any harm, injury or loss to the environment, flora or fauna. The Authorisation provided further that the Chief Forest Officer could from time to time "add to or vary the terms and conditions of this Permission in the interest of the preservation, conservation and protection of the Nature Reserve, its wild life and environment." In light of these provisions, it could hardly be

said that the activities which were authorised would alter the essential characteristics of the nature reserve and indeed the Authorisation rather depicts a Chief Forest Officer who was sensitive to his task of protecting the nature reserve, while at the same time authorising the activities which the legislature expressly empowered the Administrator to authorise.

[28] Ms. Marin Young's alternative, and in my view, more important submission was to the effect that, whether or not the activities authorised by the Chief Forest Officer under section 6 had the effect of altering the character of the Bladen Nature Reserve, the power under section 6 could only be exercised if the activities which were being authorised, promoted the objectives for which a nature reserve was created, even if they did not detract therefrom. She pointed to the fact that in this case, the Authorisation was expressly granted "for the purpose of conducting longitudinal and topographical surveys and acquiring hydrologic data." She also noted that in its request to the Chief Forest Officer for permission to carry out the stipulated activities on the Reserve, the third respondent identified the purpose of these studies as being to determine "the feasibility of a run of river hydroelectric project", all the while making clear that any permission granted "would not be construed as any approval to conduct any works not related to the feasibility study nor to build any aspect of the hydroelectric project." The determination of the feasibility of a run of river hydroelectric project, Ms. Marin Young submitted, was clearly not a purpose for which the Bladen Nature Reserve was established and accordingly any permission to conduct activities on the reserve to that end was not within the power of the Administrator under section 6, as not being within the objects and purposes of the Act.

[29] Ms. Marin Young relied primarily on the decision of the Court of Appeal of New South Wales in ***Packham v Minister for the Environment*** (1993) 31 NSWLR 65. In that case, the Minister granted a license for vehicular traffic through a national park to access private land adjacent to the park, pursuant to a broad power to "grant licenses to occupy or use lands within a national park". The Court held that the Minister's power could only be exercised "to license acts or conduct things the characters of which are

such as to promote, or to be ancillary to, the use and enjoyment of the national park as public park or for public recreation." The license to permit access to private property did not have this character. As Kirby J. Said:

> "What is in question ... is the proper characterisation for legal purposes of the Minister's purported action in approving the requested licence. Properly characterised, in my view, there is no doubt that what is purposed to be granted is a license for access to private property over a national park for the private purposes for the second respondent and his tenants. A road will be constructed for that purpose. Only incidentally would such road act as a fire break and drain. The essential character of what is proposed is not changed by the attainment of incidental or collateral benefits to the national park. The essential character is, and remains, the granting of vehicular access to private property. That is what prompted the proposal. It was not the public spirited achievement of physical changes to be made to protect the park, as a park. The Minister is not, as such, licensing the second respondent to build a road on the national park for reasons essential to the park. He is, instead, granting him a right of access through the national park, over that road, to a property owned by him and leased to a tenant. In these circumstances, the granting of a license for such access is not authorised by s. 151(1)(f) of the Act. It is not properly characterised as the use of the park as a public park nor for public recreation. Instead, so viewed, it amounts to nothing more than the authorisation of use of the park for private ends; viz., to gain access to private property."

[30] In short, Ms. Marin Young submits that the power to authorise activities under section 6 could only be used to authorise the use of the nature reserve as a nature reserve, as defined, and not for other purposes.

[31] The difficulty which this submission faces is that section 6 expressly empowers the Administrator to authorise activities which, on their face, are not compatible with the character of a nature reserve. For example, clearing land for cultivation or the grazing of domestic livestock cannot be characterised as using the nature reserve as a nature reserve. It therefore appears to me that the Administrator is permitted to authorise activities which do not involve the use of a nature reserve, as a nature reserve, as long

as in degree and scale, the activities do not result in the transformation of the character of the nature reserve itself. For example, while the Administrator may authorise the clearing of land for cultivation, he could not do so if the result would be that the preservation of the reserve for its statutory purposes is substantially affected.

[32] In this case, as already noted, the Chief Forest Officer was careful to ensure that only minimal damage was done to the Reserve. Although the purpose for which entry was allowed did not further the objects of a nature reserve, neither were the activities permitted to be carried out in the context of the controls mentioned likely to substantially affect the character of the Reserve. The damage which was expected to be done was localised and contained and carried out over a relatively short period of time. It is also relevant that the studies being carried out concerned the potential use to which the natural resources with which Belize is endowed could be put for the development of Belize. It may be that it is a wise use of water resources to establish a hydroelectric plant. That is a matter for the duly elected representatives of the people of Belize to determine. There is nothing in the Act which says that once created, a nature reserve must forever be used as such. Indeed, the Minister may at any time revoke the Order designating Bladen as a nature reserve. There is nothing unlawful in carrying out studies to determine whether any part or even the whole of a nature reserve should be put to other uses in the service of the public interest. Awich J made a similar point in ***SATIM***. He said (at para 15):

> "The Government was entitled to take a decision such as that authorising seismic surveys which could provide the Government with facts as to whether it would in the end opt for oil exploitation in the area and abandon the "protection and preservation of natural and scenic values of national significance for the benefit and enjoyment of the general public". That will be a decision that will entail choice between competing economic and social merits, a political choice, an area about which the Government is entitled to make a decision. Court is not the proper arbiter in such a matter."

[33] For these reasons, I am of the view that, leaving aside the question whether the Chief Forest Officer could exercise the powers of the Administrator, the Authorisation was not issued ultra vires the Act.

Costs

[34] Rule 56.13(6) of the Supreme Court (Civil Procedure) Rules 2003 provides that

> "The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."

In the court below, Legall J ordered the applicant to pay the respondents' costs, but he did not say why he thought the general rule ought not to apply.

[35] Ms. Marin Young says that the general rule should apply both here and in the court below because the appellant brought these proceedings in the public interest in order to protect the Bladen Nature Reserve from damage caused by the activities carried out under the Authorisation and not for any commercial or proprietary reasons. She says that it was important that the appellant pursue this case because of the uncertainty surrounding the powers of the Administrator under the Act.

[36] The first and second respondents, on the other hand, say that the appellant acted unreasonably in pursuing the claim for damages given that the appellant had no legal interest in the Bladen Nature Reserve and there was no evidence showing that anyone had suffered as a consequence of the granting of the permit.

[37] While joining with the first and second respondents in their claim that the appellant acted unreasonably in pursuing the claim for damages, the third respondent argues further that the general rule under 56.13(6) applies only to applications for administrative orders and not to a damages claim, which is not considered to be a claim for an administrative order. Having been denied the claim for damages, the appellant is

accordingly exposed to the general discretion of the court as to costs, including the competing general rule that costs follow the event.

[38] In support of the latter point, the third respondent refers to the fact that under Rule 56.1(4) the court is empowered, in addition to or instead of an administrative order, to grant an injunction, restitution or damages, or an order returning property. A claim for damages, therefore, is not a claim for an administrative order and accordingly Rule 56.13(6) does not apply.

[39] I do not agree. Rule 56.13(6) provides that the general rule applies to "an applicant for an administrative order." A person who applies for judicial review of the decision of a public authority is an "applicant for an administrative order" and does not cease to be such because he also includes a claim for damages. Whether an applicant for an administrative order has acted unreasonably in including a claim for damages, thereby justifying the non-application of the general rule that no order as to costs shall be awarded against him, is another matter altogether.

[40] There was only a faint hint of a suggestion that the applicant acted unreasonably in challenging the Chief Forest Officer's decision to grant the authorisation under section 6. As this judgment would clearly indicate, issues of public importance concerning the true ambit of the Administrator's power under section 6 have been raised which, though strictly academic, nevertheless were of sufficient public interest to require this Court's adjudication. It therefore cannot be said, in my view, that the appellant acted unreasonably either in pursuing this appeal or in challenging the Chief Forest Officer's decision. The mere fact that Legall J was minded to find that the Chief Forest Officer did not have the power to authorise any activities under section 6, by itself, militates against any finding that the appellant acted unreasonably in launching the challenge.

[41] With regard to the claim for damages, the evidence before the trial judge consisted, in part, of a report dated 15 February 2010 prepared by the Forest Department whose investigations revealed that there were a total of three camp sites at the Reserve and that vegetation had been cleared and the land levelled to facilitate the

landing of helicopters. There were no large trees or shrubs found in the area of the sites which were kept in a clean state, with garbage buried and covered with soil. There was also evidence of the excavation of Maya ruins, perhaps by laid off workers of the third respondent, and that hunting appeared to be out of control, given the presence of spent gunshot shells strewn around. Nevertheless, the Forest Department concluded that there was no major contravention of the conditions of the Authorisation granted to the third respondent.

[42] There was also the evidence of witnesses for the appellant which painted a different picture of the extent of the damage which had been done. Thus, witnesses spoke of several helicopter landing sites which had been cleared, blocked creeks and tributaries, soil erosion along the slopes that had been cleared, and looting of archaeological sites. Witnesses testified that the trails that had been cut facilitated entry into the Reserve by local looters and looters from Guatemala, called Xateros, who had extracted leaves and fauna, and had raided archaeological sites. There was also evidence that Guatemalan hunters and Xateros were grazing horses on the helicopter landing sites.

[43] The trial judge was in no doubt that some unauthorized damage had been done to the Reserve, but he was not satisfied that the appellant had established, on a balance of probabilities, that the third respondent had directly caused such damage. On the other hand, he was satisfied that the cutting of trails by the third respondent, without effectively monitoring them, facilitated entry into the Reserve by hunters and looters, who then caused damage to the Reserve. Although he was not satisfied, therefore, that the third defendant directly caused damage to the Reserve, he was satisfied that the third respondent must shoulder some liability for the damage caused by the hunters and looters, but he felt unable to quantify that liability because there was no evidence of the quantum of damage caused by the hunters and looters.

[44] As to the contention that the third respondent was liable in damages for trespass, the trial judge found that the third respondent had permission to enter the Reserve and

that in any event there was no claim for trespass made by the appellant against the third respondent.

[45] As to the claim that the appellant was entitled to compensation for damage done to the Reserve itself, the trial judge found that the Reserve was not owned by the appellant but by the State, and the appellant was not entitled to compensation done to land which it did not own. Furthermore, the claim for damages was initially made against the Chief Forest Officer and the Attorney General, who were themselves representatives of the State which owned the property, and there was no proof in any event that they had caused damage to the reserve.

[46] When the appellant commenced these proceedings it included a claim for damages against the parties then joined, namely the Chief Forest Officer and the Attorney General, the latter no doubt as representative of the State. The only complaint was that the Chief Forest Officer had acted ultra vires his powers under the Act. But to sustain a claim for damages against the Chief Forest Officer for the exercise of statutory powers it would have been necessary for the appellant to establish that he was guilty of misfeasance in public office, a tort which involves an element of bad faith and arises when a public officer exercises his power specifically intending to injure the claimant, or when he acts in the knowledge of, or with reckless indifference to, the illegality of his act and in the knowledge of, or with reckless indifference to, the probability of causing injury to the claimant or persons of a class of which the claimant was a member, or when he is subjectively reckless in the sense of not caring whether the act was illegal or whether the consequences happened - see ***Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)*** [2003] 2 AC 1. Suffice it to say that at no time has the complaint made against the Chief Forest Officer risen to anywhere near this level. Indeed, given the lengths to which he went to protect the Reserve from any damage that might be caused by the activities he was authorising, any complaint of misfeasance would have been nothing short of vexatious.

[47] Once the third respondent was joined, it appears that the appellant shifted gear and trained its sights on the beneficiary of the Authorisation. As the trial judge found, any claim in trespass against the third respondent was bound to fail given that the third respondent had the Chief Forest Officer's permission to be on the Reserve and there was no serious allegation that the terms of the Authorisation had been exceeded. Moreover, as the trial judge held, there was no clear evidence that the third respondent, as opposed to the hunters and looters, had caused what the trial judge found to be unauthorised damage. Any liability on the part of the third respondent would have been as a result of its failure to adequately monitor the trails it had cut. But quite apart from the question whether the appellant had any locus to pursue such a complaint for damage to property it did not own, a matter on which I express no opinion, the failure of the third respondent to monitor the trails sounded in negligence in private law and was an inappropriate claim to join in an application for an administration order, in circumstances where the third respondent was not the decision maker whose decision was under challenge.

[48] In my judgment, therefore, the appellant acted unreasonably in the conduct of the application in so far as it included the claim for damages. In the result, the default position of no order as to costs did not apply, but it is also clear to me that given that the appellant behaved reasonably in challenging the vires of the Authorisation, it ought not to have been made to bear one hundred per cent of the respondents' costs. In my assessment, the appellant should bear only one third of the costs in the court below.

[49] I would therefore dismiss the appeal except to the extent of varying the order as to costs made by the trial judge in the way just indicated.

[50] As to the costs of the appeal, since there was no appeal on the question of damages, the appellant is entitled to the benefit of the general rule of no order as to costs, even though not successful on the merits of the appeal. But given that it was not successful on the merits, I would likewise, provisionally, not make any order as to costs in its favour even though it was in part successful on its appeal against the order as to

costs in the court below. This order as to costs on the appeal shall stand unless application be made for a contrary order within 7 days of the date of delivery of this judgment, in which event the matter shall be decided by the Court on written submissions to be filed within 15 days from the said date.

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MENDES JA

AWICH JA

[51] I concur in the judgment prepared by Mendes JA, and the orders agreed.

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AWICH JA