IN THE SUPREME COURT OF BELIZE, A. D. 2013

CLAIM NO. 698 of 2013

IN THE MATTER OF a Claim pursuant to Section 20 of the Constitution
AND IN THE MATTER OF Sections 3, 15 and 17 of the Constitution

BETWEEN

(Belize International Services Ltd.	**Claimant**
(And	
(The Attorney General of Belize	**Defendant**

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Eamon Courtenay, S. C., and Ms. Pricilla Banner of Courtenay, Coye LLP for the Claimant
Mr. Denys Barrow, S. C., and Ms. Naima Barrow of Barrow and Co for the Defendant

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D E C I S I O N

1. This is an application for striking out a Claim brought pursuant to Rule 26.3 (1)(b) of the Rules of the Supreme Court. It was brought in response to a Fixed Date Claim for Constitutional Relief filed on December 23rd, 2013. The Attorney General has applied for an order that this claim for constitutional redress be struck out as an abuse of the process of the court; as an abuse of

the procedure for constitutional relief; and that judgment be entered for the defendant dismissing the claim with costs to be paid by the Claimant.

2. The grounds for the Application are that the facts alleged by the Claimant present causes of action for (i) breach of contract and (ii) trespass to goods. Mr. Barrow S. C. submits on behalf of the Applicant/Defendant that this is not a true case of breach of constitutional rights. It is clear from the claim itself that an award of damages for the alleged breach of contract and trespass to goods, if proved, would give adequate redress to the Claimant. Such an award would be readily available in an ordinary common law claim. It is therefore inappropriate and unjustifiable that the Claimant should seek redress for alleged violations of constitutional rights; such a claim is an abuse of the process of the court and should be struck out at the outset.

3. On behalf of the Respondent/Claimant, Mr. Courtenay, SC, submits that this application to strike out claim should be dismissed on the following grounds:

    i) The Government has not established that this is an appropriate case for the Claim to be struck out as an abuse of process on the ground that the claim is unsustainable or bound to fail or otherwise abusive;

    ii) The Claim is an appropriate case for constitutional relief pursuant to ss.3, 15, 17 and 20 of the Constitution;

iii) The amendment to s. 20 of the Constitution means Belize International Services Ltd. is at liberty to claim constitutional redress on the facts of this case, despite a potential alternative claim for breach of contract;

iv) The breadth of the Court's jurisdiction to grant remedies under Part 56 has been widened to enable the Court to fashion appropriate remedies in constitutional cases even where such remedies may sound both in public and private law;

v) Alternatively, if the Court finds that the Claim only gives rise to private law contractual remedies or a claim for other administrative relief, the Court has power under Part 56 of the CPR and/or the inherent jurisdiction of the Court to grant contractual damages in the context of the Claim.

The Facts

4. Belize International Services Ltd., the Claimant, is a company duly incorporated and existing under and by virtue of the International Business Companies Act, Chapter 270 of the Laws of Belize, with its office situate at No. 60 Market Square, Belize City, Belize. The Defendant is the Attorney General of Belize. The Claimant has developed and managed the International Business Companies' Registry ("the IBCR") and the International Merchant Marine Registry ("the IMMARBE") since 1993 pursuant to a Management Services Agreement made between the Government of Belize and the Claimant ("the Agreement"). The Agreement

is dated June 11th, 1993 and was for a term of ten years. The Claimants say that its duration was renewed for a further term of ten years on the 9th May, 2003 when the Claimants exercised the option contained in Clause 15 of the Agreement. By mutual agreement and on the payment of the sum of US$1.5 million by the Claimant to the Government, the parties amended the Agreement on the 24th March, 2005 pursuant to clause 20(1) of the Agreement, and extended the duration of the Agreement to 11th June, 2020. The Claimants further allege that, notwithstanding the extension of the 1993 Agreement to 11th June, 2020, the Government has taken the position that the Agreement has expired on 10th June, 2013. On the 11th June, 2013 the Government forcibly took over control of the registries without compensating the Claimant for the unexpired term of the Agreement. The Government has also taken possession of and vested in itself all the office furniture and equipment situate at the IBCR and IMMARBE on 11th June, 2013 without compensating the Claimant in respect hereof.

5. The Claimants aver that the actions by the Government violate the Claimant's constitutional rights guaranteed by sections 3 and 17 of the Constitution. The Claimant's right, interest and property under the

Agreement together with its chattels, goodwill and its chose in action have been compulsorily acquired and taken possession of by the Government without the authority of any law conforming to section 17 of the Constitution, and without compensating the Claimant for the said rights and property as aforesaid in respect of the unexpired term of the Agreement.

6. The relief sought by the Claimant include a declaration that the Government's forcible takeover of the registries violates sections 3 and 17 of the Constitution (protection against arbitrary deprivation of property), and violates the Claimant's right to work under section 15 of the Constitution; the Claimant also seeks damages for violation of its constitutional rights.

7. The Claimant has filed an affidavit by Juan David Morgan, setting out the facts on which they rely, while the Defendant has filed affidavit in response by Joseph Waight, Financial Secretary of the Government of Belize.

Issue

8. Is this a constitutional claim, or a claim for breach of contract/judicial review? Was the proper procedure used to bring this claim and if not, should the claim be struck out or otherwise dealt with by the court?

Applicant/Defendant's Submissions on Application to Strike Out Claim

9. Mr. Barrow S. C. on behalf of the Defendant argues that filing this claim as a claim for constitutional redress is an abuse of the procedure for constitutional relief and judgment should be entered for the defendant dismissing the claim with costs. He submits that the courts have repeatedly said that the right of persons (under section 20 of the Constitution of Belize) to apply to the Supreme Court for redress where any of their fundamental rights have been infringed must not be abused by the bringing of claims for constitutional redress where a normal common law claim would be adequate. Such an abuse diminishes the value of section 20.

10. Learned Counsel cites ***Harrikissoon v and the AG of Trinidad and Tobago*** [1980] AC 265 where the appellant sought a declaration that his human rights had been contravened when he was transferred unlawfully from one school to another and that this amounted to a deprivation of property. The

Privy Council held that one should not be allowed to use the procedure provided by section 6(1) of the Constitution as the route to challenge administrative action and thereby avoid the necessity of applying in the normal way. Lord Diplock said:

> *"In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."*

His Lordship went on to state that the case before them was one which only concerned the right of the holder of a public office not to be transferred against his will from one place to another, and that in the view of the Privy Council, it was manifest that that right is not included among the human rights and fundamental freedoms specified in Chapter 1 of the Constitution.

11. Mr. Barrow S. C. also cites ***Attorney General v Luciano Vue Hotel Ltd and Others*** (2001) 61 WIR 406. In that case the respondent company filed a

constitutional motion against the seizure of a quantity of liquor by the Comptroller of Customs and Excise. The basis of the seizure was that the special license under which the company sold liquor had been terminated as a result of the surrender of that license by the joint licensee. The company claimed that the license was renewed and still in force at the time of the seizure. De La Bastide CJ considered the matter of abuse of constitutional motions and stated:

> *"It is time in my view that this abuse of using constitutional motions for the purpose of complaining of breaches of common law rights should be stopped. The only effective way of doing so is for the court at first instance to dismiss summarily any process which on its face seeks to force into the mould of a constitutional motion, a complaint of some tort or other unlawful act for which the normal remedy is an action at common law for damages or injunctive relief."*

12. In ***Thakur Persad Jaroo v. The Attorney General*** [2002] UKPC 5, where a car was purchased by the Appellant and seized by the licensing authorities upon suspicion of being a stolen vehicle, the Appellant sought constitutional redress alleging deprivation of property. The Privy Council found that the Appellant's case for the return of his vehicle was capable of being dealt with in the ordinary courts in Trinidad and Tobago by means of processes which were available to him under the common law. The

question whether it was appropriate for him to assert his constitutional rights was at the heart of the appeal. The Board found that the allegedly stolen vehicle was the property of the Appellant and therefore he could have had a claim for deprivation of property but given the nature of the claim and the significant dispute in facts it was an abuse of process to proceed with a constitutional motion. The Privy Council said:

> *" … The answer to the question whether or not the allegation can be established lies in the future. The point to which Lord Diplock drew attention was that the value of the important and valuable safeguard that is provided by s 14 (1) would be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures are available. His warning of the need for vigilance would be deprived of much of its value if a decision as to whether resort to an originating motion was appropriate could not be made until the applicant had been afforded an opportunity to establish whether or not his human rights and fundamental freedoms had been breached.*
>
> *Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another procedure is available, resort to the procedure by way of originating motion would be inappropriate and it would be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the*

procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances would also be an abuse…"

13. Mr. Barrow S. C. also relies on ***The Attorney General of Trinidad and Tobago v. Siewchand Ramanoop*** [2005] 66 WIR 334 where the Appellant sought constitutional relief for his unlawful detention by a police officer. The Board was invited to clarify its decision in Jaroo regarding abuse of process in constitutional motions and a subsequent decision of the Court of Appeal of Trinidad and Tobago. After discussing the relevant authorities, the Board stated:

> *"In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it inappropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been arbitrary use of state power."*

14. In his oral arguments before this court Learned Counsel specifically addressed the submissions made on behalf of the Respondent/Claimant

opposing this application to strike out claim. In relation to Ground 1, that the Government of Belize has not established the ground that the claim is unsustainable or bound to fail or is otherwise abusive, Mr. Barrow S. C. argues that Government of Belize does not make this application on the ground that the claim is unsustainable or bound to fail or otherwise abusive. He clarifies that this application is made on the ground that it is an abuse of process to bring a claim for constitutional relief when the claim gives rise to no more than an ordinary common law action for breach of contract and trespass to goods. He further submits that the Claimant/Respondent does not begin to address the clear line of authority on which Government of Belize relies. All the cases from ***Harrikisoon*** in 1980 to ***Ramanoop*** **i**n 2005 affirm and repeat that it is the duty of the court to strike out an abusive claim for constitutional relief.

15. Mr. Barrow S. C. also argues that the premise of the contention advanced by the Claimant/Respondent in its second ground that is, *"that the GOB must establish that the Claim on its face fails to disclose a claim which is sustainable as a matter of law,*" is wholly wrong. He submits that the principle behind every case cited in Government of Belize's submissions is that the Claimant who abusively applies for constitutional relief has a

sustainable claim but should bring it as a judicial review claim or as an ordinary common law claim.

16. On the third ground of the Claimant/Respondent's objection to this application *"that the amendment to the Constitution to remove alternate redress provision means that the Supreme Court no longer has the discretion to dismiss a claim for constitutional relief solely on the basis that adequate means of redress exist under some other law which may be pursued by BISL,"* Mr. Barrow S. C. contends that this ground is also wrong. He submits that the Claimant goes too far in saying that the courts will only conclude there is an abuse of process where the constitutional claim can be properly regarded as frivolous, vexatious or a contrived invocation of the facility of constitutional redress. Learned Counsel for the Applicant/Defendant submits that the true statement of the law remains the later decision of Ramanoop: where there is a parallel remedy there must be some feature which makes it at least arguable that the means of legal redress otherwise available would not be adequate. Mr. Barrow S. C. argues that this is what the Claimant/Respondent has wholly failed to present.

17. In regards to the Claimant/Respondent's submission that Part 56 enables the grant of a wide range of remedies, Mr. Barrow S. C. states that Government of Belize agrees with all statements of law made by the Claimant/Respondent on this point. But he contends that the issue of remedies in a constitutional claim can only arise in a claim that is properly so brought, and not one brought in abuse of process.

18. Finally, Mr. Barrow S. C. agrees with the Claimant/Respondent's statement of the law under the Civil Procedure Rules Part 56 that the court is given power to direct that the application for constitutional relief be dealt with as a regular claim. He would only ask for wasted costs because of the unreasonable use of the procedure for constitutional relief.

Respondent/Claimant's Submissions on Application to Strike out Case

19. Mr. Courtenay S. C. on behalf of the Belize International Services Ltd., submits that the power to strike out a claim is a power to be exercised in accordance with Part 26 but also in accordance with the overriding objective of the Civil Procedure Rules. He states that the Court will exercise great care, particularly in a constitutional claim as the strike out application is a harsh option which has been described by the Privy Council as a

"*nuclear option*" in ***Real Time Systems Ltd v Rentraw Investments Ltd*** [2014] UKPC 6:

> *"In that connection, the Court has an express discretion under rule 26.2 whether to strike out (it 'may strike out'). It must therefore consider any alternative, and rule 26.1 (1) (w) [26.1(1)(u) for Belize CPR enables it to 'give any other directions or make any other order for the purpose of managing the case and furthering the overriding objective' which is to deal with cases justly. As the editors of The Caribbean Civil Court Practice (2011) state T Note 23.6, correctly in the Board's view, the court may under this sub-rule make orders of its own initiative. There is no reason why the court, faced with an application to strike out, should not conclude that the justice of the particular case militates against this nuclear option, and that the appropriate course is to order the claimant to supply further details, or to serve an amended statement of case including such details within a further specified period. Having regard to rule 26.6, the court would quite probably also feel it appropriate to specify the consequences (which might include striking out) if the details of the amendment were not duly forthcoming within that period."*

Mr. Courtenay S. C. therefore urges the court to adopt a deliberate posture of judicial restraint and heightened caution when considering this application to strike out claim. He cites ***Anthony Burnette-Biscombe v Fadelle*** Claim No. DOMHCV 2010/0022 High Court of Dominica at 29 where the Master refused to strike out a claim because in view of the Defence already filed, there were substantial issues of fact which needed to be tried.

It was held that this was not a suitable case for strike out because there were issues that required trial. In the case at bar, the Defendant has filed its Defence in the First Affidavit of Joseph Waight, Financial Secretary in the Ministry of Finance. Mr. Courtenay S. C. submits that the Government cannot demonstrate that the claim is unsustainable and bound to fail. This is therefore not a proper case for the Court to strike out the Claim. He also contends that this is an appropriate case for constitutional relief in that the Government compulsorily acquired Belize International Services Ltd's property without acquiring legislation or instrument and without compensating Belize International Services Ltd. for the said acquisitions.

20. Mr. Courtenay S. C. argues that the Supreme Court no longer has the discretion to dismiss a claim for constitutional relief solely on the basis that adequate means of redress exist under some other law.

> *"20(1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.*

(2) The Supreme Court shall have original jurisdiction –

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

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

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

Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law." *(emphasis mine)*

The discretion under this section was to be exercised if the Supreme Court "*was satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law"*. Mr. Courtenay S. C. also contends that the repeal of the proviso to sub-section (2) therefore removed the Court's discretion to refuse constitutional relief on the basis that there was an alternative redress available to a person under some other law, in this case, contract law. He submits that the question which arises is not whether there is an alternative cause of action for breach of contract but whether invoking the

right of access to the Court on a constitutional basis "*is properly to be regarded as an abuse of the Court's process*." He further argues that the Government took the extraordinary step of using State might to acquire Belize International Services Ltd's property without first giving Belize International Services Ltd. an opportunity to be heard and certainly without compensating Belize International Services Ltd. for depriving it of its property. The power that was exercised by the Government in this case was not a power under contract but a power of the State. It was the exercise of this public power (passing Statutory Instrument No. 58 pf 2013 *"to take charge of IBCR*" and Statutory Instrument No. 59 of 2013 "*to assume control*" of IMMARBE) that had the effect of displacing BISL as the manager of both registries.

21. Mr. Courtenay S. C. also argues that Part 56 of the CPR has enhanced the jurisdiction of the Court to grant remedies for the purpose of permitting the Court to fashion appropriate remedies in constitutional cases.

> *"56.1(4) In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant –*
>
> *(a) an injunction;*
>
> *(b) restitution or damages; or*

(c) an order for the return of any property, real or personal.

56.8 (1) The general rule is that, where permitted by the substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that –

(a) arises out of; or

(b) is related or connected to,

the subject matter of an application for an administrative order.

(2) In particular the court may award –

(a) damages;

(b) restitution; or

(c) an order for return of property, to the claimant on a claim for Judicial Review or for relief under the Constitution if –

(i) the claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or

(ii) the facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and

(iii) the court is satisfied that, at the time when the application was made, the claimant could have issued a claim for such remedy.

(3) The court may however at any stage –

(a) direct that any claim for other relief be dealt with separately from the claim for an administrative order; or

(b) direct that the whole application be dealt with as a claim and give appropriate directions under Parts 26 and 27; and

> *(c) in either case, make any order it considers just as to costs that have been wasted because of the unreasonable use of the procedure under this Part."*

He submits that reliance on the former rigid approach adopted by the Courts in older cases in deciding not to grant constitutional relief in cases where an alternative remedy exists, or in refusing to grant a combination of remedies which sound both in private and public law, would be misguided and would also be inconsistent with an interpretation of the unambiguous provisions of Part 56 of the Civil Procedure Rules. It would be decidedly contrary to the overriding objective of the Civil Procedure Rules. He cites ***The Belize Bank Ltd v The Association of Concerned Belizeans*** et. al. Civil Appeal 18 of 2007 where Carey JA, with whom Sosa and Morrison JA expressly agreed, said:

> *"Ms. Lois Young is correct when she argues that Part 56 gives the Court great flexibility in dealing with administrative orders. The former situations are gone and the court has a wide selection of remedies and combination of remedies to choose from. This can be seen by a reference to Rules 56.1(4); 56.8(2); 56.6(3); 56.13(3). The New Rules should be given a liberal rather than a restrictive interpretation."*

22. Finally Mr. Courtenay S. C. submits that, without prejudice to its primary position that it has properly commenced the Claim for constitutional relief,

and without admitting that this application to strike has any merit, Belize International Services Ltd. says that if this Court finds that this claim should have been commenced as an ordinary claim for breach of contract, the Court has the power under Rule 56.8(3) to convert the claim:

> "56.8(3) *The court may however at any stage –*
>
> *(a) direct that any claim for other relief be dealt with separately from the claim for an administrative order; or*
>
> *(b) direct that the whole application be dealt with as a claim and give appropriate directions under Parts 26 and 27; and*
>
> *(c) in either case, make any order it considers just as to costs that have been wasted because of the unreasonable use of the procedure under this Part."*

He asks that the application be refused.

Ruling

23. I am most grateful for the submissions made on behalf of the Applicant/Defendant and Respondent/Claimant in this matter. Having considered all the authorities and submissions made (written and oral) and having perused the affidavits filed in this matter, I am satisfied that this is a contractual dispute. I am not prepared to go so far as to say that this is an ordinary claim masquerading as a constitutional claim which therefore amounts to an abuse of process. I do find that the facts alleged if proven by

the Claimant/Respondent may give rise to serious constitutional concerns especially with regard to the allegations regarding the arbitrary use of state power. However, upon examining the nature of the claim made and the relief sought, I find that this is essentially a claim for breach of contract. Did the contract between the parties come to an end on June 10th, 2013 (as alleged by the Defendant/Applicant) or was the contract extended to June 11th, 2020 (as averred by the Claimant/Respondent)? Did the Defendant/Applicant breach the contract? And if so, what quantum of damages should be awarded to the Claimant/Respondent? To my mind, these are major issues which need to be determined by the court in addressing this claim. This is a claim for damages for breach of contract and should have been brought as an ordinary claim. However, I will not strike out the claim. Instead I order pursuant to Rule 56.8(3) of the Civil Procedure Rules that this matter be converted to an ordinary claim for breach of contract. A Statement of Claim shall be filed within the next two weeks after which the matter shall proceed as if it had been commenced as an ordinary claim pursuant to Civil Procedure Rules Part 8.

Application to strike out claim is refused.

Wasted costs awarded to the Applicant/Defendant to be paid by the Respondent/Claimant to be taxed or agreed.

Dated this 12th day of March, 2015

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Michelle Arana
Supreme Court Judge