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

CLAIM NO. 698 OF 2013

BETWEEN:

(BELIZE INTERNATIONAL SERVICES LIMITED	**CLAIMANT**
(	
(AND	
(	
(THE ATTORNEY GENERAL OF BELIZE	**DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Eamon Courtenay, SC, along with Pricilla Banner and Ms. Angeline Welsh of Courtenay Coye LLP for the Claimant
Mr. Denys Barrow, SC, along with Jaraad Ysaguirre of Barrow and Co for the Defendant

Hearing Dates:

9th December, 2015
10th December, 2015
16th February, 2016
28th October, 2016

The Facts

1. This is a claim for $45 million US in damages brought by Belize International Services Ltd. (hereinafter "BISL") against the Government of Belize for breach of contract. The Claimant as stated in the Statement of Claim dated March 26th, 2015 was and is at all material times a company duly registered and existing under the Laws of the British Virgin Islands with its registered office situate at Craigmuir Chambers P.O. Box 71, Road Town, Tortola, British Virgin Islands. The Defendant is the legal representative of the Government of Belize ("the Government"). By virtue of a written Management Services Agreement ("the Agreement")

dated 11th June, 1993, the Claimant agreed with the Government to develop and manage the International Business Companies Registry ("the IBCR") and the International Merchant Marine Registry of Belize ("the IMMARBE") (together "the Registries") for a period of ten years with an option to renew the term.

2. On the 9th May, 2003 the Agreement was renewed for a further term of ten years when the Claimant exercised the option contained in Clause 15 of the said Agreement. The Claimants say that on 24th March, 2005 the Claimant and the Government acting pursuant to clause 20(1) of the Agreement and in consideration of the payment of the sum of $1.5 million dollars by the Claimant to the Defendant, amended the Agreement and extended the duration of the Agreement to the 11th June, 2020. The Defendant says that the contract came to an end by effluxion of time on June 10th, 2013 and therefore the Government proceeded on June 11th, 2013 to take possession of the Registries. The Defendant also contends that the terms of the Agreement which required the deposit of public moneys into the Claimant's private bank account and the withdrawal of moneys so deposited amounted to gross violations of constitutional and public finance law thereby rendering the contract illegal and unconstitutional. The Defendant argues that the contract was also unlawful in that it was awarded without following the mandatory tender procedure; the Claimant is therefore not entitled to the relief which it seeks.

The Issues

3. a) Did the Government breach the Agreement with BISL? Was the Agreement validly extended by the letter dated 24th March, 2005 signed by the Prime Minister and Attorney General addressed to BISL?

b) If there was a breach, has the Government's breach of the Agreement resulted in loss and damage to BISL?

c) If the answer to b is yes, then what is the amount of loss and damage suffered by BISL as a result of the said breach by the Government together with interest and costs?

The Claimant's Case

4. Mr. Courtenay, SC, on behalf of the Claimants submits that on March 24th, 2005 the Claimant and the Government, acting pursuant to clause 20(1) of the Agreement and in consideration of the payment of the sum of US $1.5 million by the Claimant to the Government, amended the Agreement, and extended its duration to 11th June 2020 (Exhibited as Annex 3 in the Claimant's Trial Bundle). On May 16th, 2005, the Claimant paid US$1.5 million to the Government as agreed (Annex 4).

By the terms of the Agreement, the Government agreed, *inter alia*, to share with the Claimant:

a. The revenue derived from the management and operation of the Registries as follows:

    i) 40% of the income in any given year is to be used to cover the operational expenses of IMMARBE and IBCR for that year;

    ii) Thereafter, the balance of income is to be shared

        1. 60% for the Government; and

        2. 40% for BISL.

b. Any income earned by the Claimant or its affiliated companies from activities related to the Agreement which are outside the scope of the fees, penalties and taxes collected under the Merchant Shipping Act or the International Business Companies Act or any subsidiary legislation and other fees collected pursuant to clauses 8(2), (3) and 8(4) of

the Agreement. In written submissions filed on December 1st, 2015, BISL argues that the evidence is pellucid that (i) the Parties entered into the Agreement (ii) BISL performed its obligations under the Agreement for twenty years; (iii) the Agreement was amended and its terms extended until 2020 (an additional seven years) in consideration of US $1.5 million paid by BISL to the Government and BISL's promise to continue to perform its obligations under the Agreement for the renewed term. The decision of the Parties to amend, and therefore extend, the term of the Agreement by reliance on clause 20(1) of the Agreement was nothing more than the parties exercising their freedom to contract.

5. Mr. Courtenay, SC, contends on behalf of BISL that the Government evinced a clear and unambiguous intention to no longer be bound by the Agreement after 11th June, 2013. The Government appointed a Deputy Registrar who took over the management of both Registries on 11th June, 2013 on behalf of the Government. Learned Senior Counsel further submits that by its letters, issuance of Statutory Instruments No. 58 and 59 of 2013 and by its conduct the Government repudiated the Agreement. He therefore argues that the measure of damages resulting from Government's breach is the amount of profits that BISL would have earned over the remaining term of the Agreement i.e. the seven years from June 2013 to June 2020.

   In submissions filed on behalf of BISL on December 24th, 2015 Mr. Courtenay, SC, advanced the argument that both Government's arguments are untenable as a matter of law and fact. He sets out his counter arguments as follows:

   Part B – addresses the submissions made by the Government in Part 1 of its Pre-trial Submissions

   Part C- addresses the submissions made by the Government in Part 2 of its Pre-trial Submissions

Part D - BISL's Submissions on the quantum of damages

The Defendant's Case

Part 1 of GOB Pretrial Submissions - Private Control of Public Moneys

6. Mr. Barrow, SC, in his submissions dated December 4th, 2015 argues on behalf of the Government that the Agreement dated June 11, 1993 was for BISL to operate and run two newly created registries; one for registrations in Belize of sea going vessels (IMMARBE) and the other for the registration in Belize of international business companies (IBCR). He says that while the Agreement was renewed on 9th, May 2003 pursuant to clause 15, the Agreement did not provide for any further renewal. He argues that the alleged extension for the period 2013 to 2020 was effected by **a letter** dated March 24th, 2005**. It is this purported renewed term of the Agreement that is the subject of this claim.**

Learned Counsel then adverts to the legislative framework of the Merchant Marine Act and International Business Companies Act as the context for his arguments on why the Government says the contract was not renewed. He cites Section 23 of the Merchant Marine Ships Act:

> *"23 (1) For the more efficient operation of IMMARBE, the Attorney General may, if he thinks fit, engage the services of a person or a body corporate possessing the qualifications and expertise necessary to manage IMMARBE's business abroad.*
>
> *(2) Any such contract as is referred to above may authorize the person or body corporate with whom it is made to do all things necessary for IMMARBEs operations, including the designation of world-wide representatives of IMMARBE, approval of classification societies and radio accounting authorities, appointment and approval of world-wide inspectors, and establishment of IMMARBE's offices abroad.*
>
> *(3) Every such contract as is referred to in this section shall contain a provision that the Auditor General shall be entitled to audit the accounts of the person or body corporate who is contracted to manage IMMARBE's operations."*

Mr. Barrow, SC, then refers to section 122 of the International Business Companies Act as follows:

> "*122- (1) The Minister shall appoint a person to be Registrar of International Business Companies.*
>
> *(2) The Registrar may with the approval of the Minister appoint one or more persons to be Deputy Registrar of International Business Companies.*
>
> *(3) The Minister may make regulations with respect to the duties to be performed by the Registrar under this Act and in so doing may prescribe the place or places where the office for the registration of International Business Companies is located."*
>
> *"Section 132.-The Minister may make regulations for the better carrying out of the provisions of this Act and for prescribing anything that needs to be prescribed."*

The Agreement

7. Mr. Barrow, SC, then turns to the Agreement between Belize International Services Ltd. (BISL) and the Government of Belize, whereby the Government agreed that BISL would assist with the development of the Merchant Marine Registry and the International Business Companies Registry. In operating and managing these registries, BISL would also be responsible for *"collection of taxes, fees, and other charges payable by vessels"* in the case of IMMARBE, and "*collection of taxes, fees, penalties and other charges payable by such companies*…" in the case of the IBC Registry. Mr. Barrow, SC, argues that the essence of these provisions of the Act was that Government revenue was to be collected by BISL and deposited by BISL into its bank accounts in various places in the world. To illustrate this point, he cites Clause 5 of the Agreement as follows:

> *"5. The Company shall have the authority to manage the financial aspects of the operations for the establishment and development of IMMARBE and the IBCR and is duly authorized by the Government to receive payment from third parties on account of taxes, penalties and fees deriving from this activity and to make payments to the Government in accordance with Clauses 8,9, and 10 below."*

8. Mr. Barrow, SC, goes on to submit **that the Agreement gave complete control over public moneys to BISL and this is seen by Clauses 9 and 10 dealing with payments to the Government relating to IMMARBE and the IBCR.** To buttress this argument Learned Counsel refers to Clause 9(1) of the Agreement which provides that BISL shall make payment in US dollars to the Government of Belize of funds which BISL has collected and to Clause 9(2) which provides that BISL shall keep the following three bank accounts at Belize Bank Ltd. in Belize City:

    1) **IMMARBE Escrow Bank Account A**: Into which the Claimant's designated offices abroad shall pay all fees and taxes except for the Annual Inspection Tax. From this account the Claimant would transfer to its operating account 40% as operational expenses and pay to the Government 60% of the remaining amount;

    2) **Operating Account:** Into which the Clamant would pay on a weekly basis the 40% operational expenses and other expenses; and

    3) **IMMARBE Escrow Bank Account B:** Into which all funds actually collected for the Annual Inspection Tax and any other taxes or fees which were identified as belonging exclusively to the Claimant would go for the sole benefit of the Claimant.

9. Mr. Barrow, SC, submits that it is revealing that Clause 9(2)(iii) of the Agreement provides that BISL shall pay out of IMMARBE Escrow Bank Account A monthly to Government its 60% of the remainder of taxes collected after deducting operational expenses, but the Agreement made no provision to pay to the Claimant, out of this account, its 40% share of the remainder. He submits that It is apparent that as a matter of reality, **the taxes collected by BISL were so completely within its control that it did not even occur to BISL that it needed contractual authorization to pay to itself moneys that were legally government revenue**. He further argues that the provisions of the Agreement in relation to the IBC

Registry were similar, including the arrangement for BISL to pay public moneys into its own bank account and to distribute those moneys as per clause 10 of the Agreement:

Clause 10: *Payments to the Government of Belize Relating to the IBCR*

> *(1) "Payments to the Government of funds actually collected by the Company relating to the IBCR shall be made in U.S. Dollars and in accordance with the written instructions of the Government.*
>
> *(2) In order to facilitate the management and distribution of fees, penalties, and taxes to be collected and pro-rated under this Agreement, the Company shall keep the following two bank accounts at the Belize Bank in Belize City:*
>
> *(a) All fees, penalties and taxes collected and related to Section 104, Part X of the Act must be remitted by the Company directly to IBCR Escrow Bank Account A and on a weekly basis, (each Monday) 40% of the amounts deposited in this account, as referred to in Clause 8(1), shall be transferred to the Company's bank account (to be opened at the Belize Bank Ltd) which is for the operational expenses referred to in Clause 8 and payments to the Government of the 60% of the remaining amount, shall be made on a monthly basis during the first five days of each month; and*
>
> *(b) All funds collected for the Annual License Fees (Section 105 Part X of the IBC Act) which are included in Clause 8, shall be remitted by the Company directly to IBCR Escrow Bank Account B and payments to the Government out of this account will be effected every year after deducting 40% for operating expenses of the IBCR and 40% as the Company's compensation for its services."*

10. Mr. Barrow, SC, submits that **all taxes and other moneys payable by virtue of the two Acts were public moneys from the moment they were paid.** The term 'public moneys' is defined in section 2 of the Finance and Audit Act Chapter 15 of the Laws of Belize Revised Edition 2000, to mean the moneys referred to in section 114 of the Constitution of Belize. He further argues that **what the Agreement purported to do was to place those moneys under the sole control of the Claimant, permit the Claimant to deposit those moneys in its own bank accounts, to withdraw from those accounts various percentages that the**

Claimant calculated and determined, and only then to pay to the Government moneys that the Laws of Belize say should from the first have only been paid into one Consolidated Revenue Fund.

The Law relating to Government Revenue

11. Mr. Barrow, SC, contends that Belize has inherited the British system of public finance, with its close controls over Crown revenue, and to illustrate this he relies on Griffith J's treatment of the origins and basic operation of that system in Claim No. 418 of 2013 ***The Belize Bank Ltd v. The Attorney General of Belize*** (17th February, 2015) from paragraph 68 onward. Learned Counsel cites section 114 of the Constitution of Belize which sets out the fundamental principle concerning government funds:

> *"Section 114- (1) All revenues or other moneys raised or received by Belize…shall be paid into and form one Consolidated Revenue Fund.*
>
> *(2)* ***No money shall*** *be withdrawn from the Consolidated Revenue Fund* ***except*** *to meet expenditure that is charged upon the Fund by this Constitution or any other law enacted by the National Assembly or where the issue of those moneys has been authorized by an appropriation law or by a law made in pursuance of section 116 of this Constitution."* (emphasis mine)

Mr. Barrow, SC, argues that the entrenchment of this over-arching principle of public finance in the Constitution along with its repetition in other laws, demonstrate that this is a principle of towering significance. Simply put, the essence of that principle is that ***All*** public moneys ***shall*** be paid into the Consolidated Revenue Fund. It is this structural simplicity that completely eliminates the possibility of anyone placing or keeping public moneys out of sight, consciousness, scrutiny or central control. This principle also eliminates the possibility of secret or unseen dealings with public moneys.

The corollary to this is that there is a prohibition in section 114(2) of the Constitution against the withdrawal of any public moneys except by authorization of a law made by the National

Assembly. As Learned Counsel for the Defendant puts it, no Minister nor even the whole cabinet can authorize payment of moneys raised or received by Belize into any fund other than the Consolidated Revenue Fund. He further submits that no statutory instrument or other regulation can authorize it. Far less can an agreement signed by a Minister authorize any departure from the principle. **Only a law made by Parliament can authorize the paying-in or deposit of public moneys otherwise than into the one Consolidated Revenue Fund, or the withdrawal of public moneys from the one Consolidated Revenue Fund.**

12. Mr. Barrow, SC, then cites the Finance and Audit Act section 4 which repeats this principle bringing home the point he argues, that it is this principle that provides the complete foundation for the regulation of the collection and spending of public moneys. He also cites section 118 of the International Business Companies Act which demonstrates the ubiquity of the principle of strict control of public moneys:

> *"118 All fees, licence fees and penalties under this Act shall be paid by the Registrar into the Consolidated Revenue Fund."*

Mr. Barrow, SC, submits that the core of the Agreement, purporting to have been made under the authority conferred by this Act, is that it purports to do precisely the opposite of what section 118 mandates. **In perfect violation of the Act and its overarching principle, the Agreement purports to give the Claimant such complete control over public moneys that, until the Claimant actually pays over to the Government the public moneys it has collected, Government is powerless to deal with that money.**

<u>The Regulation of Public Moneys</u>

13. Mr. Barrow SC submits that the Financial Orders 1965 underscore by their detail and ethos how utterly abhorrent must be an agreement that purports to disapply all that these regulations intended to secure. He relies on Conteh CJ decision in **The Queen on the**

application of the *Belize Printer's Association and BRC Printing Ltd v. The Minister of Finance and Home Affairs (the Printer's case)* where His Lordship held that the Financial Orders were subsidiary legislation (and not merely executive instructions for the "guidance " of public officers) which pre-existed the Act and were grandfathered and incorporated into the body of subsidiary legislation made pursuant to section 23 of the Finance and Audit Act. Learned Counsel contends that this judicial pronouncement as to the status of the Financial Orders is now confirmed by the declaration in primary legislation that the Financial Orders have legislative effect and are binding on all public officers with particular reference to the collection, receipt, custody, due accounting for and management of all public moneys and the duties of all persons concerned therein.

14. Learned Counsel then presents an overview of the control and safeguarding of public moneys under the Financial Orders by examining Orders 1 to 21 which allocate responsibility for the control of public revenue between different levels of authority. "*Accounting Officers*" are responsible for the authorizing of all payments from the votes or funds under their control, furnishing the Ministry, the Accountant General, the Ministry of Finance and the Principal Auditor with any information called for concerning finance, accounts and stores and most importantly arranging a system of internal checks and internal control covering all aspects of revenue and expenditure. The "*Accountant General*" has general duties to see that a proper system of account is established in every ministry and department of government, to exercise general supervision over the receipt of public revenue, and as far as possible to ensure its punctual collection and oversee sub-accountants who are entrusted with the day to day receipt, custody and disbursement of monies and who are required to keep a cash book in the form directed by the Accountant General. "*Finance Officers*" are appointed to each of the main departments to serve the

Accounting Officers; also they are tasked to ensure that public revenue is collected promptly and properly accounted for and to exercise supervision over all officers of their departments entrusted with the receipt or expenditure of public money. "*Revenue collectors*" are entrusted with an official receipt or licence book for the collection of revenue and he is required to keep a cash book recording all moneys received and their lodgment. In addition, Mr. Barrow, SC, states that Order 18 requires that finance officers establish proper accounting systems in every branch and district office and they shall also ensure that public revenue is collected properly and properly accounted for.

15. Mr. Barrow, SC, relies on a number of decisions which have examined and delineated the limitations on the contracting power of the Executive. He argues that this present case at bar arises out of one of a number of agreements made during the period 1989 to 2008 which various Belizean courts have declared to be unlawful. In each case, the basis of the decision was that the executive had no power to contract in violation of Belize's laws governing public finances. He cites Action No. 198 of 2004 ***BRC Printing Ltd. v The Minister of Finance (the Printer's Case)*** where judicial review was brought concerning the sale of Government's Printing Department to a private entity and the making of a contract in 2003 between the executive and the purchaser for the provision by the latter of all printing services and needs of the government. There had been no compliance with the tender requirements of the Finance and Audit Act or its subsidiary legislation. The sale itself escaped a declaration of invalidity because the structure the Government devised was to transfer the assets to a statutory body which then made the secret sale to the purchaser. The contract for the provision of printing services was held to have been made in disregard of the statutory tender regime and therefore improper, but the Chief Justice stopped short of declaring it unlawful and void.

16. In Claim No. 433 of 2010 ***Belize Bank and BCB Holdings Ltd. v Central Bank of Belize and the AG*** the Supreme Court applied the decision of an arbitration tribunal that a 2008 Settlement Agreement between those Claimants and the Government was void for illegality because it purported to authorize the payment of moneys donated by Venezuela to GOB for housing for the poor into a private bank account controlled by the Claimant. The tribunal specifically identified the illegality as the contravention of section 114 of the Constitution and section 3 of the Finance Act which required such moneys to be paid into the Consolidated Revenue Fund.

17. In ***BCB Holdings Ltd and The Belize Bank Ltd. v The Attorney General of Belize*** [2013] CCJ 5 AJ where the CCJ found that a 2005 Settlement Deed made between the Claimant and the Government created a unique tax regime for the Claimant which had not received the approval of the National Assembly. The CCJ held that what the deed purported to do could only be done by the legislature and that to allow the Executive to assume essential law making functions, beyond its constitutional or legislative authority, would put democracy in peril.

18. In Claim No. 418 of 2013 ***Belize Bank v. The Attorney General of Belize*** the Supreme Court (17th February, 2015**)** held that it would be contrary to public policy to order the enforcement against the public purse of an arbitration award for breach by the Government of its promise to pay money due under a 2007 promissory note. The court held that the executive branch of government had not sought or obtained Parliamentary approval for the payment of public money under the contract and had no authority to bind the country to this expenditure without such Parliamentary approval.

Mr. Barrow, SC, submits that these cases illustrate that the Court will perform its duty to uphold the foundational principles of control of public moneys and will not permit the executive, by contract, to depart from the strict provisions of the law that repeatedly state the principle. The cases show that the executive cannot, by contract, waive the payment of taxes, as it had purported to do in the special tax regime case (***BCB Holdings v The Belize Bank cited above)***. Neither can it, by contract, authorize the payment into a private bank account of public moneys, as it had purported to do in the Venezuela money case (***BCB v The AG of Belize Claim No. 433 of 2010***).

The Claimant's Response to GOB's Arguments on the Illegality/Invalidity of the Agreement

19. Mr. Courtenay, SC, on behalf of BISL counters these arguments by saying that these arguments are untenable both as a matter of law and in light of the facts as established by the evidence in court in this case on December 9th and 10th, 2015. He starts by examining the Legislative Framework that the Government relies on as the foundation of its arguments, pointing out that Section 114 of the Constitution of Belize deals with the treatment of public monies that are *raised* or *received* by Belize:

> *"114(1) All revenues or other moneys raised or received by Belize (not being revenues or other moneys payable under this Constitution or any other law into some other public fund established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund*
>
> *(3) No money shall be withdrawn from the Consolidated Revenue Fund except to meet expenditure that is charged upon the Consolidated Revenue Fund by this Constitution or any other law enacted by the National Assembly or where the issue of those moneys has been authorized by an appropriation law or by a law made in pursuance of section 116 of the Constitution."*

Mr. Courtenay, SC, states that these provisions are repeated in section 4(1) of the Finance and Audit Act (the FAA) Chapter 15 of the Laws of Belize Revised Edition 2000. That Act was enacted in 1972 and brought into force in 1979. The FAA was repealed in 2005 by the

Finance and Audit (Reform) Act which was later amended in 2010 by the Finance and Audit (Reform) Amendment Act. Learned Counsel submits that since the 2005 Extension was entered into between Government and BISL on 24th March, 2005 the relevant legislation at the time of this Extension would be the Constitution and the FAA.

20. In countering Government's arguments that rely on the Financial Orders, Mr. Courtenay submits that the Financial Orders are instructions which were originally issued administratively and not pursuant to any legislation. He submits that Financial Orders are merely internal instructions issued to Public Officers for the safeguarding of public moneys. He further submits that failure by the Government to strictly comply with any of the provisions of Financial Orders when entering a contract does **not** render that contract unlawful and void. Mr. Courtenay, SC, argues that this is so because:

    a. Firstly the Financial Orders are administrative instructions for the internal use and guidance of public officers only and have no legislative effect; and/or

    b. Secondly even if the Financial Orders have legislative effect (which is denied) they are directory and not mandatory.

Learned Counsel concludes that the consequence of these submissions is therefore that Government's non-compliance with any part of the Financial Orders does not render the 2005 extension of the Contract unlawful. He says that Government expressly authorized BISL to manage the financial aspects of the operations for the establishment and development of IMMARBE and IBCR. He further argues that first instance payments were deposited into Escrow Accounts either in the name of IMMARBE or IBCR, and not into BISL's accounts. The signatories of these accounts were directors of BISL. He contends that it was open to Government to give written instructions at any time in relation to the way in which payments were to be made to the Government of funds actually collected by IMMARBE and the IBCR, provided such payments were made in US dollars. However, BISL was obliged to

keep certain bank accounts in order to facilitate the management and distribution of the fees.

21. Mr. Courtenay, SC, also contends that (i)the terms of the Agreement are in **substantial compliance** with the requirements of the Constitution and the FAA (ii) the Government's argument is fundamentally flawed as the Fees were raised by either IMMARBE or the IBCR not by the Government of Belize; and (iii) even if the Court concludes that the Fees were in fact "*raised or received*" by Belize, any offending provision in the Agreement is **plainly severable** with the consequence that the remainder of the Agreement is valid.

22. In advancing the argument that the Agreement is in substantial compliance with the Constitution and the FAA, Mr. Courtenay, SC, says that there is no reason why the Agreement as extended could not have been performed in this way i.e. the Government could have directed that the fees collected were to be paid into the Consolidated Revenue Fund. Clause 9(1) and 10(1) of the Agreement provided that it is open to the Government to give written instructions at any time in relation to the way in which payments were to be made to the Government of funds actually collected by BISL relating to IMMARBE and the IBCR, provided such payments were made in US dollars. **The Government authorized BISL directors to sign on accounts in the name of IBCR and IMMARBE in order to *"facilitate the management and distribution of the Fees"*.** He submits that section 114 of the Constitution, section 4 of the Finance and Audit Act are essentially **procedural** requirements that certain monies be paid into the Consolidated Revenue Fund and be treated in a particular way.

23. Mr. Courtenay, SC, cites ***R v. Home Secretary ex p Jeyeanthan*** [2000] 1 WLR 354 to buttress the point that non-compliance with a legislative procedural requirement does not

always mean that the relevant act is a nullity, in cases where the procedural requirement is directory rather than mandatory in nature. In that case Lord Woolf said:

> *"The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorized as directory or mandatory. If it is categorized as directory it is usually assumed it can safely be ignored. If it is categorized as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect."*

24. Woolf LJ set out three questions to be asked depending on the circumstances of the case:

> *(a) "Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance?*
>
> *(b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case?*
>
> *(c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance?"*

25. Mr. Courtenay, SC, submits that these questions do not lay down a cumulative test to be complied with on all three levels. They are questions that are relevant depending on the circumstances of each case. He argues that while in the past the Fees were not paid into the Consolidated Revenue Fund, and notwithstanding that they could have been so paid, there was substantial compliance with the aims and objectives of section 114 of the Constitution, section 4 of the FAA and the Financial Orders. This is so because the Extension provided that the Government and specifically the Auditor General will have complete oversight of the accounts through the audit and inspection rights. He further argues that there is no confidentiality provision in the Extension and so where funds are not paid through the Consolidated Revenue Fund there would be substantial compliance in that the Fees could be

dealt with in a transparent manner. Learned Counsel argues that the evidence of Financial Secretary Joseph Waight at trial was that the Government had no reason to doubt the financial reporting of BISL; that the Government used the reporting to make projection forecast for the next fiscal year based on receipts and that the Government never requested an audit of the books of BISL. From this evidence the inference to be drawn is that Government was satisfied with the financial and reporting controls which Government had put in place and the way it dealt with funds in a transparent way.

26. Mr. Courtenay, SC, argues that fees were raised by IMMARBE and IBCR and not by the Government. IMMARBE is a statutory body under section 3 of the Registration of Merchant Ships Act 1989 and that Act provides that fees collected pursuant to the Act are to be paid to IMMARBE and not to the Government. He sets out various provisions of the Merchant Ships Registration Act which address the payment of fees, e.g., Section 8 of the MSR Act:

> *"There shall be paid to IMMARBE the several fees set out in the First Schedule to this Act for the registration of vessels and for the maintenance of such vessels in good standing under the flag of Belize."*

Section 12 of the MSR Act:

> *"There shall be paid to IMMARBE the several fees set out in the First Schedule to this Act for the registration of vessels and thereafter at annual intervals for the continued maintenance of such vessels as Belizean vessels."*

Section 16 of the MSR Act:

> *"There shall be paid to IMMARBE the several fees set out in the Second Schedule to this Act for the preliminary and permanent registration of every document pursuant to sections 14 and 15 above."*

Section 37 of the MSR Act:

> *"There shall be paid to IMMARBE the several fees set put in the Second Schedule to this Act for the preliminary and permanent registration of every document pursuant to sections 35 and 36 above."*

Mr. Courtenay, SC, in citing these provisions is making the point that the MSR Act envisages that the Fees will be paid directly to IMMARBE and not to the government. The Agreement is consistent with this statutory scheme as it provides that the sums are to be paid into a bank account held in IMMARBE's name. He contrasts this position with section 8 of the Broadcasting and Television Act which requires that a licensee must pay prescribed fees into the Consolidated Revenue Fund before beginning to broadcast any radio or television program. He further argues that the MSR Act also expressly contemplates that the management of IMMARBE to a private company such as BISL. There is no provision which imposes duty on the Registrar of IMMARBE to pay fees into the Consolidated Revenue Fund.

27. Mr. Courtenay, SC, makes similar arguments in relation to the IBCR. He says that under the IBC Act, the Minister appoints a person to be a Deputy Registrar. The Registrar is responsible for registering companies and administering the IBCR. The Deputy Registrar undertakes these tasks in order to raise revenue for the Registry. Learned Counsel makes the point that fees were raised by IBCR and not by the Government and that therefore section 114 of the Constitution and section 4 of the FAA do not apply to this Agreement between the parties.

28. Mr. Courtenay, SC, concludes that while there was an obligation on the Registrar to pay the Fees raised by the IBCR into the Consolidate Revenue Fund, he states that this was in fact done but only after deductions were made in accordance with the Extended Agreement. He submits that non-conformity with the Constitution and the FAA does not render the Agreement invalid because the purpose of those sections was to ensure accountability for Government monies. He submits that under the Extension to the Agreement, Government was to have full access to and have the right of audit over the books of BISL and this provided effective oversight and accountability by the Government. He points to a letter written by Government to BISL dated June 9th, 2003 which serializes alleged "*material*

events" which "*affects the continuous validity of the Agreement*". Mr. Courtenay, SC, argues that the letter did not cite non-compliance with the Constitution, FAA or the Financial Orders as a material event. He also points out that at trial Financial Secretary Joseph Waight was cross-examined and said that all valid concerns that the Government had were satisfactorily dealt with; this therefore means that at all material times Government regarded the contractual arrangements with respect to Fees collected by IBCR as in conformity with applicable laws.

29. Mr. Courtenay, SC, concludes that even if the Court finds that the fees received by the registries were raised or received by the Government and not by the registries, that the Agreement actually requires that those fees must be paid into an account other than the Consolidated Revenue Fund, and that the Agreement as extended is not in substantial compliance with section 114 of the Constitution, section 4 of the FAA of the Financial Orders, he argues that this does not render the Agreement invalid. He submits that those clauses of the Agreement that provide for Fees to be paid into the bank accounts of IMMARBE and IBCR Clauses 8(3), (5), 9(2) and 10(2) can plainly be severed from the Agreement; he therefore asks that the Blue Pencil Test be applied to those provisions of the Agreement which the Court considers to be contrary to the Constitution and the Financial Orders.

Ruling

30. I fully agree with the submissions of Mr. Barrow, SC, on the illegality of the contract arising from the unauthorized and unconstitutional private control of public monies. There is no way that the Executive, in signing the Extension to this Agreement in 2005, had the authority to unilaterally bind the Government to this Agreement which allowed the payment of millions of dollars of Government Revenue into the private accounts of the IBCR

and IMMARBE instead of into the Consolidated Revenue Fund. This purported extension occurred by way of a letter signed by the then Prime Minister and Attorney General of Belize to the Claimant company dated and I now produce it in its entirety:

"BELIZE INTERNATIONAL SERVICES LIMITED
212 NORTH FRONT STREET
P.O. BOX 1764
BELIZE CITY
BELIZE

Hon. Said Musa
Prime Minister and Minister of Finance
Government of Belize
New Administration Building
Belmopan
Cayo District
Belize

Hon. Francis Fonseca
Attorney General of Belize
Attorney General's Ministry
Government of Belize
New Administration Building
Belmopan
Cayo District
Belize

24 March, 2005

Dear Sirs,

We refer to the agreement dated 11 June, 1993 (the Agreement) between the Government of Belize (Government) and Belize International Services Limited (BISL).

The Government recognizes and declares that the option under Clause 15 to renew the term of the Agreement under the same terms and conditions for a further ten years was validly and legally exercised by way of BISL's letter dated 9 May, 2003, and consequently the Agreement is in full force and effect.

Each of the Government and BISL, declares and recognizes that it has benefited from the Agreement and wishes to amend it in order to extend its duration.

In consideration of the payment by BISL to the Government of the sum of US $1,500,000 to be paid within 45 days of the date of the execution of this letter of amendment to the Agreement by the Government, the Government agrees and confirms the extension of the duration of the Agreement to 11 June, 2020 (Extension). The Government confirms that the terms of the Agreement as set out therein (as amended by this letter) continue to apply for the duration of the Extension.

By countersigning and returning the attached counterpart letter, you agree to these terms.

Yours faithfully,

For and on behalf of)
Belize International Services) _____
Limited)

We agree to the terms set out above

Signed, sealed and delivered by the)
GOVERNMENT OF BELIZE)
this 24th day of March, 2005)
in the presence of) _____

Hon. Said Musa
Prime Minister and Minister of Finance

_____
Hon. Francis Fonseca
Attorney General of Belize"

In finding that this Agreement was unconstitutional and void and contrary to public policy, I rely on Saunder's J reasoning as stated in ***BCB Holdings The Belize Bank Ltd v. The Attorney General of Belize*** CCJ Appeal No CV 7 of 2012 [2013] CCJ 5 (AJ). In deciding that the application to enforce the arbitration award should be refused as it would be contrary to public policy, His Lordship considered the legality of a Settlement Deed which purported to create and guarantee to certain companies a unique tax regime which was unalterable by Parliament. Saunders J acknowledged that while a Minister has wide prerogative powers to enter into agreements and may do so even when those agreements require legislative approval before they become binding on the State, the **making** of a Government contract may be a matter quite distinct from its **enforceability** against the State (as in ***The Attorney General v Francois*** (Civil Appeal No. 23 of 2003 OECS). In my view, His Lordship's deliberations concerning the Executive's lack of legal authority to **unilaterally** waive or circumvent the laws of Belize in the Settlement to suit the Claimant companies in that case are just as applicable to the case at bar, where the Executive sought to authorize the payment of government revenue into private accounts of the IBCR and IMMARBE, **solely**

controlled by BISL, instead of into the Government's Consolidated Revenue Fund. I take particular note of Sanders J's statement that *"In a purely domestic setting, we would have regarded as unconstitutional, void and completely contrary to public policy any attempt to implement this Agreement."*

31. In this present case, this Agreement purported to flout the requirements of the Constitution, the FAA and the Financial Orders which all contain specific safeguards designed to ensure that government revenue should not be handled and manipulated by a private entity. The language of section 114 of the Constitution is mandatory requiring that **all** revenue or other moneys raised or received by Belize **shall** be paid into one Consolidated Revenue Fund. The section itself provides the sole circumstances under which that rule may be deviated from:

> *"Section 114: - (1) All revenues or other moneys raised or received by Belize…shall be paid into and form one Consolidated Revenue Fund.*
>
> *No money shall be withdrawn from the Consolidated Revenue Fund* ***except to meet expenditure that is charged upon the Fund by this Constitution or any other law enacted by the National Assembly or where the issue of those moneys has been authorized by an appropriation law or by a law made in pursuance of section 116 of this Constitution****." (emphasis mine)*

It is very clear that there is not a scintilla of evidence in this case that the Agreement fell within any of the exceptions set out in section 114 of the Constitution. For example, there is no evidence that there was any appropriation law enacted by Parliament to legitimize this course of action taken by the Executive. While it is true that (as Mr. Courtenay, SC, rightly points out) the Agreement commenced between the parties in 1993 and was renewed by the parties for an additional 10 years from 2003 up to 2013, the point is that the purported Extension of this Agreement in 2005 for the period of an additional 7 years up to 2020 is what is presently before the court for scrutiny as to its validity and enforceability. I

completely reject the argument of substantial compliance as articulated by Mr. Courtenay, SC, and I find that such an Agreement required strict compliance with the Constitution, the FAA and the Financial Orders before it could be upheld by this court. I agree fully with the submissions of Mr. Barrow, SC, as contained in paragraph 10 of his speaking notes dated February 16th, 2016 . This statement, in my view, encapsulates the gravamen of the entire matter:

> *"Moneys collected by these departments are public moneys. In conformity with the law that is applicable to all government registries these moneys were required to be paid into bank accounts held in the name of Government of Belize. No law authorized the private contractors, BISL, to pay these monies into their own private accounts. Wholly and exclusively owned by them, and obscure the fact of this ownership by giving the accounts the names of the registries (which had no legal existence except as departments or agencies of GOB)*

I agree with Mr. Barrow SC's submission that severance is not appropriate in this case. Taking out the offensive provisions and substituting them with provisions that direct the Claimant to deposit all revenue into the Consolidated Revenue Fund would in my view be tantamount to the Court rewriting the Agreement between the parties and that is not the Court's role in resolving contract disputes.

When I look at Clause 2(G) of the Agreement, it is clear that the purpose was a lawful purpose:

> *2(G) "The Government and Belize Holdings PLC (now called Belize Holdings Inc.) entered into an agreement on June 13, 1990 pursuant to which Belize Holdings Inc. agreed to establish and develop the IBCR. The Government and the Company entered into an agreement on April 19, 1991 pursuant to which the Company agreed to establish and develop IMMARBE. Both of the foregoing agreements are to be replaced in their entirety and superseded in all respects by the provisions of this Agreement."*

Simply put, BISL was contracted by GOB to establish, develop and manage the IBCR and IMMARBE. The Court has no difficulty with the legality of that purpose. However, in enabling and authorizing BISL (a private entity) to be in **total control** of **Government revenue** by depositing government funds into the accounts of IBCR and IMMARBE (fully and solely controlled by BISL), instead of depositing those funds into the Consolidated Revenue Fund, the Agreement violated the Constitutional safeguards and financial regulations specifically designed to protect Government Revenue. In my respectful view, this Court would be abdicating its role as vanguard of the Constitution and Laws of Belize if it were to sanction the enforceability of such an Agreement.

The evidence of the full control of the IMMARBE and IBCR bank accounts by BISL **to the exclusion of the Government of Belize** is borne out by the oral evidence of witnesses of the Claimant under cross-examination of Mr. Luis Vallee (member of the Executive Committee on the Board of Directors for both registries) at pages 34 to 35 of the Transcript:

> *"Q. And the IBC Registry owned a bank account in Belize?*
>
> *A. Yes it does, in the name of the IBC Registry.*
>
> *Q. It was not in the name of the Government of Belize?*
>
> *A. No.*
>
> *Q. Who were the signatories to the IBC Registry account?*
>
> *A. Members of the Board of Directors of BISL and the Director of the IBC Registry.*
>
> *Q. Who was that person?*
>
> *A. At the time the Government -- Katherine Haylock*
>
> *Q. Was any Government official a signatory in that account?*
>
> *A. No person paid directly by the Government were signatories.*
>
> *Q. Could the Government operate that account? Could the Financial Secretary have signed a cheque on that account?*

A. No.

Q. Could the Accountant General have signed a cheque on that account?

A. Nobody could inspect the --

Q. I'm not asking you about inspect at all.

A. No."

32. I also agree with the submission by Barrow, SC, that the failure to follow the Financial Orders and put this contract valued by the Claimant at $45 million US dollars out to tender further vitiates the enforceability of the contract. I do not agree with the submission made on behalf of the Claimant by Mr. Courtenay, SC, that the Financial Orders are merely administrative instructions to Public Officers which do not have legislative effect. I agree fully with the reasoning and conclusion of Conteh CJ in the ***Printer's*** case, **The Queen on the application of the *Belize Printer's Association and BRC Printing Ltd v. The Minister of Finance and Home Affairs,*** that the Financial Orders are subsidiary legislation and not mere administrative guidelines for public officers. I also agree with the submission made on behalf of the Defendant that the Financial Orders are mandatory and not directory and I fully embrace the reasoning of the Court of Appeal in the ***Kabara Development*** case [2010] 2 LRC 350 at page 8 of the decision, where Byrne and Goundar JJA reasoned thus:

> *"In short, the scheme of the Act and Regulations is to **provide a system of checks and balances**, the **overriding purpose** of which is to ensure that **government funds** are spent as wisely as possible. The regulations are also designed to **prevent collusive contracts** and **allegations of favoritism**.*
>
> *In his judgment Singh J quoted from Nicholas Seddon's book Government Contracts (3rd edn. 2004), p 257, where para 7.2 states:*
>
> > *'… the body seeking tenders is under a **public responsibility** to use public money in the best way possible. The responsibility involves not only securing*

*the best deal through open and effective competition but also the **protection of the public purse from collusion, fraud and extravagance**. It is also important that the integrity of the whole process is maintained so that potential contractors are not put off, with consequential lessening of competition.' "* (emphasis mine).

In the case at bar, this Agreement involved several million dollars worth of government revenue. To my mind, it is unfathomable that such an Agreement would bypass the tender process, flouting the safeguards designed to protect government revenue from abuse.

For these reasons, I declare that the Extension of the Agreement dated 24th March, 2005 is unconstitutional, illegal and invalid.

33. The Claim is dismissed. Prescribed costs are awarded to the Defendant to be paid by the Claimant to be taxed or agreed.

Dated this 28th October, 2016

_____

Michelle Arana
Supreme Court Judge