THE COURT OF APPEAL OF BELIZE AD 2018

CIVIL APPEAL NO 36 OF 2016

BELIZE INTERNATIONAL SERVICES LIMITED Appellant

v

THE ATTORNEY GENERAL Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madam Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Lennox Campbell	Justice of Appeal

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E Courtenay SC along with P Banner for the appellant.
Denys A. Barrow SC along with J Ysaguirre for the respondent.

18 and 20 June 2018, 15 March 2019.

SIR MANUEL SOSA PA

[1] This appeal must, in my opinion, be dismissed. I concur in the reasons for judgment given, and the orders proposed, in the judgment of Campbell JA, which I have read in draft.

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SIR MANUEL SOSA P

HAFIZ-BERTRAM JA

[2] I had the pleasure of reading the judgment of my learned brother, Campbell JA, in draft, and concur in the reasons for judgment given, and the orders proposed therein."

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HAFIZ-BERTRAM JA

CAMPBELL JA

Introduction

[3] By this proceeding the appellant seeks to challenge the orders and judgment of Madam Justice Arana, delivered on the 28th October 2016. The learned judge, by her judgment declared that the Extension Agreement dated 24th March, 2005 was unconstitutional illegal and invalid and dismissed the appellant's claim to recover the sum of US$45 million dollars for breach of contract. The learned judge ordered costs to the defendant to be paid by the Claimant.

[4] The appellant, is a company duly registered on the 10th April 1991 under the laws of the British Virgin Islands, with its registered office situate at Craigie, P.O Box 71, Road Town, Tortola and is jointly and equally owned by the Panamanian Law firm of Morgan & Morgan and WIHL, a British Virgin Island company.

[5] The respondent is the legal representative of the Government of Belize.

Background

[6] In 1980's the Government of Belize decided to enter the services industry. The legislative framework for this industry was enacted with the passage of **The Registration of Merchant Ships Act 1989** to establish IMMARBE, as an open shipping

Registry. That Act was repealed and replaced by the **Merchant Ships (Registration) Act** which came into force on the 23rd October 2010, and, secondly, **The International Business Companies Act 1990** to establish IBCR, for the registration of international business companies under IBCA. The Hon. Mr Said Musa, was Prime Minister from 1998 to 2008, when following national elections, a new government was installed with Hon. Mr Dean Barrow as Prime Minister.

[7] The IBCR, was managed between 1990 and 1993, pursuant to an Agreement between the Government and Belize Holding PLC, for, the private entity, to establish and develop the IBCR. In respect of IMMARBE, operations started, based on the Agreement of 19th April 1991. In the stead of both these Agreements, the parties entered into the 1993 Management Services Agreement, dated 11th June 1993. (1993 Agreement), which was renewed for a further 10-year period. (hereinafter referred to as Renewal Agreement)

[8] On the 9th June 2003, Mr Gandhi, legal counsel, in the Ministry of Finance wrote to BISL, on behalf of the Government of Belize, expressing concerns about fundamental change of circumstance, in the parties contractual relationship.

[9] BISL rejected the factors enumerated in the Government's letter, and denied that they were, affecting the validity of the 1993 Agreement. The parties engaged in two meetings, involving BISL's representative, the finance minister, and Mr Gandhi. There was a further meeting, with the Government being represented by Prime Minister, Hon. Mr Said Musa, and Mr Gandhi. Subsequently, Prime Minister Musa, wrote that the Government was considering the extension of the relationship.

[10] On the 24th March 2005 an Agreement (Extension Agreement), amending the 1993 Agreement was signed. On the 16th May 2005, BISL paid US$1.5 million to the Government, for an additional period of seven years, from 2013 to 2020. On the 26th January 2009, Mr Gandhi wrote BISL, stating that the 1993 Agreement had expired on the 10th June 2003, and inquired whether there was a new agreement. A new government was installed in 2008. On the 11th February, 2009, BISL confirmed the extension of the 1993 Agreement to the 11th June 2020.

[11] On the 6th May 2013, Mr Waight, the Financial Secretary, noted that BISL had exercised its option, for an additional period of ten years, from the 11th June 2003 and expiring 10th June 2013, and that the government had no record of any further extension. BISL responded by sending a copy of the Extension Agreement purporting to extend the 1993 Agreement to 2020 by way of an amendment effected on the 24th March 2005.

[12] On the 4th June 2013, the Financial Secretary, wrote to BISL, acknowledging receipt of the Extension Agreement. The letter indicated that, insofar as the document purports to extend the Agreement beyond 2013, it was 'wholly invalid', as it was patently contrary to applicable laws. It was indicated, that the Renewal Agreement would expire on the 10th June 2013, and the government would assume control of the Registries, with effect from 11th June 2013.

[13] On the 8th June 2013, an Order was gazetted by the Registrar of Merchant Shipping. It appointed a public official to assume control of the Head Office of IMMARBE subject to the control of Mr Gandhi. The Order revoked any previous appointment to that post. There was a press release informing the public of the Government's assumption of control of the Registries.

[14] BISL commenced an action with the filing of the Claim Form and Statement of Claim, both dated 26th March, 2015, seeking the following reliefs:

(1) A Declaration that on the 11th June 2013 the Government breached the Agreement;

(2) Damages, including exemplary and/or aggravated damages, for the Defendants breach of the Agreement;

(3) Interest pursuant to sections 166 and 167 of the Supreme Court of Judicature

(4) Such further and other reliefs as may be just; and

(5) Costs.

[15] The trial before Arana J, commenced on the 9th December 2015, and lasted over 3 days, with hearings on the 10th December, 2015 and 16th February 2016, judgment was delivered on the 28th October 2016, with the claimants case being dismissed, and the claimant ordered to pay the defendants prescribed costs, to be taxed or agreed .

[16] On the 12th December 2016, consequent on the dismissal of the claim BISL filed a Notice of Appeal, seeking to set aside, inter alia, an Order setting aside the Order of the Supreme Court dated 22nd day of November 2016 in Claim No 698 of 2013.

Complaints of Mismanagement of Registries - withdrawn at Trial

[17] Mr Denys Barrow, SC, for the Respondent, at the start of the trial, advised the Court that, the manner in which the Government's case would be conducted, the allegation of mismanagement would be entirely irrelevant. Mr Barrow, SC, indicated that the Court was not being asked to make any determination as to whether the Registries were 'impeccably run'.

[18] The parties had joined issue on the manner in which the appellant had managed the Registries. The Claimant in its Statement of Claim, at paragraph 9, asserted; that the claimant had faithfully managed the Registries and shared the revenue with the Government, in strict compliance with the terms of the Agreement

[19] For its part, the Government in its Defence, dated 13th April 2015, alleged, at paragraph 11:

> 'The Defendant, denies paragraph 9, of the Statement of Claim, and says that the Claimant BISL operated the Registries strictly along commercial lines, without regard to regulatory aspects and damaged Belize's reputation with the EU, FATF and CFATF and other international bodies, thereby adversely affecting Belize's economy'.

[20] Mr Barrow, SC, indicated that the Government was prepared to amend paragraph 11, to read, "That the Defendant does not admit paragraph 9, of the Statement of Claim". According to Mr Barrow there would be no pleading on the government's case, of bad management or of breach. Mr Courtenay informed the court

he would not make any submission on the point, if the Court is satisfied there need be no resolution on the issue.

Issues at trial

[21] The learned trial judge identified the issues, as follows

(i) 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?

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

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

Decision of Arana J – Claimants Case

[22] The learned trial judge laid out the claimant's case, as outlined by Mr Courtenay, that the parties acting pursuant to the 1993 Agreement and for the consideration of US 1.5 million dollars, amended and extended the duration of the Agreement, to 2020. The terms of the Agreement provided for the Government to share the revenue derived from the management's operations with BISL as follows:

(a) 40% of the income in any given year is to be used to cover the operational expenses of IMMARBE and IBCR for that year. Thereafter, the balance of income is to be shared, 60% for the Government, and 40% for BISL.

[23] The Claimant submitted that the Agreement had been extended until 2020 for consideration. That the Government evinced an intention to repudiate the Extension Agreement after 11th June, 2013, by appointing a Deputy Registrar, to control both Registries and by its letters, issuance of statutory instruments No. 58 and 59 of 2013 and by its conduct. That the measure of damages, from the Government's breach, is

the amount of profits that would be earned by BISL over the remaining term of the Extension Agreement.

The Defendants case at trial

[24] The learned trial judge, in outlining the Defendant's case, in her reasons, noted that Mr. Denys Barrow, SC, contended that the Agreement renewed on the 9th May 2003, did not itself, provide for any further renewal. The purported extension from 2013 to 2020, was effected by a letter dated March 24th 2005, this purported renewed term is the subject of the claim.

[25] The 1993 Agreement provided that BISL, in respect of IMMARBE, would be responsible, "for collection of taxes fees and other charges payable by the vessels". In respect of IBRC, it bore responsibility, for the collection of taxes, fees, penalties and other charges payable by such companies. Government Revenue was to be collected then deposited by BISL, into its bank accounts, in various places in the world. Complete control over public moneys was given to BISL pursuant to Clauses 9 and 10, of the 1993 Agreement.

[26] Clause 9(1) of the 1993 Agreement, provides that BISL shall make payments in US dollars to the Government, of funds, it has collected. Clause 9(2) which provides that BISL shall keep the three accounts at Belize Bank Ltd, (1) IMMARBE Escrow Account, into which BISL overseas offices fees and taxes are deposited. (2) Operating Account, into which the BISL would pay on a weekly basis the 40% operational expenses and other expenses, (3) IMMARBE Escrow Account B, into which funds collected for 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, to pay BISL, its share of the 60% remitted to the Government

[27] The term "**Public moneys**", is defined by s2 of the Finance and Audit Act (FAA). Those funds were placed under the sole control of BISL. BISL was allowed to deposit and withdraw public moneys from its own bank account, and to calculate and determine the amount to pay the Government. Public moneys under the laws of Belize should only been paid into one Consolidated Revenue Fund. (hereinafter referred to as CRF)

[28] Mr Denys Barrow, SC, referred the court to The **Belize Bank Ltd v The Attorney General of Belize** Claim 418 of 2013, delivered on the 17th February 2015 and s114 of the Constitution Belize Act (the Constitution). The principle is that all public moneys shall be paid into the CRF. There is a prohibition in s114 (2) of the Constitution, against the withdrawal of any public money except by authorisation of a law made by the National Assembly.

[29] According to Mr Barrow, the Renewal Agreement does precisely the opposite of what s114 mandates. Section 4 of the FAA underscores the point of close control over public funds. Learned Counsel relied on the Queen on an application of the **Belize Printers Association and BRC Printing Ltd v The Minister of Finance and Home Affairs (the Printers Case) Action 198 of 2004** to support his submission, that the financial orders were subsidiary legislation and not merely 'executive instructions.' Mr Barrow then examined Orders 1 to 21, to demonstrate the regulatory framework for control and safeguarding of public moneys.

[30] He argued that the case at bar represents one of several agreements made during the period 1989 to 2008, which several Belizean Courts have declared to be unlawful. In each case, the basis of the decision was that the Executive arm of Government, had no power to contract in violation of Belize laws governing public finance. He cited **"the Printers Case", (**supra**)** in which the Executive entered into a contract in 2003, for the sale of the government's printing facilities and the purchase of printing services from the same private entity. Settlement Deed was found void for illegality. In **BCB Holdings Ltd and Belize Bank Ltd v Attorney General of Belize [2013] CCJ 5** the Caribbean Court of Justice (CCJ) held that a 2005 Settlement Deed made between the Claimant and the Government, created a unique tax regime which had not received the approval of the National Assembly. The CCJ ruled, that, what the deed purported to do, could only be done by the legislature. In **Belize Bank V the Attorney General of Belize**, **Claim no 418 of 2013** in a judgment delivered on the 17th February 2015 the court held that it would be contrary to public policy to order the enforcement of an arbitral award, against the public purse, in respect of a promissory note, for which the executive branch had not sought Parliamentary approval.

[31] It was submitted that those cases demonstrate 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 and The Belize Bank v Attorney General of Belize (supra) .** Neither can it, by contract, authorise the payment into a private bank account of public moneys, as it purported to do in, "the Venezuelan money case" **BCB v the Attorney General of Belize**, Claim 433 of 2010.

Claimant's Reply

[32] Mr Courtenay SC pointed out that s114 of the Constitution deals with treatment of public monies that are "raised" or "received" by Belize. These provisions are repeated in s4 (1) of the FAA. 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. The Agreement was extended on the 24th March 2005, the relevant legislation at the time would be the Constitution and the FAA.

[33] Mr Courtenay, SC, attacked the relevance of the Financial Orders, which, he submitted, were merely administrative orders, issued to public officers. Failure to strictly comply with any of the provisions of the Orders does not render the contract unlawful and void or the Extension Agreement unlawful. The funds deposited were in the name of the Registries and not BISL. It was open to government to give written instructions on accounting in relation to the deposits. The fees were raised by either IMMARBE or IBCR, and not by the Government. IMMARBE and the Act establishing it provides that the fees collected pursuant to the Act are to be paid to IMMARBE. There is no duty on the Registrar of IMMARBE to pay fees into the CRF. Even if, the court so conclude that, the fees were raised by the Government, those clauses could be severed. He says non conformity with the Constitution and FAA does not render the Agreement invalid because the purpose of those sections was to ensure accountability for the Government moneys.

Arana J ruling

[34] The learned trial judge agreed with the submissions of Mr Barrow, SC on the illegality of the contracts arising from the unauthorised and unconstitutional private

control of public monies. The court held that the Executive in signing the extension to the Agreement, did not have the authority to unilaterally bind the Government to the Agreement which allowed payment of millions of dollars of Government Revenues into private accounts of ICBR and IMMARBE, instead of the Consolidated Revenue Funds

[35] The Court relied on Saunders P's reasoning, in **BCB Holdings Ltd and Belize Bank Ltd v Attorney General of Belize [2013] CCJ 5** in which the CCJ held that a Deed made between the Claimant and the Government, created a unique tax regime, which had not received the approval of the National Assembly. The learned trial judge underscored the distinction, Saunders P made, between the undisputed wide prerogative powers of the Minister, to enter into contracts, as against the unenforceability of those contracts against the State in the absence of parliamentary approval.

[36] The learned judge cited with approval the case of **Attorney General v Francois, Civil Appeal No. 23 of 2003, OECS,** on which Saunders P, relied in **Belize Holdings Ltd.** to support the CCJ's reasoning on the inability to enforce against the state, a contract, that had not received parliamentary approval. Arana J was of the view that Saunders P deliberations on the Executive's lack of authority, to unilaterally guarantee a unique tax regime, for certain companies, was applicable to the case before her. She noted that Saunders P, opined, "In a purely domestic setting, we would have regarded as unconstitutional, void and completely contrary to public policy any attempt to implement this policy." The relevant circumstances of the matter before the learned trial judge was in a "purely domestic setting".

[37] **Arana J** found that the Agreement flouted the mandatory requirement of s114 of the Constitution, FAA and the financial Orders which were safeguards against the funds being handled by private entities, and found no evidence that the Agreement fell into any of the exceptions provided for, by s114. The learned judge rejected Mr Courtenay's argument of substantial compliance. She ruled that for the Agreement to be upheld it had to be in strict compliance with the Constitution, FAA and the Financial Orders.

[38] Her Ladyship accepted the respondent's submissions, that severance of the impugned terms of the agreement was not appropriate. The evidence of Mr Valle, supported the finding that BISL exerted full control over the bank accounts of the Registries, to the exclusion of the Government of Belize. The court accepted, the submission that the departure from the tender process vitiates the enforceability of the contract.

[39] The learned judge rejected Mr Courtenay's submission that the financial Orders were merely administrative instructions to public officials and applied the reasoning and conclusion of Conteh CJ, in the **Printers Case** and the decision of the Fiji Islands' Court of Appeal in **Kabara Development Corpn Ltd [2010] 2 LRC 350** . She declared the Extension of the Agreement dated 24th March 2005 to be unconstitutional, illegal and invalid.

The Appeal

[40] With the decision of the Supreme Court, dismissing the claim, the appellant on the 12th December, filed a Notice of Appeal, the grounds of Appeal were

(1) The learned trial judge erred in law in holding that the extension of the contract by letter dated 24th March 2005 between the Appellant and the Respondent (the Agreement) for the management of the International Merchant Marine Registry of Belize (IMMARBE) and the Internal Business Company Registry (the IBC Registry) was unconstitutional illegal and invalid and was therefore unenforceable on the grounds that

(a) It circumvented the Constitution, the Finance and Audit Act and the Financial Orders

(b) It was not put out to tender as required by the Financial Orders.

(2) The learned trial judge misdirected herself in concluding that severance is not appropriate in this case on the basis that deleting the "offensive provisions and substituting them with provisions that direct the claimant to deposit all Revenues 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 courts role in resolving contractual disputes.

(3) The learned trial judge erred in failing to consider and award damages to the Appellant in the sums claimed.

(4) The learned trial judge erred in awarding prescribed costs to the Respondents.

[41] In the Pre-trial Memorandum, the parties have identified the following issues for determination. (a) Did the Government breach the Agreement with the Claimant? (b) Did the Government breach of the Agreement resulted in loss and damage to the Claimant?

Appellants Submission

[42] The Appellant was contracted, because of the special expertise it had in the maritime industry. The 1993 Agreement was for a period of 10 years, and had two important clauses, (i) an option to renew which was exercised on the 9th May 2003, for a further period of 10 years (ii) the clause to amend the agreement. By amendment, the duration of the contract was extended for seven additional years, from 2013 to 2020. It was agreed that US$1.5 million should be paid by BISL to the government as consideration for the amendment, for the additional seven years.

[43] According to Mr Courtenay SC, the government's position, is that, the amendment, is unlawful, for violating the Constitution, The Finance and Audit Act and the Financial Orders. The learned counsel submitted that the extension was valid and lawful and the decision of the Government to take back the management of the Registries was a violation of the agreement. The issues are, (a) Was there a valid extension (b) If, the extension was valid, was the decision of the Government in June 2013, to take back management, a breach of the agreement. If the Court answers 'yes' on that, then the question arises, whether as a result of the breach the Claimant has suffered loss and damage and the quantum of that loss and damage

[44] The Government authorised BISL to manage the financial aspects of the operations of IMMARBE and IBCR and to receive monies from third parties in respect of

taxes, penalties and fees. The monies collected by the Deputy Registrars and paid to BISL to accounts were then paid over to the Government in accordance with the terms of Clauses 8, 9 and 10 of the Agreement. The Government retained full power to audit BISL accounts but chose not to do so. During the currency of the Agreement, the Government through the Financial Secretary, Accountant General and the Auditor General, never once complained about the accounting by BSIL or made any allegations whatsoever, of irregular accounting practices.

[45] BISL notes that the challenge is to the extension only, there is no challenge to the matrix contract or to the Renewal Agreement. Indeed, the trial judge noted that the purported extension in 2005, is what is presently before the court. Any issues of alleged breach of the Agreement by BISL are irrelevant, Government having expressly abandoned that BISL's management and operation of the Registries was an issue for the court to decide.

[46] It was submitted on behalf of BISL that there was no violation of the relevant legislative framework, alternatively, this is a case for severance of such terms as the court finds unlawful. Were the fees 'raised or received' by Belize. Under the IBC Act, S118, there was an obligation to pay the fees into the CRF. BISL recognise the argument that the Registrar did not conform to the Constitution and the FAA, in respect of IBCR. The question is whether there should be deductions for operational expenses. The purpose behind s114 of the Constitution and s4 of the FAA is to ensure accountability for government monies. The full access and right to audit in the Agreement provided the required effective accountability.

[47] If the Agreement cannot stand because of the impugned clauses, does it make the entire agreement illegal or not? If not, the court is obliged to apply the doctrine of severance. The impugned clauses in the Agreement, can be severed. Submitted that the learned trial judge erred, in finding that severing any offensive part of the contract, would be tantamount to the Court rewriting the Agreement between the parties and that was not the Court's role in resolving contractual disputes.

[48] It was Mr Courtenay's contention that, merely, raising the defence of illegality is not sufficient to defeat BISL claim. He drew the court's attention to, **Saunders et al v Edwards et al 1987 2 ALL ER 651,** a decision of the English Court of Appeal where at page 665f to 666a, Lord Bingham LJ, says. "Firstly, illegality. Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On one hand, it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, that the court on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss or how disproportionate his loss to the unlawfulness of his conduct. The applicable test is propounded in **Patel v Mizar (2016) UKSC 42** at 120. The test consists of three limbs, (a) to consider the underlying purpose of the prohibition, and whether that purpose will be enhanced by a denial of the claim. (b) to consider any other public policy on which the denial of the claim could have an impact. (c) to consider whether the denial of the claim is a proportionate response. The underlying purpose of S114 of the Constitution and s4 of the FAA, is to prohibit the private management of public funds and to ensure accountability and transparency.

[49] Neither section imposes criminal sanctions for their breach. The character of the prohibited act is important. In **Donegal International Ltd v Republic of Zambia and another [2007] All ER (D) 184** the South African Constitutional Court, held that the impugned Settlement Deed was directory and the failure to comply with it, meant merely that the Attorney General, had not done what the Constitution requires. In Patel, Toulon LJ stated at para. 40, that whether the statute has the implied effect of nullifying any contract that infringes it requires a purposive construction of the statute. See **Yangon Pastoral Company Pty Ltd. [1978] HCA42** the terms of the Agreement furthered the underlying purpose of the Constitution and the FAA, by granting full oversight and accountability to the Government. Denying BISL claim would not enhance the purpose of the prohibition against the private management of public funds. BISL's conduct could not be labelled criminal, it should not therefore be punished.

[50] In upholding the Agreement, would the Court be permitting a violation of the Constitution or compromise the integrity of the legal system, by appearing to encourage individuals or companies to enter into illegal contracts. Conversely, could it be encouraging Government to enter Illegal contracts. See **Kendal Mendez** where Bingham LJ statement in Saunders was approved, the government should not have been left to enjoy the fruits of it's deceit.

[51] The question of proportionality, was considered in **Parking Eye Ltd v Somerfield Ltd Stores Ltd (2012) EWCA CIV 1338**, in enforcing a contract tainted with illegality, the Court had regard to the fact the contract involved continuous performance over time. The court made reference to the intention behind the contract, which was not to perform illegal acts. See **Chitty on Contracts 29th Edition** (2004) at 16-012, "the parties through ignorance of the law, failing to appreciate that fact, contract may be enforced on the ground that there was never a fixed intention to do that which was later discovered to be unlawful.

Respondents Submissions.

[52] The Agreement was not in keeping with the purport and intent of the Constitution of Belize and all other laws relating to public finances. It is against the separation of powers. Government may not make a law for any tax etc. which has the effect of fettering the executive power from acting in the public interest. **Revere Jamaican Alumina Ltd v Attorney General (1977) 26 WIR 486.**The authority of the Executive to contract is regulated by the Constitution and statute. The Executive is bound by these provisions. See **Commercial Cable Co v Government of Newfoundland (1916) 2 AC 610 to 617**. Therefore, the contract for collection of taxes with exclusive control by a private company would be unlawful.

[53] In **BCB Holdings Ltd and The Belize Bank Ltd v The Attorney General of Belize [2013] CCJ 5**, CCJ held, that what the Deed purported to do, could only be done by the Legislature .The Court found it was against the legal order of Belize and a gross violation of the principle of separation of power. **See Williams v The Commonwealth [2014] 252 CLR 416.** "The Executive had no unlimited authority to contract, and no

authority to make contracts which involves the expenditure of public moneys or expend public moneys without parliamentary approval. The Merchant Shipping Act does not give approval for a separate tax collecting regime."

[54] In respect of IBCR, the Agreement gave complete control over public moneys to IBCR. See Clause 9(1) and 9(2). It is submitted that all taxes and other moneys payable under the Acts were public moneys. Belize inherited the British system of public finance. The essence of the principle, is that public moneys should be paid into the Consolidated Revenue Fund. There is a prohibition in s114 (2) against withdrawing funds from the CRF except by a law made by the National Assembly.

[55] In the **Printers Case,** there had been non-compliance with the tender requirements of the FAA and its subsidiary legislation, Conteh CJ, held that the financial orders were subsidiary legislation (and not merely executive instructions). The contract 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. The Financial Orders are now confirmed by the declaration in primary legislation that it has legislative effect and are binding on all public officers.

[56] In **Belize Bank and BCB Holdings Ltd v Central Bank of Belize and the AG**, the Supreme Court upheld the decision of an arbitral tribunal, that an Agreement between the Claimant and the Government was void for illegality because it purported to authorise the payment into a private bank account controlled by the claimant, of moneys donated by the Venezuelan government to Government of Belize, for the purpose of provision of housing for the poor. The illegality was identified as the breach of section 114 of the Constitution and section 3 of the FAA.

[57] In the case of **Belize Bank v Attorney General of Belize**, Claim 418 of 2013, the Court refused to enforce an arbitral award against the Government for breach of promise to pay monies due under a promissory note. The Court held that the Executive had no parliamentary approval, for the payment of public moneys, and therefore had no authority to bind the Government.

Discussion

[58] The core of the challenge to the learned judge's ruling is that the Court was wrong in ruling that the letter dated 24 March 2005,(the Extension Agreement) , which purported to extend the 1993 Agreement, from 2013 to 2020 is unenforceable, because it circumvented the Constitution, FAA and the Financial Orders , and the Executive in signing the letter, lacked authority. The starting point is therefore the Constitution. The learned authors of Wade and Phillips, "Constitutional Law", commenced the eighth edition of their work, with a useful definition of the Constitution, at page 1:

> 'By a constitution is normally meant a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government of a State and declares the principles governing the operations of those organs. Such a document is implemented by decisions of the particular organ, normally the highest court of the State, which has power to interpret its contents.'

[59] Perhaps, because the work was primarily about the "unwritten" British constitution, there was no mention made, in that definition, that the constitution is Supreme Law. Supremacy of the constitution has the consequence that laws that are inconsistent with its provisions, lose the force of law. Section 2, of the Constitution provides;

> 'This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void' The case of **Claymore v AG (1997) 12 WIR 5** supports the principle of the supremacy of the Constitution over Parliament. The fact that the learned authors, ascribe legal sanctity to the Constitution is important. The Constitution provides` for separation of powers, by regulating the principal organs of government and their relationship to each other. In the Jamaican case of **Hinds v R, [1977] AC195** the Privy Council considered the entrenchment of the Supreme Court as a principle of the separation of powers. The Constitution is a standard

for judicial review of legislation and government action to determine their consistency with the Constitution.

[60] The Respondent alleges a violation of section 114 Constitution of Belize, which provides:

(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 Fund.

(2) No moneys shall be withdrawn from the Consolidated Revenue Fund except to meet expenditure that is charged upon the Fund by the Constitution or any other law enacted by the National Assembly or where the issue of those money has been authorised by an appropriation or by a law enacted by the National Assembly.

(3) No money shall be withdrawn from any public fund other than the Consolidated Revenue Fund unless the issue of those moneys has been authorised by a law enacted by the National Assembly.

(4) No money shall be withdrawn from the Consolidated Revenue Fund or any other public fund except in the manner prescribed by law.

[61] Public moneys, are defined in Section 2 of the FAA, **to include**:

(a) “all revenues or other moneys raised or received for the purposes of the Government of Belize

(b) any other monies or funds held, whether temporarily or otherwise by any public officer in his official capacity either alone or jointly with any other person, whether a public officer or not”.

[62] Section 2(b) widens the definition of public funds, to include, “any other money or funds”, (not being ‘all revenues raised or received for the purposes of the government of Belize) which public officers hold in their public capacity, whether they do so alone or

with another person, who may or may not be a public officer. Whereas in section 2(a) the determinative factor in the identification or definition, of public moneys, is the purposes of the Government for which the revenue is raised or received, in s2(b) the determinative factors are the status of the revenue–holder in whose custody the funds are held, and the circumstances under which the funds are held. There is raised a presumption, that funds, not captured by s2a, that are being held or in the custody of a public officer in his official capacity, whether held solely by him or jointly, with another person, who may not be a public official, are public moneys. Revenue coming into the hands of a public officer assigned to either of the Registries, in his official capacity is public money, by virtue of s2 (b).

[63] The definition of "public moneys" in the FAA, "includes" what is contained in s2(a) and s2(b), as a part of the total moneys or funds, that comprise public moneys. The word "includes' indicate that there are funds external to what is expressed in s2 of the FAA. S2 of the FAA, is not exhaustive of the funds, that comprise public moneys. This statutory meaning was demonstrated in the case of **M & F, Frawley Ltd v Ve-ri-Best Co. Ltd[1953] 1 QB. 318.** By s74(1) of the Shops Act 1950, "retail trade or business ' includes the business of a barber or hairdresser etc. But does not include ... Somerville LJ said at p.323, "I think it is plain, that the words that follow "includes" describe activities about which, at any rate, there might have been disputes whether they came within the words "retail trade or business".

[64] It was submitted in the court below and before us, on behalf of the Government, that section 114 of the Constitution, along with FAA and the Financial Orders were features of the Westminster Model system of controlling, safeguarding and accounting for the Crowns revenue .In respect of the constitutional provisions, BISL does not deny that they are provided to control and safeguard public moneys but contends that the Government's argument is fundamentally flawed, as the fees were raised or received by either IMMARBE or the IBCR, not the Government of Belize. There is no issue that, and I accept, that public moneys, once identified fall to be dealt with pursuant to the financial provisions of the Constitution at s114, and s4 of the Finance and Audit Act. S.4(1) of

the FAA is ipsissima verba of s114(1) of the Constitution. Those provisions are intended to control and safeguard public moneys.

[65] Mr Courtenay SC submits IMMARBE is a statutory body, and the MSR Act, which establishes it, provides that fees collected pursuant to sections 8, 12, 16 and 37 of that Act are to be paid directly to IMMARBE. Learned Senior Counsel further submitted that, the Agreement is consistent with the statutory scheme that constituted IMMARBE, and contrast, those statutory provisions with s3 of the Broadcasting and Television Act, which mandates that fees should be paid into the CRF. Mr Courtenay contends that, outsourcing of management is permissible and s114 of the Constitution and s4 of FAA are inapplicable to moneys raised or collected by IMMARBE. In his written submissions dated 20th September, Mr Courtenay SC accepts that there was an obligation on the Registrar to pay the fees and penalties raised by IBCR into the CRF, in accordance with the legislation which established IBCR.

[66] There need not be any delay for consideration, as to whether the 2005 Agreement, to extend the 1993 Agreement, was consistent with the MSR Act. If the MSR Act has sections that are repugnant to provisions in the Constitution, then those sections of the MSR Act are void. S2 of the Constitution expressly provides for the supremacy of the Constitution All three judges in **Attorney General v Martinis Francois,** underlined the settled principle of constitutional law that, "any legislation which conflicts with any constitutional provision, the legislation is void, to the extent of the conflict and the Constitution prevails. The point of the MSR Act being inconsistent with the Constitution was not ventilated before the Court.

[67] The question, posed on behalf of BISL is,' Are moneys collected by the Registries public moneys, that is, were the moneys raised or received, 'for the purposes of the Government of Belize. Or were they raised or received by BISL?" The first response to that is, as we have seen, in our examination of s2 of the FAA, which defines "public moneys" that s2 (a) of the FAA, is merely a part of an enlarged pool of funds, that may be defined as "public moneys "[See paras 58-60, above.] As a matter of construction, the definition of public moneys in s2 of the FAA is not exhaustive of what constitutes 'public moneys' for the purpose of the FAA. .A relevant consideration is

whether the funds were held by public officials in their official capacity, even if held with another person, who was not a public officer, in circumstances where the moneys were held only temporarily.

[68] The Report of Mr Peter Closely, an Expert, on whose testimony the appellants relied, described the business of IMMARBE as follows: “IMMARBE operates as a part of the global vessel registration industry, international law require that every merchant ship is registered in a country, called its “flag state”. Vessel registration is the process by which a ship is documented and given nationality of the country that the ship has been documented to”.

[69] What is clear is that the nature of the shipping registration industry, is such, only states can raise moneys from vessel registration. IMMARBE has evidenced no sovereign flag, to offer any ship. Further, clause 8 of the agreement states “that the Company was to collect, on behalf of the government”, which directly refutes, the claimant’s assertion that the funds were raised and received by BISL The management agreement, at Clause 1, makes clear, that BISL was contracted, as a part of its function, “to assist in the development of IMMARBE”, and to collect taxes etc. Clause 8, states, that the Company is duly authorised 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 relation to clause 8, 9 and 10.

[70] In his closing submission, at trial and in his written submission, Mr Courtenay SC acknowledged in relation to IBRC Registry that, “a strong argument can be made, that, this contract, provided for monies going into escrow and not directly to the Consolidated Revenue Fund. So we accept that there was not strict compliance with the Constitution and Finance and Audit Reform Act.” There is a great gulf between, Mr Courtenay’s argument that the funds were “raised and received ‘for BISL’s purpose, and BISL’s contractual obligation,’ to collect on behalf of the government’. I cannot accept the submission that the moneys collected at the Registries were raised or received by the appellant. In any event, the public officers at the Registries would be obliged, to deal with funds coming to them in their official capacity, in accordance with the FAA and the Financial Orders. See paras 59 - 60 above. I find that the funds collected by the

Registries were raised and received by the Government of Belize, so the funds should have been dealt with consistent with the provisions of s114 of the Constitution and s4 of FAA.

[71] The Financial Orders are made pursuant to S23 of the Finance and Audit Act, which empowers the Minister to issue instructions called Financial Orders and Stores Orders., with the aim of better carrying out the provisions of the Act. The Orders provide for, among others, the Financial Duties and Responsibilities of Public Officers. Safeguarding of Funds, Internal Control, Contracts (Works & Services) and Tenders. BISL has challenged the learned judge's ruling that the extension Agreement did not comply with the tender procedures provided in the Financial Orders. The learned judge specifically held that the non-compliance with the Tender procedure in the Financial Orders, was a factor in voiding the extension agreement.

[72] Mr Courtenay SC has set his face against the decision of Conteh CJ, in the **Printers Case**, in which the learned Chief Justice had rejected a similar submission to that raised by Mr. Courtenay, before this Court**.** The basis for counsel's contention, was that, "when the learned Chief Justice decision was reached, "critical matters were either not brought to the attention of Conteh CJ or the Chief Justice proceeded on the basis of unsafe assumptions'. Mr Courtenay SC contends that the government provided no evidence in the Court below how the financial orders were issued in 1965. Counsel questioned whether the stage the country had attained in 1965, under a system of colonial self-government, would have allowed the issuance of the FOSO by a Minister, as required by Section 3. Mr Barrow SC contended that the Chief Justice reasoning is contained in paragraph 33 of his judgment because the FOSO existed before the coming into force pursuant to s3 of the FAA and they were continued in force pursuant to s23 of the 1979 Act.

[73] I find myself, unable to agree with Mr Courtenay's submissions in respect of Conteh CJ's ruling. The Printers case was an application by an association of private printers and a private printer, by way of judicial review, challenging government's decisions to sell off the government's printing facilities to a private entity and award them a contract to provide printing services to the Government. The nub of the

complaint was that the government in awarding the contract and the sale acted contrary to the tender procedures prescribed in the Financial Orders. The applicants said the decision was unfair and irrational, and that they had a legitimate expectation that the government would have invited public tenders.

[74] At the review in the Printers Case, it was the applicants submission that the FOSO, were a specie of subsidiary legislation with legislative effect .They contended that the FOSO were mandatory and their breach was not trivial or nugatory. The Solicitor General, on behalf of the respondents, submitted that the FOSO were merely administrative orders directed at public officers, and that the Minister can vary the Orders in the public interest and because they were not published in the Gazette, as required by the Interpretation Act, they are not subsidiary legislation and therefore had no legislative force that could affect the parties to the Extension Agreement.

[75] Copious affidavits were filed on both sides, the Court found that the Minister derived his power to make FOSO from s23 and by s3 of FAA. The Court found on the question of publication in the Gazette, that, ordinarily, the non-publication in the Gazette, is fatal to the instrument "qualifying as a virile subsidiary legislation". The Interpretation Act, s21 (h) makes provision, for publication, by means other than publication in the Gazette. The section provides for a contrary intention other than publication in the Gazette, being expressed in the Act, that confers the power to make the subsidiary legislation. That contrary intention is expressed in s23 (2) of FAA as follows, "Financial Orders and Stores Orders shall be published in a manner to be directed by the Minister". I find that, Conteh CJ, found correctly, that non publication in the Gazette does not undermine the status as a specie of delegated legislation. I view as relevant on the question of issuance of the FOSO, that the applicants, before Conteh CJ, not being public officers, had knowledge of these FOSO.

[76] In his written submissions, dated 20th September 2017, at paragraphs 129 to 133, Mr Courtenay SC, worried, whether in 1965, under colonial self-government, the Ministerial authority existed for the issuance of FOSO. He states at paragraph, 132, of his written submissions, inter alia; there was 'no evidence from the Government that the Financial Orders were so issued by the Minister of Finance'. Out of character for Mr

Courtenay SC, this submission, was unsupported by authority. Section 3, allows for Financial Orders, that predated or were "grandfathers' to the Financial Audit Act of 1979, that have not been revoked, withdrawn to come into effect, as if they were made pursuant to the later Act. The section recognises, that the pre-existing Financial Order, may because of constitutional, political, legislative changes may be in need of adjustment to properly align them to the period, when they come to be construed. The court of construction is mandated to make such modifications, adaptations, qualifications and exception as is necessary to bring it into conformity with the Finance and Audit Act or the Constitution. The country has moved from a colonial self-government stage to a sovereign nation, during the period 1965, when the Financial Orders were made to 1979, when the Finance and Audit Act commenced. A court of construction is empowered, pursuant to s3, to construe the Order, with such modifications and adaptations as to bring it in conformity with the FAA and the Constitution .So the issuing authority for the FOSO in 1965, may be construed by this court with such modifications as to bring it in conformity with the description of the issuing authority in the FAA.

[77] Counsel's challenge goes to the validity of the order, challenging whether it could have been issued, as required by S 3. It is important to note, that on its face, FOSO would have existed before its reception into the FAA on the 1st of May 1979 and for some twenty-five years regulated the control and safeguarding of public moneys, by establishing accounting standards and making provisions for transparency in the conduct of government business. In 2004, those Orders came under the scrutiny of the Supreme Court, in the Printers case which held that the Orders had legislative effect.

[78] Now almost forty years after it fell under the purview of s23 of the FAA, Mr Courtenay SC, astride his steed, has levelled his lance and has charged at the legislation. There are presumptions of validity of Acts of Parliament and delegated legislation. These presumptions are rebuttable, but the onus rests on the party who attacks the validity of the legislation. In this case, the appellant challenges the validity of the FOSO, and on the appellant's shoulders lies the burden of dislodging the presumption. Merely, raising an allegation is not enough .He who asserts must prove In the case of **McEldowney v Forde [1971] AC632**, the presumption of regularity (omnia praesumuntur rite esse acta) applies and the regulation is assumed prima facie to be intra vires. per Lord Pearson at 655f, and at 649A per Lord Guest, 'plain that the task of a subject who endeavours to challenge the validity of .... a regulation is a heavy one'. See also **Hoffmann-La Roche F & Co. AG v Secretary of State for Trade and Industry [1975] AC 295,** 366E-F, 368A.There has not been demonstrated any evidentiary support for the contention that critical matters were not brought to the attention of Conteh CJ .For my part ,I have been unable to find any such critical matters or evidence of the Chief Justice, proceeding on unsafe assumptions. I find no merit in the appellant's submission on this point.

[79] Mr Courtenay, questioning of the legislative effect of the Financial Orders, I found with respect, to be also without merit, he was of the view that, S23, specifically empowered the Minister to issue "instructions", because these were merely administrative instructions to public officers. I must disagree, the orders confer justiciable rights on private citizens, who have sufficient interest. Any examination of the Tender procedure, in Chapter X of the Financial Orders will reveal that they confer justiciable rights, by way of judicial review, to members of the public, who have the requisite standing and are aggrieved by some procedural impropriety, illegality or irrationality. The Printers Case demonstrates the point that the FOSO, confers justiciable rights on persons with sufficient interest. This may be illustrated by Clause 701, which guarantees that tenders will be invited for contracts over $20,000, if A's business rival gains such a contract, in the absence of, the publication of an invitation to tender, X may apply for judicial review of the administrative actions. If a tender is

held and the tender committee was not properly constituted and the procedures outlined in Clause 702, are not followed, X may seek redress by way of the prerogative writs. The applicants for review, not being public officers, and not susceptible to administrative orders from the Minister, pursued rights, conferred on them under the orders. They did so on sound authority as the case of **Harrower R v Hereford Corporation, ex Harrower [1970] 1 WLR 1424** DC demonstrates.

[80] In the **Harrower** case, a local authority confined its invitation, to the local gas coal and electric boards, to submit tenders for a scheme, the authority was to undertake. The corporation next wrote to contract with the electricity board for the works. Harrower, was an electrical contractor, on the Corporations approved list and a ratepayer. He applied for mandamus to have the Corporation perform its duties of inviting tenderers before contracting for the works. The applicant alleged that, the corporation was in breach of section 266 of the Local Government Act, 1933, and standing orders 52 and 53 of the council's standing orders in that (a) the council had failed to invite tenders from a reasonable number of persons whose names appeared on the list of suitable contractors approved by the council, and (b) had failed to give ten days' or any public notice in one or more newspapers of any such proposed contract. Lord Parker CJ, who wrote the leading judgment said,

> "These electrical contractors complain that the **standing orders** of the council have not been observed, in particular standing orders 52 and 53. Standing order 52 provides that 10 days' public notice should be given in one or more newspapers before any contract over £200 is placed for goods or materials or the execution of any work. Standing order 53 goes on to provide that no contract which exceeds £50 in value, shall be entered into, unless tenders have been invited from a reasonable number of persons who supply such goods' The councils, answer was they did not know that the standing order applied. They did not have an engineer."

[81] The court found that the council did not comply with its own standing orders. Lord Parker CJ at page 1427

So far, therefore, as the merits are concerned I am sorry to say that this council have not complied with their own standing orders. The only question is whether it is a case in which an order of mandamus should issue. As to that, Mr. Sears says it cannot issue for two reasons; the first, as he puts it, is that here there was no statutory duty whatsoever in respect of which the council were in breach. For my part I am wholly unable to accept that. No doubt the standing orders themselves are merely directions as to the functions inter se of the council and its officers, but section 266 of the Local Government Act, 1933, provides by subsection (2) - and this is statute: "All contracts made by a local authority or by a committee thereof shall be made in accordance with the standing orders of the local council." [emphasis added]

[82] In both **Harrower** and the case at bar, the complaint was that the specific instrument, standing order or the instructions, lacked legislative force. In both cases there was a refusal by the public entity to comply with its own directions, with which persons with standing, had a legitimate expectation that the entity would be in compliance. The Finance and Audit Act, S23, provides that the Minister may issue instructions, for the better carrying out of the provisions of the Act. The Financial Orders may provide for, at paragraph (d) the purchase of other property of the government.

I find that the reasoning of Parker CJ in **Harrower** is applicable and respectfully adopt it in this matter. I find that the FOSO have legislative effect, as Conteh CJ correctly found in the Printers Case and that learned trial judge was correct in applying that reasoning.

[83] Mr Courtenay had argued in the court below, that the termination of the Agreement by the Government was without lawful authority. Of the 2005 Extension Agreement, he argued, that then, Prime Minister, had ostensible authority to execute such an Agreement. He submitted that the 1993 agreement was signed by the Attorney General, and had not received Parliamentary approval. Neither did the Renewal Agreement in 2003.

Was the termination of the Agreement, by the Government of Belize unlawful? Or was the Agreement itself, "unconstitutional and void and contrary to public policy", as the learned trial judge had ruled.

[84] The Constitution mandates that all revenues raised or receive by Belize except revenues payable under the constitution or some other law into some public fund established for some special purpose, must be paid into the Consolidated Revenue Fund. The exception does not arise in this case. We rejected the submissions, of learned counsel, Mr Courtney, that the revenue collected at the Registries were raised or received for the Claimant and not the Government of Belize. There is no dispute, that the funds were paid into the accounts of IMMARBE and ICBR, and not in the Consolidated Revenue Fund. We noted, that counsel for the Appellant, had, properly, acknowledged, that the Registrar, at IBCR, ought to have deposited revenues collected into the CRF, in accordance to the IBCR Act. The relevant clauses of the Agreement, were in conflict with and contravened S114, the Finance provision, of the Constitution of Belize. That the Agreement circumvented the FAA and FOSO. The constitutional control and safeguard of public moneys afforded by the Belizean Constitution was lost to the Belizean people as a result of the departure from the strictures of Section114 of the Constitution and S4 of the FAA and Financial Orders and Store Orders."

[85] In the matter of **Belize Bank and BCB Holdings Ltd v Central Bank of Belize** and the AG, The Supreme Court applied the decision of the London Court of International Arbitration, which found that a Settlement Agreement was void for illegality. It was found that the Settlement Agreement, permitted the payments, into a private bank account controlled by the claimant, of moneys donated by Venezuela, to the Government for the provision of housing for the poor. The illegality is the breach of section 114 of the Constitution and Section 3, of the Financial and Audit Act, which mandates that public moneys, like the loan to the Government of Belize, should be paid into the CRF.

[86] It was argued that neither s114 of the Constitution nor s4 of FAA does not attach a sanction for its breach, and therefore should not void the contract. I have not been shown any authority that there is required a finding of criminal conduct. All that the common law

requires to void the contract for illegality, is a breach of a prohibition set in place by the statute. This prohibition may be express or implied. There is no express prohibition in s 114 of the Constitution, against entering into a contract to deposit public moneys, other than into the CRF. However, it is clear to do so will contravene the legal sanctity of the Constitution, and render the contract illegal. There has to be a determination as to whether enforcement would be contrary to public policy. The CCJ in **BB Holdings Ltd**, was of the view that whether the Minster had authority was an important test of the legality of the contract. It is also clear that prohibition by a statute or legislative instrument taints a contract with illegality. **Chitty on Contract, 29th Edition (2004)** at **page 17**

> "Contract or contractual provisions are illegal if they are prohibited by statute or legislative instrument. A contract or contractual provision is prohibited if a statute expressly or impliedly prohibits its being made. If performed in a way which is prohibited by statute, rights arising under the contract in respect of that performance may be treated as though they arose under an illegal contract."

[87] BISL are experts in maritime law and may be imputed with knowledge of local revenue laws that would impact the maritime industry under their management. In any event, in respect of IBCR, the legislation directed funds collected to be deposited into the CRF, which directions BISL flagrantly disregarded and substituted a procedure which contravened the constitutional and legislative control and safeguards of public moneys. I infer from that action, a settled intention, in BISL, to avoid the constitutional controls and safeguards of S114 of the Constitution and s4 of FAA in their arrangements with the Government of Belize. The underlying purpose of the breached constitutional provision, was to maintain parliamentary control and safeguards of public moneys for the benefit of the Belizean people. To my mind, Arana J's denial of the claim, will act as deterrence, against similar contraventions of constitutional and legislative safeguards, which were enacted , for the protection of the Belizean people. I am of the view that the denial of the claim is a proportionate response to BISL's admitted contravention of the Constitution and International Business Companies Act 1990 in respect of public moneys raised by IBCR on behalf of the Government of Belize, and BISL's unconstitutional control of public

moneys raised and received, for the purposes of the Government of Belize. I am satisfied that this determination, is the lesser of the two unacceptable courses, at the disposal of the court, as described by Bingham LJ, in **Saunders et al (supra)**. I am fortified in this view by the comments of Pearce LJ in **Archibald's (Freightage) Ltd v Spangled Limited [1961] 1 QB 374**:

"If a contract is expressly or by necessary implication forbidden by statute or if it is ex facie illegal or both parties knew that though ex facie legal it could be performed by illegality or it is intended to be performed by illegality, the law will not help the plaintiff.

Did the Prime Minister, have the requisite authority to bind the government?

[88] Any court that is asked to determine executive action, must approach the task, aware of certain boundaries that should circumscribe its deliberations. The Court should be aware that it is not their role, to be concerned with the prudence and sagacity of government's policies, save in that rare occasion, when called upon to say that Executive decision is irrational on the basis of Wednesbury principles. The reason for this, is the recognition of the importance of the doctrine of separation of powers in the Constitutions that are established in the Westminister mould. The doctrine which is regarded as the hallmark of democracy, ensures that there is no exercise by any organ of the functions of another. Thereby avoiding a concentration of powers from more than one organ in any one person or institution. The essentials of democracy, law, and liberty are more firmly secured when the organs of government are distinctly sited in different locations. In small states, the lines of demarcation may be blurred, the Executive, being drawn from the Legislature.

[89] In **BCB Holdings Ltd and The Belize Bank Ltd v The Attorney General of Belize,** Saunders, President, Caribbean Court of Justice, speaking on the separation of powers, at paragraph 42 inter alia

> "The structure and content of the Belize Constitution reflects and reinforces the distinction. The Constitution carefully distributes among the branches the unique function that each is recognized to exercise. The rights and freedoms of the

> citizenry and democracy itself would be imperiled if courts permitted the Executive to assume onto itself essential law making functions in the absence of constitutional or legislative authority so to do. In young states especially, keen observance by the courts of the separation of powers principle remains vital to maintaining the checks and balances that guarantee the rule of law and democratic governance."

And in **Hanie v Director of Public Prosecutions [1999] 2 AC 294**, 302-303, the Privy Council expressed it thus;

> Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government, such power 'as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary.'

[90] As a creature of statute, the Minister, is constituted of those statutory powers, those ascribed to his office by the Constitution, legislation and the common law prerogative powers. It clear that the Minister had no authority to contract outside the provisions of the Constitution, and the FAA .This court has not been pointed to any constitutional exemption, that the Minister could claim.

[91] In neither **Francois** nor in **BCB Holdings**, was the impugned agreement challenged as being illegal, on any ground, other than the lack of authority, in the executing Minister. In fact, **BCB Holdings** the CCJ agreed, with the arbitral tribunal, on the point, that the Minister was clothed with sufficient authority to enter into Agreements, even when they needed the prior approval of Parliament, before they could bind the state. However, they construed 95, as not be able to support an interpretation capable of granting the Minister the power to do what the Deed purported to do.

[92] As discussed in paragraphs 81 to 84, the case at bar is not concerned solely with the issue of Ministerial authority or the lack, thereof. When the issue is one of illegality of the Agreement itself, the learned authors of Chitty on Contracts, cast doubt on whether,

among the disadvantages attached to such an illegal agreement, is the refusal of the court to sever the illegal term. Chitty on Contracts (supra), at page 17,

> "When a contract is illegal, the law not only refuses to enforce it but imposes additional legal disadvantages to discourage the making. For example, money paid or properly transferred may not be recoverable. Opinions differ whether another disadvantage is the refusal to sever a contractual provision which is illegal.(emphasis added)

The question of Ministerial authority

[93] Having heard and considered the contending views, on the question of ministerial authority. It is apposite, that the impugned instruments in **Francois** and **BCB Holdings**, were not illegal for being prohibited by statute or legislative instrument. In **BCB Holdings**, the arbitral tribunal found that Section 95, of the Income Tax Act, allowed the Minister to remit taxes. The CCJ went on to hold that although s 95, allowed the minister to remit the taxes, the remission was not to be done, in the manner the minister effected it. The CCJ however, cited additional factors, that caused the court not to enforce the award, despite its concurrence with the arbitral tribunal, on the extent of the minister's authority,

[94] In **BCB Holdings Ltd et al v The Attorney General of Belize. (2013) CCJ 5**, the claimants applied to enforce an award made by a foreign arbitral tribunal against the State, for breach of promise contained in a Settlement Deed which provided that the companies should receive a special tax regime, which was never legislated. Deed was executed by the Prime Minister, then the Minister of Finance and the Attorney General Before the CCJ, it was submitted that the State was never bound by the Deed because implementation of the same without parliamentary approval violated the country's fundamental laws.

[95] The arbitral hearing, was not attended by Government of Belize. The tribunal concluded that the Prime Minister had the actual and ostensible authority to make the promises he made. It was recognized that at common law, the Minister has wide

prerogative powers, to enter into agreements, and this power was unfettered by restrictions as to subject matter or person. The Minister may even enter into Agreement which required legislative approval before they can bind the State. The tribunal also supported their decision with S95 of the Income and Business Tax Act. The CCJ agreed with the finding of the Tribunal on the extent of the Minister wide prerogative powers to enter into agreements. And that the Executive may do so even when those agreements needed legislative approval before they became binding on the State. However , where as in this matter, the contract, itself is unlawful, I am of the view , there is no authority for a Minister to enter into an unlawful contract , a fortori ,a contract which contravenes the legal sanctity of the Constitution .

[96] The CCJ applied the decision of the Court of Appeal in St Lucia, in **Francois v Attorney General,** where a citizen brought a complaint and sought review of the Governments actions, after the government gave a guarantee in the absence of parliamentary approval, and the government made good the guarantee. The court held that nothing prevented the Minister from giving the Guarantee but the State only became bound after Parliament had given the funds necessary to discharge the debt.

[97] Mr Courtenay sought to distinguish the 2004 extension agreement, from the agreements, in the authorities, on which the Respondent relied. It was argued on behalf of BISL, that in **BCB Holding Ltd**, the court said it required parliamentary approval for the conferment of a unique tax regime applicable to the entities. Provisions of the Constitution, assigned that role to Parliament. The Settlement Deed, departed radically from the relevant Statute under which the business was constituted. Mr Courtenay submitted, those impugned features, were not present in the case at bar. I cannot accept that submission, The CCJ agreed that the Minister had wide prerogative powers, to enter into Agreements, even when those agreements required legislative approval before they bind the state**.** Saunders P, found that the implementation of the agreement without parliamentary approval and without any intention on the part of makers to seek such approval is repugnant to the established legal order of Belize. In the matter before this Court, there could be no lawful approval of the Extension Agreement, which was prohibited by S114 of

the Constitution. Parliament itself, even if motivated to do so, could not give such an approval, because of the supremacy of the Constitution. In any event, there appeared to be no intention on the part of the makers of such an agreement, to seek such approval. The extension Agreement was illegal ab initio, void and of no effect.

[98] All three judges in **Martine Francois**, (a case where Parliamentary approval was necessary) were of the view that there was no condition precedent to be satisfied before the Minister enters into a contract of guarantee. The judgment of Redhead JA (Ag) as he then was, at para 63, dismissed the notion that the Executive must seek Parliamentary approval before entering into a contract, if that contract is to be valid. The Executive cannot make a withdrawal to fulfil terms of that contract in the absence of parliamentary approval. The issue in Francois is the breach of the constitutional principle of separation of powers. That the Court will not allow neither the Executive nor the Legislature, to trespass on the other's sphere of power.

[99] The learned trial judge, correctly found that severance would not be appropriate in the circumstances of this case. Mr Courtenay, SC, argued that, if there is a departure, there was substantial compliance. The Court may strike down the offending provisions, and enforce what remains. If it is contract for a lawful purpose, but its performance is unlawful, there may be severance. Mr Barrow submitted that the whole Agreement is bad and the obscene nature of the agreement is exposed by the payment of US$1.5 million by BISL, whose consideration ought to be the management and development of the Registries.

[100] To my mind, severance has no relevance when one of the complaints, that this court has found proved, is the absence of a competitive tender that would have afforded transparency and openness. The Extension Agreement should have invited public tenders. Public tender would have provided an opportunity to assess the expertise, cost and expense of each bid. Public tender would lend itself to competition, thereby driving down cost and ensuring that the Government gain access to the best expertise available. The FOSO makes provision for a performance bond from the bidder. The Agreement as signed, is notable for its lack of any performance criteria or standard against which, BISL's

management operations could be assessed. A developing State may not always have available in the public or private sector, the necessary skills and expertise to negotiate the contracting of professionals for implementation of projects , which it has determined is necessary for national development . In the absence of such assistance, the resulting Extension Agreement, was described “as obscene”, by counsel for the defendant, at trial.

[101] In **Kabara Development Corpn Ltd V A-G [2010] 2 LRC 350** , the Court of Appeal, Fiji, quoted with approval Nicolas Seddon’s book, Government Contracts Seddon’s Government Contract (3rd End 2004) p257, where para 7.7 states;

The body seeking tenders is under a public responsibility to use public money in the best possible way. The responsibility involves not only securing the best deal through open and effective compensation but also 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.

[102] I am indebted to Counsel, on both sides, for the industry diligence and scholarship, they have brought to the preparation and conduct of this matter.

Conclusion

[103] I propose that the decision of Arana J be affirmed, that the Contract letter of 24th March 2005 is unconstitutional illegal and unenforceable. Costs awarded to the Respondent to be agreed or taxed.

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CAMPBELL JA