

BEDECO Limited:	a private local company which owns facilities that cater to cruise ship passengers right beside the Fort Street Tourism Village and one of the Respondent/claimants in this appeal
Belize City Council:	an elected body vested with the statutory authority to manage the City of Belize and conferred with the power to grant miscellaneous licensed and permissions.
Belize Port Authority:	the statutory authority vested with the power to provide a coordinated and integrated system of ports and port services
Belize Tourism Board:	the statutory body vested with the power to develop tourism in Belize and a signatory, along with the Government of Belize to a contract with FSTV in which FSTV is exclusively designated as a port of entry for cruise ship passengers in the Belize District.
Brown Sugar Market Place Ltd	a private local company which owns facilities that cater to cruise ship passengers right beside the Fort Street Tourism Village and one of the Respondent/Claimants in this appeal
Eurocaribe Shipping Services Ltd:	does business as “Michael Colin Gallery Duty Free Shop” a private local company which owns facilities that cater to cruise ship passengers right beside the Fort Street Tourism Village and one of the Respondent/Claimants in this appeal
Fort Street Tourism Village Limited:	a private local company which serves as the sole disembarkation/embarkation point for cruise ship passengers entering and exiting the mainland of Belize under and by virtue of a contract with the Government of Belize and the Belize Tourism Board
Maritime Estates Ltd:	a private local company which owns facilities that cater to cruise ship passengers right beside the Fort Street Tourism Village and one of the Respondent/Claimants in this appeal

GLOSSARY

A G	Attorney General of Belize
BCC	Belize City Council
BEDECO BSMP	Bedeco Limited Brown Sugar Market Place Ltd
BPA	Belize Port Authority
BTB	Belize Tourism Board
ESS	Eurocaribe Shipping Services Ltd dba Michael Colin Gallery Duty free Shop
FSTV	Fort Street Tourism Village Limited
GOB	Government of Belize
ISPS	International Ship and Port Facilities Security Code
M E	Maritime Estate Ltd Claimants
BEDECO) BSMP) ESS) ME)	together sometimes referred to as the claimants

2. These appeals arise out of the consolidated actions brought by Bedeco and BSMP and ME and ESS against the AG, BPA BCC BTB and FSTV in which they sought the following declarations:

1. A declaration that the Defendants contravened the rights of the Claimants guaranteed under Section 6 (1) of the constitution of Belize when they caused or allowed the Fort Street Tourism Village Limited to discriminate against the Claimants or subject the claimants to unequal treatment by

depriving the Claimants access to the cruise ship passengers market at the Belize Tourism Village located in the Fort George Area of Belize City.

2. A declaration that the Defendants contravened the rights of the claimants to gain a living by work guaranteed under Section 15 (1) of the Constitution of Belize when they caused or allowed the Fort Street Tourism Village Limited to deprive the Claimants access to the cruise ship passenger market at Belize Tourism Village located in the Fort George Area of Belize City.
3. An order directing the defendants to remove within 7 days all the obstructions placed at different locations on the boardwalk erected and existing along the north bank of the Haulover Creek including the shoreline of the Fort Street Tourism Village Limited.
4. An injunction restraining the defendants and each of their directors, officers, employees and servants from further contravention of the said rights of the Claimants as guaranteed under the Belize constitution.
5. Damages.
6. Costs.

These proceedings were brought pursuant to the enforcement provisions of the Constitution of Belize (the Constitution) which in Section 20 (1) says:-

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

3. The power of the Court when dealing with an application under s20(2) of the Constitution is set out in that subsection which states:-

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

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

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

4. The Chief Justice declared that BEDCO BSMP ME and ESS were entitled to the rights guaranteed under section 15 (1) of the Constitution which states:-

S15 (1) "No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business, or otherwise".

The Chief Justice further declared that FSTV by erecting a wall on the boardwalk prevented the cruise ship passengers who came ashore from having direct access to the claimants' business premises thereby depriving the claimants the opportunity to earn their living and consequently constituted an infringement of their constitutional rights as set out under section 15 (1) of the Constitution. Following on these declarations, he ordered that the walls and other structures on the boardwalk which were impeding access to the properties of the claimants be removed. The Chief Justice declined to make any order for the payment of damages.

5. As explained in his judgment, the action is related to an aspect of the burgeoning tourism industry of Belize more particularly the cruise ship industry which had experienced tremendous growth in a relatively short space of time. No deep water facilities exist in Belize City which would permit the cruise ship to be anchored along the land which in turn would allow the passengers to disembark on the land without having to use a tender. In the absence of such facilities, the ships are required to anchor out at sea. The passengers are then taken to the landing facilities by boats known in the industry as "tenders". The landing facilities are situated at the premises of FSTV.

6. On 8 August 2003, the Minister of Natural Resources gave permission to the Belize City Council to erect a boardwalk connecting to their pier in Tourism Village (then the predecessor in title to FSTV referred to as FSTV). The boardwalk was to be constructed along the North and South Banks of Haulover Creek. Permission was granted subject to the following conditions:
 - (a) the permission is a privilege to erect a structure on National Lands and does not confer ownership or interest in the land;

- (b) no gates or barriers are to be placed on the boardwalk;
 - (c) the public is to have access to the boardwalks at all reasonable times;
 - (d) the licence cannot be assigned or transferred by the licensee to a third party.

- 7. The boardwalk was constructed on the northern frontage of the Harbour Creek in the area of the Fort George in Belize, City. It is along the shoreline of Bedeco BSMP, ME and ESS. It is constructed on the sea bed. By Section 2 of the National Lands Act, Cap 19 “national lands” as defined as “all lands and sea bed.” FSTV and Bedeco, BSMD, ME and ESS all required licences from the Minister of Natural Resources to construct the structure or boardwalk on the sea bed.

- 8. Carlos Romero, the owner of a property known as the Wet Lizard brought an action in 2003 against the FSTV for obstructing access to the Wet Lizard. In October 2003, FSTV agreed with the Wet Lizard that there should be free flow of access to the dock during the day when cruise ships were in the port. The walls erected on either side of the Wet Lizard’s premises would be modified to allow pedestrian access to the entire boardwalk between 6 am and 5 pm on these days.

- 9. The wall which was constructed effectively blocked any access to the Harbour View Property. ESS and ME obtained an injunction restraining FSTV, BCC the Minister of Natural Resources and the AG from continuing the construction. Access to Bedeco and BSMP was also blocked.

- 10. In order to fulfil its intention to promote tourism as an important aspect of its economic development programme, the GOB decided that it was necessary to develop a tourism village with such facilities.

Recognizing that there were no proper docking facilities for the tender of passengers which were required to carry passengers from cruise ships to and from Belize City. The GOB and the BTB entered into an Agreement with Belize Tourism Village Ltd, the predecessor in title to FSTV, and Michael Feinstein. Among the obligations undertaken by FSTV was the requirement to provide facilities in the village for the operation of Customs and Immigration. The GOB undertook to “establish or cause to be established regulations providing for the entry and exit from the tourism village of persons and things. In addition GOB further undertook to take all steps necessary to designate the tourism village as the official port of entry of cruise ship passengers.

11. Under the Agreement, a tourism village was to be developed. The village would provide docking facilities for tenders bringing cruise ship passengers to land in Belize City. In addition, stores and other facilities for the sale of goods and services to these passengers would be established. Under the Restated Agreement in September 2003 FSTV would take over the assets and liabilities of the original investors and operate the tourism village. This scheme was part and parcel of the plan of the GOB to provide for tourism and to make it an important engine of economic development of Belize.
12. Part 9 of the Agreement contains covenants made by the GOB. Under paragraph 6 of that part the GOB designated.....

”the Tourism Village as the official port of entry of cruise ships visiting the Belize District to use the Tourism village for passengers who wanted to land in Belize or to return to the ships”.
13. The BTB and Registrar of Hotels have statutory obligations inter alia establishing the rate of tax to be paid by the cruise ship passengers, the

head tax, collecting cruise ship taxes, granting permission for cruise ships to call at Belize and generally regulating the cruise ship industry. The Agreement provides that the BTB and the Registrar must consult FSTV before any adjustment is made to the rate of the head tax or the method of collecting that tax. The Agreement expressly provides:

“The BTB will remain responsible for formulating and ensuring compliance with a national cruise ship policy. No responsibility currently carried out by the Registrar and the BTB is delegated to the Company unless expressly laid out in this Agreement.

14. In their submission the appellant has identified three basic issues to be determined in this appeal. These issues are:-
- (i) whether FSTV is a public authority or performs the functions of a public nature and as such it is required to enforce the fundamental rights, and freedoms provision of the Belize Constitution?
 - (ii) whether FSTV infringed the rights of Bedeco, BSMP ME and ESS to work?
 - (iii) whether FSTV infringed the rights of Bedeco, BSMP, ME and ESS to the equal protection of law?

GROUND ONE AND TWO

15. The appellant’s first ground of appeal is that the Chief Justice erred in law in holding that FSTV is by virtue of its role and functions as a port of entry and port facility operation clothed with public power that makes it amenable to public law.
16. In its second ground, FSTV alleged that the Chief Justice erred in law in finding that FSTV was a party to the proceedings concerning the alleged

breached of the claimants' constitutional rights. I propose to deal with grounds one and two together.

17. In order for the claimants to have succeeded in their claim that their right to work which is guaranteed by section 15 (1) of the Constitution had been breached, it was necessary for them to prove that FSTV was exercising a public function as a port of entry into Belize and therefore the exercise of that public function made it amenable to the redress under section 20 of the Constitution. It is not disputed that FSTV is a private company and not a public authority. Before the Chief Justice the claimants however contended that, even though FSTV was never designated as a port as required under the Port Authority Act nonetheless, it exercised certain public functions having been designated as the sole port by virtue of (the Agreement). The claimants argued that, in exercising their power under the Agreement, FSTV committed acts which infringed their constitutional rights when it erected walls and structures on the boardwalk which, they alleged, it had no power to do.

18. FSTV submitted that it was a private company and, the fact that it was designated as a port of entry under the Agreement, did not make the nature of its functions public. It was urged upon the Court that FSTV did not perform any public duties, functions or responsibilities whether by virtue of statute or contract. It was argued that FSTV had no coercive power, a prerequisite for the enforcement of the provisions which guaranteed the fundamental rights as set out in the Constitution. In the absence of such coercive powers, FSTV submitted that it could not be subject to an action for constitutional redress on the ground that it infringed the constitutional rights of the claimants.

19. In order to make FSTV liable, it was necessary for the claimants to show that FSTV exercised functions of a public nature. In order to do this the claimants relied on the provisions of the Agreements referred to earlier.
20. It was submitted that, even though the Agreement purported to designate FSTV as official port of entry, FSTV was not in fact a port of entry under the provision of the Belize Port Authority Act. In order for the port to be designated as an official port of entry, the Minister responsible for ports must designate it as a port under the provisions of section 20. This designation is by Order, which must be published in the Official Gazette. This section provides:-

20 (1) The Minister may, by Order published in the Gazette, designate any place, not already included under the definition of the term “port” herein, a port for the purposes of this Act.

The Minister shall, by Order published in the Gazette, effuse limits of the parts named in this Act and any other place designated as a port by him under subsection (1)”.

In the light of this provision and. in the absence of any designation as required by section 20, it was not disputed that FSTV was never designated a port by the Minister. In these circumstances, it was argued that FSTV did not exercise any public function.

21. In his judgment at paragraph 35 of his judgment the Chief Justice stated:-
- “...I am inclined to the view that the designation of the 5th Defendant as the sole port of entry and exit for cruise ship passengers has, both a statutory and governmental underpinning, such as to make it amenable to public law challenge. I am fortified in this view by the fact that the power to designate any place as a port of entry into or exit from Belize is statutory: - see section 39 of the Immigration

Act – Chapter 156 of the Laws of Belize, Rev. Ed. 2000. This section grants the Minister responsible for immigration the power to make regulations prescribing ports or places of entry into Belize. I am therefore of the view that it matters not that it was by contract (the agreements between the 5th defendant and the Government of Belize and the 4th defendant already referred to in para. 26 above) that the 5th defendant was purportedly designated the sole port of entry for cruise ship tourists. This much is admitted on the 5th defendant's behalf. Mr. James Nisbet, its Operations Manager, states in paragraphs 5 and 6 of his affidavit filed on its behalf:

“5. It is true that the 5th defendant's FSTV has been designated an official port of entry for a limited category of visitors to Belize, i.e. those visitors that are passengers on cruise ships that make one day stops in Belize

6. It is also true that to date the FSTV is the only official designated port of entry for such one day cruise ship visitors.”

Surely, every officially designated port of entry or exit is part of the immigration and emigration paraphernalia of every sovereign state, which perform, must have a considerable element of public law. I am persuaded that the designation of the 5th defendant as the sole port of entry and exit for cruise ship passengers, assimilates it for that purpose, to a public body or authority amenable to public law.”

22. Counsel for FSTV informed this Court that, at the hearing, it was never contradicted that all custom and immigration functions continued to be

performed by the respective departments of government and that the FSTV did not perform any of these public functions.

23. The Chief Justice was indeed correct when he held that the power to designate any place as a port of entry into or exit from Belize is statutory. However, it would appear that the Chief Justice assumed that it was made a port of entry and exit as there was no evidence that the Minister responsible for Immigration had in fact made any regulation prescribing the ports of entry into Belize. In the absence of any such evidence the conclusion reached by the Chief Justice cannot be maintained.
24. As stated earlier, the Chief Justice concluded as paragraph 35 of his judgment that:

“I am persuaded that the designation of the 5th Defendant (FSTV) as the sole port of entry and exit for the cruise ship passengers, assimilates it for that purpose, to a public body or authority is amenable to public law challenge.

Later the Chief Justice went on in paragraph 36 to observe

“Thus, even though it is a private entity, the 5th defendant (FSTV) is, in my view, by virtue of its role and function as a port of entry and a port facility operator, clothed with public power that makes it amenable to public law.”

Based on these observations, the Chief Justice in paragraph 37 determined that:-

“It is for these reasons that I found and hold that the Fifth Defendant (FSTV) is a necessary party to these proceedings which raised clear public law issues concerning the alleged breaches of the claimant’s constitutional rights.”

25. Before this Court, counsel for the FSTV submitted that, even if it is found that FSTV was designated a port of entry, this was not enough to make the nature of its function public. Counsel further submitted that FSTV was never a body endowed by law with coercive power, which was a requirement before it could be held to be amenable to constitutional. He referred to Maharaj v Attorney General of Trinidad & Tobago (No 2) [1978] AC 385; Thornhill v Attorney General of Trinidad & Tobago [1980] 2 W. L. R. 510 and Alonzo v Development Finance Corporation 1 BZLR 82.
26. In **Maharaj v Attorney General of Trinidad & Tobago (No 2)[1979] AC 385** Lord Diplock, rendering the judgment of the Judicial Committee of the Privy Council stated at p 396:
- “Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in section 1 already existed, it is in their Lordships’ view clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers
- The chapter is concerned with public law, not private law.
- One man’s freedom is another man’s restriction, and as regards infringement by one private individual of rights of another private individual, section 1 implicitly acknowledges that the existing law of torts provided a sufficient accommodation between their conflicting rights and freedoms to satisfy the requirements of the new constitution as respects those rights and freedoms that are specifically referred to.
- Some of the rights and freedoms described in section 1 are of such a nature that for contraventions of them committed by anyone acting on behalf of the state or some public authority, there was already at the time of the constitution an

existing remedy, whether by statute, by prerogative writ or by an action for tort at common law.”

27. **In Thornhill v AG [1980] 2 WLR 510** Lord Diplock reaffirmed his observation expressed in Maharaj’s case when he said at p 516:-

“It was held by the Judicial Committee in *Maharaj v Attorney-General of Trinidad and Tobago (No. 2)* [1979] A.C. 385, 396, that the protection afforded to the individual by these sections was against contraventions of those rights and freedoms “by the state or by some other public authority endowed by law with coercive powers” and not by another private individual Chapter I of the constitution does not deal with purely private wrongs.”

Later Lord Diplock explained what he meant by public authority. His Lordship said at p 520:-

“In this context “public authority” must be understood as embracing local as well as central authorities and including any individual officer who exercises executive functions of a public nature. Indeed, the very nature of the executive functions which it is the duty of police officers to perform is likely in private to involve the commonest risk of contravention of an individual’s rights under section 1 (a) and (b), through overzealousness in carrying out those duties.”

28. In **Alonzo v Development Finance Corporation** 1 BZLR 82, this Court followed the law as set out in Maharaj and Thornhill and in giving judgment of the Court had this to say at page 86:-

“The fundamental right and freedoms protected by the constitution are not intended as guarantees of purely private rights, that is rights as between one individual and another.

They are intended as protection afforded to individuals as against any contravention of their rights and freedoms by the state or some other authority endowed by law with coercive powers...(the DFC) is not exercising functions of a public nature when it engages personnel or terminated their employment.”

29. The claimants as corporate entities are entitled to the protection of their rights which are set out in the Constitution. However these rights are only enforceable against the state or public authority endowed with coercive powers. It is therefore necessary to determine whether FSTV had any coercive power when it operated as a port of entry under the terms of the Agreement. The evidence demonstrated that the duties and functions of the customs and immigration departments were indeed at all times performed by these departments and were not in any way delegated or transferred to FSTV. The fact that FSTV is to be consulted before the head tax is changed does not give FSTV any coercive power. Nor can it be said that the receipt of part of the head tax by FSTV changed its nature and gave it any coercive powers.
30. In the court below the Chief Justice rejected the submission of counsel that FSTV was a private entity and therefore not amenable to an action to enforce the fundamental rights provision of the Constitution. The Chief Justice held that the fact that the wall was constructed by a private entity did not in itself confer some kind of “talismanic immunity from constitutional challenge as being in breach of guaranteed right and therefore susceptible to judicial oversight or control.”
31. The Chief Justice then proceeded to set out what in his view was the correct test. He said at paragraph 34 of his judgment:

“I therefore adopt with respect, the statement by the learned author of Judicial Review Handbook, by Michael Fordham, 4th ed. 2004 at para. 34.2 at p. 673: “The Principles of reviewability. The mass of case-law can be seen to provide a host of working examples apply a series of interrelated principles regarding reviewability, with perhaps these main lessons: (1) treat no single factor as determinative; but (2) focus particularly on (a) statutory or governmental underpinning and (b) the substances and effects of the functions being discharged.”

32. With due respect to the Chief Justice, I consider that this was the wrong approach. In my view, that is the correct approach when dealing with the judicial review of an administrative decision. But that was not the issue in this action. The issue to be determined in this case was whether FSTV, being a private entity, had any coercive power so as to make it amenable to an action under section 20 (1) of the Constitution for the protection of the Fundamental Rights as guaranteed under Chapter 2 of the Constitution. The Chief Justice ought to have been guided by what was said by Lord Diplock in Maharaj's case and reaffirmed in Thornhill's case. The rights are enforceable against the state or a public authority endowed with coercive powers. Had the Chief Justice adopted this approach, he would have concluded that FSTV was not a public authority endowed with coercive power.

33. It was submitted on behalf of the appellant that FSTV is a private entity providing a service, i.e. its boardwalk as a landing point for cruise ship passengers. This service was to Government in order for the Government to perform its public duties. Counsel accepted that, even though FSTV was a private entity, nonetheless it could in certain circumstances be said to be exercising public function. He relied on **Poplar Housing and**

Reservation Community Association Ltd v Donoghue [2001] 4 All ER 604 which was referred to by this Court in *Ward v Roches* Civil Appeal No. 5 of 2004. In Poplar's case the issue was whether a private entity was performing private functions under the provision of the Human Right Act 1998 of the United Kingdom. Lord Woolf, Chief Justice, in his judgment said at p 619:

“The fact a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such performance is necessarily a public function. A public body in order to perform its public duties can use the services of a private body. Section 6 should not be applied so that if a private body provides such service, the nature of the functions are inevitably public.

It is not to make a body, which does not have responsibilities to the public, a public body merely because it performs acts on behalf of a public body which would constitute public functions were such acts to be performed by the public body itself. An act can remain a private nature even though it is performed because another body is under a public duty to ensure that that act is performed.

What can make an act, which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact that the acts are

supervised by a public regulatory body does not necessarily indicate that they are of a public nature.”

34. Counsel for FSTV submitted that, in applying the test of “the combination of features” referred to by Lord Woolf, FSTV cannot be said to have been exercising a public function. In support of this submission, he stated that there was no statutory authority which established FSTV as a port. Nor was there, he urged, any statute which empowered FSTV to perform any public function or which imposed a public character or stamp on the action of FSTV. He also suggested in support of his submission, that, save for approving security plans under the ISPS Code, neither the BPA customs or the immigration departments exercised any supervisory or any control whatsoever over FSTV in the operation of its facility. Finally, in support of his submission counsel asserted that save for the cruise ship passenger alighting on the boardwalk the operations of its facility did not in any way involve any public authority.
35. The Court was referred to **Wade v Maria Roches (Civil Appeal) No. 5 of 2004**) where this Court held that on the evidence, a close-knit connection between the Government and the Catholic Church in Belize existed and, as a result, the Catholic Church was amenable to relief under the enforcement provisions of the Constitution. In that case there was indeed evidence to support the conclusion which was reached.
36. Counsel for the claimants submitted before this Court that FSTV was controlled by the Government and its designation as an official port of entry its function and operation and the provision of business and services were all closely interwoven with the Government, BTB, and BPA. He contended that the BPA designated FSTV as a port facility under the Port Facility Security Regulation Statutory Instrument 101 of 2004. He further contended that whether designated or not, FSTV, under the security plan

approved by the BPA, has been given coercive powers which included the securing of persons their belonging and their vehicles.

37. In support of his submission, counsel for the claimants urged that a representative of BTB sits on the board of directors of FSTV. He also urged that FSTV was designated and official port of entry for cruise ships passengers arriving and departing Belize City. He stated it was mandatory for all cruise ships arriving in Belize District to use FSTV.
38. In deciding whether FSTV is a private entity and is in fact performing any public function, I adopt the test of “combination of features” as set out in Lord Woolf in Poplars case. There is no evidence that FSTV was designated a port of entry either under the Immigration Act Cap or Belize Port Authority Act Cap It is designated a port of entry under the Agreement but it would appear that such designation does not have any statutory underpinning. In my view the Agreement was a commercial transaction between the Government, BTA and FSTV. The evidence demonstrates that all functions powers and responsibilities in relation to customs and immigration formalities which cruise ship passengers are required to undergo have always been retained and are in fact exercised by the customs and immigration departments.
39. I am therefore of the view that FSTV is not subject to an action to enforce any of the constitutional provisions which relate to the protection of the Fundamental Rights as guaranteed by the Constitution. In so concluding I respectfully differ from the conclusion reached by the Chief Justice.

GROUND THREE

40. In its third ground, FSTV alleged that the Chief Justice erred in law in finding that the walls and structures erected on the boardwalk denied the

claimants the opportunity they would have had to earn a living in breach of S 15 (1) of the Constitution. The issue that arises under this ground is whether FSTV infringed the claimants' right to work. In other words, did the erection of the wall on the boardwalk by FSTV constituted a denial of the claimants' opportunity to work.

41. In paragraph 55 of his judgment, the Chief Justice observed that "the presence of the wall and other structures immediately next to the claimants' properties abutting that boardwalk effectively prevents cruise ship passengers from patronizing, if they so desire, the establishment in these properties." This prevented cruise ship passengers from having direct access from the boardwalk to the claimants' properties. In order to gain access to these properties, the cruise ship passengers must exit the premises of FSTV on to the road and then enter the premises of the claimants. The claimants complained that, by the time the passengers exit the premises, they would have had, "first to run the gauntlet of myriad other vendors such as tour and taxi operators, local craftspeople plying their wares and trades like hair-braiders and other assortment of vendors including food sellers."
42. The Chief Justice held that the permit of the Ministry was necessary for the construction of the boardwalk and that "the invariable practice of the Ministry" was to include as standard conditions that "no gates or barrier should be placed on the boardwalk and that the public must have access to the boardwalk at all reasonable times." The Chief Justice observed that the conditions apply to all parts of the boardwalk. He accepted that any wall or other structures on the boardwalk that are obstructive of free movements on it would be in breach of permission granted to construct the boardwalk.

43. He found that FSTV unilaterally constructed the wall in the “purported discharge of its obligations to make its premises ISPS Code-compliant stemming from the purported designation by the Government and BTB as the sole port of entry for cruise ship passengers.” He concluded that in building the wall FSTV

“effectively impeded cruise ship passengers direct access to the claimants’ establishment abutting on the boardwalk thereby, I find, denying them the opportunity they would otherwise have to earn a living contrary to Section 15 (1) of the Constitution.”

He went on to observe that construction of the wall materially denied “the claimant the opportunity to have a share patronage of the passengers who are discharged on to the boardwalk by tenders.”

44. The Chief Justice expressly found at paragraph 69 of this judgment that the construction of the wall was

“.....not in consonance with the claimants’ rights as provided for in section 15(1) of the Belize Constitution. Section 15 of the Constitution is in my view, an affirmation of the work ethic and a validation of this as a fundamental right. No one, subject to the express exceptions mentioned in sub-section (2) and (3) should be denied this right. I therefore find and hold that in the circumstances this case, the construction and maintenance of the walls and other obstructive structures on the boardwalk deny the claimants the opportunity, to gain their living by engaging in trade or business with cruise ship tourists who lack direct access from the boardwalk to the claimants’ establishment. The denial of this opportunity is I find, in the contest of this case, a breach of the claimants’ constitutional right.”

45. It is against these findings that FSTV has grounded its second ground of appeal.

46. Before this Court, counsel for FSTV submitted that the claimants have freely engaged in pursuing their several businesses in their respective facilities and in fact earn money from sales to locals as well as passengers from the cruise ships. He contended that FSTV never denied the claimants the opportunity to operate their businesses. In his written submission counsel for FSTV stated that:

“the claimant did not have immediate and direct access to the cruise ship passengers by way of an unimpeded and continuing side walk cannot meet the threshold of denial of opportunity to earn a living by engaging in a trade of choice, since the claimants have access to those visitors through other means.”

He took issue with the finding by the Chief Justice that the walls and structures were constructed in breach of permission to construct the boardwalk. He submitted that the Chief Justice arrived at this conclusion on the basis that “these conditions are evidently standard in every permission given....”

47. In my view, the issue whether the wall was built without permission or breach of any condition granted in any permission is not germane to the substance of the allegation of a breach of the provisions of section 15 (1) of the Constitution. Section 15 (1) provides that “no person shall be denied the opportunity to gain his living by work he freely chooses or accepts....” The Constitution speaks of a denial of the “*opportunity to work*”. It is the opportunity that must not be denied to the citizen. If that opportunity is denied then fundamental right as guaranteed by the Constitution is infringed. While it is often referred to as the right to work,

what is in fact guaranteed is not the right to work but the opportunity to work. The erection of the wall on the boardwalk with or without permission, prevented the passenger from directly accessing the business premises of the claimant from the premises of FSTV. Passengers are required to exit the premises of FSTV on to the road and, from there, gain access to the several businesses of the claimants. In order for section 15 (1) to be breached in so far as a denial of the opportunity to work is concerned, legislation or some statutory instrument would have to provide that the claimants were not entitled to engagement in the any business or in a particular type of business.

48. In **Belize Petroleum Haulers Associations v Daniel Habet and others** (Civil Appeal No. 20 of 2004) 24 June 2005 (unreported) the Court had to consider whether the provisions of Sections 3(4) 19 (1) (a) and (2) (c) of the Belize Petroleum Haulers Association Act No. 28 of 2003 (BPHA Act) offended section 15 (1) of the Constitution. Section 3 (4) of the BPHA Act provides:

(4) The Association is and shall be the only legal entity authorized to conduct business of petroleum transportation in Belize, save and except haulage to a private facility not owned by an oil company or its affiliates.

Section 19 (1) sets out the factors to which the Department of Transportation must have regard when considering an application for a licence. The first factor is whether the applicant is a member of the Haulage Association and certified by the Committee under Section 19 (2). The Department cannot issue a special licence to an applicant unless such applicant is inter alia recommended by the Association.

49. The Chief Justice, in giving judgment in that case, held:

“The effect of section 3 (4) coupled with section 19 (1) (a) and (2) (2) of the Act is effectively to chill the right to association or not to associate of the applicants and this directly impacts on their right to work in their chosen field, namely the commercial haulage of petroleum products. Together, I find these sections grant the Association an unwarranted imprimatur event to the extent of prohibiting a public officer, the Director of Transport, from issuing special licence to applicants unless “recommended by the Association.” The imprimatur given by these sections to the Association seriously undermines and infringes both the right to associate or not and the right to work guaranteed by sections 3 (1) and 15 (1) of the Constitution.”

50. In upholding the conclusion reached by the Chief Justice, this Court held:

12. “...Section 19(1) (a) provided that in considering an application for a licence, the Department shall have regard to the fact whether the applicant is a member of the Association and is so certified by the committee
13. Section 19 (2) (c) prevents the Department from issuing a special licence to anyone unless he has been recommended by the Association. This again places an applicant at a disadvantage as it maybe unlikely that the Association would be willing to recommend a person who is not a member as someone to whom a special licence should be issued.

The Court concluded that “the effect of the provisions of Section 19 (1) (a) and 19 (2) (c) is to interfere with the right of citizens to be gainfully employed in the field of his choice.”

51. In that case, the effect of the legislation was to prevent the Department of Transportation from issuing a special licence to an applicant unless his application was recommended by the Association. That was considered to be an unreasonable denial of the opportunity to pursue his chosen employment.

52. That case is distinguishable from this matter. No legislation or other statutory instrument prevented the claimants from pursuing their choice of business. The erection of the wall, while it prevented the passenger from having direct access from the board wall to their business premises, did not deny the claimants an opportunity of pursuing their choice of work. The obstruction made it less convenient for the passengers to access the claimants' business premises. But, in my view, this does not and cannot be said to be a denial of the opportunity of the claimants to pursue their work.

53. **THE RESPONDENTS' NOTICE**

Notices of Intention to Contend that the Chief Justice's decision be varied was filed by the claimants pursuant to Order 11 Rule 5 (1) of the Court of Appeal Rules. They took issue with the declaration of the Chief Justice that the claimants' right to equal protection of the law without discrimination as guaranteed in section 6 (1) of the Constitution had not been contravened by the appellant.

54. The essence of the complaint is that "the Chief Justice failed to construe section 6 (1) of the Constitution as prohibiting unequal treatment of persons in similar circumstances both in the privileges conferred and in the liabilities imposed by law, whilst section 16 prohibits affording different treatment to different persons based wholly or mainly on grounds of sex, race, place of origin, political opinion colour or creed."

55. In their first declaration, the claimants sought a declaration that their rights under Section 6 (1) of the Constitution has been contravened when FSTV were permitted to discriminate against the claimants by subjecting them to unequal treatment by depriving them of access to cruise ship passenger market at the Tourism Village when such access was given to Wet Lizard.

56. Section 6 (1) of the Constitution provides as follows:-

6 (1) All persons are equal before the law and are entitled without any discrimination to the equal protection to the law.

Section 16 (1) and (3) provide as follows:-

16 (1) Subject to the provisions of subsections (4), (5) and (7) by this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2)...

(3) In this section, the expression “discriminatory” means offending different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which person of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

57. The evidence disclosed that an arrangement had been made between the owner of the Wet Lizard and FSTV which had resulted in there being no wall or obstruction on the boardwalk which prevented passengers from gaining access to the Wet Lizard from the boardwalk.

58. The Chief Justice concluded that the unimpeded access to the boardwalk enjoyed by the Wet Lizard Restaurant did not give rise to a contravention of the claimant's right to the equal protection of the law. He accepted that the arrangements may indeed be unfair in so as the claimants were concerned, but this did not amount to a denial of the equal protection of the law as guaranteed by section 6 (1).
59. Counsel for the claimants submitted that the Chief Justice ought to have given an "autonomous" construction to section 6 (10) of the Constitution. He relied on Act No. 2 of 2001 which amended the Constitution. He said that this amendment sought "to increase the guiding principles enunciated in the Preamble to the Constitution. Reference is made to the respect for the principles of social justice and belief in the operation of economic system that must result in material resources of the community being distributed in such away as to serve the common good of the nation. The Preamble also speaks to the eliminations of economic and social privileges and disparity among Belizean. Counsel contended that, in construing section 6 (1) and 15 (1) of the Constitution, the Chief Justice ought to have had regard to these provisions of the Preamble.
60. In support of these submissions counsel relied on **Smith and another v L.J. Williams Ltd** (1980) 32 WIR 395. L.J. Williams Ltd had applied to the court for a declaration that its constitutional right to equality of treatment from a public authority in the exercise of its functions and the protection the law under s4 of the Constitution of Trinidad and Tobago had been violated. In his judgment at 411, Bernard J (as he then was) said:-
" In so far as official acts are concerned, the nub of the matter is, in my view, that the section both guarantees and is intended to ensure that where parties are similarly placed under the law they are entitled to treatment under law."

61. In the Court of Appeal, Kelsick JA, in his judgment at p 415 equated the expression “equal treatment with the definition of “equal protection” as set out in Basu’s Shorter Constitution of India (1976) vol 1, page 29 where it was stated

“Equal protection means the right to equal treatment in similar circumstances both in the privileges conferred and in the liabilities imposed by the law...In other words, there should be no discrimination between one person and another if as regards the subject matter of legislation their position is the same.”

62. Counsel also relied on **Mohanlal Bhagwandeem v Attorney General (2004) 64 WIR 402**. The appellant, a police officer in the Police Service of Trinidad and Tobago, alleged that the Commissioner of Police had treated him unequally and/or unfairly and had discriminated against him in breach of section 4 (b) and (d) of the Constitution – the right of the individual to equality of treatment and protection of the law. In delivering the judgment of the Judicial Committee of the Privy Council, Lord Carswell at paragraph 18 stated:

“18. A claimant who alleges inequality of treatment or its synonymous discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 ALL ER 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provision in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

63. Counsel for the claimants then referred to the circumstances relating to the comparators who he stated were FSTV and Wet Lizard. He identified the following circumstances:

- (i) their shore lines are on Natural Lands the Northern portion of Haulover Creek which is the same as the Claimants;
- (ii) the shorelines of the claimants are within Belize City Port and Belize Harbour and as such under the jurisdiction of the Ports Commissioner also the Wet Lizard and FSTV;
- (iii) the property of the Wet Lizard, as does the property of the claimants adjoins FSTV;
- (iv) The Minister of Natural Resources in, gave a licence to FSTV or its predecessors to construct the boardwalk and that no gate or obstruction should be placed on the boardwalk;
- (v) BPA was designated the Government's agent for implementing ISPS Code
- (v) BCC condoned the act of FSTV in permitting the erection of building walls and fence and the boardwalk blocking the access of the claimants whilst giving full access to the Wet Lizard.

64. In relation to the equal treatment, counsel alleged that the Minister of Natural Resources allowed FSTV to erect fences and building in breach of the conditions which are set out in the licence so as to block access to the Claimants and not the Wet Lizard. He blamed the Minister of Natural Resources and BBC for permitting FSTV the condition in respect of the Claimants and not the Wet Lizard without sanctions. Counsel complained that after the BPA wrongfully designated FSTV as a port facility, it approved a Port Facility Security Plan for FSTV and then allowed FSTV to

use the ISPS Code to block access to the Claimants property while granting access to the Wet Lizard. He relied on the admission by FSTV that it blocked access to the premises of the Claimants to protect its exclusive contractual rights and privilege which were contained in the agreements with the Government and BTB which it enjoys in conjunction with Wet Lizard but not the Claimants.

65. Counsel for FSTV in his short response submitted that, even if the reasoning of the Chief Justice is found to be flawed, the conclusion reached was correct. He contended that cases of *Smith v LJ Williams Ltd* and *Bhagwandeem* demonstrate that, in interpreting the right to equal protection of law as guaranteed in the Constitution, it must be shown that the unequal treatment occurred as a consequence of application of a duty imposed by statute or an administrative act by an official endowed by law with coercive power who is enforcing the statute. He contended claimants were unable to point to any legislation which discriminated against them. Neither could they show that FSTV was a private entity or an agent of the state implementing any legislation which discriminates against the claimants.
66. I consider that there is force in submission of counsel for the appellant. The authorities demonstrate that the protection offered in these sections of the Constitution dealing with the fundamental rights and freedoms can only be enforced if those rights and freedoms have been contravened “by the state or by some other public authority endowed by law with coercive powers.” If there is discrimination by a private individual or private entity who is not endowed by law with any coercive power, then the person claiming breach would be unable to rely on the protection offered under the Constitution. In view on the conclusion reached earlier that FSTV was not a public authority endowed with any coercive power, the provisions under sections 6 (1) and 15 (1) of the Constitution cannot be enforced

against FSTV. In any event, I do not consider that there is any discrimination which would fall within the ambit of section 15 (1) of the Constitution.

67. It was for these reasons that I concurred in the decision to dismiss the appeal with costs to the appellant to be taxed if not sooner agreed.

MOTTLEY P

CAREY JA

68. The respondents Maritime Estates Ltd., EuroCaribe Shipping Services Ltd., dba Michael Colin Gallery Duty Free Shop, Bedeco Ltd. and Brown Sugar Market Place Ltd are all entrepreneurs of one kind or another offering varied services to tourists who arrive by cruise ships to visit Belize. As the country is without a harbour, these ships are obliged to anchor off-shore resulting in their passengers being ferried ashore by tenders. The appellant, a private company incorporated in Belize, is the owner of Fort Street Tourism Village which is the officially designated port of entry for cruise ship visitors. It is at this location, that all cruise ship passengers disembark. They actually land on a boardwalk. These respondents also occupy a part of this boardwalk on which their property fronts and is situated along the northern frontage of Haulover Creek in the Fort George area of Belize City. Concrete walls and other structures constructed on this boardwalk by the appellant have provoked this litigation. The entrepreneurs to whom I have referred, complain that these obstructions on the boardwalk which prevent access to their property by the tourist visitors, denied them the right to gain a living guaranteed under

section 15(1) of the Constitution and, as well, that they have been discriminated against, in that they have been subjected to unequal treatment by reason of this denial of access. Joined in the actions as defendants were the Attorney General, The Belize Port Authority, the Belize City Council, and the Belize Tourism Board. The Chief Justice granted the declaration regarding the guarantee not to be denied the opportunity to earn a living but refused the other. He also made some consequential orders which it is not necessary to rehearse. Fort Street Tourism Village Ltd. has appealed the judgment.

69. Mr. Godfrey Smith, for the appellant, who argued with commendable economy and clarity, founded himself on three grounds of appeal as follows:-

“(i) that the learned Chief Justice erred in law in finding that the appellant is by virtue of its role and function as a port of entry, and a port facilitator operator, clothed with public power that makes it amenable to public law;

(ii) that the learned Chief Justice erred in law in finding that the appellant was a party to the proceedings concerning the alleged breaches of the claimants’ constitutional rights;

(iii) that the learned Chief Justice erred in law in finding that the walls and structures erected on the boardwalk by the appellant denied the respondents the opportunity they would otherwise have to earn a living, contrary to section 15(1) of the Constitution.

With the court’s leave, he argued grounds (i) and (ii) together. It was agreed that the appeals would be consolidated.

70. The Chief Justice accepted that the appellants, like the entrepreneur respondents, are private entities. He then posed the following question - “does this fact immunize it from the prohibitory provisions of the

Constitution such as non-discrimination and the non-denial of the opportunity to anyone to gain a living... by engaging in a trade or business?" His answer was an emphatic no. He held -

"I find myself unable to accede to Mr. Barrow's contentions and submission on this score. In my view, the fact that the offending act is done by a private entity, such as the 5th defendant, does not in and of itself confer, as it were, some kind of talismanic immunity from constitutional challenge as being in breach of a guaranteed right, and therefore susceptible to judicial oversight or control. R v. Panel on Takeovers and Mergers, ex parte Datafin Plc (1987) QB 815; (1987) 1 ALL ER 565; LJ Williams v. Smith and Attorney General (1980) 32 WIR 395".

But with all respect to the Chief Justice, the question at issue in this case, was not concerned with judicial oversight or control, in the sense of reviewability. Rather the question for him, related to constitutional liability by an entity, that was neither the state or an arm of the state or a public authority endowed by law with coercive powers. Neither of the cases cited by him are of particular assistance in providing a solution to the matter at issue in the instant case. The former *R v. Panel on Takeovers and Mergers, ex parte Datafin Plc (supra)* was concerned with judicial review, while the latter case *Williams v. Smith and anor. (supra)* related to a constitutional breach by an entity conceded to be a public authority. Although he seemed to be somewhat attracted by Professor Fiadjoe's view in his work *Commonwealth Caribbean Public Law*, 2nd ed. at p. 84 that the phrase "endowed with coercive power" is wholly, unnecessary and can be misleading, he ended up, despite his misgivings as to its meaning, by saying that it was not necessarily determinative of the issue whether the body or authority is amenable to public law. It is, I venture to think passing strange that in order to ascribe liability to the appellant, he

described this entity being a designated port of entry, as being part of the immigration and emigration paraphernalia of every sovereign state. It is a short step to conclude that as such it would be endowed by law with coercive powers. In order to arrive at that answer, there would seem little need to undertake an analysis on whether a private entity has some talismanic immunity from constitutional challenge.

71. Howsoever that might be, the authorities of *Thornhill v. Attorney General* [1980] 2 WLR 510 and *Maharaj v. Attorney General* (No. 2)[1979] A.C. 385 show that what is redressible under the Constitution, are contraventions of the rights and freedoms guaranteed under the Constitution, by the state or some other public authority endowed by law with coercive powers. These authorities have neither been overruled, doubted, except by an academic, nor modified. We are, as part of the curial hierarchy, obliged loyally to follow and give effect to them on the principle of *stare decisis*.
72. The question which must now be answered is whether, the appellant had “any statutory and governmental underpinning”, so as to make it endowed by law with coercive powers. The Chief Justice found this statutory and governmental underpinning on the basis of the designation “sole port of entry” status conferred on it. He held by way of a rhetorical question that surely, every officially designated port of entry or exit is part of the immigration paraphernalia of every sovereign state. With respect, that begs the question for it assumes what is sought to be proved. Port is not a term of art. It is an ordinary English word, which according to the Oxford English Reference Dictionary (1996) means - “a harbour, a town or place possessing a harbour where ships load or unload or begin or end their voyages, especially where custom officers are stationed”. The appellant constitutes the entity that manages the port, provides the facilities of a port, usually docking, cranes, lifts, stevedores, warehouses for storage of

goods in bond, offices for customs and immigration. It is a business undertaking and it is a site which must comply in the instant case, with the Port Facility Security Regulations S.I No. 104 of 2004 which incorporates the International Code for the Security of Ships and of Port Facility. Nothing which I have detailed is in my opinion capable of converting “a port” into a body, despite the statutory underpinnings” identified by the Chief Justice, into a body endowed by law with coercive powers. The immigration and customs which are agencies of government, are often located on the site. It is unnecessary to observe that they remain separate and distinct from whatever body which manages the port. In the case of the appellant’s site no immigration or custom officials are stationed there. Cruise passengers get clearance aboard ship before landing.

73. Mr. Lumor sought to say that there was a closely interwoven relationship between the government (agencies) and the appellant who managed the facility. He used the relationship which existed between the Government and the Roman Catholic Church in relation to education in *Wade v. Roches (unreported) 9 March 2005* to fix constitutional liability on the church. In that case, the church had dismissed a teacher on the ground that she had become pregnant. The church was held in breach of the guarantee against discrimination on the basis of gender. The facts are clearly distinguishable for there the school was not a private entity but a Government-aided school. It was also contended that the appellant was controlled by government because the Belize Tourist Board sits on its Board of Directors. That conclusion is, I would suggest, plainly untenable. It is very unlikely one director can control the majority. In order to fix the appellant with coercive power, Mr. Lumor argued that the appellant had been given the power of search of persons and belongings. That argument fails because the coercive power referred to by Lord Diplock in *Thornhill v. Attorney General (supra)* and *Maharaj v. Attorney General (supra)* is one endowed by law. It might not be amiss to comment that any

search likely to be undertaken by the employees of the appellant, could not be pursuant to breaches of the Immigration or Customs law, but purely in their own interest for purposes of security or safety of persons on their site. In my judgment, the appellant was not therefore a body endowed by law with coercive powers which made it liable in the circumstances of this case, to constitutional action.

74. Having arrived at that conclusion, that is sufficient, in my view, to completely dispose of the appeal but since we are disagreeing with the Chief Justice, it seems right to address his findings which we think were in error, and raised in a ground of appeal (see ground (iii) p. 3). The Chief Justice found that because of “the walls and other structures placed next to the claimants’ properties by the (appellant)” direct access from the boardwalk to the claimants’ properties is effectively unavailable. Accordingly, he held that these obstructions denied the claimants the opportunity to have a share of the patronage of the passengers who are discharged onto the boardwalk by the tenders. Tersely put, he said that they were being denied the opportunity to earn their living.
75. Mr. Lumor, S.C. maintained that this denial of direct access deprived the claimants of the chance to earn a living because they were being subjected to unequal treatment and were thereby frustrated in their chance to earn a living. He cited a case from the Court of Appeal of Grenada. *Duncan v. Attorney General* [1998] 3 LRC 414, where a public servant who was sent on indeterminate paid leave, although he had not applied for any kind of leave, applied for a declaration that he had been retired from the public service in contravention of the Constitution. The Court of Appeal found in his favour. Mr. Lumor referred us to the following passage in the judgment of Byron, CJ with whom Singh and Matthew JJA concurred at p. 426:-

“The Constitution also guarantees the right to work as a fundamental right in 51(a). I do not think it necessary to do more than state that the right work can be infringed even when one is receiving salary, if one is prevented from discharging the duties of one’s office. It is unthinkable that the Constitution could intend that the PSC could arbitrarily order a public servant to be prevented from performing his job for an indefinite period”.

He used this case to argue that a breach of the constitutional guarantee of the right to work, can occur where the citizen is frustrated in achieving his aim, which is to work. Although I have grave misgivings that the case cited is an illustration of frustration, seeing that the appellant in that case was not allowed to perform his official duties, I would be disposed to accept that if a person’s opportunity to gain a living is frustrated, in some circumstances, that would amount to a constitutional contravention. Be that as it may, the claimants were not deprived of the opportunity to gain a living. Cruise boat passengers could gain access to those establishments. That fact Mr. Lumor, S.C. could in no way, effectively deny. He did say that some rental shops remained closed but there was no evidence that they remained closed specifically because cruise boat passengers were denied direct access.

76. There now remains Respondents’ Notices by which it was sought to vary the judgment of the Chief Justice, in effect by reversing his order that the claimants’ right to equal protection of the law without discrimination guaranteed in section 6(1) of the Constitution has not been contravened. Although this notice purports to set out six grounds on which these respondents intended to rely, in reality, there is only one ground, the other five merely set out “rulings” and “reasons” for rulings. The one ground is in these terms:

“6. The learned Chief Justice failed to construe Section 6(1) of the Constitution as prohibiting unequal treatment of persons in similar circumstances both in the privileges conferred and in the liabilities imposed by law, whilst section 16 prohibits affording different treatment to different persons caused wholly or mainly on grounds of sex, race, place of origin, political opinion, colour or creed”

77. One of the reliefs which the claimants sought under the Constitution was:-

“A declaration that the Defendants contravened the rights of the Claimants guaranteed under section 6(1) of the Constitution of Belize when they caused or allowed the Fort Street Tourism Village Limited to discriminate against the claimants or subject the claimants to unequal treatment by depriving the claimants of access to the cruise ship passenger market at Belize Tourism Village located in the Fort George Area of Belize City”.

It is useful to set out the relevant constitutional provision. It states:-

“6(1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”.

The first question which arises is what is the scope of this guarantee under the Constitution? The Chief Justice said that the section seeks to protect the equality of everyone before the law and the entitlement, without discrimination, to the law’s equal protection. That did not find favour with Mr. Lumor, S.C. He preferred the opinions of Bernard J in *Smith and Another v. LJ Williams Ltd (1980) 32 WIR 395 at p. 411* where he said:-

“In so far as official acts are concerned, the nub of the matter is, in my view, that the section both guarantees and is intended to ensure that where parties are similarly placed under the law, they are entitled to like treatment under that law”.

And that also, of Kelsick JA at p. 45:-

“Equal protection means the right to equal treatment in similar circumstances both in privilege conferred and in the liabilities imposed by law ... In other words, there should be no discrimination between one person and another, if, as regards the subject matter of the legislation their position is the same...”

Apart from the obvious fact that the opinions of the judges in Trinidad are expressed in more expanded terms,. I can discern no difference in import. Mr. Lumor made no reference to any legislation administered by any “official” which discriminated against these claimants (respondents). The Chief Justice expressed himself in elegant language when he said:-

“On the facts of this case, I am not persuaded that rights guaranteed to the claimants by section 6(1) are engaged to the level of their being denied equal protection of the law”.

The treatment of which Mr. Lumor complains, and which he said was discriminatory in relation to the claimants, was the construction of structures which debarred access directly to their businesses but this action could scarcely be described as an official act. Counsel did not actually so state, but if his submission is to have any vestige of merit, he was obliged to advance that view. He did urge that the Government, The Belize City Council, The Belize Tourist Board and The Belize Port Authority, all condoned the discriminatory treatment, viz. the blocking of

access to the claimants and allowing access to another business in the port area, namely the Wet Lizard. But the appellant a private entity, was not an agent of any of those official bodies. As I have endeavoured to show, it was not “a body endowed by law with coercive powers”.

78. Mr. Lumor argued that the court should give a broad meaning to “due process” which it has been held by the Privy Council in *R. v. Lewis (P.C.) (unreported)*, has the same import as “equal protection of the law”, as suggested by the Privy Council in *Thankur Persad Jaroo v. Attorney General [2002] 5 LRC 258* per Lord Hope who said:-

“In the present context, a broader meaning is appropriate. Here too, it has two aspects. First there is the right to protection against abuse of power. Secondly, there is the requirement that when powers are exercised by the state against the individual they must be exercised lawfully and not arbitrarily”. (p.268)

It was counsel’s contention that the appellant used all the public functions conferred on it to discriminate against the claimants and not against the Wet Lizard. But there was not evidential base whatever to support this contention hopefully advanced

79. It was for all these reasons that I agreed with the disposition of these appeals and Respondents’ Notices in the terms announced on 17 June 2008.

CAREY JA

MORRISON JA

Introduction

80. This is an appeal from the judgment of the Chief Justice given on 8 April 2008, by which he made the following declarations:

- 1) The Defendants did not contravene the rights of the Claimants to the equal protection of the law nor did they discriminate against the Claimants in the terms forbidden by the Constitution in sections 6(1) and 16 by depriving the Claimants access to the cruise ship passenger market at the Belize Tourism Village located in the Fort George area of Belize City.
- 2) The Claimants' rights guaranteed in section 15(1) of the Constitution not to be denied the opportunity to earn their living by businesses that they have freely chosen have been contravened by the Defendants by the denial of direct access to cruise ship passengers tendered on the boardwalk to the Claimants' establishments located in the Fort George area of Belize City.
- 3) The Claimants are entitled under section 15(1) of the Constitution to have an opportunity to earn a living by having direct access to cruise ship passengers tendered or landed on the boardwalk leading to the Claimants' establishments located in the Fort George area of Belize City.

81. On 17 June 2008, at the conclusion of the hearing in this court, it was announced that the appeal would be allowed and the orders of the Chief Justice set aside, with costs to the appellant to be agreed or taxed. These are my reasons for concurring in that decision.

The background

82. The appellant and the respondents, who are all private corporate citizens of Belize, own and occupy separate facilities comprising stores, restaurants and bars, which are situated along a continuous boardwalk on the northern frontage of the Haulover Creek in the Fort George area of Belize City. The boardwalk lies within the statutorily defined area of the Belize City Port (section 2 of the Belize Port Authority Act). The appellant's facility (which is adjacent to an establishment known as the "Wet Lizard" which is not a party to these proceedings) lies in between the facilities belonging to various of the respondents at either end of the boardwalk.
83. The appellant's facility is, as its name implies, described as a "tourism village", equipped with suitable docking facilities for tenders, stores and other facilities for the sale of goods and services to cruise ship passengers who may visit Belize from time to time.
84. There are at present no facilities to enable the cruise ships which now call at Belize with increasing frequency to dock alongside a port or land in Belize City or its environs. Instead, as the Chief Justice put it, "they anchor out at sea, within sight of the City and their passengers are ferried from and back to the ships on boats called tenders".
85. The point of disembarkation of these visitors is onto the appellant's property on the boardwalk, pursuant to an Amended and Restated Agreement ("the agreement") made on 9 September 2003 between the Government of Belize ("GOB"), the Belize Tourist Board ("BTB") and the appellant, whereby GOB has designated the appellant's facility "as the official port of entry of cruise ship passengers to the Belize District and makes it mandatory, for the duration of this agreement, for all cruise ships

visiting the Belize District to use the Tourism Village in order to gain for its passengers who desire to come ashore, entry into and access out of the Belize District” (clause 9(6) of the agreement). I shall return in greater detail to the terms of this agreement in due course.

86. The evidence is that customs and immigration functions with regard to cruise ship passengers landing in Belize are performed by GOB’s public servants attached to the relevant departments. Although office space has been made available on the appellant’s facility for this purpose, the evidence was that for the purposes of expediting the disembarkation of passengers the actual processing is in fact done on board the ships by the customs and immigration authorities before the passengers even get to the appellant’s facility. Indeed, according to the evidence of the Ports Commissioner of Belize, Major Lloyd Jones, what actually happens in practice is that “the Immigration Department reviews the [ship’s] Passenger Manifest in advance and unless there is a suspect person on that list then it is done basically as a blanket entry.”
87. This litigation arose because of the fact that the appellant erected a structure (variously described as a wall, fence or obstruction) on the boardwalk at either end of that part of the boardwalk enclosing its facility and the Wet Lizard which prevents the disembarked cruise ship passengers from entering on the facilities of the respondents directly from the boardwalk. In other words, having disembarked from the tenders onto the boardwalk on the appellant’s facility, the passengers are obliged to walk through the appellant’s property and on to the streets of Belize City and thence, if they wish, enter the respondents’ facilities on either side of the appellant from the street.
88. The result of this obstruction, the respondents contend, is that direct access to their facilities by the cruise ship passengers has been denied,

thus affecting their businesses and limiting their ability to secure tenants for their duty free facilities. The appellant for its part contends that the walls were built primarily for security purposes, but that in any event it is fully within its rights as a property owner “to permit access to its premises on such terms as it considers appropriate and in its best commercial interest, or not to permit such access at all.” The appellant maintains that it is not correct that the respondents are denied access to cruise ship passengers and that the true position is as described by the appellant’s operations manager, Mr. James Nisbet in his affidavit as follows:

“Cruise ship passengers that visit the City of Belize and take overland tours, disembark first at the FSTV as the official Port of entry. Thereafter they are able to exit the FSTV and visit and patronize all neighbouring establishments on Fort Street or on North Front Street (where both the Claimants’ property and the 5th Defendant’s Terminal 4 of the FSTV are located).

I note from HR-3B to Hector Rivera’s first affidavit, that Goodmark Jewellers is a shareholder in Brown Sugar Market Place Limited, the 2nd Claimant.

Goodmark Jewellers operates a duty free store on Fort Street, and that store does a brisk and obviously successful business with the same cruise ship passengers that first disembark at FSTV. The 5th Defendant cannot and does not in any way restrict the cruise ship passengers that pass through the FSTV from doing business with any of the numerous businesses, (or the street vendors, hair braiders, arts and craft sellers), located on Fort Street or on North Front Street near to FSTV.”

89. It is against this background that the respondents moved the court for constitutional relief on the grounds that the appellant had by its actions infringed their rights guaranteed by the Belize Constitution (“the Constitution”) to equal protection of the law and to work. The learned Chief Justice held that while there had been no infringement of the right to equal protection of law, there had been an infringement of the right to work. In so holding the Chief Justice also held that the appellant was amenable to public law challenge, on the basis that its designation as the sole point of entry and exit for cruise ship passengers had “both a statutory and governmental underpinning.” The actual terms of the Chief Justice’s formal order are set out at paragraph 80 of this judgment.

The appeal

90. The appellant filed three grounds of appeal from this judgment:

- (i) That the learned Chief Justice erred in law in finding that the Appellant (Respondent) is by virtue of its role and function as a port of entry, and a port facility operator, clothed with public power that makes it amenable to public law.
- (ii) That the learned Chief Justice erred in law in finding that the Appellant (Respondent) was a party to the proceedings concerning the alleged breaches of the claimants’ constitutional rights.
- (iii) That the learned Chief Justice erred in law by finding that the walls and structures erected on the boardwalk by the Appellant (Respondent) denied the Respondents the opportunity they would otherwise have to earn a living, contrary to section 15(1) of the Constitution.

91. The respondents also filed notice of their intention to contend for a variation of the order of the Chief Justice on the following ground:

“The Learned Chief Justice failed to construe section 6(1) of the Constitution as prohibiting unequal treatment of persons in similar circumstances both in the privileges conferred and in the liabilities imposed by law, whilst section 16 prohibits affording different treatment to different persons based wholly or mainly on grounds of sex, race, place of origin, political opinion, colour or creed.”

92. The issues that arise for determination on this appeal are therefore (and this is the appellant’s formulation, which I gratefully adopt) as follows:

- (i) Whether the appellant constitutes a public authority or carries out functions of a public nature making it amenable to the enforcement of the fundamental rights and freedoms provisions of the Constitution of Belize.
- (ii) Whether the action of the appellant in erecting the structures complained of infringed the respondents’ right to work.
- (iii) Whether the actions of the appellant have infringed the respondents’ right to the equal protection of law.

The statutory context

93. Before going to a consideration of these issues, it may be helpful to set out briefly the statutory context that is relevant to these proceedings.

94. The Belize Port Authority Act (Cap. 233 of the Laws of Belize, RE 2000) (“the BPA Act”) defines “ports” to mean “The Belize City Port, Corozal Port, Dangriga Port, Commerce Bight Port, Riversdale Port, and Punta

Gorda Port or any place which may be designated as a port by the Minister” (section 2). The BPA Act establishes the Belize Port Authority (“the BPA”) (section 3(1)), which is empowered to provide “a coordinated and integrated system of ports, lighthouses and port services” (section 19(1)). The Minister is given power to designate other places not already included in the definition of port to be so included, and to define the limits of the ports named in the BPA Act and any other places designated by him as a port under the BPA Act (section 20(1)) and may also grant licences for the construction and operation of “private” ports (section 23(1)). The BPA is also given the power to, with the approval of the Minister, make regulations generally for the maintenance, control and management of ports, (section 74).

95. By the Definition of Limits of Ports Order, 1980, made pursuant to section 20 of the BPA Act, the Belize City Port is defined as follows:

“Starting at the Belize City Swing Bridge on the north bank of the Haulover Creek thence down stream to Fort George Light thence northwards along the coast to the Belize River Mouth, thence easterly to Mapp’s Caye thence along the western coast to the Drowned Cayes to the southern point of Water Caye thence south-westerly to the northern point of Long Caye, thence due west to the coast thence northerly along the coast back to the Belize City Swing Bridge” (section 2(1)).

96. The Port Facility Security Regulations, also made pursuant to the BPA Act defines a “port facility” as follows:

“... a location, as determined in Belize by the Belize Port Authority, or elsewhere by the relevant governmental authority, where the ship/port interface takes place. This includes areas such as

anchorages, waiting berths and approaches from seaward, as appropriate.”

A “port facility operator” is defined to mean any person operating a port facility as designated by the BPA to be such.

97. These regulations adopt as the standard for the operation of port facilities in Belize the provisions of the International Code for the Security of Ships and of Port Facilities (“the ISPS Code”) as adopted on 12 December 2002 by resolution 2 of the Conference on Contracting Governments to the International Convention for the Safety of Life at Sea, 1974.
98. The Immigration Act (Cap. 156) empowers the relevant Minister to make regulations prescribing the ports as places of entry or exit for Belize (section 39(a)). No regulations have been made pursuant to this Act in respect of the appellant’s facility.
99. The Harbours and Merchant Shipping Act (Cap. 234), a 1920 statute, defines the limits and boundaries of the Belize City Harbour in terms which appear on their face wide enough to accommodate the limits of the Belize City Port (see paragraph 16 above), and the Public Wharves Regulations made pursuant to the Act provide for the anchorage or making fast of ships within the limits of or alongside any public wharf. The Fort George Wharf (Definition) Regulations define the Fort George Public Wharf as including “the entire area situate in the City of Belize and lying between the Queen’s Bonded Warehouse and the Fort George Light and extending for a distance of forty feet on the seaward side of the said area.” There is, obviously, considerable overlap between the BPA and the Harbours and Merchant Shipping Act regimes, which is also reflected in the fact that Major Jones held simultaneously both the positions of Ports Commissioner and Harbour Master.

100. And finally, the Belize Tourism Board Act establishes the BTB with a general mandate to develop all aspects of the tourist industry of Belize and to promote the efficiency of the industry, including the securing of “the most favourable arrangements for the entry of tourists into Belize” (section 11(a) and (d)).

The security dimension – the impact of the ISPS Code

101. It is an explicit part of the appellant’s case that the erection of the structures on the boardwalk to prevent free movement from end to end had a security dimension. In this, it was supported by Major Jones, whose evidence was that the BPA was the “designated authority” with respect to the ISPS Code and “as such is directly responsible for port security at all ports in Belize including the Fort Street Tourism Village.”
102. According to Major Jones, the ISPS Code “applies to ships which are engaged on international voyages and to the facilities that service those ships”, which is how the appellant “ended up being designated a port in 2004.” The ISPS Code requires that all ports have in place an approved security plan, “informed by minimum requirements for security, lighting, fencing, etc.” and such a plan was required from the appellant “and indeed from all other Ports in Belize.” The concrete walls which have given rise to the litigation were in fact, Major Jones testified, part of the overall security arrangements put in place by the appellant and approved by the BPA. Those arrangements were in May 2006 reviewed and approved by the United States Coast Guard, although among the recommendations for improvement was a suggestion that the walls should be “strengthened”.

The appellant's submissions

103. The appellant very helpfully summarized its case on the appeal in relation to each of the issues identified at paragraph 92 above, in the following terms:

Issue (i): The appellant is a wholly private company and its designation as a port of entry, whether de facto or de jure, does not make the nature of its functions public. It was never conferred with nor in fact carries out any public duties, functions or responsibilities whatsoever, by virtue of any statute, contract or other document. It has no coercive powers. The boardwalk in front of its property merely serves, by virtue of a contract with the GOB and BTB, as a disembarkation/embarkation point for cruise ship passengers. All customs and immigration functions, and all other public functions reside with those departments. In the circumstances of this case, it is therefore not amenable to redress for alleged infringement of constitutional rights and not a proper party to this claim. (Thornhill v Attorney General of Trinidad & Tobago [1980] 2 WLR 510, Maharaj v Attorney General of Trinidad & Tobago [1979] AC 385, Alonzo v Development Finance Corporation (1984) 1 BZLR 82, Weblinks Ltd v Attorney General for Anguilla; suit no. 14 of 2001, Eastern Caribbean Supreme Court (Anguilla) (unreported), judgment delivered 12 April 2001, Poplar Housing and Regeneration Community Association Ltd v Donoghue (2001) 4 All ER 604).

Issue (ii): The appellant was not in breach of its permission to build its boardwalk. It was entitled as property owner to build the walls and structures on its permitted boardwalk. Furthermore with the enactment of the Port Facility Security Regulations of 2004, as

a point of entry for cruise ship visitors, it was required to maintain the walls. If it was in breach of any law, it was up to the relevant public authorities to seek its compliance. If they refused, the claimants' recourse was to proceed against the public authorities. The appellant in no way denied the claimants the opportunity to gain their living or engage in business which, in fact, the claimants were doing and continue to do.

Issue (iii) The respondents cannot establish that their right to equal protection of law was infringed since they cannot point to any legislation under which they are being treated unequally or point to any administrative act being carried out under such legislation which results in unequal treatment. Nor can they show that they are similarly circumstanced to the Wet Lizard which is mistakenly used as the comparator to establish unequal treatment. (Mohanlal Bhagwandeem v Attorney General of Trinidad and Tobago (2004) 64 WIR 402, Smith and Another v L. J. Williams Ltd (1981) 32 WIR 395).

The respondents' submissions

104. The respondents submit on issue (i) that the appellant is in fact controlled by GOB, that it has been invested with coercive powers and is therefore amenable to public law challenge within the principle of Maharaj v Attorney General of Trinidad & Tobago. On issue (ii) the submission is that the boardwalk is a public thoroughfare intended for the full enjoyment of all members of the public and that using the boardwalk is an international cruise ship passenger market to which, by the appellant's actions, the respondents have been denied access. This amounts to a negation of the respondents' right to work under section 15 of the Constitution. (Duncan v Attorney General of Grenada [1998] 3 LRC 414

and Saudan Singh and others v New Delhi Municipal Committee [1993] 4 LRC 704). And finally, on issue (iii), the respondents submit that the Chief Justice ought to have given an “autonomous” construction to the preambular reference to equality before the law and the equal protection of the law in section 6(1) of the Constitution and to have interpreted section 16(3) accordingly (Smith and Another v L. J. Williams Ltd (supra), Mohanlal Bhagwandeem v Attorney General (supra) and Thakur Persad Jaroo v Attorney General [2002] 5 LRC 258).

The constitutional provisions

105. Part II of the Constitution, headed “Protection of Fundamental Rights and Freedoms”, opens with the declaration in section 3:

“3. Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

- (a) life, liberty, security of the person, and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association;
- (c) protection for his family life, his personal privacy, the privacy of his home and other property and recognition of his human dignity; and
- (d) protection from arbitrary deprivation of property,

the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions,

being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.”

106. Section 6(1) provides that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

107. Section 15(1) provides that “No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business or otherwise”.

108. Section 16(1), (2) and (3) provides as follows:

“(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person or authority.

(3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

109. Section 20(1) and (2) provides as follows:

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

(2) The Supreme Court shall have original jurisdiction –

- (a) To hear and determine any application made by any person in pursuance of subsection (1) of this section; and
- (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section.

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

Issue (i) – amenability of the appellant to constitutional redress

110. In Maharaj v Attorney General of Trinidad & Tobago (supra), the Privy Council held, in relation to the Constitution of Trinidad & Tobago, that the protection afforded against contravention of the fundamental rights and freedoms secured by the Constitution was as against the state or some other public authority “endowed by law with coercive powers” (per Lord Diplock, at page 396). This conclusion necessarily followed, in the view of the Board, from the explicit recognition in that Constitution that “each of the highly diversified rights and freedoms of the individual described in section 1 already existed”, (whether de jure or de facto) and the

constitutional provisions were therefore designed to protect the citizen against breaches committed by the state (see especially the judgment of Lord Diplock at page 396, where he states that the chapter in question “is concerned with public law, not private law”), and not by another private individual.

111. In Thornhill v Attorney General of Trinidad & Tobago, (supra), the Privy Council confirmed and applied Maharaj, Lord Diplock (who again delivered the judgment of the Board) observing that “Chapter 1 of the Constitution does not deal with purely private wrongs” (at page 516). Lord Diplock (at page 519) also drew attention to his own earlier general comment in Hinds v The Queen [1977] AC 195, 213, a case from Jamaica dealing not with fundamental rights and freedoms, but with the separation of powers, that the provisions of a chapter on human rights and fundamental freedoms “impose a fetter on the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers.”
112. The Board accordingly had no doubt that contraventions by public officers of any of those rights or freedoms fell squarely within the Maharaj formulation, though Lord Diplock did add that in that context “ ‘public authority’ must be understood as embracing local as well as central authorities and including any individual officer who exercises executive functions of a public nature” (at page 520).
113. Maharaj and Thornhill were applied by this court in Alonzo v Development Finance Corporation (supra), a case in which the appellant, a former employee of the respondent (a statutory corporation), sought a declaration under section 20 of the Constitution that the termination of his employment by reason of his trade union membership was unconstitutional.

114. Summerfield P (with whom Staine and Henry JJA concurred), in dismissing the appellant's appeal from the refusal of the Supreme Court to grant him the declaration sought by him, concluded as follows:

“The fundamental rights and freedoms protected by the constitution are not intended as guarantees of purely private rights, that is rights as between one individual and another. They are intended as protection afforded to individuals against any contravention of their rights and freedoms by the state or by some other public authority endowed by law with coercive powers. The employer in this case, although a statutory corporation set up by an ordinance, is not a public body endowed by law with coercive powers. In its contractual relations with employees it is in exactly the same position as any private employer. Nothing turns on the fact that it is a statutory corporation. It is not exercising functions of a public nature when it engages personnel or terminates their contracts of employment.”

115. Although Summerfield P did acknowledge that the Constitution of Trinidad & Tobago “uses a somewhat different form from that of the Constitution of Belize in recognizing and protecting human rights and fundamental freedoms”, (page 86), he nevertheless concluded that the principles of Maharaj and Thornhill applied “with equal force” to the fundamental rights and freedoms specified in Chapter II of the Belize Constitution.
116. A similar conclusion was reached by Webster J (Ag) in the High Court of Anguilla in Weblinks Ltd v Cable & Wireless (West Indies) Ltd and the Attorney General for Anguilla (supra). In that case, the learned judge declined to grant constitutional relief against Cable & Wireless (West Indies) Ltd., the sole provider of telecommunications services in, to and

from Anguilla, pursuant to the terms of a licence for this purpose granted by the Government of Anguilla pursuant to statute.

117. Webster J (Ag) applied Maharaj and Thornhill and concluded that constitutional redress was not available against Cable and Wireless (West Indies) Ltd., a privately owned United Kingdom registered company, which was not a public authority endowed by law with coercive powers. In this conclusion Webster J (Ag) was also applying an earlier Eastern Caribbean Supreme Court case from Dominica in which constitutional relief was declined against Cable and Wireless Dominica Ltd. on the basis that it was “neither a public body or in the nature of a public body”. Rather it was “a private company incorporated under the Companies Act, Cap 318 and not in any way controlled by Government” (per Cenac J in Marpin Telecoms and Broadcasting Ltd v Cable and Wireless Dominica Ltd and the Attorney General of Dominica, suit no. 550 of 1998).

118. Two other cases may be mentioned in this very brief survey. Firstly, in Poplar Housing and Regeneration Community Association Ltd v Donoghue (supra), it was held by the Court of Appeal in England that the fact that a body performs an activity which otherwise a public body would be under a duty to perform did not mean that such performance was necessarily a public function. As Lord Woolf CJ pointed out:

“A public body in order to perform its public duties can use the services of a private body ... It is not to make a body, which does not have responsibilities to the public, a public body merely because it performs acts on behalf of a public body which would constitute public functions were such acts to be performed by the public body itself. An act can remain of a private nature even though it is performed because another body is under a public duty to ensure that that act is performed” (page 619).

119. However, Lord Woolf CJ did go on to make this further observation:

“What can make an act, which would otherwise be private, public, is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature. This is analogous to the position in judicial review, where a regulatory body may be deemed public but the activities of the body which is regulated may be categorised private.”

120. And, finally, Clement Wade v Maria Roches (Civil Appeal No. 5 of 2004, judgment delivered 9 March 2005), in which this court held that by virtue of the “closely interwoven relationship between the State and the Church in the provision of education” in Belize, as demonstrated by the relevant statutory provisions, the Santa Cruz Roman Catholic School was thus brought “into the public domain” (per Mottley P at pages 13 and 24). As a result, an unmarried female teacher at the school who had been dismissed by reason of her pregnancy was held to be entitled to constitutional relief.

121. It is a fact, as Summerfield P pointed out in Alonzo v DFC, that the form (or formula) by which the Belize Constitution recognizes the protected rights and freedoms as being in existence at the time of the Constitution is somewhat different from that used in the Trinidad & Tobago Constitution. But, in common with Summerfield P, I think that it is a difference in form

only and that the declaration (“Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say ... the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms ...”) with which section 3 of the Constitution opens is no less a declaration of existing rights than that to be found in the Trinidad & Tobago Constitution. This was certainly the view taken by the Privy Council of the very similar wording of the preambular section 13 of the Jamaica Constitution in the well known case of Director of Public Prosecutions v Nasralla [1967] 2 AC 238, 247.

122. So that, it seems to me, Lord Diplock’s valuable analysis in Maharaj remains, as this court found in Alonzo v DFC, fully applicable in Belize (as does the observation of the Board in Hinds v R that the fundamental rights and freedoms provision “impose a fetter on the exercise by the legislature, the executive and the judiciary of the plentitude of their respective powers”).
123. But further support for the view that relief under Part II of the Belize Constitution is only available against the state or emanations of the state may be derived, in my view, from the language of section 3 itself. The protection of the rights and freedoms is stated to be subject to the limitations set out in the Constitution itself, “being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest” (section 3).
124. Both from the standpoint of common sense and as a matter of law, it seems to me, the only body able and empowered to strike the balance between the full enjoyment of the rights and freedoms of each citizen, on the one hand, and those of other citizens and the public interest, on the other hand, is the state itself, thus providing some confirmation that the

protection against abuse of the rights and freedoms is also intended to be protection against the actions of the state.

125. Indeed, section 15 itself, the right to work with which this case is much concerned, is itself subject to the limitation that nothing “contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section”, to the extent that the law in question makes reasonable provisions in the public interest or for the purpose of protecting the rights and freedoms of others.
126. These matters were fully canvassed before Conteh CJ, who commented that “conventional wisdom and legal orthodoxy regard the Government, its agencies and departments ... as the ready and obvious candidate for amenability to public law for the purposes of redress”. Nevertheless, he found himself able to come to the opposite conclusion on the following basis:

“After some anxious reflection, I find myself unable however, to accede to Mr. Barrow’s contentions and submissions on this score. In my view, the fact that the offending act is done by a private entity, such as the 5th defendant, does not in and of itself confer, as it were, some kind of talismanic immunity from constitutional challenge as being in breach of a guaranteed right, and therefore susceptible to judicial oversight or control – R v Panel on Takeovers and Mergers, ex parte Datafin Plc (1987) QB 815; (1987) 1 All ER 565; L. J. Williams v Smith and Attorney General (1980) 32 WIR 395. Indeed, the case law demonstrates that different factors have been considered by the courts in deciding whether an entity is susceptible to judicial review and constitutional redress. There is however, no one single factor or test for determining whether an entity or body is amenable to judicial

review; see generally Halsbury's Laws of England 4th ed. (2001) Reissue Vol. 1(1) at para. 661 and the host cases cited therein on this issue. I therefore adopt with respect, in this regard, the statement by the learned author of Judicial Review Handbook, by Michael Fordham, 4th ed. 2004 at para. 342 at p. 673: "The Principles of reviewability. The mass of case-law can be seen to provide a host of working examples applying a series of interrelated principles regarding reviewability, with perhaps these main lessons: (1) treat no single factor as determination; but (2) focus particularly on (a) statutory or governmental underpinning and (b) the substances and effects of the functions being discharged."

This, in my view, is a more preferable formula and does not emphasize the element of a body being "endowed with coercive power" in order to be held a public body for the purposes of redress. And as Professor Albert Fiadjoe correctly, in my view, with respect, states in his work Commonwealth Caribbean Public Law 2nd ed. at p. 84 (Cavendish Publishing Ltd.) that this "is wholly unnecessary and can be misleading." In my view, the absence or presence of "coercive power", whatever this may mean, is not necessarily determinative of the issue whether the body or authority in question is amenable to public law.

127. The Chief Justice therefore took the view that the designation of the appellant as the sole port of entry and exit for cruise ship passengers, albeit by contract rather than by the exercise of statutory authority, had "both a statutory and governmental underpinning, such as to make it amenable to public law challenge."
128. Mr. Godfrey Smith, to whose conspicuously able argument on behalf of the appellant I am greatly indebted, submitted that in this conclusion the

Chief Justice failed to distinguish amenability to constitutional redress from amenability to judicial review, and I respectfully agree. Indeed, a slightly closer examination of some of the authorities referred to by Conteh CJ in the passage cited above tends to confirm the correctness of Mr. Smith's submission on this point.

129. The Trinidadian case of Smith and Another v L J Williams Ltd (supra), to start with, is in fact, on this point, a straightforward application of Maharaj and Thornhill, in that it was accepted that for the purposes of constitutional relief the Chief Immigration Officer of Trinidad & Tobago was a public authority endowed "with functions, duties and powers of a public nature and for the application of the law was clothed with coercive powers" (per Bernard J, as he then was, at page 412; and this point was in fact not disputed by the state on appeal: see per Kelsick and Cross JJA, at pages 415 and 441, respectively).
130. But R v Panel on Takeovers and Mergers, ex parte Datafin [1989] 1 All ER 564, was emphatically a judicial review case, in which it was held that, in determining whether the decision of a particular body is subject to judicial review, the court is not confined to considering the source of the body's powers, but should look at the nature of those powers. Accordingly, if the duty imposed on a body, whether expressly or by implication, is a public duty and the body exercises public law functions, the court, in the exercise of the historic supervisory jurisdiction of the Queen's courts, has jurisdiction to entertain the application for judicial review. It is by this means that the Panel on Takeovers and Mergers, which according to Sir John Donaldson MR (at page 574) "[operated] wholly in the public domain", was held, despite the fact that it lacked a direct statutory basis, to be amenable to judicial review.

131. To similar effect is the passage from Fordham's Judicial Review Handbook (4th ed. 2004, paragraph 34.2, page 673), quoted by the Chief Justice, which has to do with whether the nature of the particular functions being carried out by a public authority makes it amenable to judicial review, in respect of which the "statutory or governmental underpinning" of such functions has emerged as an important criterion. Professor Fiadjoe's comment that the "emphasis on endowment with coercive powers' is wholly unnecessary and can be misleading", was also made in the context of a discussion of the kinds of authorities amenable to judicial review (though, even in that context, the comment seems slightly misplaced as a criticism of Bernard J's statement of the position in L. J. Williams v Smith and Attorney General, which was, as I have pointed out, in fact a constitutional, rather than a judicial review case, with the result that the statement was completely unexceptionable - see Albert Fiadjoe, Commonwealth Caribbean Public Law, 3rd edition, page 85).
132. So that while it may be that the Chief Justice was correct in thinking that the absence or presence of 'coercive powers', is not necessarily determinative of the issue whether the body or authority in question is amenable to judicial review, it remains the position on a long and unbroken line of authority that for that body to be amenable to constitutional redress it must be a body endowed with functions, duties and powers of a public nature and clothed for the purpose of carrying out those functions with coercive powers.
133. On the hearing of appeal Mr. Lumor SC did not in fact dissent from this proposition, but rather attempted to demonstrate from the terms of the agreement and the ISPS Code themselves that the appellant was endowed with coercive powers. So, for instance, he highlighted clause 4(1) of the Agreement ('the [appellant] shall be responsible for managing the day to day operations of the Tourism Village'), clause 6(1) ("prior to

any contemplated change in or adjustment to the rate of the head tax or the method of collecting the head tax, the [appellant] shall be consulted by the BTB ...'), and clause 2(D) of the Amended Agreement dated 14 September 2004 ("To the extent that any cruise ships calling in the Belize District require the use of tenders to embark or disembark passengers, the cruise ships shall be required to use the Tourism Village in order for its passengers to enter or leave the Belize District"). Mr. Lumor also referred to item 10 of the Preamble to the ISPS Code ("Nothing in this Code shall be interpreted or applied in a manner inconsistent with the proper respect of fundamental rights and freedoms ...") and clause 16.17.6 (requiring the establishment of controlled security points for the purpose of "undertaking searches of persons, personal effects, vehicles and their contents").

134. Even if this approach was properly open to Mr. Lumor on appeal (which in my view it was not, in the light of the Chief Justice having implicitly found that the appellant possessed no coercive powers and in the absence of a respondent's notice inviting a departure from that finding), nothing referred to by him as set out in the previous paragraph can it seems to me even vaguely support a finding that the appellant enjoyed coercive powers. The agreements themselves were plainly only enforceable by the parties against each other and the ISPS Code, while describing an optimal port security regime, could hardly invest the appellant with any meaningful coercive powers without praying in aid the assistance and support of the national police.
135. In this case, the appellant's facility was never lawfully designated a port facility and the uncontroverted evidence was that the immigration and customs functions continued at all times to be exercised by the appropriate national authorities. The submission that the appellant was "controlled" by the GOB rose no higher on the evidence than the right given to BTB under the agreement to appoint one director to the

appellant's board of directors. In these circumstances the test of what could "impose a public character or stamp" on the appellant's role in providing by contract a landing point for cruise ship passengers cleared for entry into Belize by the proper authorities, as propounded in the Poplar Housing case, has not in my view been satisfied. The case is therefore distinguishable from Wade v Roches, where the close interconnectedness between church and state in the field of education was held to impose the necessary public character or stamp on the relationship between the parties, for the purposes of constitutional relief.

136. For all of these reasons, I would decide issue (i) in the appellant's favour, as a result of which grounds of appeal (i) and (ii) accordingly succeed. My conclusion on this issue is, of course, also sufficient to dispose of this appeal in the appellant's favour. However, in deference to the wide range of arguments deployed by counsel on both sides on issues (ii) and (iii), I will nevertheless express my views on them as briefly as I can.

Issue (ii) – whether the respondents' right to work was infringed by the appellant

137. The first point to note is that what by its clear terms section 15(2) of the Constitution protects against is the denial of the citizen's "opportunity to gain his living by work." There therefore is much to be said in my view for the appellant's submission that section 15, taken as a whole, was intended to be applicable to situations where, through legislation, regulation or administrative action on the part of a public authority, an unjustifiable fetter is placed on the citizen's right to freely choose or practice a trade or profession.
138. Belize Petroleum Haulers Association v Daniel Habet et al (Civil Appeal No. 20 of 2004, judgment delivered 24 June 2005) provides a classic example of a case where by legislation (the Belize Petroleum Haulers'

Association Act, 2003) the respondents' membership of the Association was made a pre-condition to their ability to obtain the licence which, by virtue of the said legislation, they were required to have in order to ply their trade as commercial haulers of petroleum products. This court held that the legislation infringed both the respondents' right to freedom of association (protected by section 13 of the Constitution) and their right under section 15(1) "to be gainfully employed in the field of their choice" (per Mottley P, paragraph 15).

139. In a case such as the instant one, where the denial of the opportunity to work is said to arise not from legislation (or even from the contract designating the appellant's premises the sole point of entry), but from the conduct of the appellant in erecting the obstructing structures, resolution of the matter must come down in my view to a consideration of the evidence. Putting to one side for the moment the threshold question of the availability of constitutional redress against the appellant, what is therefore required to be shown from the evidence in this case is that the respondent have been "denied the opportunity to gain [their] living" by doing business with the cruise ship passengers arriving at the Tourism Village.
140. Conteh CJ found that the constitutional breach had been established on the evidence:

"There is no denying that the presence of the walls and other structures immediately next to the claimants' properties abutting that boardwalk effectively prevents cruise ship passengers from patronizing, if they so desire, the establishments in those properties. This much was evident from a visit by the Court to the boardwalk and the premises of the claimants and the 5th defendant. At the moment, once cruise ship passengers are tendered on to the

boardwalk (and then only to the part in front of the 5th defendant bit) they can only be funneled out to the streets of Belize City through the 5th defendant's premises. The cruise ship passengers have no direct access from the boardwalk to the claimants' properties. Once out on the streets, they may, of course, if they so wish, visit the claimants' own premises which are at the rather extreme of the street; but this would be after having first to run the gauntlet of myriad other vendors such as tour and taxi operators, local craftspeople plying their wares and trade like hair-braiders and other assortment of vendors including food sellers. But direct access from the boardwalk to the claimants' properties is effectively unavailable because of the walls and other structures placed thereon next to the claimants' properties by the 5th defendant."

141. As a result, the Chief Justice concluded, the construction of the walls "effectively impede[d] cruise ship passengers direct access to the [respondents'] establishments abutting on to the boardwalk thereby ... denying them the opportunity they would otherwise have to earn a living contrary to section 15(1) of the Constitution."

142. With the greatest of respect to the Chief Justice, I do not think that this conclusion is sustainable on the evidence. While the wall prevented immediate direct access to the respondents' establishments by the passengers upon their disembarkation from the tenders on the appellant's premises, there was no impediment to their entering the respondents' premises from the street, which on the evidence they were free to and did do from time to time. It cannot be said on this evidence, in my view, that the respondents have been denied an opportunity to earn their living within the meaning of section 15(1), since they clearly have access to these visitors by other, not unreasonably onerous, means.

143. I would therefore conclude that the appellant is entitled to succeed on the second issue as well (ground (iii)).

Issue (iii) – whether the respondents’ right to the equal protection of law has been infringed by the appellant

144. This issue is based on the respondents’ notice dated 2 May 2008, which is as follows:

“The learned Chief Justice failed to construe section 6(1) of the Constitution as prohibiting unequal treatment of persons in similar circumstances both in the privileges conferred and in the liabilities imposed by law, whilst section 16 prohibits affording different treatment to different persons based wholly or mainly on grounds of sex, race, place of origin, political opinions, colour or creed.”

145. It arises because the Chief Justice declined to grant the declaration sought by the respondents that their rights guaranteed under section 6(1) of the Constitution had been contravened by the appellant and the other defendants in the court below “when they caused or allowed [the appellant] to discriminate against the [respondents] or subject the [respondents] to unequal treatment by depriving the [respondents] of access to the cruise ship passenger market at the Belize Tourism Village located in the Fort George area of Belize City.”

146. The factual basis for claiming this declaration appears to be that the appellant, at some point prior to the commencement of this litigation, came, “through some accommodation” as the Chief Justice put it. to terms with the owners of the Wet Lizard, with the result that there is no wall or obstructive structure between that property and the appellant’s property. The consequence of this is that cruise ship passengers upon disembarkation onto the appellant’s property have direct access, if they

wish to go there, to the Wet Lizard without having to exit and re-enter the boardwalk from the street.

147. Section 6(1) of the Constitution provides that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” The Chief Justice held that the right protected by section 6(1) is “essentially a procedural guarantee of equality before the law” and therefore to be distinguished from the prohibition against discrimination in section 16, which prohibits “affording different treatment to different persons attributable wholly or mainly to their respective description by sex, race, place of origin, political opinions, colour or creed.” The respondents’ claim, the Chief Justice held further, appeared to conflate both rights and he concluded that there was no evidence either that the respondents had been denied due process, which is the essence of section 6, or had been discriminated against within the meaning of section 16.
148. In my view Conteh CJ was plainly right in this analysis and, even if a claim for redress under the Constitution was available to the respondents against the appellant in this case, there was not on the evidence before him any material to ground the claim of a breach of either section 6 or section 16.
149. I would therefore also decide the third issue in favour of the appellant, with the result that the respondents’ notice must be dismissed.

Conclusion

150. Since writing this judgment, I have had the opportunity of reading in draft the judgments prepared by Mottley P and Carey JA. I agree with both of them and wish to associate myself in particular with the learned President’s view that the question of whether or not the walls were built

with the necessary permissions has no real bearing on the issues raised by this appeal (see paragraph 47 above).

151. These are my reasons for concurring in the decision of the court that the appeal should be allowed, with costs to the appellant to be agreed or taxed.

MORRISON JA