

IN THE SUPREME COURT OF BELIZE, A.D. 2022

Claim No. 216 of 2021

BETWEEN

KAREN BEVANS

CLAIMANT

AND

BELIZE TOURISM BOARD

DEFENDANT/ANCILLARY CLAIMANT

MANUEL HEREDIA

1st ANCILLARY DEFENDANT

EINER GOMEZ

2nd ANCILLARY DEFENDANT

GLENFORD EILEY

3rd ANCILLARY DEFENDANT

BEFORE The Honourable Madam Justice Geneviève Chabot

Dates of Hearing: May 10th and 11th, and June 8th, 2022

Appearances:

Rt. Hon. Dean O. Barrow, S.C and Darinka Muñoz, Counsel for the Claimant and the Ancillary Defendants

E. Andrew Marshalleck, S.C., Counsel for the Defendant /Ancillary Claimant

JUDGMENT

Introduction

1. Karen Bevans was employed by the Belize Tourism Board (“BTB”) as its Director of Tourism. On March 12th, 2021 she was terminated from her employment. The terms governing the termination of Mrs. Bevans’ employment are in dispute.
2. This claim revolves around the validity of a written employment agreement between the Claimant and the Defendant dated April 1st, 2019 (the “Agreement”). The Agreement was the second employment agreement between the parties. The first employment agreement commenced on April 8th, 2014 for a period of five years (the “First Agreement”).
3. Following Mrs. Bevans’ termination, the BTB disbursed the equivalent of one year’s salary into the Claimant’s bank account on an *ex-gratia* basis as full and final settlement of Mrs. Bevans’ employment relationship with the BTB. The Claimant claims the sum of BZ\$769,869.44 corresponding to the remainder of her alleged entitlements under the Agreement.
4. The BTB argues that the Agreement is invalid and unenforceable because it was executed by BTB’s Chairman and Vice Chair without the sanction or approval of the BTB’s Board of Directors, and without the approval of the Minister of Tourism as required under the *Belize Tourism Board Act*.¹ In addition, the BTB argues that Clause 7.1.1 of the Agreement, which deals with termination without cause, amounts to an unenforceable penalty, is excessively generous to the Claimant, *Wednesbury* unreasonable, and disproportionate to the aim of securing the services of the Claimant on an arm’s length commercial basis.
5. The BTB brought an Ancillary Claim against three Ancillary Defendants. The BTB claims that the First Ancillary Defendant, Manuel Heredia, breached his statutory duty as then Minister of Tourism of Belize by failing to approve the Agreement as required under the *Belize Tourism Board Act*. The BTB also claims that the Second and Third Ancillary Defendants breached their fiduciary duty as Chairman and Vice Chair of the BTB Board of Directors, respectively, by executing the Agreement without the full Board’s approval.
6. This Court finds that the Agreement is valid and enforceable. The requirements under section 14(1) of the *Belize Tourism Board Act* have been met. The Minister approved the Agreement, and the Chairman and Vice Chair of the Board of Directors had the authority

¹ Cap. 275, Revised Ed. 2011.

to execute the Agreement without the need for a resolution of the Board of Directors. The Board of Directors acquiesced to the terms and conditions of the Agreement by conduct.

7. Clause 7.1.1 does not constitute an unenforceable penalty. Clause 7.1.1 is justified, proportionate, and reasonable. The Claimant is awarded the sum of BZ\$769,869.44 under the terms of the Agreement.
8. The Ancillary Claim is dismissed. The First Ancillary Defendant did not breach any statutory duty. The Second and Third Ancillary Defendants are immune from these proceedings under section 17 of the *Belize Tourism Board Act*.

Issues

9. The following issues and sub-issues must be decided to determine the Claim and Ancillary Claim:
 - I. Is the Agreement dated April 1st, 2019 valid and enforceable?
 - A. Have all of the statutory requirements for validity been met?
 - a. The approval by the Board of Directors
 - b. The approval by the Minister
 - B. Did the Defendant acquiesce to, or is estopped from disputing the terms of the Agreement?
 - C. Is Clause 7.1.1 valid?
 - II. If the Agreement is valid, what are the Claimant's entitlements under the Agreement?
 - III. If the Agreement is invalid, is the Claimant entitled to any compensation for the termination of her employment?
 - IV. Are the Ancillary Defendants liable in contribution, indemnity, or damages?
 - A. Are the Ancillary Defendants immune from these proceedings?
 - B. Did the Ancillary Defendants breach any fiduciary duty?
 - C. Did the Ancillary Defendants breach any statutory duty?
 - D. Is the Ancillary Claimant entitled to contribution, indemnity, or damages from the Ancillary Defendants?

Analysis

I. Is the Agreement dated April 1st, 2019 valid and enforceable?

A. Have all of the statutory requirements for validity been met?

10. The appointment of the BTB's Director of Tourism is governed by section 14(1) of the *Belize Tourism Board Act*. Section 14(1) provides as follows:

14.-(1) The Board shall, with the approval of the Minister, appoint a chief executive officer to be called the "Director of Tourism", and a secretary to the Board, at such remuneration and on such terms and conditions as the Minister may approve.

11. Section 14(1) of the *Belize Tourism Board Act* therefore provides for two conditions for the appointment of the Director of Tourism: an appointment by the Board of Directors under certain terms and conditions, and the approval of the Minister (defined in section 2 as the "Minister responsible for Tourism"). The Defendant contends that neither condition was met in this case.

a. The approval by the Board of Directors

12. A copy of the Agreement was provided to the Court. The Agreement is dated April 1st, 2019. It is signed by Einer Gomez as Chairman of the Board of Directors, Glenford Eiley as Vice Chair, and Karen Bevans as Director of Tourism. The signatures are undated. All three signatures are witnessed by a person who is not identified on the Agreement, but has been referred to as the Secretary of the BTB by the parties. The corporate seal of the Belize Tourism Board appears under the signatures.
13. The Defendant contends that the Agreement was executed by the Chairman and Vice Chair without the sanction or approval of the Board of Directors, contrary to section 14(1) of the *Belize Tourism Board Act*, and therefore that the Board of Directors acted *ultra vires* the legal powers, and beyond the capacity of the BTB as a statutory body.
14. The Defendant argues that there is no record of the Agreement being presented to, or approved by the Board of Directors as required by section 14(1) of the *Belize Tourism Board Act*. The Defendant introduced into evidence the minutes of all the BTB's Board of Directors meetings held between 2018 and 2020. The only reference to the Claimant's employment agreement appears in the minutes of the April 25th, 2019 Board of Directors meeting. The minutes state that "the Board is updated that the contract for the Director of Tourism has expired on April 8th. The Minister of Tourism and the Chairman are currently working on an extension".

15. The Defendant notes that the Agreement was affixed with the BTB's seal, an act that could only lawfully be done pursuant to a resolution of the Board of Directors under section 8(1) of the *Belize Tourism Board Act*. According to Mr. Evan Tillett, the BTB's current Director of Tourism, the Board of Directors is required to keep proper minutes of all Board meetings under section 9(6) of the *Belize Tourism Board Act*. If such resolution had been passed, it would be reflected in the minutes of the meetings. The minutes reflect no such resolution.
16. Although the Agreement is dated April 1st, 2019, there is evidence that the Agreement had not yet been signed in July of 2019 and was still under review by the Claimant. In addition to the above-noted notation in the minutes of the April 25th, 2019 Board of Directors meeting, the Defendant adduced into evidence an email from the Claimant to a person named "Steve" dated July 13th, 2019, in which the Claimant asks "Steve" for a "quick read" of a document entitled "Director Contract Renewal" and asks for any recommendations of amendments. The recipient responded on July 15th, 2019 that "nothing untoward" stood out to him.
17. That the Board of Directors never formally approved the Agreement before it was executed is not disputed by the Claimant. In cross-examination, Mr. Gomez stated that the Board discussed the issue of the renewal of the Claimant's employment agreement "many times", but that the Board did not need to approve and pass a resolution confirming the approval of the Agreement prior to its execution. The Agreement was executed by Mr. Gomez, Mr. Eiley, and Mrs. Bevans after the Minister approved the terms of the Agreement and communicated the approval to Mr. Gomez by phone. Once the Agreement was executed and issued, Mr. Gomez stated that he informed the Board of Directors at its next meeting and that the "Board unanimously endorsed and adopted the making and issuing of the contract". In cross-examination, Mr. Gomez acknowledged that the Board's endorsement is not recorded in any minutes of any meeting of the Board of Directors.
18. As for the date of the Agreement, Mr. Gomez could not recall whether the Agreement was executed on April 1st, 2019. In cross-examination, he disputed the accuracy of the minutes of the April 25th, 2019 meeting of the Board of Directors recording that the Minister and he were, at that time, working on the extension of the Claimant's first employment agreement. He could not recall the exact date when the Agreement was executed.
19. Three issues arise from the evidence on this point. The first issue is whether a resolution of the Board of Directors was required before the Agreement could be executed. The second issue is whether the seal was properly affixed to the Agreement. The third issue is whether the Agreement was made retroactively and, if it was, whether this has any impact on the validity of the Agreement.

20. The first and second issues are more conveniently dealt with together. Upon a review of the *Belize Tourism Board Act* and the evidence, the Court finds that a resolution of the Board of Directors was not required before the Agreement could be executed by the Chairman and Vice Chair of the Board. The Board of Directors was aware of the renewal of the Claimant's employment agreement. The Agreement did not need to bear the seal of the BTB. As such, the absence of a resolution by the Board of Directors to affix the seal does not invalidate the Agreement.
21. The powers of the BTB are provided for in the *Belize Tourism Board Act*. Section 14(1) of the *Belize Tourism Board Act* provides that "[t]he Board shall [...] appoint a chief executive officer to be called the "Director of Tourism"". Under section 14(1), it is therefore the Board of Directors that appoints the Director of Tourism. The *Belize Tourism Board Act* does not specify how the appointment is to be made.
22. The BTB has not enacted any regulations or by-laws to regulate its proceedings. The *Belize Tourism Board Act* is the only instrument governing those proceedings. Under section 8(1) of the *Belize Tourism Board Act*, "the seal of the Board [...] may be affixed to instruments pursuant to a resolution of the Board". Section 8(1) must be read alongside section 8(3), which provides that the seal is to be affixed to an instrument when "required by law". Therefore, the BTB's seal is only required to be affixed on instruments pursuant to a resolution of the Board of Directors, when required by law.
23. Section 14(1) of the *Belize Tourism Board Act* does not require that the instrument of appointment of the Director of Tourism be made under seal. There was therefore no requirement for the seal to be affixed to the Agreement. The fact that the seal was in fact affixed to the Agreement without a resolution of the Board of Directors does not invalidate the Agreement, as it was not statutorily mandated. This resolves the second issue.
24. As for the first issue, section 14(1) of the *Belize Tourism Board Act* does not require that the appointment of the Director of Tourism be made by resolution of the Board. The *Belize Tourism Board Act* explicitly sets out when a resolution of the Board of Directors is required. For example, section 8(1), as we have seen, requires a resolution of the Board of Directors for the affixing of the BTB seal on an instrument. Section 10(3) requires a resolution of the Board of Directors for the declaration of the remuneration and allowances of persons, not being members of the Board, as members of a committee. Section 10(4) requires a resolution of the Board of Directors for the rejection of a report by a committee. By contrast, section 14(1) does not require that the appointment of the Director of Tourism be made by resolution. A resolution was therefore not required.
25. The Court is satisfied that the Chairman and the Vice Chair had the authority to execute the Agreement on behalf of the Board. The evidence shows that the Board of Directors was aware that the First Agreement had expired and that the Claimant's employment was in the

process of being renewed. Mr. Gomez testified that the renewal of the Claimant's employment was discussed by the Board "many times" prior to the execution of the Agreement. The minutes of the April 25th, 2019 meeting of the Board support that the Board was being updated during the renewal process. In addition, Mrs. Bevans testified that after her employment agreement was renewed, members of the Board congratulated her and expressed their satisfaction with her performance. No evidence has been presented that would suggest any opposition by members of the Board of Directors to the renewal of Mrs. Bevans' employment agreement with the BTB.

26. It is true that apart from the minutes of the April 25th, 2019 meeting of the Board, there is no record of the discussions that took place within the Board of Directors with regard to the renewal of Mrs. Bevans' employment with the BTB. Mrs. Bevans testified that Board discussions pertaining to her were usually held *in camera* and were not recorded in the minutes. It is not unusual for a board of directors to hold *in camera* meetings to discuss personal or confidential matters. While section 9(6) of the *Belize Tourism Board Act* requires that "minutes in proper form of each meeting" be kept and approved by the Board, the *Belize Tourism Board Act* does not exclude the holding of *in camera* meetings. As will be discussed later, the Board's conduct after the execution of the Agreement provides evidence that the Board acquiesced to the terms and conditions of the Agreement.
27. Section 8(3) of the *Belize Tourism Board Act* allows documents to be "signified" under the hand of the Chairperson or Deputy Chairperson:
 - (3) All documents, other than those required by law to be under seal, made by, and all decisions of, the Board, may be signified under the hand of the Chairperson or Deputy Chairperson
28. The expression "signified under the hand of", as used in section 8(3) of the *Belize Tourism Board Act*, has been interpreted by the Privy Council in *British Guiana Credit Corp v Clement Da Silva*² as "permitting signatures under the hand of". Section 8(3) allows all documents of the Board (other than those required by law to be under seal), and all decisions of the Board, to be signed by the Chairperson or Deputy Chairperson of the BTB. Because section 14(1) of the *Belize Tourism Board Act* does not require the instrument of appointment of the Director of Tourism to be made under seal, and the appointment was not required to be made by resolution, the Agreement was therefore validly executed by the Chairman of the BTB's Board of Directors.
29. The evidence shows that the Agreement was made retroactive to April 1st, 2019. This appears clearly from the minutes of the April 25th, 2019 meeting of the Board of Directors which refer to the Minister and the Chairman of the Board as still "working on" the

² (1965) 7 WLR 248.

extension of the Claimant's first employment agreement. The Claimant's July 13th, 2019 email to "Steve" suggests that the Agreement might not have been finalized until July 2019. The fact that the Agreement was retroactive does not jeopardize its validity. The Court has not been referred to any authority that would suggest otherwise.

30. It was specifically contemplated by the BTB that Mrs. Bevans would continue her employment after the expiration of the First Agreement, unless notice to the contrary had been given by any party to the First Agreement 6 months prior to its expiration:

Six months prior to the expiration of this agreement, either party will give notice in writing to the other party to indicate whether they/she wishes to conclude the employment upon the expiration of this agreement. In the absence of notice from either party, the contract of employment will automatically renew on the same terms set out in this agreement.³

31. In this Court's view, that the Agreement was made retroactive amounted to the ratification of the continuing employment of the Claimant as Director of Tourism as of April 1st, 2019 and the confirmation of the new terms and conditions of employment.

b. The approval by the Minister

32. Section 14(1) of the *Belize Tourism Board Act* states that the Board appoints the Director of Tourism "with the approval of the Minister", "at such remuneration and on such terms and conditions as the Minister may approve". The Minister of Tourism must therefore approve both the appointment and the terms and conditions of appointment of the Director of Tourism.
33. The Claimant's position is that section 14(1) of the *Belize Tourism Board Act* does not require the approval of the Minister of Tourism to be in writing. The Claimant testified that the Minister orally approved the renewal of her employment agreement. She presented a copy of the Agreement to the Minister of Tourism in the course of one of their weekly meetings prior to the renewal. The Claimant testified that the Minister knew and approved of the terms and conditions of the Agreement, including the changes to her salary and allowances, prior to giving his approval. To her knowledge, the Minister did not record his approval in any document, nor did he record any approval for the employment agreements of any of the directors and heads of departments in writing. The Claimant is unaware of any BTB internal document recording the Minister's approval. She believes, however, based on comments she received after a Board meeting that the Minister raised the issue of the Agreement with the Chairman of the Board.

³ Clause 8 of the First Agreement.

34. The evidence of Mr. Heredia was consistent with that of Mrs. Bevans. In his witness statement and in cross-examination, Mr. Heredia confirmed that he was presented with the First Agreement and a draft of the renewal Agreement by the Claimant during one of their regular meetings. Mr. Heredia admitted that he could not recall who negotiated the terms and conditions of the Agreement, but was adamant that the renewal of the Claimant's employment agreement was justified because of her exceptional performance during her first term with the BTB. It is Mr. Heredia's understanding that there was no requirement for his approval to be in writing. He instructed the Chairman of the Board to execute the Agreement, and once those instructions were issued the Board had to follow those instructions, which it did.
35. Mister Gomez's evidence was consistent with that of Mrs. Bevans and Mr. Heredia. Mr. Gomez testified that he signed and executed the Agreement after Mr. Heredia had informed him orally, by phone, that he agreed with the terms and conditions of the Agreement and approved it. Mr. Gomez then informed the Board of Directors at the next Board Meeting that the Agreement had been executed. The Board unanimously endorsed and adopted the making and issuing of the Agreement.
36. The Claimant relies on the Caribbean Court of Justice's ("CCJ") decision in *Warrington v Dominica Broadcasting Corporation*⁴ for the proposition that acquiescence to the continued employment of a person satisfies statutory requirements and amounts to an approval. The fact that an approval is given retroactively does not affect the validity of the approval. In addition, in *Warrington* the CCJ stated that absent words to this effect, it is not open to a court to read into a section a requirement for writing.
37. The Defendant disputes that the Minister actually approved the Agreement prior to its execution as mandated by sections 14(1) and 14(2) of the *Belize Tourism Board Act*. There is no record of any request for any approval of the Agreement by the Minister of Tourism, or any record of such approval having been given by the Minister.
38. According to the Defendant, since section 14(2) of the *Belize Tourism Board Act* requires the "prior approval" of the Minister of Tourism, the Agreement could not be the subject of acquiescence or ratification by the Minister. The Defendant distinguishes the *Warrington* decision on the basis that the *Belize Tourism Board Act* requires the *approval* of the Minister, not his advice. In addition, the *Belize Tourism Board Act* provides that the approval must be given with respect to the appointment, the remuneration, and the terms and conditions of employment of the Director of Tourism, and not only her continued employment.

⁴ [2018] CCJ 31 (AJ) ("*Warrington*").

39. The Defendant points out that contrary to the situation in *Warrington*, the Minister of Tourism plays a pivotal role under the *Belize Tourism Board Act*. The Minister must essentially approve all posts within the BTB, all appointments to those posts, all regulations of the BTB, the remuneration of members of the Board, all borrowing, the writing off of all bad debts, and give policy directives in relation to capital assets and the auditing of BTB's finances. The Minister's role is therefore more administrative than political. As such, the requirement that the Minister approves the appointment of the Director of Tourism, as well as her remuneration and terms and conditions of service is not mere "technicality" or a "trifle".
40. The Court is satisfied that the Minister approved the Agreement as required under section 14(1) of the *Belize Tourism Board Act*. The *Belize Tourism Board Act* does not require the approval to be in writing, and pursuant to *Warrington* the Court cannot read into section 14(1) a requirement that the approval be in writing.⁵ In addition, the *Belize Tourism Board Act* expressly states when something must be done in writing. For example, section 5(2) of the *Belize Tourism Board Act* provides that a resignation must be done through an "instrument in writing". There is no such requirement in section 14(1). As a result, the Minister's approval could lawfully be conveyed orally.
41. The evidence of all three witnesses who testified on this issue was remarkably consistent. The Court accepts that Mrs. Bevans presented both the First Agreement and the renewal Agreement to the Minister during one of their regularly-scheduled meetings. The Minister had an opportunity to look over the differences in both agreements and was satisfied that the renewal of the Claimant's employment for another five-year term was justified. He conveyed his approval orally to Mr. Gomez as Chairman of the Board of Directors. Once he received the approval, Mr. Gomez caused the Agreement to be executed.
42. In addition to the witness testimonies, the minutes from the April 25th, 2019 Board of Directors meeting provide evidence that the Minister and the Chairman of the Board were in contact in April 2019 and together were "working" on the renewal. These minutes support that the Minister was involved in the renewal process.
43. While it is true that he was unable to recall the exact date at which he approved the contract, Mr. Heredia was clear that his approval was given before the Agreement was executed. This is consistent with Mrs. Bevans' and Mr. Gomez's evidence. As discussed above, there is evidence that the Agreement was executed retroactively to April 1st, 2019, but this does not put the validity of the Agreement into question. Therefore, the fact that Mr. Heredia does not remember the exact date he gave his approval to the Chairman of the

⁵ *Warrington* at para. 24.

Board is immaterial to the issue of whether the requirements in section 14(1) of the *Belize Tourism Board Act* were met.

B. Did the Defendant acquiesce to, or is estopped from disputing the terms of the Agreement?

44. The Court concluded that the Chairman and the Vice Chair of the Board of Directors had the authority to execute the Agreement on behalf of the Board. The Court also concluded that a resolution was not required under section 14(1) of the *Belize Tourism Board Act* before the contract could be executed. However, there is no record of the Board sanctioning or ratifying the Agreement once it was executed. This raises the issue of whether the Defendant acquiesced to, or is estopped from disputing the terms of the Agreement.
45. The Claimant argues that the Board and the Minister acquiesced to the terms and conditions of the Agreement, and are therefore estopped from disputing its validity. The Claimant relies on Nathan J.'s decision in *Taegar v Belize Tourist Board*⁶ and on *Warrington* in support of her position on this point. According to the Claimant, it is dishonourable and unconscionable for the Defendant to seek to profit from its own default to keep proper minutes of its Board of Directors' meetings.
46. The Defendant's position is that while the BTB was aware of the continued employment of the Claimant, it was not aware of the terms and conditions of the Agreement. Relying on *Pacific Coast Coal Mines Limited v Arbuthnot and Others*,⁷ the Defendant asserts that the BTB can only be bound by the terms and conditions which would have been within its knowledge. The BTB cannot be bound by acquiescence to terms of which it had no knowledge, such as the fixed term of 5 years and/or Clause 7.1.1, which mandates payment of all wages and benefits for the remaining life of the Agreement if it is terminated without cause prior to the expiration of its terms.
47. In addition, the Defendant contends that the Claimant does not benefit from the "Indoor Management Rule" because she is a member *ex officio* of the Board of Directors and she knew there was non-compliance with the statutory requirements, or should have been put on inquiry in relation to the same. Since the Claimant's employment depended on the fulfillment of a statutory condition, she was bound to ascertain whether the conditions of validity had been fulfilled but did not do so.
48. The Court is satisfied that the Board had knowledge of the terms and conditions of the Agreement and can therefore be said to have acquiesced to it by conduct. As will be discussed in the next section, the only changes between the First Agreement and the

⁶ Dated July 16th, 1998 ("*Taegar*").

⁷ [1917] AC 607.

renewal Agreement are increases to the Claimant's salary and telephone/internet and housing allowances. These increases were within the knowledge of the Board of Directors because it is the Board who is, under the *Belize Tourism Board Act*, responsible for the day to day management of the BTB, including the management of its budget. The Board of Directors was therefore well aware of the salary and allowances given to the Claimant.

49. All of the other terms and conditions of the Agreement are identical to those of the First Agreement. The Agreement is a 5 year fixed term contract, just like the First Agreement was. Clause 7.1.1 is present in both the First and the renewal Agreement. There is no suggestion that the Board of Directors was not aware of these terms and conditions before the renewal of the Claimant's employment with the BTB. There is also no suggestion that any of the members of the Board of Directors ever raised any concerns or objected to those terms and conditions. As a result, there is no support for the proposition that the Board of Directors was not aware of the terms and conditions of the Agreement after its renewal in April 2019.
50. As noted by the President of the CCJ, Mr. Justice Saunders in *Warrington*, "law must be premised on principle and must also make sense";⁸

[...] it would be unreal to suppose that, throughout the 15 months after the expiry of the 2004 contract, there was no employment arrangement in existence between Ms Warrington and the Board. Ms Warrington was dutifully carrying out the functions of the office and for this she was being paid. The Board was always fully aware of this. If either party desired to end that relationship, they were obliged to do so on notice.⁹

51. Similarly, on the facts of this case, it would simply make no sense to suggest that the absence of a record of the Board of Directors' ratification of the terms and conditions of the Agreement in the minutes of its meetings would result in the invalidity of the Agreement. The requirements in section 14(1) of the *Belize Tourism Board Act* were complied with. The Board of Directors was aware of the renewal, was aware of the terms and conditions of the First Agreement, and was aware of the salary and allowance increases. The Claimant carried out her function for almost two years under the Agreement before being terminated. The Court has no difficulty finding that the Board of Directors acquiesced to the terms and conditions of the Agreement.
52. As a result, the BTB is estopped from denying the validity of the Agreement. The Court finds support for this proposition in Nathan J.'s decision in *Taegar v Belize Tourist Board*, a case not dissimilar to the present case. In *Taegar*, the claimant was terminated from what

⁸ *Warrington* at para. 65.

⁹ *Ibid.*

was then called the Belize Tourist Board approximately 1 year into her 2-year employment agreement with the Board. The Belize Tourist Board contested the validity of the agreement on the basis that it had never been attested and sealed as required by law. At issue was whether the Board was estopped from denying the validity of the employment agreement after accepting the claimant's performance of the agreement as satisfactory to it for a period of 1 year, "in circumstances where [the Board] induced and freely negotiated its terms, accepted past performance of it, terminated it unjustifiably, and failed as an employer to have the contract presented for attestation". The court was satisfied that under these circumstances, the Board was estopped from denying the validity of the employment agreement.

53. Similarly, Mrs. Bevans worked for the BTB for a total of 7 years. The First Agreement contained an automatic renewal clause, unless notice had been given by any party to the First Agreement 6 months prior to its expiration that the employment was to conclude. No such notice was given, and therefore there was an expectation on both sides that the employment relationship would continue. There is no suggestion that the BTB was prevented in any way from freely negotiating the terms of the renewal Agreement. The renewal of the Claimant's employment agreement appears to have been considered by all to be a formality. The employment relationship continued between the parties, without any issues, for 2 years until a new Board of Directors was installed and Mrs. Bevans was terminated. In those circumstances, the Court holds that the Defendant is estopped from denying the validity of the Agreement.

C. Is Clause 7.1.1 valid?

54. Clause 7.1.1 of the Agreement deals with Termination without Cause in the following terms:

7.1.1 Termination without Cause

If the BTB terminates this contract of employment without cause before the expiration of the full term of this contract the BTB shall be liable for and shall pay to the Director upon termination the sums equal to all salaries and all other remuneration, and confer on the Director all other benefits, that would have been due to the Director for the full remaining term of this contract.

55. As a result of the termination of her employment, the Claimant claims, under Clause 7.1.1 of the Agreement, the total salaries, allowances, and emoluments which would be due to her under the Agreement for the period between March 15th, 2021, corresponding to the first business day after the termination of her employment, and April 7th, 2024, corresponding to the last day of the five-year period covered by the Agreement.

56. The Claimant argues that the Agreement is a fixed-term employment contract that is sufficiently clear to oust the common law presumption of reasonable notice on termination. The Claimant submits that she is entitled to the compensation that would have been earned to the end of the employment Agreement.
57. The Claimant contends that she is not a political appointee, but rather was hired by the BTB as a professional with a long record of accomplishments in other organizations. She was hired after submitting her *curriculum vitae* and being interviewed by the Minister of Tourism and members of the BTB. She entered into the First Agreement with the BTB on April 1st, 2014 for a fixed term of 5 years. The BTB renewed her employment following an assessment, by the Board of Directors and the Minister, of her performance and the overall performance of the BTB. According to the Claimant, the renewal Agreement was negotiated at arm's length and was mandated and justified by the renewal clause of the First Agreement and by her documented success as the Director of Tourism of the BTB.
58. The Claimant testified that at the end of each fiscal year, the Chairman of the Board of Directors would meet with her to review the BTB's performance and assess her own performance. The Claimant was rewarded based on the positive financial and operational results. In cross-examination, she added that her salary had been increased in the years leading up to the renewal Agreement, but the increase had not been reflected by any amendments to the First Agreement.
59. Both Mr. Heredia and Mr. Gomez testified that the renewal of the Claimant's employment agreement with the BTB was justified by her satisfactory performance during the 5 year term of the First Agreement.
60. All of the witnesses for the Claimant agreed that Clause 7.1.1 is nothing unusual, and is almost standard for the BTB. Similar clauses have been included in the employment contracts of other Directors of Tourism and senior staff, current and past. The Defendant introduced into evidence several contracts including clauses drafted in language similar to Clause 7.1.1. According to the Claimant's witnesses, Clause 7.1.1 (or its equivalent) is beneficial to both parties to the employment agreement because it provides security of tenure for the employee, and stability and employee leadership continuity for the BTB. This allows the BTB to attract and retain high caliber, professional employees such as Mrs. Bevans.
61. The Defendant argues that Clause 7.1.1 is invalid as it amounts to an unenforceable penalty. The Claimant seeks damages for wrongful dismissal. The normal measure of damages for wrongful termination is the net loss suffered by a party as a result of the termination. The court must deduct from the award any income earned by the employee from subsequent employment. While parties have the liberty to agree on a sum to be paid on termination of the employment, the sum must be a genuine pre-estimate of the loss, and

not in the nature of a penalty intended to secure performance of the contract. Clause 7.1.1 amounts to an unenforceable penalty as it requires the payment of an extravagant and exorbitant sum which includes not only the Claimant's wages, but also her allowances and other benefits under the Agreement. Allowances and benefits are excluded from entitlements on termination under the *Labour Act*.¹⁰ In addition, the Agreement makes no provision for mitigation of damages, thereby further supporting the argument that it provides for the payment of an unenforceable penalty.

62. As the advantaged party, the Claimant has the onus of showing that there was a commercial justification for the inclusion of Clause 7.1.1 in the Agreement. The Defendant argues that the only justification for the inclusion of Clause 7.1.1 was to give the Claimant security of tenure, and a continuous and reliable source of employment. The BTB would be obligated to pay the Claimant for the entirety of the 5 years, whether she remains in the BTB's employ or not. This confers no benefit on the BTB.
63. The Defendant also argues that the Agreement is *ultra vires* because it is excessively generous to the Claimant, *Wednesbury* unreasonable, and disproportionate to the aim of securing the services of the Claimant on an arm's length commercial basis. Relying on *Roberts v Hopwood and others*¹¹ and *Gibb v Maidstone and Tunbridge Wells NHS Trust*,¹² the Defendant asserts that a public authority is not permitted to be irrationally generous to its employees. A public authority empowered to fix terms and conditions of employment is obligated to act reasonably, to consider the commercial circumstances that existed at the time the decision was made, to ensure that the terms fixed are necessary to obtain the services required and to maintain a high standard of efficiency, and are not in reality gifts to their employees in addition to remuneration for their services.
64. The Defendant contends that the effect of Clause 7.1.1 is to compensate the Claimant over and above the compensation contemplated by the *Labour Act*, without any obligation on the part of the Claimant to mitigate her damages. Clause 7.1.1 is irrationally generous in the sense that no reasonable and rational contracting authority would have considered it, that the facts giving rise to the irrational generosity argument provides a basis for impugning the Agreement recognized in private law, and that the Claimant had notice of the breach of public law duty. In addition, while the Claimant has a right, pursuant to Clause 7.2 to terminate the Agreement on 3 months' notice, no such right is afforded the BTB, and the BTB is not given the right to terminate the Agreement otherwise than for cause. The Agreement is therefore *Wednesbury* unreasonable because no reasonable board

¹⁰ Cap 297, Rev. Ed. 2020.

¹¹ [1925] AC 578.

¹² [2010] EWCA Civ 678.

would agree to restrict its right to terminate an employee, and in the event of termination, to the payment of such exorbitant termination compensation.

65. From the evidence and the submissions of the parties on this point, three issues arise. The first issue is whether the Agreement was a fixed-term contract. The second issue is whether Clause 7.1.1 constitutes an unenforceable penalty. The third issue is whether the terms and conditions of the Agreement are unjustified, irrational, and unreasonable.
66. As to the first issue, the Court finds that the Agreement constitutes a fixed term contract. The duration of the Agreement is ascertainable from its terms. The Agreement has a clear state date, April 8th, 2019. Its end date is ascertainable. Under Clause 1, the Claimant's employment "shall continue from that date [April 8th, 2019] for the term of five (5) years or until terminated under the provisions set out in clause 7 of this agreement". Unless terminated in accordance with its terms, the Agreement was therefore to terminate on April 7th, 2024. Clause 7 dealing with early termination does not change the fixed term nature of the Agreement.
67. On the second issue, the Defendant's position is that Clause 7.1.1 amounts to an unenforceable penalty because it requires the payment of an extravagant and exorbitant sum. According to the Defendant, Clause 7.1.1 does not stipulate a sum that is a genuine pre-estimate of the loss, but is in the nature of a penalty intended to secure the performance of the Agreement. The Defendant relies on the *Labour Act* in support of its argument that payment under Clause 7.1.1 is exorbitant because the amount is well in excess of the amount contemplated by the statutory regime.
68. While section 39(1) of the *Labour Act* only provides for the payment of "wages" upon the wrongful termination of an employment contract, the *Labour Act* constitutes a statutory minimum which the parties to an employment agreement can supplement. The parties to an employment agreement are at liberty to negotiate terms which are more generous than the statutory minimum, from salary and other benefits to the rights of the employee upon termination. The fact that the *Labour Act* does not provide for the payment of any allowances or benefits upon wrongful termination is therefore not sufficient to support a finding that Clause 7.1.1, which so provides, constitutes an unenforceable penalty.
69. Similarly, the parties to an employment agreement can agree to provide for a notice period that is greater than the minimum notice period provided for in common law. On this point, the decision of the Court of Appeal for Ontario in *Howard v Benson Group Inc.*¹³ is helpful. The question at issue in *Howard* was whether an employee who is employed under a fixed term employment contract that does not provide for early termination without cause is entitled to payment of the unexpired portion of the contract on early termination of the

¹³ 2016 ONCA 256 ("*Howard*").

contract. The court concluded that the employee was so entitled. While *Howard* is distinguishable from the present matter because the Agreement does provide for the early termination without cause of the Agreement, the court in *Howard* confirmed that the presumption that an employee is entitled to common law damages can be rebutted “if the employment contract ‘clearly specifies some other period of notice, whether expressly or impliedly’”. Parties to a fixed term employment contract can therefore specifically provide for early termination and specify a fixed term of notice or payment in lieu.¹⁴

70. Because parties are free to negotiate terms that are more generous than those provided under the *Labour Act* or the common law, the minimum entitlements provided under these frameworks do not constitute the proper measuring stick to determine whether the Agreement is so generous as to constitute a penalty.
71. The Defendant relies on *Cavendish Square Holding BV v Makdessi*,¹⁵ in which the Supreme Court of the United Kingdom stated that the question whether a clause challenged as a penalty is enforceable “depends on whether the means by which the contracting party’s conduct is to be influenced are ‘unconscionable’ or (which will usually amount to the same thing) ‘extravagant’ by reference to some norm”. Applied in employment contract cases, the *Cavendish* decision has been interpreted as requiring that the advantaged party shows that there was a commercial justification for the inclusion of the clause, that the clause was proportionate to the legitimate interest concerned, and that the clause was subject to arm’s length negotiation.¹⁶
72. The question whether Clause 7.1.1 amounts to a penalty because it is unjustified, disproportionate, and was not subject to arm’s length negotiation overlaps with the Defendant’s argument that Clause 7.1.1 is not in the best interest of the BTB, excessively generous to the Claimant, *Wednesbury* unreasonable, and disproportionate to the aims of securing the services of the Claimant on an arm’s length commercial basis. Both arguments will therefore be considered together.
73. A preliminary question is whether public law elements such as bad faith and *Wednesbury* unreasonableness can be imported into a private contractual employment relationship. The Court is satisfied, upon the authorities submitted by the Defendant, that they can. In *School Facility Management Ltd. and others v Governing Body of Christ the King College and another*,¹⁷ the court unequivocally stated that “it is clear that a public law error can be relied upon either to found, or to answer, a private law claim”

¹⁴ *Ibid* at paras. 20 and 22.

¹⁵ [2015] UKSC 67 (“*Cavendish*”).

¹⁶ *Harvey on Industrial Relations and Employment Law* at para. 537.04.

¹⁷ [2020] EWHC 1118 at para. 113.

74. The Court is satisfied that Clause 7.1.1 is justified, reasonable, and proportionate. The Agreement is nearly identical to the First Agreement, save for increases to the Claimant's salary and certain allowances. With respect to salary, while the Agreement provides for an increase of BZ\$53,250 from the First Agreement, the Claimant testified that her salary had been increased in the course of the First Agreement. The First Agreement was not amended to reflect this increase. Clause 3.1.3 of the First Agreement specifically contemplated salary increases of between 5% and 10% on the anniversary of the First Agreement's commencement date based on the Director's performance. The salary increase between the end of the First Agreement and the renewal Agreement was therefore less than it appears on paper.
75. The Claimant's telephone/internet allowance increased from BZ\$700 to BZ\$1,000 per month. Her housing allowance increased from BZ\$1,500 to BZ\$2,000 per month. Aside from noting the increases, the Defendant has not argued that these amounts were in themselves disproportionate to the costs of those services. It is customary for employment contracts to be adjusted based on the general increase in the cost of living and the Court was presented with no argument to support that those increases were unjustified or disproportionate.
76. The Court rejects the notion that Clause 7.1.1 was either unjustified, disproportionate, not in the best interest of the BTB, excessively generous to the Claimant, or *Wednesbury* unreasonable based on the fact that Clause 7.1.1 is a standard clause in BTB's employment contracts, that the Agreement was negotiated at arm's length, and that there is evidence that Clause 7.1.1 is justified on a commercial basis.
77. That Clause 7.1.1, or its equivalent, is a standard clause in BTB's employment contracts for senior employees appears clearly from several contracts introduced into evidence by the Defendant. In his second witness statement, Mr. Tillett introduced into evidence the following contracts including the clauses as noted below:
- a. Employment contracts of a Director of Tourism, a Director of Finance and Administration, a Director of Marketing and Public Relations, and a Registrar of Hotels and Cruise Vessels, all dated September 1st, 2006, and all containing the following clause:

1.3 For the avoidance of any doubts, both Parties agree that because of the requisite knowledge, skill, experience and qualifications of the person engaged, if the Board at any time and for any cause determines terminates suspends or revokes the engagement of the person engaged before the expiration of the full period of engagement, then the Board shall be liable forthwith to pay to the person engaged such salaries, annual increments, housing allowances, insurance

allowances, telephone allowances, payment in lieu of vacation leave, and gratuity for the full term of engagement, including the unserved portion of engagement.

- b. Employment contract of an Internal Auditor dated June 1, 2009 containing the following clause:

1.3 For the avoidance of any doubts, both Parties agree that because of the requisite knowledge, skill, experience and qualifications of the person engaged, if the Board at any time and for any cause determines, terminates, suspends, or revokes the engagement of the person engaged before the expiration of the full period of engagement, then the Board shall be liable forthwith to pay to the person engaged such salaries, and gratuity for the full term of engagement.

78. Also relevant is the Claimant's First Agreement dated April 8th, 2014, which contains a clause similar to Clause 7.1.1 in the renewal Agreement, with some minor differences:

7.1.1 Termination without Cause

If the BTB terminates without cause the contract of employment before the expiration of the definitely specified herein, the BTB shall pay to the Director the sum equal to the salaries and all other remuneration and confer on the Director all other benefits that would have been due to the Director during the term of the agreement.

79. Since at least 2006, the BTB has included in senior employees' contracts of employment an early termination clause under which the BTB is liable to pay the terminated employee the salary they would be entitled to until the end of the contract period, as well as various benefits and allowances for that same period. Despite some changes in language between former clause 1.3 and clause 7.1.1, the Court is satisfied that these clauses were meant to confer the same advantages.
80. It is noteworthy that clause 1.3 in the June 1st, 2009 employment contract of the Internal Auditor does not confer an entitlement to benefits and allowances in addition to salary and gratuity upon early termination of the contract. This demonstrates that the BTB consciously sought to confer these benefits and allowances to some, but not all employees.
81. Also exhibited to the second witness statement of Mr. Tillett is the employment contract of a Director of Product Development dated April 14th, 2008 which does not contain any clause equivalent to Clause 1.3 or Clause 7.1.1. In cross-examination, Mr. Heredia stated that the clause was not included because the Director was on probation at the time. This uncontradicted evidence supports the intentionality behind the inclusion of the early termination clause at issue.

82. The fact that the BTB has included a clause equivalent to Clause 7.1.1 to a number of employment contracts disposes of the argument that a contract containing this type of clause is *Wednesbury* unreasonable. Under *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,¹⁸ a decision is *Wednesbury* unreasonable, or irrational, if it is so unreasonable that no reasonable person acting reasonably could have made it. It is difficult to reconcile the Defendant's argument that no reasonable board would have included Clause 7.1.1 in the Claimant's Agreement with the fact that the BTB, under different administrations, has been making contracts containing the equivalent of Clause 7.1.1 for at least a decade. The BTB does not suggest that these previous administrations acted unreasonably, or that any of the previous contracts containing Clause 7.1.1, or its equivalent, were *Wednesbury* unreasonable. It is unclear to the Court why Clause 7.1.1 would become *Wednesbury* unreasonable in the case of Mrs. Bevans.
83. There is no evidence to support the suggestion that the Agreement was not negotiated at arm's length. The Defendant alleges that "the inclusion of clause 7.1.1 was also motivated by bad faith, namely, the saddling of any newly elected government with the services of the Claimant, as a political appointee, well beyond the term of the existing Minister of Tourism as well as well beyond the term of the then Board of Directors of the Defendant, and for the majority of the new term of any newly elected government". In cross-examination, the Defendant attempted to elicit from the witnesses information to support this bald statement, without success. The evidence before this Court is that the Claimant was hired as a professional with a proven track record of professional accomplishments. The First Agreement was negotiated by Mr. Heredia and officers of the Defendant. The renewal Agreement does not appear to have been discussed at great lengths, but was made under the same terms and conditions as the First Agreement, and by all accounts was justified by the Claimant's satisfactory performance during her first term. There is no mention in either the First Agreement or the renewal Agreement that the Director of Tourism's position was contingent on which of the political parties governed at the time. As a result, this Court finds that the Agreement was negotiated at arm's length, and that the Claimant was hired as a professional and not as a political appointee.
84. The Claimant has established to the Court's satisfaction that Clause 7.1.1 is justified on a commercial basis. Both Mr. Heredia and Mr. Gomez testified that Clause 7.1.1 is mutually beneficial. By providing Mrs. Bevans with security of tenure, Clause 7.1.1 allowed the BTB to attract and retain a professional of Mrs. Bevans' caliber. The fact that the BTB has included an equivalent clause in several other senior employees' contracts in the past bolsters this position. Had this clause been as detrimental to the BTB as the Defendant

¹⁸ (1948) 1 KB 223.

contends, the Defendant would have stopped including it in subsequent contracts. Yet, from 2006 to at least 2019, the clause continued to be included in several contracts.

85. Implied throughout this case is the suggestion that Mrs. Bevans took advantage of the BTB by inducing the BTB to conclude an unfair, one-sided employment agreement to the detriment of the BTB. However, it bears noting that the parties to the Agreement were on an equal bargaining footing. The BTB is a sophisticated party who has, in the course of its existence, employed a great number of employees, including in the position of Director of Tourism. The BTB benefits from legal advice from both inside and outside counsel. There is no allegation that the BTB was in any way prevented from negotiating different terms and conditions for Mrs. Bevans' employment. There is no evidence to suggest that Mrs. Bevans conducted herself in anything less than a professional manner towards the BTB at all times. This Court can reach no other conclusion than Clause 7.1.1, and indeed the whole Agreement, is justified, proportionate, reasonable, and therefore valid.

II. If the Agreement is valid, what are the Claimant's entitlements under the Agreement?

86. The Claimant was dismissed from her employment without cause. The Claimant claims, under Clause 7.1.1 of the Agreement, the total salaries, benefits, and allowances that would be due to her under the Agreement for the period between March 15th, 2021, corresponding to the first business day after the termination of her employment, and April 7th, 2024, corresponding to the last day of the five-year period covered by the Agreement. The total amount claimed by Mrs. Bevans is BZ\$769,869.44.
87. The Claimant particularized the amount claimed in her Claim Form. From the amount claimed the Claimant deducted income tax and social security contributions. The Defendant does not dispute the particulars of the total amount claimed by Mrs. Bevans.
88. Following the termination of the Claimant's employment, the Defendant deposited the sum of BZ\$238,094.21 in the Claimant's bank account, corresponding to 1 year salary and benefits under the Agreement, in what it considered the full and final settlement of all claims arising out of the parties' relationship. The Claimant deducted this amount from the sum she claims.
89. The Court heard submissions on the nature and timing of the payment made by the Defendant in the Claimant's bank account. However, given the Court's conclusion that the Claimant is entitled to what she claims, there is no need to dwell on that point.
90. The Claimant was under no duty to mitigate her losses, and as such the salary earned in her current employment is not to be deducted from the amount claimed. This conclusion is based on the language of Clause 7.1.1. Clause 7.1.1 constitutes an early termination clause in a fixed-term contract. In *Howard*, the Court of Appeal for Ontario held that, in the case

of a fixed-term contract, “there is no duty to mitigate where the contract specifies the penalty for early termination”.¹⁹ In *Quach v Mitrox Services Ltd.*,²⁰ the British Columbia Court of Appeal clarified *Howard* by noting that where a contract contains an early termination clause, the court must look at the language used in that clause to determine whether a duty to mitigate arises:

[39] The result of these authorities, in my view, is that in British Columbia, on the authority of *Neilson*, the fixed-term nature of a contract does not entitle the employee to damages in the full amount of unpaid wages for the balance of the term without deduction of monies earned elsewhere during the term, absent a provision otherwise. In this way *Neilson* is at odds with *Howard* but not *Bowes*.

[40] I mention all of this lest the judge’s reference to *Howard*, and our silence on it, be taken as agreement with the conclusion that in all cases of fixed-term contracts, mitigation of damages may not be considered. Instead, I suggest the jurisprudence is to the effect that consideration of mitigated damages will depend on the particular termination provisions of the contract at issue [emphasis added].

91. This principle applies in the Caribbean context as well. In *Warrington*, it is on the basis of the phrasing of the early termination clause at issue that the CCJ concluded that the claimant was under a duty to mitigate her losses. The clause at issue reads as follows:

Determination of Engagement

6 The Corporation may at any time determine the engagement of the Person Engaged on giving her six months (sic) notice in writing or paying her six months salary and all benefits due to her under Clause 10, and full compensation for salaries lost for any period remaining on this agreement. The Person Engaged may at any time determine the engagement by giving six months notice to the Corporation or pay to the Corporation six months salary in lieu of notice [...] [emphasis added].

92. As noted by the CCJ, the clause at issue in *Warrington* refers to “compensation for salaries lost”. Counsel for Ms. Warrington argued that these words meant that Ms. Warrington was to be paid the equivalent of the salary lost for the unexpired period of her contract. However, based on its careful analysis of the language in the clause, the CCJ concluded that the clause meant that Ms. Warrington would be entitled to be compensated beyond the contractually stipulated six months’ salary for the salary she would have earned had she not been terminated, up to the point where she secured alternate employment.

¹⁹ *Howard* at para. 39.

²⁰ 2020 BCCA 25 at para. 39 and 40.

93. By contrast, Clause 7.1.1 does not provide for “compensation” and does not refer to any “loss”. Clause 7.1.1 states that the Claimant is to be paid “the sums equal to all salaries and all other remuneration, and [...] all other benefits, that would have been due to the Director for the full remaining term of the contract”. The Court finds that the Agreement did not require the Claimant to mitigate her losses.
94. The Claimant is entitled to the sum of BZ\$769,869.44.

III. If the Agreement is invalid, is the Claimant entitled to any damages for the termination of her employment?

95. Given the decision of the Court, this question does not arise.

IV. Are the Ancillary Defendants liable in contribution, indemnity, or damages?

96. In its Ancillary Claim, the Defendant/Ancillary Claimant claims a contribution or an indemnity from the Ancillary Defendants in respect of any liability of the Defendant/Ancillary Claimant to the Claimant in regards to the main Claim. The Defendant/Ancillary Claimant also claims from the Ancillary Defendants damages for breach of statutory and/or fiduciary duties to act bona fide in the best interests of the Defendant and/or within the statutory objects and powers of the Defendant.
97. In response, the Ancillary Defendants deny any liability and raise the immunities provided for under sections 16 and 17 of the *Belize Tourism Board Act*.

A. Are the Ancillary Defendants immune from these proceedings?

98. Section 17 of the *Belize Tourism Board Act* provides for the immunity of the members of the BTB’s Board of Directors in the following terms:
17. No action, suit, prosecution or other proceedings shall be brought or instituted personally against any member of the Board in respect of any act done bona fide in pursuance or execution or intended execution of this Act.
99. The parties dispute whether Mr. Gomez and Mr. Eiley are entitled, as board members at the time, to the protection of section 17. These Ancillary Defendants maintain that they complied with the statutory requirements for the execution of the Agreement. There is no evidence that the Claimant was a political appointee, or that the Ancillary Defendants acted in bad faith in any way. Because they acted bona fide in the execution of their duty under the *Belize Tourism Board Act*, they are immune from these proceedings.
100. The Ancillary Claimant’s argument on this point is twofold. First, citing Rule 10.7 of the *Supreme Court (Civil Procedure) Rules, 2005*, the Ancillary Claimant points out that the

Ancillary Defendants did not specifically plead section 17 of the *Belize Tourism Board Act* as a statutory defence, and as such this defence is unavailable to them.

101. Second, the Ancillary Claimant alleges that the Ancillary Defendants are not entitled to the immunity of section 17 of the *Belize Tourism Board Act* because they did not act bona fide in the execution of their duties. Given their failure to comply with the statutory requirements under section 14(1) of the *Belize Tourism Board Act*, the Ancillary Claimant contends that Mr. Gomez and Mr. Eiley acted in bad faith and are therefore not entitled to statutory immunity.
102. With respect to the Ancillary Claimant's first point, it is true that the Ancillary Defendants did not specifically plead section 17 of the *Belize Tourism Board Act* in their defence. However, this omission is not fatal in this case. The law recognizes some circumstances where trial fairness is not compromised by the failure of a party to plead a defence. In *Midland Resources Holding Limited v. Shtaiif*,²¹ the Court of Appeal for Ontario explained the general rule, as well as the rationale for the exception, in these terms:

[110] The reason for this pleading rule is quite simple. The just determination of a civil proceeding on its merits requires a fair adjudicative process. Trial by ambush is not fair. Accordingly, trial unfairness may result where a defendant is permitted to rely on an unpleaded defence which, if pleaded, might have prompted counsel to employ different tactics at trial [...] As this court stated in *Hav-A-Kar Leasing Ltd. v. Vekselshtein*, [2012] O.J. No. 5592, 2012 ONCA 826, at paras. 69-70:

The failure to raise substantive responses to a plaintiff's claims until trial or, worse, until the close of trial, is contrary to the spirit and requirements of the Rules of Civil Procedure and the goal of fair contest that underlies those Rules. Such a failure also undermines the important principle that the parties to a civil lawsuit are entitled to have their differences resolved on the basis of the issues joined in the pleadings[.]

[W]here a defence to a civil action is not pleaded and no pleadings amendment is obtained, judges should generally resist the inclination to allow [page504] a defendant to raise and rely on the unpleaded defence if trial fairness and the avoidance of prejudice to the plaintiff are to be achieved.

[111] The rule is not absolute. This court has excused defendants from their failure to raise an affirmative defence in the pleadings where the issue was otherwise clearly raised and put in issue before trial [...] However, raising a

²¹ 2017 ONCA 320.

potentially dispositive issue during closing submissions, after the close of evidence, may well prove too late.

103. The Court finds that no unfairness stems, and no prejudice flows, from the Ancillary Defendants' failure to specifically plead section 17 of the *Belize Tourism Board Act* in their defence. The Ancillary Defendants did not wait until trial to raise the defence, but specifically included it in their Pre-Trial Memorandum, thus putting the Ancillary Claimant on notice. In addition, the defence under section 17 rests on a finding by this Court that Mr. Gomez and Mr. Eiley acted in good faith in the execution of their duties under the *Belize Tourism Board Act*, and specifically whether they complied with the statutory requirements under section 14(1) of the *Belize Tourism Board Act*. These issues are at the very heart of this case, and were therefore clearly raised and put in issue before and at trial.
104. In light of the Court's findings on the main Claim, this Court finds that Mr. Gomez and Mr. Eiley are immune from this suit under section 17 of the *Belize Tourism Board Act*. This Court found that these Ancillary Defendants complied with the requirements under section 14(1) of the *Belize Tourism Board Act* in executing the Agreement. There is no evidence that they acted in bad faith in exercising their duties under the *Belize Tourism Board Act*. As a result, they are entitled to the statutory immunity conferred by section 17.

B. Did the Ancillary Defendants breach any fiduciary duty?

105. Given the decision of the Court, this issue does not arise.

C. Did the Ancillary Defendants breach any statutory duty?

106. The Ancillary Claimant contends that Mr. Heredia, as Minister of Tourism, breached his statutory duties under sections 14(1) and 14(2) of the *Belize Tourism Board Act* by failing to approve the appointment, the remuneration, and the terms and conditions of employment of the Claimant.
107. This Court found, in the main Claim, that Mr. Heredia approved the renewal of the employment Agreement of the Claimant in compliance with section 14 of the *Belize Tourism Board Act*. As a result, Mr. Heredia did not breach any statutory duty owed under the *Belize Tourism Board Act*.

D. Is the Ancillary Claimant entitled to contribution, indemnity, or damages from the Ancillary Defendants?

108. Given the decision of the Court, this issue does not arise.

109. The Ancillary Claim is dismissed.

THIS COURT THEREFORE ORDERS:

- 1) Judgment is entered in favour of the Claimant;
- 2) The Claimant is awarded the sum of BZ\$769,869.44 under the terms of the Employment Agreement dated April 1st, 2019;
- 3) The Counterclaim is dismissed;
- 4) The Ancillary Claim is dismissed;
- 5) Costs are awarded to the Claimant on the prescribed basis;
- 6) Costs are awarded to the Ancillary Defendants on an agreed-upon basis. Should the parties be unable to agree on those costs, they can apply to the court for an assessment.

Dated September 12th, 2022

Geneviève Chabot
Justice of the Supreme Court