IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 322 of 2023

IN THE MATTER OF an Application under Section 20 of the Belize Constitution

AND

IN THE MATTER OF Sections 3(c), 6, 9, 15, 16 and 68 of the Belize Constitution

AND

IN THE MATTER OF Sugar Industry (License to Import/Export Sugar) Regulations 2023

BETWEEN:

[1] BELIZE SUGAR INDUSTRIES LTD

1st Claimant/Applicant

[2] COROZAL SUGAR CANE PRODUCERS ASSOCIATION

2nd Claimant/Applicant

AND

[1] ATTORNEY GENERAL OF BELIZE

1st Defendant/Respondent

[2] MINISTER OF AGRICULTURE

2ndDefendant/ Respondent

[3] SUGAR INDUSTRY CONTROL BOARD

3rd Defendant/Respondent

[4] CONTROLLER OF SUPPLIES

4th Defendant/Respondent

Appearances:

Godfrey Smith S.C. with him Hector Guerra, Attorney at Law, for the claimants

Douglas Mendez S.C. with him Jerome Rajcoomar, Attorney at Law, and Alea Gomez, Crown Counsel, for the defendants

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2024: January 29;
January 30;
February 29

JUDGMENT

In a matter challenging the Constitutionality of the Sugar Industry (License to Import/Export Sugar) Regulations 2023; Right to Privacy; Right to Work; Right to Equal Protection of the Law.

[1] **GOONETILLEKE, J.**: This is an Application filed by the claimants by way of originating motion dated 29th May 2023, challenging the vires of the Sugar Industry (License to Import/ Export Sugar) Regulations 2023 (the regulations), which were made under Section 73 of the Sugar Industry Act and published in the Gazette on the 16th May 2023. More particularly, the claimants seek orders from court declaring **regulations 3 (4), 5(1) (b), 5(2) (a) and (b), 11, 16 (1) (a) and (b), 16(3), 21(b), 22 and 24** as unconstitutional, null and void.

[2] The 1st claimant, Belize Sugar Industries Ltd. (BSI) is a company registered under the Companies Act of Belize, in the business of manufacturing sugar mainly for export, by farming, buying and processing sugarcane from farmers in Orange Walk, Belize. The 2nd claimant, Corozal Sugar Cane Producers is Sugar Cane Farmers' Association registered as a body corporate under the Companies Act.

[3] The 1st respondent is the Attorney General of Belize (AG), who is the principle legal adviser to the Government of Belize against whom proceedings against the State must be instituted. The 2nd respondent is the Minister of Agriculture, who approved the regulations under Section 73 of the Sugar Industry Act. The 3rd respondent is the Sugar Industry Control Board (SCIB) which under section 73 of the Sugar Industry Act, made the regulations for the approval of the Minister. The 4th Respondent, Controller of Supplies, is responsible for issuing permits for the export of sugar under the regulations.

[4] For the reasons set out herein below, I hold that regulations **5(1) (a)**, **5 (2)**, **16**, **21 (1) (b)** and **22** of the regulations are unconstitutional, null and void.

Background

[5] The growing of sugar cane and processing of sugar is an important export industry in Belize. In the Northern region, the industry provides direct employment to approximately five thousand (5,000) registered farmers and accounts for about 14% of the Gross Domestic Product (GDP). According to the affidavit of Porfirio Marcus Osorio, the Chairman of the SCIB, the earnings from the sugar industry in 2021 amounted to approximately 128 Million Belize Dollars ($128, 000,000) which is about 27 % of total agricultural exports.

[6] There are two sugar mills in Belize. BSI's mill being the oldest and the only mill in the Northern Province. While BSI grows some sugar cane on its own, the bulk of the sugar cane processed at the BSI mill is produced by independent farmers, who through their associations, sell the sugar cane to BSI. The relationship between the farmers and the mill owners is a symbiotic one; the mill owners cannot produce the sugar without the cane the farmers supply and the farmers would be at a loss to sell their cane if BSI did not buy it from them. There have been and continue to be disputes between BSI and the farmer associations in regard to the sale and purchase of sugar cane. There are presently four **(4)** farmer associations in Belize, with Belize Sugar Cane Farmers' Association (BCSFA) being the oldest and largest association.

[7] The sugar cane that is processed, is exported by BSI to overseas buyers. Chief among BSI's buyers is Tate and Lyle Sugars (TLS) of London, an internationally reputed sugar company. Sugar that is produced in terms of Fairtrade Trader Standards and Guidelines and certified as such by Fairtrade International (FTI), an international non-governmental organization, obtains higher prices at market. The premiums received for Fairtrade sugar are required by FTI to be passed on to the farmers for their benefit; for investment in their business and the community. This may be done by one of two methods: The buyer of Fairtrade sugar (Fairtrade payer) could directly make payments to the farmers by entering into contracts with the farmers' associations to pay Fairtrade premiums. Alternatively, the buyer could send the money for the Fairtrade premiums to the sugar mill or exporter in Belize who then acts as a conduit or 'conveyor' of the money to the farmers. The Fairtrade premiums are paid separately and at a later point in time, in addition to the price the farmers receive for the sugar cane when the cane is sold to the mill.

[8] According to the material placed before this court and submissions of counsel, though sugar may be produced as Fairtrade eligible sugar at the point of harvest and processing, such sugar becomes Fairtrade sugar only if labelled as such at the point of sale in the market. In other words, not all sugar produced in terms of the Fairtrade Trader Standards and Guidelines will reach the market as Fairtrade sugar. This is because there is a limited quantity of demand for Fairtrade sugar, due to its higher price. Supply of Fairtrade eligible sugar is greater than the demand for it; only about 30% of Fairtrade eligible sugar receive premiums for it. Once the requirement in the market for Fairtrade sugar is met by the international wholesaler, the balance sugar, even though it has be produced in terms of the Fairtrade

Trader Standards and Guidelines, would nevertheless be sold as regular sugar and would not receive a premium price.

[9] For sugar to be considered as Fairtrade sugar, the farmer associations, the mill, the seller and the marketer must all be certified as Fairtrade eligible by FTI, which monitors or audits the process globally.

[10] Prior to the impugned regulations, the international buyers entered into contracts with the mills in Belize (mainly BSI) to buy processed sugar. The international buyers also entered into separate contracts with the farmers' associations to pay Fairtrade premiums directly to them. In regard to BSI, the 1st Claimant, TLS was the main international buyer. TLS contracted separately with the farmer association, BSCFA and other associations to pay Fairtrade premiums.

[11] At a recent point in time, prior to the issuance of the impugned regulations, the relationship between TLS and BSCFA broke down and as a result, the contract for payment of Fairtrade premiums to BCSFA by TLS was not renewed. This has caused anxiety among the farmers of BSCFA, the largest farmers' association in Belize. Both TLS and BSCFA are not parties to this Claim. From the pleadings and documents before this court, it is apparent that though they receive no premiums, BSCFA has doubts about whether the sugar produced from sugar cane supplied by them is sold at market as Fairtrade sugar. BSCFA does not receive Fairtrade premiums because they do not have a renewed contract with TLS for payment of the premiums.

[12] The Claimants in their pleadings and their counsel in his submissions stated that BSI consolidates the sugar produced from the sugar cane of all sources including from BSCFA. BSI states however, that there is a record of the quantity of sugar produced from each of the suppliers including that of BSCFA. It was also submitted that as all the sugar produced is not sold as Fairtrade sugar it was possible to exclude the quantity produced by BCSFA in distributing the premiums to other associations. BSCFA was excluded as they do not have a contract for payment of premiums. Thus, for example, it could be possible for three suppliers of sugar cane; one having a Fairtrade premium contract with TLS supplying 10% of the product, the other also having a Fairtrade premium contract with TLS supplying 30% of the product and the third not having a Fairtrade premium contract supplying 60% of the product. All these supplies would be consolidated when the final sugar is produced and sold. In an instance for example where only 40% or less of the consolidated sugar was labelled and sold as Fairtrade sugar, the first two suppliers (whose supply would aggregate to 40 %), would receive the premium as they had

Fairtrade premium contracts with the international buyer. In an instance where less than 40% of the Fairtrade eligible sugar was sold as Fairtrade sugar, the suppliers having contracts with TLS would be paid the premiums allocated in proportion to their supply. The process by which calculation and allocation of premiums is done when sugar is consolidated in such manner is known as 'Mass Balance' according to the Fairtrade Trader Standard (FTS)[1] published by FTI.

[13] The mass balance process was disputed by the respondents who argued that it was impossible once the sugar was consolidated, to state that there was no part of the sugar produced as a result of BSCFA's supply that was sold as Fairtrade sugar in the market. The respondents also submitted that the figures presented by the claimant were not accurate and that more quantity of sugar had been sold as Fairtrade sugar than premiums received.

[14] The premiums at present are paid by TLS and other international buyers directly to the farmers in Belize. As these international buyers could decide not to enter into such contracts with farmers and as the international buyers of sugar are situated outside Belize, they are not regulated by the laws of Belize. As submitted on behalf of the respondents, it was in order to have some means of controlling the payments of Fairtrade premium that the impugned regulations were implemented.

[15] It was also alleged by the respondents in their submissions that TLS and BSI which were companies of the ASR group of companies (an international conglomerate) were colluding to deprive BSCFA of Fairtrade premiums because BCSFA was having disputes with BSI. It was argued that TLS, which is not situated in Belize, by not renewing a Fairtrade premium contract with BCSFA, was forcing the hand of BSCFA to the terms of BSI. It was argued that in order to address this situation, the regulations required the premiums to be payable by the exporter of sugar, acting as a conveyor of the premiums, rather than the international buyers paying directly to the farmers. The regulations also require the exporter of sugar to disclose all its contracts with its international buyers at the point of applying for an annual licence to export and at the point of applying for each individual shipping permit for export of sugar. The respondents argued that this was required for the purposes of transparency. The sanctions for failing to do so include; cancellation of the licence, fine or imprisonment and forfeiture of the sugar.

[1] P.6348, Vol 1, Trial bundle

[16] These regulations are challenged by the claimants on the basis that they are; irrational, *ad hominem* legislation aimed at BSI and its business, violate the right to privacy, the right to work, the right to equal protection of the law and the rule of law and therefore unconstitutional, null and void.

The Regulations Impugned and the grounds of challenge

[17] Regulation 3(1) requires any person who desires to import or export sugar, ethanol or any other derivative of sugar cane, to or from Belize, to apply for a valid licence. Regulation 3(2) is in regard to the form of application for licence to import sugar and regulation 3(3) is in regard to the form for application for a licence to export sugar.

[18] Regulation 3(4) reads as: "*Any person who contravenes this regulation commits an offence and the sugar in connection with which the offence was committed shall be liable to be forfeited and shall be disposed of in such manner as the Minister, or such person as may be appointed by him direct*" [Emphasis added]. The originating motion of the claimants challenged regulation 3(4) as being in violation of the claimant's right to equal protection of the law. The respondents in their pleadings pointed out that the word "*this*" in the regulation, underlined above, made it clear that the forfeiture was restricted to this particular regulation – regulation 3. The respondents stated that the sanction of the regulation applied to an instance where sugar was imported or exported without a licence. At the hearing, senior counsel for the claimants informed court that the claimants were abandoning their challenge to this particular regulation.

[19] **Regulation 5(1)** reads as follows; "*The Minister, or such person as may be appointed by him, shall grant the licence if he is satisfied that –*

(a) The applicant is authorised to and equipped to conduct operations for which the licence is being sought;

*(b) The applicant has **disclosed copies of import or export contracts** which indicate the specific purpose for which the licence is being applied for and which specifies the period within which operations are to take place; and*

(c) *The applicant is a fit and proper person"*. [Emphasis added]

The claimants take issue with **regulation 5(1) (b)** which requires the disclosure of import export contracts in order to obtain an export licence, stating that it violates the right to privacy and protection of the law.

[20] **Regulation 5(2)** reads as follows; *"Where the applicant enters into a contract to sell certified sugar, the applicant shall disclose, when making an application for a licence, a detailed report of –*

*(a) The total amount of **certified sugar** or other derivatives of sugar cane contracted to be sold for each transaction of exporting sugar, and*

(b) *Any premiums or benefits **due to** **each certified producer** according to the volume of production of sugar cane delivered by each certified producer"* [Emphasis added]

The claimants challenge regulation 5(2) in its entirety on the grounds that it is impossible to give these figures at the time of applying for a licence as the premiums are calculated and paid after the sale of sugar as Fairtrade sugar on the market. The claimants state that these sales in the international market are beyond its control and the figures are not known at the time of contracting and applying for a licence. The respondents did not dispute the fact that at the point of export, the sugar is only 'Fairtrade eligible' sugar and that the actual amount of Fairtrade sugar sold on the market upon which premiums would be calculated would be known at a later point in time to that when the licence is applied for. Senior Counsel for the respondents however, justified the regulation on the basis that the words 'due to each certified the producer' (emphasized above), referred to past dues.

[21] **Regulation 11** reads as follows; "*Where a licence is granted, the licensee shall apply and obtain, in addition to the licence, a shipment permit in accordance with regulation 20, **for each** importation or exportation shipment of sugar or any other derivative of sugar cane the licensee engages in within the one calendar year validity period of the licence*" [Emphasis added]. The claimants argue that the requirement to obtain a permit for each and every shipment of sugar serves no legislative purpose, is disproportionate and oppressive and is in breach of the claimant's right to protection of the law.

[22] **Regulation 16** reads as follows; "*16(1) Where the licensee enters into a contract to purchase or process certified sugar cane from a certified producer and to sell certified sugar or any derivative or by-product of sugar cane that earns a premium or any other benefits for the certified producer, the licensee shall–*

(a) collect all proceeds, premiums or other benefits from the total volume of certified sugar or any derivative or by-product sold to buyers; and

(b) distribute any premiums or other benefits on a quarterly basis to certified producers to which premiums are due based on the respective volume of sugar cane delivered to the licensee by each certified producer.

(2) *The licensee may deduct any respective or applicable bank charges of the premium or other financial benefits from the amount being remitted to the respective certified producers.*

(3) *Failure to pay the respective premium or benefit in accordance with this regulation shall result in an immediate revocation of a licence.*"

The claimants challenge regulation 16(1) (a) and (b) as being unreasonable by imposing a compulsory requirement for the claimants to collect and distribute premiums and/or benefits which is beyond their control. The claimants also allege that the premiums are paid by third party buyers and the claimants would have no means of compelling the buyers to provide the benefits/premiums to them for collection and distribution. The claimants allege that in these circumstances, regulation 16(3) is unreasonable, not proportionate, discriminatory and in violation of the right to protection of the law, as it imposes a sanction of immediate cancellation of the licence for non-compliance of regulation 16(1), when compliance with those requirements are beyond the control of the claimants. The claimants also argued that regulation 16(1) read with regulation16 (3) was in violation of the claimant's right to work.

[23] **Regulation 21** reads as follows; "*21(1), The Controller of supplies shall grant a shipping permit if he is satisfied that –*

(a) The applicant is in possession of a valid licence granted in accordance with regulation 3; and

(b) *The applicant has disclosed all import or export contracts and reports required under regulation 5.*

The claimants challenge this regulation on the basis that a shipping permit could only be granted if there is compliance with regulation 5, which was onerous and impossible to comply with and that it therefore violates the claimants' constitutional rights.

[24] **Regulation 22** reads as follows; "*Where sugar is being exported, the licensee shall disclose to the Sugar Industry Control Board and to the association or producer from which it receives sugar cane for processing into sugar for exportation, **all copies of contracts** between the licensee and its buyers for any product for which the licence and shipment permit is granted*" [Emphasis added]. The claimants read regulation 22 with regulation 5(1) and state that the requirement of disclosure violates the right to privacy and protection of the law.

[25] **Regulation 24** reads as follows; "*Any person found acting in contravention of these Regulations shall be punishable on summary conviction by a fine not exceeding five thousand dollars, or by imprisonment not exceeding six months, or by both such fine and period of imprisonment, and in addition, by a fine of five hundred dollars for every day the offence continues*". The Claimants argue that this regulation is unconstitutional in so far as it provides additional penalties for non-disclosure of contracts required of regulations 5(1) read with regulation 22 and non-compliance with collection and distribution of premiums required by regulation 16, which the claimants state are unconstitutional requirements mandated by the regulations.

Submissions on behalf of the claimants

[26] The claimants state that the entirety of the regulations has been made targeting BSI, the 1st claimant, as it is the only company in Belize having a mill that processes and exports sugar. It was submitted that BSI and its predecessor had been farming and exporting sugar successfully for over 50 years with no regulatory issues and had done so under the Sugar Industry Act and the Supplies Control Act, which together provided an adequate regulatory system for the industry.

[27] The claimants argued that the purpose of the new regulation was to compel BSI to disclose its contracts and to compel it to collect and distribute premiums. The claimants were of the view that the regulations were entirely to benefit the BSCFA and was politically motivated as the farmers constitute a large voter base.

[28] The claimants submitted that in these circumstances the regulations were *ad hominem* legislation and that *ad hominem* legislation is unconstitutional and ought to be stuck down. The claimants cited the

Privy Council decision of ***Liyanage v. R*** [2] as an example of *ad hominem* legislation being struck down by court. The claimants also relied on the Canadian decision of ***R v. Morgentaler***[3] for the principle that the court in examining the vires of legislation should look at the substance of legislation and not only its form. The claimants commended the following passage from that case for the attention of court;

> *"In any event, the colourablility doctrine really just restates the basic rule, applicable in this case as much as in any other, that form alone is not controlling in the determination of constitutional character, and that the court will examine the substance of the legislation to determine what the legislature is really doing… under either the basic approach to pith and substance or the "colourability doctrine", therefore, we need to look beyond the four corners of the legislation to see what it is really about.."*[4]

[29] While the claimants conceded that the regulations do not purport to be a measure of judicial interference as in the case of **Liyanage**, they argue that if the regulations flout fundamental constitutional principles such as the rule of law, it ought to be struck down. The claimants referred to the case of ***Belize International Services Limited v. Attorney General of Belize***[5] in support of the argument that separation of powers and the rule of law was part of the deep structure of the Belize constitution. It was submitted, therefore, that if the regulations were contrary to the rule of law they ought to be struck down. The claimants emphasised paragraph 305 of that judgment which reads as follows;

> *"[T]he rule of law signifies that all actors in our society – public and private, individual and institutional- are subject to and governed by law. The rule of law excludes the exercise of arbitrary power in all its forms. It requires that laws…are applied consistently to each citizen, without favouritism thus ensuring the legitimacy of state exercise of power*."

The claimants therefore urged that the entire regulation be struck down on the basis that it was an arbitrary and colourable regulation specifically targeted at BSI and in favour of BSCFA and therefore contrary to the rule of law.

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[2] [1967] 1 AC 259
[3] [1993] 3 SCR 463
[4] [1993] 3 SCR 463, p. 496-497
[5] [2020] CCJ 9 (AJ) BZ

[30] It was also submitted by the claimants that the regulations in their entirety should be struck down on the ground of bias, as the Minister who was responsible for the regulations is a member of BSCFA, and that the regulations were made in favour of BSCFA[6].

[31] The claimants also challenged the regulations individually. Regulations 5 and 22 were challenged on the grounds that they required disclosures of a private nature by requiring BSI to disclose all its commercial contracts, which they were entitled to keep confidential. Senior Counsel for the claimants referred to the decisions of ***Niemietz v. Germany***[7] and ***Societe Colas Est and others v. France***, decided by the European Court of Human Rights as instances in which activities of a business nature were encompassed in the right to privacy. It was pointed out that companies too were held to have the right to privacy and protection from invasion of its documents. Cases on this point cited from other jurisdictions included ***Magajane v. Chairperson, Northwest Gambling Board and others***[8] decided by the Constitutional Court of South Africa which referred to the tests of public interest and proportionality when considering legislation that would invade privacy. ***Digital Ireland Limited v. Minister for Communications and others***[9] was cited for the proposition that the right to privacy extended to companies in the protection of their commercial information and business negotiation and that commerce and industry could not survive if access to such information was freely granted. It was further submitted that the right to privacy of a legal entity had been recognized in Belize by the decision of ***Titan Securities v. The Attorney General of Belize***[10] and that this decision had been affirmed in appeal by the Caribbean Court of justice.

[32] As regards to the tests for permissible limitation, the claimants cited the Canadian case of ***R v. Oaks***[11] and the Jamaican case of ***Julian Robinson v. Attorney General of Jamaica***[12]. Citing the Oaks case, counsel submitted that any restriction on rights needed to; firstly, be sufficiently important to warrant the restriction (proper purpose); secondly, measures taken must be rationally related to that purpose; thirdly, freedoms must be impaired as little as possible (least intrusive measures); and fourthly, the measures in their entirety must be proportional. The claimants submitted that the regulations did not

[6] Paragraph 11, Originating motion, p. 5850, Vol I. Trial bundle
[7] [1992] 16 EHRR
[8] [2006] 5LRC 432 and
[9] [2010] IEHC 211
[10] Claim No. 700 of 2014, decided on 21st January 2016
[11] [1986] 1 SCR 103
[12] [2019] MFC 04

meet the criteria set out in the Oaks case; that there was no public interest in the intrusion of the affairs of BSI, that the regulations did not have a rational connection to the object sought as they were onerous on BSI and impossible to comply with. It was further submitted that the regulations were not the least intrusive measure and that the effects of the measure were disproportionate as immediate revocation of the licence and forfeiture of sugar for non-compliance were excessive and detrimental to BSI.

[33] It was also submitted on behalf the claimants that regulation 16 was onerous and impossible to comply with and that therefore it was irrational and unreasonable and contrary to the rule of law. Attention of court was drawn to the cases of ***Maya Leaders Association v. Attorney General of Belize***[13]***, Lucas & Carillo v. Chief Education Officer et al***[14], ***Attorney General of Barbados v. Joseph Boyce***[15] and ***Nevis and Severin v. the Queen***[16] as instances in which the rule of law was recognized by court to be a concept fundamental to the notion of justice, that it is a free standing right where no other right is available against the arbitrary exercise of power. The claimants also submitted that the rule of law is also encompassed in the state's international obligations.

[34] It was submitted on behalf of the claimants, that regulation 16, breached the right to work, guaranteed by section 15(1) of the Belize Constitution. Section 15(1) of the Constitution states 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*". It was submitted that regulation 16, by requiring BSI to collect and distribute premiums; a requirement that was onerous or impossible for BSI to comply with, taken together with the penalty for non-compliance which is immediate revocation of the licence, in effect precluded BSI from its right to work.

[35] The claimants cited the cases of ***H.T.A. Bowman Limited & Others v. the Attorney General***[17], and ***Belize Petroleum Haulers Association v. Daniel Habet & Others***[18] in support of the position that the claimants' right to work was denied by the regulations in general and particularly by regulation 16. In the former case, the requirement to join a fruit growers association under the Citrus (Processing and Production) Act had been found in violation of the right to work, while in the latter case, requiring a

[13] [2015] CCJ 15 (AJ), para 47
[14] [2015] CCJ 6 (AJ), para 138
[15] [2006] CCJ 1 (AJ), para 60
[16] [2018] CCJ 19 (AJ), para 52
[17] Claim No.730 of 2009, decided on 13th May 2010
[18] Civil Appeal No.20 of 2004, decided 24th June 2005

recommendation from the Belize Petroleum Haulers Association before a licence could be issued was held to be an unwarranted restriction on the right to work. The claimants contrasted these cases with the cases of ***Fort Street Village Tourism v. Attorney General of Belize and Others***[19], ***Caribbean Investment Holdings Limited v. Attorney General of Belize***[20] *and* ***Courtney Coye LLP v. Attorney General of Belize***[21]. In the Fort Street Village Tourism case, the court had ruled that inconvenience alone was insufficient to amount to a denial of the opportunity to gain a living, while in the latter two cases, the court held that there is no violation of the right to work if the right to work is merely limited and not denied. It was submitted for the claimants that the regulations in issue in this case fell squarely within the ambit of the decisions in the cases of H.T.A. Bowmen and the Petroleum Haulers Association.

[36] The claimants also submitted that the regulations contravened Belize's international obligations under the General Agreement on Tariffs and Trade (GATT) as the regulations could be construed to be a non–tariff barrier to trade. In support of this argument, the World Trade Organisation (WTO) Panel decision in ***China- Raw Materials***[22] was cited as an instance in which onerous amounts of documents required to obtain a licence were found to be inconsistent with Article XI: I of the GATT. The claimants submitted however, that they were not asking this court to make a determination that the regulations were incompatible with the GATT obligations of Belize, but that the GATT obligations are relevant factors that the court ought to consider when considering the reasonableness of the regulations and the proportionality of the sanctions.

[37] The claimants finally drew attention of court to the doctrine of severability in regard to striking down the regulations. It was submitted that even if the court finds that the regulations as a whole are not inconsistent with the Constitution, individual regulations may be severed and declared unconstitutional. In support of this position, the claimants cited the case of ***The Attorney General v. Zuniga et al***[23], and the Privy Council decision of ***Hinds v. R***[24] in which Lord Diplock referred to the test of severability laid down in ***Attorney General for Alberta v. Attorney General for Canada***[25], formulated as;

[19] [2008] 78 WIR 133
[20] Claim No.66 of 2017, decided on 25th July 2022
[21] Claim No. 77 of 2017, decided on 25th July 2022
[22] China- Raw Materials, Panel Reports, paras 7.957-7.958
[23] [2014] CCJ 2 (AJ)
[24] [1975] 24 WIR 326
[25] [1947] AC 503, 518

"The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter, it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

The claimants therefore, urged that, firstly; the entire regulations should be struck down as unconstitutional on the basis that it was *ad hominem* legislation targeted at BSI and secondly; in the alternative, that the individual regulations impugned could and should be severed and declared as unconstitutional as they were unreasonable, disproportionate and not compatible with the principles of permissible limitations set out in the case of ***R. v. Oaks*** commonly referred to as, the Oaks test.

Submissions on behalf of the Respondents

[38] The Respondents submitted that the Sugar industry was important to Belize as it contributed 14% to the GDP, and is an important export industry and provided employment to many persons. It was submitted that there had been several disputes between BSI and BSCFA in the past which disrupted the sugar industry and that the Government had to intervene on many occasions to bring about peace. It was further submitted that a majority of the sugar cane farmers were from the BSCFA and that there was unease among these farmers in regard to the distribution of the Fairtrade premiums. Counsel submitted that this was the underlying reason for the regulations; to bring about transparency in the distribution of the premiums and to bring about peace between the farmers and the BSI. It was the position of the respondents that the Government was entitled to intervene to bring about peace in the industry. In the words of Senior Counsel, *"when two elephants are fighting, the government has to intervene".* It was submitted that the regulations were justified as an instrument of intervention to settle the issues of the distribution of Fairtrade premiums to farmers.

[39] Considerable emphasis was placed by Senior Counsel for the respondents in his submissions that though the claimants submitted that BSI and TLS were two separate companies, they were in fact acting in concert in regard to the distribution of the Fairtrade premiums. It was pointed out that although there were no accounts presented to demonstrate related party transactions, there was evidence to show that both BSI and TLS were subsidiaries of the ASR Group of Companies. Counsel for the respondents referring to BSI and TLS used the metaphor of "siblings of the parent, ASR", with one acting to protect the other. Attention of court was drawn to the letterheads of both BSI and TLS; that

they both had the same ASR Logo and the same business theme of the ASR group; "*making life a little sweeter*", set out at the bottom of their letters[26] to indicate that they were in fact, part of the same organization.

[40] It was further submitted for the respondents that TLS was engaged in twisting the arm of BSCFA to agree to the terms of BSI. It was submitted that, when BSCFA had an issue with BSI, TLS would inform BSCFA that it would not renew its contract with BSCFA for payment of Fairtrade premiums unless BSCFA had a better relationship with BSI. This position, it was submitted, demonstrated that BSI and TLS were acting in concert rather than at arm's length. In this regard, counsel drew attention of court to BSI's letter dated 14th March 2022[27] addressed to the Prime Minister. Court was also referred to the letter of TLS dated 26th May 2023[28] written to BSI, whereby, TLS states that it requires higher standards from BSCFA than is required by Fairtrade Trader Standard. Counsel specifically drew attention to the paragraph in the letter which reads as;

> *"As you are aware, we are in discussion with the BSCFA (with the support of Fairtrade International) to agree some principles which will support a renewed relationship with agreed joint goals and a commitment to progress. The same principles have been shared with BSI and the other SPOs, and all but the Northern and BSCFA have agreed to comply.* ***BSCFA complains that the principles go beyond the requirements of the Fairtrade standard; they do, but our position is allowed under the Fairtrade rules and the principles we propose are reasonable and important to us. I think, given the difficulties of recent years, to have agreed rules of engagement will be useful***." [Emphasis added]

Counsel submitted that the above passage demonstrated that the intention of TLS was to have BSCFA agree to the terms of BSI, in the guise of having BSCFA comply with Fairtrade standards. It was argued that TLS was seeking to enforce higher standards merely to deny BSCFA of Fairtrade premiums "*due to the difficulties in recent years*", which was a reference to disputes BSCFA was having with BSI. Counsel referred to these dealings of TLS as an "iron hand sheathed in a velvet glove".

[26] Letter of BSI dated March 27, 2023 at p. 6405 of Volume 2 of the Trial bundle compared with TLS dated 12th July 2023 at p.6267 of Volume 2 of the Trial bundle.
[27] P. 6391, Vol 2 of the Trial bundle
[28] P.6274, Vol. 1 of the Trial bundle

[41] It was also submitted that although BSI was the buyer of sugar from BSCFA, TLS in its correspondence with BSCFA clearly indicated that it was the real buyer of sugar. Counsel referred to the letter of 10th January 2023[29], written by TLS to representatives of BSCFA and more specifically to the sentence therein which read; "*Tate & Lyle Sugars, reserves the right to buy Fairtrade sugar from producers with whom we share values with and with whom we can work to implement improvements*…" [Emphasis added]. Attention of court was drawn to the fact that this letter written to members of BSCFA was in fact produced with the affidavit of Mr. Shawn Chavarria submitted in support of the Claim of BSI. Mr. Chavarria in his first affidavit explains the circumstances leading to this letter, when he states at paragraph 45 of this affidavit that; "*TLS came to the decision not purchase Fairtrade sugar from BSCFA when it heard about the barricade of the First Claimant's mill in 2021 and intimidation of its employees. Indeed the First Claimant informed TLS of this developmen*t...". It was submitted, therefore, that these circumstances demonstrated a close collaboration between BSI and TLS.

[42] Counsel went to great lengths to demonstrate this relationship between BSI and TLS to impress upon the court that the regulations were not unreasonable or impossible to comply with as both BSI and TLS were in fact interconnected by the ASR group. It was submitted that the requirement of the regulations to have BSI act as the conveyor of the premiums was both reasonable and possible because TLS and BSI had a close collaboration and because it was TLS that was really buying the sugar through BSI. It was further submitted that if TLS and BSI were acting in good faith, it could convey the Fairtrade premiums.

[43] In regard to the matter of the claimants' allegation that the regulation was *ad hominem* legislation targeted at BSI, it was submitted on behalf of the respondents that *ad hominem* legislation was not *per se* unconstitutional. It was submitted that decisions such as ***Liyanage v. R*** were based on the principle of separation of powers, where judicial discretion had been taken away by the legislature and that no such issue arose with these regulations. The Privy Council decision in ***Ferguson v. Attorney General of Trinidad and Tobago***[30] was also cited in support of this proposition. It was further submitted that the case of ***Attorney General v. Zuniga*** held that the law enacted with particular persons in mind did not offend the *ad hominem* principle, provided that the laws were of general application. Therefore, it was the position of the respondent that while the regulations may have been made with a view to

[29] P.5896, Vol 1 of the Trial bundle
[30] [2016] 2 LRC 621

addressing the issues of BSI, TLS and BSCFA, this does not make it fall foul of the constitutional principle of the separation of powers nor in any manner deprive the judiciary of its judicial powers.

[44] The respondents also referred to the case of ***Belize Bar Association v. AG of Belize***[31] to support the position that the basic structure doctrine in regard to the Belize constitution had not been recognized by the Court of Appeal. The respondents submitted that while the Caribbean Court of Justice (CCJ) in ***McEwan and others v. AG of Guyana***[32] and ***Sabapathee v. State***[33], recognised the rule of law as a separately justiciable ground for impugning legislation, the Privy Council in the decision of ***Chandler v. The State***[34] had rejected this argument. Therefore, the respondents argued that the 'rule of law' as an independent ground of challenge was still in its infancy and that the court ought not to, in the absence of any clear direction by the CCJ on the supra constitutional nature of rule of law, decide matters thereon, but instead focus on whether the regulations were arbitrary or biased.

[45] Addressing the arguments of the Claimants in regard to the biased nature of the regulation as the Minister is a member of the BSCFA, the respondents submitted that the Minister is a mere member of BSCFA and that the regulations were made in the public interest. Counsel relied on the UK Supreme Court case of ***R (HS2 Action Alliance) v. Secretary of State***[35] which referred to ***Franklin v. Minister of Town and Country Planning***[36] in which it was held that;

> *"... there is no universal rule requiring that decision-makers must possess the independence and the impartiality required of a court or tribunal: it is necessary to take account of the constitutional position of the decision-maker, and of the nature of the decision*."

The respondents also cited the Canadian case of ***Imperial Oil v. Quebec***[37] and the Australian case of ***Minister for Immigration and Multicultural Affairs v. Jia***[38], in support of this postulate. Hence, it was argued that the regulations could not be found fault with on the ground of bias, merely because the Minister is a member of the BSCFA.

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[31] [2017] CCJ 4
[32] [2018] CCJ 30
[33] [1999] 4 LRC 403
[34] [2022] UKPC 19
[35] [2014] PTSR 182
[36] [1948] AC 87
[37] [2003] SCJ No 59
[38] [2001] HCA 17

[46] In regard to the claimants' arguments as to permissible limitations, the respondents submitted that in addition to the decision in ***R v. Oaks***, the court also ought to have regard to the decisions of ***British Caribbean Bank v. AG of Belize***[39] and ***Suarj v. AG of Trinidad and Tobago***[40]. The respondents cited the case of ***Suraj*** in support of the proposition that the proportionality test applied by the court respects the legislature's judgement and recognises that it is not for the court to determine what is in the public interest.

[47] In regard to the claimants' argument of right to privacy challenging regulations 5, 21 and 22, the respondents sought to distinguish the cases cited by the claimants. It was submitted that the cases of ***Niemietz*** and ***Societe Colas Est*** decided by the European Court of Human Rights were consistent with Article 8 of the European Convention on Human Rights which was wider in scope than the right to privacy in sections 3 and 14(1) of the Belize Constitution. It was argued that this was also the case in regard to the South African decision of ***Magajane***, as the South African right to privacy under their constitution was far more expansively worded. In regard to the case of ***Titan Securities***, a case decided in Belize, it was argued for the respondents that this case was restricted to unreasonable and excessive searches and did not extend to the disclosure of contracts as was required by the regulations. It was submitted, therefore, that the extensive rights of privacy guaranteed to individuals did not automatically extend to artificial entities or legal persons.

[48] Developing the argument further, it was submitted for the respondents that BSI had disclosed its contracts to the farmer associations and that once disclosed, it lost its character of being private. The respondents referred to Mr. Chavarria's affidavit in reply where he states that BSI discloses its sales contract for associations to verify prices received[41] and that if required, the respondents could ascertain the terms of these contracts from the associations[42]. In support of this argument, the respondents cited the House of Lords decision of ***AG .v Observer Ltd.***[43] in which it was held that for information to attract the right of privacy, the information must not be public knowledge nor in the public domain and to be confidential, the information must have the basic attribute of inaccessibility. Therefore, the respondents

[39] Civil Appeal 30 of 2010
[40] [2022] UKPC 36
[41] Paragraphs 20, 37 and 47 of Mr. Chavarria's third affidavit.
[42] Paragraphs 20 of Mr. Chavarria's third affidavit.
[43] [1990] 1 AC 109, 215

argue that Regulations 5(1), 21 and 22 cannot breach the right to privacy as BSI's export contracts are already shared with the associations.

[49] The respondents also justified the interference with the privacy of contracts on the basis of public interest. The respondents suggested that the regulator is required to be informed of these contracts to verify the figures. It was also argued that the disclosure of contracts was aimed at removing the distrust between BSI and the BSCFA, whose troubled relationship had threatened the sugar industry in Belize. Therefore, it was submitted that disclosure of BSI's contracts would resolve their differences and mistrust of each other and it would be in the public interest to do so.

[50] It was submitted that the impossibility argument advanced by the claimants in regard to the disclosure of Fairtrade premiums was inaccurate. In regard to the claimants' argument that the premiums are paid by TLS when the sugar reaches the market and would not be known by BSI at the time of applying for the licence, the respondents countered; stating that regulation 5(2) (a) only required the disclosure of amounts of sugar already contracted for export. The respondents also submitted that regulation 5(2) (b) related to disclosure of premiums due from the applicant to a certified producer and that if nothing was due or the information was not available, the applicant could say so in its report. Senior Counsel for the respondents in his oral submissions suggested that the word "due" in regulation 5(2) (b) referred to "due" in the past tense. Hence, it was submitted that the argument of impossibility of disclosure advanced by the claimants was misconceived.

[51] The respondents also argued that regulation 16 was designed to have the exporter of sugar, act as the conveyor of the premiums. It was stressed that this requirement was in the public interest. It was also argued that compliance with this regulation was not an impossible task given the factual circumstances of the close relationship between BSI and TLS and the requirement of all parties to act in good faith.

[52] It was further argued, that on the basis of the legal maxim, "*lex non cogit ad impossibilia*" (which means that the law does not recognize that which is impossible), if the information was impossible to obtain, then there is no issue of non-compliance. The respondents cited the authority of ***R (Obo warden and Fellows Winchester College) v. Hampshire County Council***[44] in support of their argument.

[44] [2009] 1 WLR 138

[53] It was suggested by the respondents that, the proper course of action for the claimants if there was an adverse application of the regulations, was to, on a case-by-case basis, move for judicial review and not pursue a constitutional motion. In support of this argument, the respondents cited ***Lucas v. Chief Educational Officer***[45]. The court's attention was drawn to a passage from that judgement, which reads;

> "...*Courts will frown on the filing of a constitutional Motion in lieu of a judicial review action when the latter is perfectly capable of yielding all the relief the litigant requires. Proceeding by constitutional Motion may well be an impermissible strategy either for unfairly jumping the litigation queue or evading the scrutiny of judicial review judge charged with filtering out groundless or hopeless cases. A similar principle is applied where the litigant has adequately recourse to private law but chooses to proceed by way of constitutional Motion. In these instances, the courts will entertain a constitutional action only if the circumstances disclose some "special feature" that justifies going beyond private law remedies invoking the constitution*."

The respondents therefore submitted that any challenge to the constitutionality of regulations 5, 16, 21, 22 and 24 on the basis of impossibility of compliance was premature and ought to be rejected.

[54] In regard to the claimants' argument that the regulations infringed the right to work given by section 15 of the Constitution, the respondents reiterated that the argument of impossibility does not arise. It was submitted that the cancellation of the licences or the forfeiture of the sugar would arise only if premiums were collected and not distributed and not if premiums were impossible to collect. Further, the respondents distinguish the cases of ***H.T.A Bowman*** *and* ***Belize Petroleum Haulers*** on the basis that in those cases there was a precondition that required the applicant of a licence to be a member of an association. It was submitted that in the instant regulations, there are no preconditions, therefore, there is no restriction on the right to work.

[55] The respondents finally submitted that adverse consequences for non-compliance are common in most regulations and that this is done to ensure compliance with regulations which are in the public interest. It was therefore contended that the claimants have failed to demonstrate that the regulations as a whole or in part, are unconstitutional. The respondents therefore urged the dismissal of the claimants' originating motion.

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[45] [2015] CCJ 6 (AJ)

Analysis of the matters in issue

Allegations of bias

[56] The regulations impugned are subsidiary legislation. The Regulations are made by the Sugar Industry Control Board with the approval of the Minster, in terms of section 73 of the Sugar Industry Act[46]. The ambit of the regulations as set out in Section 73 (1) of the Act is for "*the control of the sugar cane industry and for giving better effect to the provisions of this Act*".

[57] In terms of Section 73 (3) of the Sugar Industry Act, all regulations made under that section are to be laid before the National Assembly as soon as possible and subjected to negative resolution. The regulations are therefore made by the SCIB, approved by the Minister and placed before the National Assembly for assent. The regulations were published in the gazette on 16th May 2023 and laid before the House on 19th May 2023[47].

[58] The SCIB is composed of a senior member of the Ministry or his nominee, the Chief Agricultural Officer or his nominee, one representative each of the associations, three representatives of the manufacturers, two suitably qualified persons in agriculture, business management or finance having no direct connection to the sugar industry appointed by the Minister at his discretion, one member nominated jointly by the manufacturers and the associations or if they are unable to agree the appointment is made by the Minister, and a representative from the Ministry of Finance[48].

[59] In this background, the fact that the Minister is a member of the BSCFA is insufficient to establish bias for the regulations. The claimants submitted that the composition of the SCIB was stacked with the Minister's appointments and therefore, likely to be biased. The mere fact that some of the members of the Board are appointed by the Minister, is insufficient to establish bias on the test of a real likelihood of bias. In terms of this test, what is required to be seen is whether a reasonable man, in possession of the facts, would come to the conclusion that there is bias or prejudice. A mere possibility of bias, surmise or conjecture is insufficient to establish bias[49]. In terms of section 5(2) of the Sugar Industry Act, the nominees of the Minister appointed at his discretion are required to not have any direct

[46] Cap. 283, Revised Laws of Belize
[47] Paragraph 79 of the Affidavit of Porfirio Marcus Osorio, Chairman of the SCIB, p.6326 Vol 2 Trial bundle
[48] Section 5(2) of the Sugar Industry Act.
[49] Porter v. Magill [2002] 1 All ER 645, R. v. Gough [1993] All ER 724 (HL) and Halliburton v. Chubb [2020] UKSC 48.

connection with the sugar industry. This is in order to maintain their neutrality to any issue arising between the manufacturers and the associations. There is therefore a balance in the composition of the SCIB, between officials of the government who are ex-officio members of the Board, representatives of the manufactures and the associations as well as nominees of the Minister.

[60] I am also persuaded by the authority of ***Franklin v. Minister of Town and Country Planning***[50] cited by the Respondents which is to the effect that non-judicial decision-makers do not have to possess the independence and the impartiality required of a court or tribunal. Therefore, in the absence of cogent evidence of bad faith, I reject the argument that the regulations as a whole should be stuck down on the basis of bias.

***Ad hominem* legislation**

[61] Senior Counsel for the claimants and respondents had no difference in position that the impugned regulations were enacted in the main, to have BSI, the main exporter of sugar disclose its contracts and for BSI to act as conveyor of the Fairtrade premiums to the associations.

[62] Looking at the substance of the regulations and what they seek to do; following the approach of the Canadian case of ***R v. Morgentaler*** which required a court to look beyond the four corners of the legislation to see what it is really about; it is apparent that the regulations at the time of their formulation had BSI in mind. This is apparent because, the chairman of the SCIB, Mr. Osorio, in his affidavit states that there are only two sugar mills in Belize: BSI and Santander, of which BSI is the oldest and with Santander starting operations in 2016. He then confirms that Santander's model is different as it cultivates a majority of its own sugar.[51] He goes on to state that BSI has a monopoly in the purchase of sugar cane from small farmers[52]. He also goes on to state that all legislation relating to the sugar industry in recent memory has specifically provided for BSI[53]. As examples, he cites the repealed Sugar Industry Control Act and section 61 of the present Sugar Industry Act.

[50] [1948] AC 87
[51] Paragraphs 12 and 13 of the affidavit of Porfirio Marcus Osorio.
[52] Paragraph 14 of the affidavit of Porfirio Marcus Osorio.
[53] Paragraph 15 of the affidavit of Porfirio Marcus Osorio.

[63] The regulations, therefore, have the flavour of *ad hominem* legislation. That finding, however, is insufficient ground to strike down the regulations. For laws or regulations to be stuck down as *ad hominem* legislation it should in some manner offend the constitution of Belize. Section 68 of the Belize constitution empowers the National Assembly to make laws for "*peace, order and good government*". This phrase is common in several constitutions of countries that have had their constitutions handed to them through imperial Britain. The phrase "*peace, order and good government*" has also come under judicial scrutiny in several jurisdictions including, Australia, Ceylon, Canada and also by the Privy Council and the House of Lords.

[64] In ***Ibrelebbe v. The Queen***[54], the Privy Council in interpreting this phrase in the Constitution of Ceylon, held that it gave the widest law-making powers appropriate to the Sovereign. However, in another case from Ceylon, ***Liyanage v. R***, the Privacy Council took the view that if legislation took away the powers of judicial discretion, it would offend the doctrine of separation of powers which was a fundamental feature of the Constitution and therefore be liable to be struck down. In a more recent development in the House of Lords in ***R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex-parte Bancoult (no 2)***[55], it was held that the phrase, "*peace, order and good government*" gave wide plenary powers to the legislature even to the extent of removing all inhabitants from a land. The legislation involved was an Ordinance made by the Commissioner of the British Indian Ocean Territory, expelling the entire population of the *Chagos* archipelago to make way for the US Military base at Diego Garcia. That judgement has also been approved by the UK Supreme Court[56]. The case of ***Attorney General v. Zuniga***, decided by the Caribbean Court of Justice has also deferred to the wide powers of Parliament to enact laws.

[65] The regulations themselves are subsidiary legislation and therefore, liable to be struck down if found to be unconstitutional. A perusal of the regulations as a whole does not indicate that it place any fetter on judicial functions or creates any offences which are beyond the scope of judicial scrutiny. As held in the case of ***Liyanage*** and cited by Lord Sumption in ***Ferguson v. Attorney General of Trinidad and Tobago and Others***[57], '*not every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power*'. I, therefore, hold that even though

[54] [1964] AC 900
[55] [2008] UKHL 61
[56] [2016] UKSC 35
[57] [2016] UK PC 2

the purport of the regulations may be directed towards BSI- the 1st claimant, it does not cross the threshold to interfere with or disturb the separation of powers under the Constitution or impinge on judicial functions. Therefore, the argument of the claimants that the regulations should be stuck down as a whole as it is *ad hominem* legislation, fails.

Regulation 3(4)

[66] The claimants in their originating motion have sought a declaration that regulation 3(4) is in violation of their right to equal protection of the law. Regulation 3 requires any person who wishes to import or export sugar to apply for a valid licence. Regulation 3(4) is a penal clause that states that any person who contravenes that regulation, i.e. who imports or exports sugar without applying for a licence is liable to have the sugar in connection with the licence forfeited. Senior counsel or the claimants, at the hearing, abandoned the challenge to this regulation.

[67] It is noted that in any event, section 57(1) of the Sugar Industry Act requires every person who imports and exports sugar to have a valid licence. Further, Section 58(3) of the Sugar Industry Act, also imposes forfeiture of the sugar or any derivative thereof sought to be imported or exported without a licence. Regulation 5(3) is couched in the same language and tenor as section 58(3) of the Act. Therefore, I see no real objection to this regulation and any objection thereto, is rejected.

Regulations 5(1) (b), 21 (1) (b) and 22 - The right to privacy

[68] Regulation 5(1) (b) requires an applicant for a license to disclose copies of contracts which indicate the specific purpose for which the licence is being applied for. Regulation 21(1) (b) relates to the issuance of a shipping permit conditional upon the applicant having disclosed all import or export contracts required under regulation 5. Regulation 22 is specifically directed to exports and requires the licensee to disclose to the SCIB and the association or producer from which it receives sugar cane for processing into sugar for exportation, all copies of contracts between the licensee and its buyer for any product for which the license and shipment permit is granted. The challenge to these regulations is that the regulation requires disclosures by the claimant which it is alleged is an infringement of its right to privacy under the constitution.

[69] Section 14(1) (a) of the Constitution prohibits arbitrary, or unlawful interference with privacy, family, home or correspondence. Section 14 (2) of the Constitution, permits limitations to this right, provided

the interference with privacy is in accordance with section 9 (2) of the Constitution which relates *inter alia* to defence, safety, public order, public morality, public health, protecting the right and freedom of others, or for officials or agents of government to enter premises to inspect it for the purpose of tax, rates or dues etc.

[70] Section 3 (c) of the Constitution states that every person in Belize is entitled to the protection of his family life, his personal privacy, the privacy of his home and other property and recognition of his human dignity. The word 'person' in both, section 3 and section 14 of the Constitution, would include a legal person or a legal entity and not merely be restricted to natural persons.

[71] This position is not in dispute; counsel for both the claimant and the respondent conceded that the right to privacy in Belize extends to legal entities/ corporate bodies and has been judicially recognised in the case of ***Titian International Securities v. Attorney General of Belize***[58]. In that case, what was in issue was the search of the business premises of the claimant and the seizure of property. The search and seizure were occasioned by a request for mutual legal assistance under the Mutual Legal Assistance and International Cooperation Act. The cases of other jurisdictions cited by the claimant such as ***Niemietz v. Germany***, ***Society Colas Est and Others v. France***, ***Magajane v. Chairperson, Northwest Gambling Board and others*** as well as ***Digital Ireland Limited v. Minister for Communications and others***, relate to searches or legislation permitting searches of corporations. The courts in those respective countries have recognised the right to privacy to extend to corporate bodies, holding that they too were protected from unlawful or arbitrary searches. The courts have struck down legislation in that regard if it was too broad or not in the public interest.

[72] What is relevant in the instant matter, however, is to ascertain if the content of the right to privacy of legal entities differs from individuals and if so, whether it would make any difference to the challenge of the impugned regulations.

[73] Article 17 of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right to privacy thus; "*17(1) No person shall be subjected to arbitrary or unlawful interference with his privacy, family or home or correspondence nor to unlawful attacks on his honour and reputation. 17(2) Everyone has the right to protection of the law against such interference or attacks*".

[58] Claim No. 700 of 2014

[74] States that are signatories to the ICCPR have in various forms recognised these rights. Belize has acceded to the ICCPR on the 10th of June 1996.[59] Article 4(1) of the ICCPR provides for derogation of these rights only for exigencies, provided such measures are not inconsistent with other obligations under international law. Sections 3(c) and 14(1) of the Belize constitution are couched in language similar to Article 17 of the ICCPR and recognise the content of the right to privacy referred to in the ICCPR. In keeping with the spirit of the constitution and Belize's international obligations, the rights recognised in the constitution would therefore have to be interpreted in the light of Belize's commitment to the ICCPR.

[75] The Supreme Court of Jamaica in ***Julian Robinson v. The Attorney General of Jamaica***[60], following the reasoning of the Indian Supreme Court in ***KS Puttaswamy v. Union India***[61], identified three elements of the right to privacy; (1) privacy of the person (2) informational privacy and (3) privacy of choice.

[76] Elaborating on these three elements, R.F. Nariman J. of the Indian Supreme Court in the KS Puttaswamy case states that;

> *"Privacy involves the person i.e. when there is some invasion of the state of a person's rights relatable to his physical body, such as the right to move freely;*
>
> *Informational privacy does not deal with a person's body but deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Unauthorized use of such information may, therefore lead to infringement of this right; and*
>
> *The privacy of choice, protects an individual's autonomy over fundamental personal choices*."

[77] The regulations impugned do not relate to the first element of the right to privacy – privacy that involves the person. What the regulations require is disclosure of contracts which would fall within the second

[59] https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en
[60] [2019] MFC Full 04
[61] Writ Petition (Civil) No. 494 of 2012 (delivered 24th August 2017)

element of the right to privacy; the right of informational privacy. By alleged restriction of informational privacy, the regulations may also affect the right of choice.

[78] No doubt, individuals have an element of dignity of the human person which is not present in legal persons or corporate bodies. There is no need for this court to elaborate on this point as it is self-evident and not relevant to this particular matter. To draw the line, however, it would be farcical to conclude that because corporate bodies do not have the requirement of human dignity, they are not entitled to the other two elements of the right to privacy. Corporate bodies do engage in activities which at their core are extensions of human affairs. They deal in information and where that information is sensitive, corporate bodies are entitled to privacy of that information.

[79] Privacy is at the core of the operations of commercial entities. There is competition in the marketplace. As Justice Chandrachaud of the Indian Supreme Court (as he then was) stated in the KS Puttaswamy case, "*Informational privacy is a facet of the right to privacy: the old adage that 'knowledge is power has stark implications for the position of the individual where data is ubiquitous*". The starkness of the implications of that statement is no less for corporates which engage in the marketplace. Business entities engaged in research and development, market surveys, manufacturing processes, negotiations and contracts and a host of other activities, all of which are sensitive to their business operations and success in a competitive world.

[80] It is not difficult to see why corporates would want to keep secret or confidential their information. The possession of such information exclusively brings some advantage or if disclosed, the information causes some detriment. It may be either or both. Commercial contracts are therefore usually kept confidential and disclosed on a need-to-know basis. It is one of the reasons why commercial entities choose to arbitrate disputes rather than litigate as arbitral proceedings are private and the records are not available to public scrutiny. I hold therefore, that corporates do have a right to informational privacy no less than the individual.

[81] The right to privacy being a constitutional right, any abridgement of such rights should only be done in terms of the Constitution. Section 9(2) of the Constitution permits such limitations. The permissible limitations are with the public interest in mind and include, as stated before, defence, public safety, public order, public morality or public health and protecting the rights and freedoms of other persons.

[82] The purpose of the regulations as stated by the defendants through the affidavit of Mr. Osorio who is chairman of the SCIB, is to have transparency in payment of Fairtrade premiums. He stated that for this purpose, it is required for the licensee to disclose to the SCIB and to the associations, the contracts it has entered into at the point of export, as well as make that disclosure at the time of applying for a licence[62]. That purpose may or may not be rationally related to the object sought to be achieved, which is to bring transparency in the distribution of the Fairtrade premiums. Such purpose however cannot be considered to be within the ambit of section 9(2) of the Constitution which permits limitation to the rights granted by sections 9 and 14 on the few grounds specified therein. As stated previously, constitutional rights could only be limited in terms of what is permissible by the Constitution. Disturbance to the sugar industry, supply of sugar or anxiety of a section of the farmers and their associations cannot be considered to fall within the rubrics of 'defence, public safety, public order, public morality or public health' stated in the Constitution as permissible grounds to limit the right to privacy. Neither could disputes between BSCFA and BSI be considered to be a matter that affects public order. It may cause a disturbance and disruption to a particular industry or particular locality; however, no material was placed before this court to demonstrate that the scale of disruption or protest amounted to a disruption to public order in general.

[83] It would be unreasonably stretching the rules of interpretation to construe the language in section 9(2)(b) of the Constitution to mean that the disclosure of contracts and the limitation of the right to privacy was necessary to protect the rights and freedoms of other persons; in this instance, the rights and freedoms of others, being the sugar cane farmers and the associations. Constitutions ought to be interpreted broadly and not narrowly; any rights granted may only be restricted for cogent reasons permissible by the Constitution itself.

[84] The next point to consider is if prior disclosure of the information would make it lose its character of confidentiality and therefore, whether these regulations would not breach the right to privacy of the claimants. What is required for disclosure by an applicant for a license in terms of the impugned regulations is all its contracts for the import or export of sugar in their entirety. Counsel for the claimants submitted that the contracts previously disclosed by BSI to farmer associations were only contracts it had with those relevant farmer associations and not the entirety of its contracts with its buyers. The

[62] Paragraphs 62, 82 and 83 of Mr. Osorio's first affidavit.

language of the regulations indicates that the disclosures required relate to prospective contracts do not refer to disclosures already made. It is quite possible that in the future, a licensee may choose not to disclose its contracts to the associations or to any other party. Hence, it is not possible to lay a general rule based on specific instances of disclosure in the past. The instances of disclosure and their loss of confidentiality which have been dealt with by courts, as in ***Attorney General v. Observer Ltd.*** cited by respondents related to the loss of privacy for specific disclosures already made and not a general formulation for information generated in the future. I therefore hold that past disclosures of any contracts by the claimants cannot be a ground upon which the prospective rights to privacy are restricted by the impugned regulations.

[85] In view of this analysis, I hold that regulations **5(1) (b), 21 (1) (b)** and **22** are contrary to section 14(1) of the Constitution in regard to the right to privacy, as they are not in conformity with the permissible limitations to the right to privacy set out in section 9 (2) of the Constitution. As these regulations fall foul of the Constitution, there is no need to make a further finding in relation to rationality and proportionality. Such tests would be required where there is no *prima facie* violation of the right to privacy and it would be necessary to assess if there has been a violation of the right to equal protection of the law. This was the approach taken by the Supreme Court of Mauritius in ***Mahdewoo v. State of Mauritius***[63] as Mauritius had no specific right to privacy in its Constitution at the time of that decision. The right to privacy is specifically recognised in the Constitution of Belize, hence there is no need to consider its violation in an oblique manner as it may be considered directly in terms of the limitations to the right of privacy approved by the Constitution itself.

Regulations 5(2) - the doctrine of impossibility

[86] Regulation 5(2) requires the applicant applying for a licence to export sugar, to give a report of the total quantity of certified sugar to be exported and the premiums to be attached to such certified sugar, according to the volumes of production of sugar cane derived from each certified producer. The claimants argued that this was impossible as sugar was only Fairtrade 'eligible' sugar at the time of export and that in any event, BSI would be unaware of the quantity of sugar that finally the reached market as Fairtrade sugar, to specify the premiums it would attract.

[63] 2015 SCJ 177 (delivered on 29th May 2015) affirmed by the Privy Council, [2016] UKPC 30

[87] The respondents did not deny the factual position that the quantity of Fairtrade sugar would only be known at the point of sale in the market. Counsel for the respondents justified this regulation stating that what was required was the disclosure of past quantities. In support of this argument, it was argued that the words "*any premiums or benefits due*" in regulation 5(2) (b) could be construed to be a reference to past dues. In support of this interpretation, the respondents referred to the words "*benefits due*" as being referable to "*volume of production of sugar cane **delivered** by each certified producer*" [Emphasis added]. It was argued that as the word "*delivered*" was in the past tense, the word "*due*" also referred to past due. I am afraid I cannot agree with that formulation. The word "*delivered*" refers to sugar cane, which is delivered to the mill to produce the sugar. The licence is applied for the export of sugar, the premiums are attached to the sugar. The export and the premium are prospective.

[88] The words in regulation 5 (2) (a) state that at the time of applying for a licence, the licensee shall attach a detailed report of; "*the total amount of certified sugar or other derivatives of sugar cane contracted to be sold for each transaction of **exporting** sugar, …*" [emphasis added]. A plain or literal reading of the language in this section makes it clear that it does not refer to past quantities but refers to prospective exports. It would result in an absurdity to have to read regulations 5(2) (a) and 5(2) (b) as relating to two separate periods. They apply to the same sugar that is being exported. Referring to the rule of literal interpretation also known as the plain meaning rule, Lord Reid in the House of Lords case of ***Pinner v. Everett***[64] stated;

> *"In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute."*

Other rules of statutory interpretation such as the golden rule of interpretation which permits interpreting a statute so as not to lead to an absurdity are applicable only when the plain reading of the words themselves leads to an absurdity[65]. In this instance, giving a different meaning to the words as

[64] [1969] 3 ALL ER 257
[65] Queen v. Flowers [2020] CCJ 16 (AJ) BZ, paragraph 37

suggested by the respondents would cause the absurdity; as regulation 5(2) (a) would refer to the present, while regulation 5 (2) (b) would refer to the past. I therefore find that regulation 5(2) refers to prospective exports and not to past exports. Applying the mischief rule of interpretation – what is the mischief the legislature seeks to remedy? One would arrive at the same conclusion: What is required in order to bring about transparency in the distribution of the premiums is the disclosure of the quantity of certified sugar and the premium it attracts so that the premiums could be distributed accordingly. Therefore, there can be no doubt that regulation 5(2) as presently worded, relates to the disclosure of quantities of certified sugar and the premiums they attract for prospective exports.

[89] The Fairtrade Trader Standard (FTS), at paragraph 4.5 on sourcing market information for planning in regard to intent, states that it is formulated to ensure producers better understand the market prospects and better estimate the volumes that they will be able to sell as Fairtrade. Paragraph 4.5.1 of the FTS as guidance states the following; "*at a minimum, the sourcing plan is a realistic estimation of future purchases. If these are difficult to plan, this should be made clear in the sourcing plan, but the requirement still applies…*". It is clear, therefore, that while there can be estimates, there cannot be definitive numbers at the time of export. What regulation 5(2) requires are not estimates but actuals. Hence, I am in agreement with the submission on behalf of the claimants that these numbers would be impossible to provide at the time of applying for the licence to export.

[90] I therefore hold that regulation 5 (2) is irrational as it is impossible to comply with in its current formulation; requiring actual numbers of certified sugar and premiums attached thereto to be submitted by the exporter. These figures cannot be known by the exporter at the time of applying for the licence. As regulation 5(2) is irrational, it would amount to a violation of the right to protection of the law guaranteed in section 3(1) and section 6(1) of the Constitution which states that "*All persons are equal before the law and are entitled without discrimination to equal protection of the law*". On this basis, I grant the claimants a declaration that regulation 5 (2) is in violation of the right to protection of the law.

Regulation 11 – principle of rationality

[91] Regulation 11 requires a licensee, in addition to the licence, to apply for a shipping permit in terms of regulation 20; for every importation or exportation shipment of sugar or its derivatives. The claimants argued that the requirement to apply for a shipping permit for each and every exportation shipment of sugar was onerous and burdensome and hence the regulation was irrational.

[92] The respondents argued that at present the claimants already apply for a shipping permit for each and every shipment of sugar. The affidavit of Mr. Osorio, chairman of the SCIB states that; "*prior to the enactment of the Regulations, BSI was required to apply for an export licence from the Controller of Supplies in accordance with section 3(1) of the Supplies Control (Import/Export) regulations on each occasion it proposed to ship sugar out of Belize*"[66]. He goes on to state that in 2022, BSI was granted 519 export licences approximating to 43 licences being issued per month and that these licences were generally approved within 24 hours. This position is not denied by the claimants. Mr. Shawn Chavarria in his reply to paragraph 62 of Mr. Osorio's affidavit states that the position is true. The only real rebuttal Mr. Chavarria makes in his reply affidavit is that the regulations "*have added more provisions for issuing of the said permits which did not exist before and wish* [sic erat scriptum] *are onerous and unnecessary in a modern evolving industry*"[67].

[93] On the facts presented, there is no real legal argument challenging regulation 11. The requirement of applying for a shipping permit for each shipment is not irrational nor is it in violation of the rule of proportionality, nor is it pleaded that it is impossible to comply with. The Crown is entitled to control imports and exports, and for this purpose, import and export permits are a legal requirement. The requirement for a permit cannot be held to be irrational merely because it may be onerous or inconvenient. It has not been pleaded that complying with regulation 11 is onerous to the point of it being impossible to carryout business activates or to be in restraint of trade. I therefore hold, that regulation 11 is not in violation of the provisions of the constitution.

[66] First Affidavit of Porfirio Marcos Osorio, paragraph 62
[67] Third Affidavit of Shawn Chavarria, paragraph 36.

Regulation 16 – doctrine of impossibility, proportionality and the right to work

[94] Regulation 16 (1) requires the licensee; (a) to collect Fairtrade premiums for sugar or its by-products sold to buyers and (b) distribute these premiums to the sugar cane producers. Regulation 16 (2) permits the licensee to deduct bank charges involved in the collection and distribution of premiums. Regulation 16 (3) is a penal clause that enables immediate revocation of the licence, in the event of failure to pay the respective premium.

[95] The claimants argued that regulation 16 is also impossible to comply with as the Fairtrade premiums are paid by the international buyers and that it is beyond BSI's control to collect these premiums if the international buyers did not pass on the premiums. The claimants relied in particular on the letters of TLS dated 12th July 2023[68] and 26th May 2023[69] to state that TLS had no intention of switching over to the conveyor system which would enable BSI to collect and distribute the Fairtrade premiums. In the letter of 12th July 2023 TLS had stated; "*There is no rationale for changing the way premiums are paid by TLS to SPOs in Belize. TLS buys Fairtrade sugar from 5 countries. In none of these cases do we pay premium to the miller. This has nothing to do with the ownership structure of our companies*"[70]. In the letter of 26th May 2023, TLS stated;

> "*Currently no millers in our supply chain take the role of conveyor and we have no reason to seek to make any miller in our supply chain take the role of conveyor and we have no reason to seek to make any miller in our supply chain conveyors of the premium…our goal in our Fairtrade relationships is to promote and support strong and constructive relationships with the producer associations that supply us. The absence of a direct relationship with producer organizations would defeat the purpose of our Fairtrade commitment. Therefore we will not be changing our approach concerning our expectations of the producer organizations from which we chose to purchase Fairtrade sugar or the manner in which we pay the Fairtrade premium*"[71].

[96] The claimants also argued that regulation 16(3) was draconian as it involved an immediate revocation of the licence in instances of non-compliance and that it was impossible to comply with the regulation. It is noted that there is no real objection by the claimants to regulation 16(1) (b) which requires the

[68] Tab 9 of Third Affidavit of Shawn Chavarria, p.6267, Vol 1. Trial bundle
[69] Tab 13 of Third Affidavit of Shawn Chavarria, p.5936, Vol 1. Trial bundle
[70] Tab 9 of Third Affidavit of Shawn Chavarria, p.6268, Vol 1. Trial bundle
[71] Tab 13 of Third Affidavit of Shawn Chavarria, p.5936, Vol 1. Trial bundle

distribution of the premium. The impossibility argument applies to regulation 16 (1) (a) which requires the collection of the premium. The argument impugning regulation 16(1) (b) is that it follows on from regulation 16(1) (a); if the premium cannot be collected, it cannot be distributed.

[97] Counsel for the respondents at the hearing argued that there was no reason why this regulation was not workable. Beyond the argument that BSI and TLS were part of the ASR group and that they were acting in concert, it was submitted that if all parties acted in 'good faith', there was no reason why the conveyor system, by which the premium is conveyed by the buyer to the mill to be transmitted to the sugar cane producer, could not work. It was further argued that there should be a margin of appreciation given to the legislature to effect policy choices. The respondents also argued by referring to the Fairtrade Trader Standard (FTS) that it required parties to comply with national legislation. The claimants countered by submitting that the mention of compliance with national legislation in the FTS was with reference to introduction of higher standards on such matters as labour practices and/or environment standards observed in production processes and not the conveyor system.

[98] It would be necessary in this background to examine the FTS in some detail as the Fairtrade premium is paid in terms of the guidelines of the FTS. This court was briefed with the Fairtrade Trader Standard version 01.03.2015 v 1.7[72] published on 16th August 2021[73].

[99] Under the heading "Purpose" of the FTS it is stated;

> "*Fairtrade is a strategy that aims to promote sustainable development and to reduce poverty through fairer trade. The main goals of Fairtrade are making changes to the conventional trading system that aim to benefit disadvantaged small producers and workers and increasing their access to markets. These actions can lead to improvements in small producers' and worker' social and economic well-being, as well as to their empowerment. … Fairtrade aims to support small-scale producers and workers who are marginalized from the benefits of trade. Fairtrade's vision is a world in which all small producers and workers can enjoy secure and sustainable livelihoods, fulfil their potential and decide their future. To fulfil this vision, Fairtrade has identified three long-term goals;*

[72] Exhibit PMO-7, Affidavit of Porfirio Marcos Osorio, p. 6348, Vol 2, Trial bundle.
[73] Exhibit PMO-7, Affidavit of Porfirio Marcos Osorio, p. 6360, Vol 2, Trial bundle.

- *Make trade fair*
- *Empower small producers and workers*
- *Foster sustainable livelihoods*

To achieve its goals, Fairtrade aims to bring about simultaneous change in four spheres:

- *Small producer and worker organizations*
- *Supply chain business practices*
- *Consumer behaviour*
- *Civil society action.*"

[100] Under the heading "Reference" it is stated;

"When setting the Fairtrade standards, Fairtrade International follows certain internationally recognized standards and conventions, in particular those of the International Labour Organization (ILO). Fairtrade has a rigorous standard operating procedure for setting Fairtrade standards, which can be found here. This procedure is designed in compliance with ISEAL Code of Good Practice for setting Social and Environmental Standards.

Fairtrade International also requires that ***operators always abide by national legislation, on the topics covered by this standard****, whenever the legislation sets higher requirements than this standard. The same applies to regional and sector specific practices*." [Emphasis added]

The term "Operator" is defined to mean; "*any producer, buyer, seller and conveyor certified against this standard*"[74].

The term "Conveyor" is defined to mean; "*Any operator that receives the Fairtrade premium from a Fairtrade payer and passes it on to the certified producer*"[75].

[74] Exhibit PMO-7, Affidavit of Porfirio Marcos Osorio, p. 6356, Vol 2, Trial bundle.
[75] Exhibit PMO-7, Affidavit of Porfirio Marcos Osorio, p. 6355, Vol 2, Trial bundle.

The term "Fairtrade payer" is defined to mean, "*The buyer responsible for paying the Fairtrade minimum price and Fairtrade premium*."[76]

As regards sugar there is further clarity in the FTS which states that, "*The buyer of Fairtrade sugar is by default the Fairtrade premium payer*".[77]

[101] It is the above highlighted phrase that the respondents relied upon to state that national legislation should be complied with by operators. 'Operator', in this instance would include BSI as the miller/exporter, in terms of the definition in the FTS. The claimants relied upon the next part of the sentence, "*whenever the legislation sets higher requirements than this standard*" to support its argument that abiding with national legislation related to higher requirements in regard to labour and environmental standards and that switching to the conveyor system of payments was not a higher requirement, but an option available for convenience.

[102] The FTS under the heading of "Requirements", sets out two different requirements: The first being "*Core requirements*" which reflect that the Fairtrade principle must be complied with. The second requirement is referred to as, "*Voluntary Best Practices (VBS), which refer to the additional steps that all supply chain actors can take to foster even fairer trading conditions*".[78]

[103] Paragraph 4.1.4 of the FTS refers to Fairtrade contracts for conveyors. The core requirement is that conveyors have to sign Fairtrade purchase contracts with the producer. The contract is to have the same elements as those required of contracts between Fairtrade payers and producers set out in paragraph 4.1.2 of the FTS. These requirements include; agreed volumes, quality specifications, price etc. Additionally, the modalities of payment of the Fairtrade premium payment is required to be included in the contract.[79]

[104] Regulation 16 compels the licensee to become a 'Conveyor' of the Fairtrade premium. BSI as conveyor would thereafter in addition to complying with the regulation, have to comply with the FTS requirements of being a conveyor, if it is to continue to have its certification as a Fairtrade operator. Thus, in

[76] Exhibit PMO-7, Affidavit of Porfirio Marcos Osorio, p. 6355, Vol 2, Trial bundle.
[77] Exhibit PMO-7, Affidavit of Porfirio Marcos Osorio, p. 6384, Vol 2, Trial bundle.
[78] Exhibit PMO-7, Affidavit of Porfirio Marcos Osorio, p. 6352, Vol 2, Trial bundle.
[79] Exhibit PMO-7, Affidavit of Porfirio Marcos Osorio, p. 6374, Vol 2, Trial bundle.

consequence of regulation 16, BSI as conveyor would have to enter into contracts with producers for the distribution of the premiums.

[105] Paragraph 4.2.8 of the FTS has the heading "*Transfer of Fairtrade Premium by Conveyors*". It applies to the conveyors. The 'Core requirement' states; "*You pay the Fairtrade Premium to the producer, **if** the Fairtrade Premium is conveyed via your company*". [Emphasis added]. This phrase is important because it indicates that payment of the premium to the producer by the conveyor is contingent upon it being received by the conveyor. This position is further clarified in the "Guidance" to Paragraph 4.2.8 of the FTS which states;

> "*When a conveyor is involved in a supply chain, the Fairtrade Premium **is either paid directly by the Fairtrade payer to the producer, or via the Fairtrade conveyor**. This requirement does not apply in case the Fairtrade payer pays the Fairtrade premium directly to the producer*".[80][Emphasis added]

[106] This reading of the FTS makes it clear that even in instances when there is a conveyor and the conveyor has signed a contract with the producer to pay the Fairtrade premium by conveying it, the Fairtrade payer may still pay directly to the producer. The payment of the Fairtrade premium by the conveyor to the producer is contingent on it being received in the first place by the conveyor. There is no obligation in terms of the FTS for a Fairtrade premium payer to use the conveyor method as it can still pay directly to the producer even in instances where there is a conveyor. The Fairtrade premium payer is outside the jurisdiction of Belize and beyond the reach of the laws of Belize.

[107] In this background, the question to be posed is; whether regulation 16 imposes a mandatory requirement for the licensee to collect the Fairtrade premium or is collection an option in the event the Fairtrade premium payer decides to pay the premium directly to the producer, by-passing the conveyor? It would be necessary to look at regulation 16 closely to answer this question. Regulation 16 reads;

[80] Exhibit PMO-7, Affidavit of Porfirio Marcos Osorio, p. 6378, Vol 2, Trial bundle.

"*16(1) Where the licensee enters into a contract to purchase or process certified sugar cane from a certified producer and to sell certified sugar or any derivative or by-product of sugar cane that earns a premium or any other benefits for the certified producer, the licensee **shall**–*

a. ***collect all proceeds, premiums or other benefits*** *from the total volume of certified sugar or any derivative or by-product sold to buyers; and*

b. *distribute any premiums or other benefits on a quarterly basis to certified producers to which premiums are due based on the respective volume of sugar cane delivered to the licensee by each certified producer.* [Emphasis added]

[108] The word "*shall*" is usually used in legislation to refer to a mandatory requirement. Section 58 of the Interpretation Act, reads; "*In an enactment 'shall', shall be construed as imperative and the expression 'may' as permissive and empowering*". This interpretation of the word 'shall' has also received judicial approval.[81] The meaning of the phrase would have been different if the words used in regulation 16 were; "*shall, where possible – collect any premiums or other benefits...".* That, however, is not the case. It is not possible, as previously stated, to read into legislation words that are not there when the meaning is plain. I hold, therefore, that the word "shall" in the chapeau of Section 16(1) indicates a mandatory requirement.

[109] The impact of that finding is; that it becomes mandatory upon the licensee to collect the premium for the certified sugar. Upon failure to do so, the licensee would be visited with the sanction in regulation 16(3), which is also couched in the mandatory language; "*Failure to pay the respective premium or benefit in accordance with this regulation **shall** result in an immediate revocation of the licence*". [Emphasis added].

[110] It is in this context that the claimants argue that it would be compelled by regulation 16 to do the impossible; as it cannot compel the payment of the premium to it by the Fairtrade payer since the Fairtrade payer could make payment of the premium directly to the producer, even if there was a conveyor.

[81] In the Matter of the Representation of the People Ordinance, Supreme Court Action No. 390 of 1983, delivered 22nd December 1983, per Moe, CJ.

[111] In response to this argument, counsel for the respondents submitted that in instances where it was not possible to collect the premium, it would not apply and that there should be a margin of appreciation for the legislature and the executive to make policy choices. It was also submitted for the respondents that it would be premature to assume that the claimant could not make the collection as the conveyor system is not yet functional and that if parties operated in good faith, there was no reason why the regulation was unworkable. It was also argued that BSI and TLS were part of the ASR group and were acting in concert and therefore there was no reason why the regulation was unworkable.

[112] In regard to the argument of the respondents that BSI and TLS are part of the ASR group and therefore acting in concert, this court cannot go beyond the corporate veil. The companies involved are separate companies of which only BSI is incorporated In Belize. The claimants state that there is no cross-holding of shares of BSI by TLS or vice versa and that no shareholder of BSI holds shares in TLS directly or indirectly and vice versa.[82] This is not refuted by any documents produced by the respondents though the respondents submitted that both TLS and BSI were part of the ASR Group of companies.[83] No shareholdings of either of the companies were produced and in the absence of evidence to the contrary this court cannot conclude that BSI could compel TLS to comply with the conveyer system for payment of premiums. The burden of proof in common law jurisdictions is based on the Roman law principle; "*onus probandi incumbit ei qui dicit, non ei qui negat*", which means that the burden of proof is on the one who asserts and not on the one who denies[84]. Therefore, the burden of proof falls squarely upon the respondents, to prove that BSI could compel TLS to make payment to it under the conveyor system. This burden has not been discharged by the respondents. It is, therefore, open for BSI to state that it cannot compel TLS to make payments of the premium to it, as TLS is a separate company outside the jurisdiction of Belize, having its own management and adopting its own policy.

[113] The FTS itself has laudable objectives; to make trade fairer, empower small producers, and bring about sustainable livelihoods and promote the return of profits to the community of the producers. The regulations have the same objectives by seeking to have some degree of control within Belize of the

[82] Paragraph 20, Third Affidavit of Shawn Chavarria, p. 6013, Vol. 1, Trial bundle.
[83] Paragraphs 37 – 42, Affidavit of Porfirio Marcus Osorio, p.6310, Vol. 2. Trial bundle
[84] Re [2008] UKHL 35

manner in which Fairtrade premiums are paid to producers. This is the policy choice – mandatorily requiring the conveyor method to be adopted for the payment of Fairtrade premiums to the producers.

[114] While the courts do not engage in weighing policy choices as to whether one is better than the other, it would be instructive to refer to the decision of the Supreme Court of Jamaica in ***Julian Robinson v. The Attorney General of Jamaica***[85], where under the heading 'Margin of appreciation' the court stated;

> *"We do not engage in policy choices but simply declare the law and where necessary declare whether a statute is compatible with the Charter. There is no such thing as a policy choice, when translated into law, which makes such a law immune from judicial scrutiny. In constitutional law, there is no such thing as the end justifying the means. The end may be laudable but the means must also be compatible with the Constitution"*[86]

[115] The law does not operate in a vacuum, the courts must be mindful of the consequences of the application of the law. This is the essence of the doctrine of proportionality; to examine if legislation meets the purpose of its creation, the measures implemented are rationally related to that purpose, the measures are only those that are necessary and finally, to balance interests between the purpose of the legislation and the effect of the measures.

[116] Viewed from this perspective, what would be the consequences that would flow from the application of regulation 16(1) (a) which makes it mandatory for the licensee to collect benefits and premiums; when a Fairtrade payer refuses to cooperate or makes payment directly to the producer instead of conveying it via the conveyor? The answer would be, that upon failure to collect the premium, the licensee would face sanctions in terms of section 16(3) of the regulations by immediate revocation of the licence and by prosecution in terms of regulation 24, for contravention of the regulation. That consequence would be unreasonable as the collection of the premiums is beyond the control of the licensee. As it is unreasonable, the regulation would violate the right to protection of the law. It would also contravene the right to work set out in section 15 of the constitution.

[85] [2019]JMFC Full 04
[86] [2019] JMFC Full 04, paragraph 134

[117] The right to work extends to corporate bodies as the language in section 15 refers to the right being available to persons, not merely individuals or citizens. Section 15 of the Constitution reads; "*15.-(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*" [Emphasis added]. A corporate body such as BSI engaged in the trade and export of sugar would fall within this definition. It is possible for the legislature to place limitations on these rights for the limited purposes set out in section 15 (3) of the constitution, as follows;

> *"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 provision-*
>
> > *(a) that is required in the interests of defence, public safety, public order, public morality or public health;*
> >
> > *(b) that is required for the purpose of protecting the rights or freedoms of other persons; or*
> >
> > *(c) for the imposition of restrictions on the right to work of any person who is not a citizen of Belize."*

[118] These restrictions on the right to work are similar to the limitation set out in section 9(2) of the Constitution, which were dealt with previously when examining the right to privacy. To reiterate, there is no argument in this instance that the limitation on the right to work in the regulation by the revocation of the licence is on the grounds of defence, public safety, public order, public health or morality. The only ground on which this restriction could be justified is on the basis of protecting the rights and freedoms of others which in this case is the farmers and the associations. As dealt with when analysing the right to privacy, it is reiterated that rights granted in the constitution ought to be interpreted broadly and not narrowly. Therefore, the right to work granted in the Constitution should not be interfered with unless there are cogent reasons for doing so and made permissible by the Constitution itself. Immediate revocation of a licence in terms of regulation 16(3) for not collecting premiums in instances where premiums cannot be collected would amount to an unreasonable interference with the right to work; to engage in a trade or business.

[119] If, however, regulation 16(1) (a) read; "*shall collect premiums and benefits where possible*", regulation 16 would be workable and not offend the constitution. It is reiterated, however, that the court cannot

read this language into the regulation. The regulation is, as it is, and on a plain reading or interpretation of it in its present form, as analysed above, falls foul of the constitutional provisions of the right to work and the right to protection of the law.

[120] I therefore find that regulation 16(1) (a) read with regulation 16(3) is obnoxious to the right to protection of the law granted by sections 3(a) and 6(1) of the Constitution and the right to work granted in section 15 of the Constitution. Regulation 16(3) also does not pass the test of proportionality as it would apply irrespective of whether the licensee could or could not collect the benefits or premiums. Even if regulation 16(1) (a) were allowed to stand without regulation 16(3), it would still be possible for prosecutions to take place in terms of regulation 24, which is a general penal provision for non-compliance with the regulations. It would not be proper to strike down a general penal provision such as regulation 24, as such penal provisions are to be found in all regulations. What remains obnoxious is the mandatory nature of regulation 16(1) (a) to collect the premium or the benefits, when such matter is outside the control of the licensee. Hence, while the objective of regulation 16 is laudable, it is unreasonable in its working or application due to the mandatory nature of the obligation cast therein. I therefore hold that regulation 16(1) (a) is unreasonable and therefore in violation of the right to protection of the law. Regulation 16(1) (b) which requires the distribution of the premiums, follows on from the collection of premiums required by regulation 16(1) (a) and has to be read together with it. Regulation 16(1) (b) cannot therefore stand alone as it is not severable from regulation 16(1) (a). This would also apply to regulation 16(2) which cannot stand alone without regulation 16(1).

[121] Therefore, I hold that regulation 16 is in violation of the right to protection of the law granted by sections 3(a) and 6(1) of the Constitution.

Regulation 24

[122] As analysed above, regulation 24 has the form of a general penal provision to be found in most regulations or laws which permit prosecution for failure to comply with the law or regulation in question. Lawmakers are within their power to make such penal provisions and they do not offend constitutional principles. If at all, it may be obnoxious to any rights granted by the Constitution, when such penal provision is applied by reading it with another provision of a law or regulation but not as a standalone provision.

[123] In the constitutional challenge to the regulations before this court, regulation 24 read with regulation 5 or 16 or 21 or 22 would violate the right to protection of the law. As however, regulations 5(1) (b), 5(2), 16, 21 (b) and 22 have been held to be unconstitutional, there is no requirement to declare regulation 24, standing alone to be unconstitutional. I therefore hold that regulation 24 is valid in law.

IT IS HEREBY ORDERED AND DECLARED THAT

(1) The claim is partially allowed: Regulations 5(1) (b), 5(2), 16, 21(1) (b) and 22 are declared unconstitutional, null and void;

(2) Regulation 5 (1) (b) is declared to be unconstitutional, null and void as it is in breach of the right to privacy granted by section 14 of the Constitution;

(3) Regulation 5 (2) is declared to be unconstitutional, null and void as it is in breach of the right to protection of the law granted by sections 3(a) and 6(1) of the Constitution;

(4) Regulations 16 is declared to be unconstitutional, null and void as it is in breach of the right to work granted by section 15 of the Constitution and the right to protection of the law granted by sections 3(a) and 6(1) of the Constitution;

(5) Regulations 21 (1) (b) and 22 are declared to be unconstitutional, null and void as they are in breach of the right to privacy granted by section 14 of the Constitution;

(6) The claimants are entitled to 2/3rd of the costs of this claim as they have not succeeded in all the challenges to the regulations;

(7) Costs are to be agreed or assessed.

Rajiv Goonetilleke
High Court Judge