Neutral Citation Number: [2022] CA (Bda) Civ 6

Case No: Civ/2021/11

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE HARGUN
CASE NUMBER 2019: No. 092

Sessions House
Hamilton, Bermuda HM 12

Date: 18/03/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

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Between:

THE CORPORATION OF HAMILTON

Appellant

- v -

(1) THE ATTORNEY GENERAL
(2) THE GOVERNOR OF BERMUDA

Respondents

Sir Jeffrey Jowell, KCMG, QC, instructed by Mr Ronald Myers, Marshall Diel & Myers Limited for the Appellant
Mr Delroy Duncan, QC and Mr Ryan Hawthorne of Trott & Duncan Limited, instructed by Lauren Sadler-Best, Attorney-General's Chambers for the Respondent

Hearing dates: 9, 10, 12, 17 and 18 November 2021

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JUDGMENT

CLARKE P:

Introduction

1. The Corporation of Hamilton ("the Corporation") contended before the Chief Justice that the decision of the Government of Bermuda to convert the Corporation into (as the Corporation would characterise it), a quango, would, if implemented, as was proposed, by the Municipalities Reform Bill 2019 ("the Bill" or "the proposed Reform Act") result, if the Bill became Law, in the passing of an Act which would contravene sections 1 and 13 of the Bermuda Constitution Order 1968 ("the Constitution"), and that a number of Municipal Amendment Acts ("the Amendment Acts") already contravened those sections. As things turned out the Senate decided – on 20 March 2019 – not to pass the Bill. But the Government has indicated that it will table the Bill again in substantially the same form.

2. As the Chief Justice recorded, the legislation with which we are now concerned is deeply controversial; but the Court is not concerned with the political decisions involved, or whether the legislation at issue is, or is not, wise or appropriate, but only with whether or not it is unlawful as being contrary to the Constitution or the common law.

3. The judgment of the Chief Justice helpfully summarised the history of legislation in relation to the Corporation, together with the facts and key findings in a number of cases. I gratefully acknowledge the assistance provided by his so doing and, in many cases, respectfully adopt, with minor changes, his summaries of cases and events.

4. The main Amendment Acts complained of at the hearing before the Chief Justice were the *Municipalities Reform Act 2010* ("the 2010 Reform Act"), the *Municipalities Amendment Act 2013* ("the 2013 Amendment Act"), the *Municipalities Amendment (No 2) Act 2015* ("the 2015 Amendment Act") and the *Municipalities Amendment Act 2018* ("the 2018 Amendment Act").

5. The basis upon which the Corporation contended, before the Chief Justice, that the Amendment Acts and the Bill, if enacted, would contravene the Constitution was as follows:

   (a) the Amendment Acts:

      i. deprive the Corporation of property without compensation; and
      ii. deprive it of the protection of the law; and

   (b) the Bill, if passed into law, does the same and will deny the Corporation and/or its electors freedom of expression in the choice of Councillors; and

   to the extent that they do so they are, therefore, void and of no effect.

6. The Chief Justice summarised the case of the Corporation before him in the following terms:

> "4 *In summary, the Corporation's case is put on two principal bases. First, it is said that the effect of the Amendment Acts and the proposed Reform Act is to exert* ***overwhelming***

control by the Government over the affairs of the Corporation so as to amount to deprivation of property *within the meaning of section 13 (1) of the Constitution.*

5 Secondly, the Corporation contends that the fundamental right to the protection of law referred to in section 1 (c) of the Constitution imports the dual concepts of due process and equal protection, as well as the rule of law, fundamental justice, fairness, certainty and rationality and, given the circumstances asserted by the Corporation, the Amendment Acts and the proposed Reform Act ***would be contrary to due process, and the rule of law and inconsistent with the protection of law enshrined in section 1 (c).*** *In relation to this submission, the Corporation asserts that there was no proper consultation with the Corporation in relation to the proposed Reform Act; and the Government's rationale for the Reform Act is entirely fatuous as the City of Hamilton is well-run, and has been well-run for a long time, without government interference. The Corporation also asserts that the general public is strongly against the proposed Reform Act."*

[Bold added in this, as in other citations]

7. I would add that the Corporation relies on the fact that Constitutions such as that of Bermuda, which recognise fundamental rights and freedoms, should receive a generous interpretation and a purposive construction: see Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, 328; Lord Diplock in *Attorney General of Gambia v Jobe* [1984] AC 689,700; and Lord Bingham in Reyes v R [2002] 2 AC 235 at [26]. See, also the dissentients, led by Lord Bingham, in *Matthew v The State (Trinidad & Tobago)* [2005] 1 AC 433, [42]; and *Commissioner of Prisons v Seepersad* [2021] UKPC [22] and [26].

8. The Chief Justice set out in his judgment a summary of the historical background which I gratefully repeat:

"7. *The Town of St. George's, in the east end of the Island, was settled in 1612 and remained the capital of the Bermuda until 1815. As explained in Bermuda's Architectural Heritage: Hamilton Town & City*[1]*, the establishment of a town in its centre, was a logical progression for an island of Bermuda's shape. Seafarers and merchants found it inconvenient to have to check in with the authorities in St. George's every time they entered or left if their business was elsewhere on the Island. The assemblymen often found it difficult to get to St. George's to attend the Assembly because of bad weather. With most of the members living west of Ferry Reach, there was always considerable support for moving the capital westward.*

8. The Corporation was originally incorporated by the St. George's and Hamilton Act, 1793 ("the 1793 Act"). By an earlier Act of 1790, the "Collection of Trade" at the west end of Bermuda was provided; and a Commission was appointed whose purpose was to deal with the landowners of the site proposed for the new town. The site for the new town was comprised of 145 acres all of which land was to be bought by the Commissioners at a fair price. The Government paid the owners the purchase price and was repaid in turn by the sale of lots in the township by auction. The auctions commenced

[1] By David White, edited by Amanda Outerbridge, published by the Bermuda National Trust, 2015 at page 1

in 1790 and the last auction took place in June 1794. The 1790 Act provided that after the lands were purchased by the Government "the said lands should be vested in His Majesty, his heirs and successors, and, after having been laid out into lots, sold at public outcry...".

9. By the 1793 Act, the Corporation was established as a body corporate consisting of the Mayor, Aldermen and Common Council, which officers were elected by Freeholders of the Town who would own and manage lands (including the land forming the port of Hamilton) and have the power to use a common seal to seal deeds, grants, conveyances, contracts and agreements to transact business for the encouragement and development of trade in the Town of Hamilton and for the convenience of the inhabitants in the area."

9. The Chief Justice also summarised some of the frequent legislative changes that have taken place over the last 250 years in relation to many issues affecting the Corporation. I set out that summary in an Appendix to this judgement. The latest Act to which he referred was the *Municipalities Act 1923* ("the 1923 Act"), which consolidated a number of previous enactments, repealing and replacing, and in some cases amending, many of them in whole or in part. The existence of the Corporation of Hamilton as a body corporate with perpetual succession was reaffirmed. Section 39 confirmed that the Corporation was vested with seisin in all lots not sold at the prior auction, as well as unoccupied and unclaimed lots.

Voting in municipal elections

10. The 1793 Act provided for an election from among landowners, referred to as freeholders, of the municipal area and for the election of municipal officials. The vote was to be under the supervision of Commissioners appointed by the central government, who were granted authority to conduct a vote by a *"plurality of voices or votes*" to elect the Mayor, Aldermen and a Common Council. For most of its history voting in Hamilton was through a one person, one vote system. But in 1978 the *Municipalities Amendment Act 1978* gave a vote to any kind of business entity occupying a valuation unit in the municipality: i.e. to corporations, partnerships and "*associations of persons corporate or incorporate or their nominees*". The 2010 Reform Act – see [12] below – abolished the business ratepayer vote. This was restored with certain modifications by the 2013 Amendment Act.

11. The Government maintains that the impetus behind the legislative changes emanates from some of the issues that have bedevilled the Corporation in the past, one of which is the effect of the business ratepayers franchise in concentrating the votes in the hands of property owners or those who may have a controlling interest in businesses that occupied valuation units within the municipal area. Other issues, which have led to conflict between the Corporation and the Government and the increased exercise of oversight by the central Government following the enactment of the 2010 Reform Act, have included the right of the Corporation to a wharfage levy – see paragraphs [16] –[19] of the Chief Justice's judgment; the Waterfront Development – see paragraphs [20] – [22] involving a long-term lease of the entire waterfront of Hamilton for a term of 262 years without an adequate bid process; the Democracy Trust – see paragraphs [22] – [23] involving a purported transfer of the leases of most of the Corporation's properties to a trust; the Par-la-Ville Hotel development – see paragraphs [24] –[25], involving the attempt by the Corporation to aid the development of the Par-la-Ville car

park into a luxury hotel by providing a guarantee of US $ 18 million, subsequently held by the Supreme Court, this Court and the Privy Council to be ultra vires.

12. In paragraphs 27ff of his judgment the Chief Justice summarised the main features of the Amendment Acts of which the Corporation complained as follows:

> ***"The Municipalities Reform Act 2010***
> 27. *The 2010 Reform Act introduced two main changes. First, the Government of the day implemented its policy goal of one person one vote franchise in Hamilton by abolishing the business ratepayer vote. The Corporation contends that this was part of a scheme that is designed to acquire Corporation property and assets. It is said on behalf of the Corporation that the clear intent was to ensure that at the next election the electorate and indeed those running the Corporation would be primarily members or supporters of the then Government.*
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> 28. *Second, the Act repealed provisions expressly providing for the capacity of the Corporation to levy and collect wharfage on goods imported and exported from the Port of Hamilton and to levy and collect port dues for the use of its wharves. The 2010 Reform Act removed the Corporation's rights to levy wharfage and replaced it with a grant from the central Government. The Attorney General contends that these legislative changes were made in an effort to rationalise wharfage, customs duties, and fees charged to importers utilising the Port of Hamilton.*
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> 29. *The Corporation contends that until on or around December 2013, the Government gave the Corporation a grant amounting to approximately $5 million per annum, paid in quarterly instalments of $1.25 million. The Corporation complains that the grant did not match the Corporation's previous revenue derived from levying wharfage and estimates and that there is a shortfall in the region of $4 .5 million.*
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> 30. *In the circumstances, the Corporation contends that the 2010 Reform Act deprived the Corporation of property without compensation contrary to sections 1 and 13 of the Constitution.*
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> ***The Municipalities Amendment Act 2013***
> *31. With the change in the Government the 2013 Amendment Act represented different policy objectives. One of the main changes implemented by this Act was to restore the business ratepayer vote with certain modifications. The Act also introduced a number of good governance provisions including:*
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> (a) *Section 7B (4) required the Corporation on an annual basis to submit a Municipal Asset Management Plan for the Government's approval and section 7B (6) gave the Minister power, in defined circumstances, to mandate that the Government assume temporary stewardship over the Corporation's infrastructure, function, or service, in order to repair or maintain it.*

(b) *A requirement for the Corporation to obtain the Government's approval[2] before it sold any of its land or leased such land for a term of 21 years or more (section 13).*

(c) *A power, vested with the Legislature, to reject any agreement entered into by a municipal corporation after 1 January 2012, for the sale of land belonging to such municipal corporation or for the lease of such land for a term of 21 years or more (section 14).*

(d) *A requirement for the submission of all Corporation Ordinances in draft to the responsible Minister and the Attorney General for their review and a power for the Minister by order subject to negative resolution[3] to directly amend or repeal any Ordinance.*

(e) *In each case, non-compliance or refusal to approve would make the relevant agreement concerning the land entirely void.*

32. The Corporation contends that, by reason of these matters, the 2013 Amendment Act unlawfully deprived the Corporation of property without compensation contrary to sections 1 and 13 of the Constitution.

The Municipalities Amendment (No 2) Act 2015

33. The purpose of the 2015 Amendment Act, as stated in the preamble, was to provide for greater supervision of the Corporations and the main features of this Act are as follows:

(a) *The Act provides the Minister or his representative a right to attend, to be heard and to receive minutes of the Corporation meetings.*

(b) *The Act provides that no resolution of the Corporation shall have effect unless and until it is approved by the Minister.*

(c) *The Act permits the Minister to give general or specific directions to the Corporation directing the Corporation to do anything, providing only that the Minister considers that to be in the public interest and that he has consulted with Corporation.*

(d) *The Act permits the Minister, with Cabinet approval, to temporarily assume control of the Corporation's financial governance, providing only that he believes that the Corporation's finances are being mismanaged, or that the Corporation's financial governance is otherwise in a poor state and that it is in the public interest.*

[2] The Act requires a draft to be submitted to the Minster for approval by the Cabinet and by the Legislature, the latter to be expressed by way of resolution passed by both Houses approving the agreement.
[3] Section 17 of the 2013 Act in fact refers, in this respect, to the affirmative resolution procedure.

(e) *The Act permits the Minister to temporarily assume control of the Corporation and its governance generally, provided only that he considers that the Corporation is being mismanaged, or that the governance of the Corporation is otherwise in a poor state and that it is in the public interest.*

34. The Corporation contends that, by reasons of these matters, this Act also unlawfully deprived the Corporation of property without compensation contrary to sections 1 and 13 of the Constitution.

The Municipalities Amendment Act 2018

35. The 2018 Amendment Act provides that:

(a) *In relation to the Minister's power to give the Corporation mandatory and binding directions, such a direction shall be deemed to be for municipal purposes and a function of the Corporation.*

(b) *The power to take over the Corporation under the stewardship provisions was no longer restricted to a "temporary" basis.*

36. The Corporation contends that, by reason of these matters, this Act also unlawfully deprived the Corporation of property without compensation contrary to sections 1 and 13 of the Constitution."

The proposed Reform Act

13. If the Bill becomes an Act it will have the following effect:

(i) municipal elections will be abolished and replaced by the selection and appointment of Members in the manner set out below;

(ii) the Members will comprise the Mayor and eight Councillors;

(iii) the Mayor and four Councillors will be appointed by the Minster, acting in his discretion, and shall be persons he is satisfied have the skills and experience to carry out the duties of Mayor or Councillor effectively and efficiently;

(iv) the remaining four Councillors are to be appointed by the Minister acting on the recommendation of the Selection Committee;

(v) the members of the Selection Committee are to be persons appointed by the Minister who shall be individuals who reside, do business or work in the municipal area of the Corporation and who, the Minister believes, will carry out the functions of the Committee effectively and efficiently.

The Corporation's complaint

14. The Corporation contends that the level of control which the Amendment Acts have brought about amounts to an unlawful deprivation of the property of the Council contrary to sections 1 and 13 of the Constitution. It is, as Sir Jeffrey put it, "*at least a deprivation and at most a taking*". The Corporation cannot make a decision without a resolution and every resolution requires the Minister's approval in writing. The Corporation cannot even approve a budget, far less expenditure or borrowing, without the Minister's participation and approval. In relation to the disposition of land, even after the Minister has participated in the deliberations and even after the approved resolution, the Corporation must submit a draft of any agreement to sell or lease for a period of more than 21 years for the approval of the Minister and the Cabinet, and then the approval of the Legislature must be obtained. The Minister may direct the Corporation to do "*any act or thing",* and, once he has given that direction, the act or thing is deemed to be for municipal purposes and a function of the Corporation. Thus, the Minister may direct the Corporation to carry out works on its land for the benefit of, or transfer its land or works to, the Government or some third party, provided that he considers it in the best interests of Bermuda and has carried out the necessary consultation. Even if the Corporation passes an Ordinance, having submitted the necessary draft to the Minister, he can simply order the Corporation not to implement it.

The Constitutional provisions

15. Sections 1 and 13 of the Bermuda Constitution provide as follows:

> *"1. Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:*
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> > *(a) life, liberty, security of the person and the protection of the law;*
> > *(b) freedom of conscience, of expression and of assembly and association; and*
> > *(c) protection for the privacy of his home and other property and from deprivation of property without compensation,*
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> *the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.*
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> *...*
>
> *13. (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say –*
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> > *(a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and*

(b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(d) provision is made by a law applicable to that taking of possession or acquisition—

(i) for the prompt payment of adequate compensation; and
(i) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation; and

(d) giving to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.

...

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that the law in question makes provision for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided from public funds."

16. It was the submission of the Corporation that deprivation of management and control of property can amount to a deprivation of property contrary to section 1 (1) and section 13 (1) of the Constitution. In support of its contention that, under the Amendment Acts and the Bill, if it is passed, a deprivation of property has or will have occurred the Corporation relies upon the following:

(a) The Minister or his representative is entitled to participate in all the Corporation's deliberations in relation to any matter. The Corporation cannot make any decision without a resolution and every resolution requires the Minister's approval in writing[4].

(b) In relation to the disposition of land, the Corporation must submit a draft of any agreement to sell or lease it for a period exceeding 21 years to the Minister for the Cabinet's approval, and the approval of the Legislature must be obtained.[5] This would be so even after the Minister has had the opportunity to participate in the deliberations and had approved the resolution.

(c) In relation to land, the Corporation may carry out development works, where the works are calculated to facilitate or are conducive or incidental to the discharge of any function of the Corporation. The Minister may issue mandatory directions to the Corporation to do "*any act or thing*", and once having given such a direction, the act or thing is deemed to be for a municipal purpose and deemed to be a function of the Corporation[6].

[4] The Municipalities Amendment (No 2) Act 2015
[5] The Municipalities Amendment Act 2013
[6] The 2015 Amendment Act and the 2018 Amendment Act.

(d) All of the Corporation's powers, functions or activities are qualified by the Minister's overarching power to approve or disapprove of them or their exercise[7].

(e) In the event the Minister believes that there has been mismanagement of the Corporation's affairs, the Minister has the power to assume control of the Corporation entirely, including of its financial governance and overall governance, for an indefinite and undefined period which comes to an end only when the Minister "*is satisfied that such control is no longer necessary*"[8].

(f) The proposed legislation leaves all these controls in place, and seeks to abolish municipal elections and replace elected members of the Corporation with members appointed by the Minister, either himself, or through a selection committee appointed by him. If the Bill is enacted the Government will not only control the Corporation's functions, powers, activities, and finances but it will also be in a position to appoint persons to the Corporation who are thought to be likely to support the Government's agenda. The Corporation will in effect become part of the Government and the Government will have control over its assets.

17. Mr Duncan QC for the Attorney General, submits that the Act does no such thing. The objective of the Act is to create a governance system for the Corporation whereby the many challenges to the provision of public services in Bermuda can be dealt with in an orderly way upon establishing a more deeply cooperative relationship with the central Government.

The issues before the Chief Justice

18. The Chief Justice identified the following issues as arising from the case presented to him:

(a) Does section 1 of the Constitution have independent force, and therefore is directly enforceable, regardless of the provisions of the remaining substantive sections?

(b) If section 1 as a whole is not directly enforceable, is the provision relating to "*protection of the law*" contained in section 1 (a) nevertheless directly enforceable?

(c) What is the scope of the "*protection of law*" provision contained in section 1(a)?

(d) If the "*protection of law*" provision is directly enforceable, is the Government in breach of this provision?

(e) What is the proper scope of section 13 (1) of the Constitution?

(i) What is the proper meaning of the expression "*shall be taken possession of, and no interest in or right over property of any description shall be compulsorily acquired*"?

(ii) Can there be "*taking*" by regulatory control exerted by the central Government over the Corporation and, if so, what is the essential nature and quality of that control.

[7] The 2013 Amendment Act and the 2015 Amendment Act.
[8] The 2013 Amendment Act, the 2015 Amendment Act and the 2018 Amendment Act.

(f) Is the Government in breach of section 13 (1) by exerting control over the Corporation as alleged by it?

Is section 1 directly enforceable?

19. There are a number of decisions of this Court on the issue of whether section 1 is directly enforceable. It is the contention of the Corporation that a particular decision of this Court which does so – *Farias v Malpas* - should be followed and that subsequent decisions which are to the opposite effect are not binding because they were either decisions reached *per incuriam* or are merely *obiter dicta.*

20. I propose to consider the decisions of the Bermuda Court in chronological order, together with a number of decisions of different courts on provisions of similar (but not necessarily identical) provisions of other Constitutions, and, in particular, the Privy Council.

Farias v Malpas **[1993] Bda LR 18**

21. The issue in this case was whether a regulation made in 1980, under the *Fisheries Act 1972*, which banned fish pots, amounted to a deprivation of property under the Constitution and whether section 1 of the Constitution was directly enforceable.

22. In *Farias* Georges JA referred to a passage in the Opinion of Lord Morris in *Olivier v Buttigieg*[9] [1967] AC 115, in which he said:

> "*The effect of section 5 of the Constitution of Malta* [in its then form] *which save for the substitution of 'Malta' for Bermuda is identical with section 1 of the Bermuda Constitution was considered in Olivier v Buttgieg [1967] A.C. 115. Lord Morris of Borth y Gest stated at p. 128—*
>
> > *'It is to be noted that the section begins with the word 'Whereas'. Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble.* ***It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow.*** *It is a declaration of entitlement coupled however with a declaration that though 'every person in Malta is entitled to the 'fundamental rights and freedoms of the individual' as specified, yet such entitlement is 'subject to respect for the rights and freedom of others and for the public interest'. The section appears to proceed by way of explanation of the scheme of the succeeding sections. The provisions of Part II are to have effect for the purpose of protecting fundamental rights and freedoms, but the section proceeds to explain that since even these rights and freedoms must be subject to the rights and freedoms of others and to the public interest it will be found that in the particular succeeding sections which give protection for the fundamental rights and freedoms there will be 'such limitations of that protection as are contained in those protections'. Further words which again are explanatory are added. It is explained what the nature of the limitations will be found to be. They will be limitations 'designed to ensure that the enjoyment*

[9] This is the correct spelling: a number of variants appear elsewhere.

of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest'.

23. The judgment in *Olivier* then goes on to say the following (not quoted in *Farias*):

> *"The succeeding sections show that the promised scheme was followed. The respective succeeding sections proceed in the first place to give protection for one of the fundamental rights and freedoms (e.g. the right to life, the right to personal liberty) and then proceed in the second place to set out certain limitations - i.e., the limitations designed to ensure that neither the rights and freedoms of others nor the public interest are prejudiced. A perusal of section 6,7,8,9,10,11 and 12…illustrates how the scheme and the scope of Part II were unfolded."*

24. Any reliance on *Olivier* as authority for the proposition that section 1 is independently enforceable is, to say the least, problematic. As the Chief Justice observed, the passage cited above, which was not part of the *ratio* (the claim in it being that there had been an infringement of sections 13 and 14, not section 5),[10] has almost universally been understood by judges to have the opposite effect, i.e. to hold that section 1 is not independently enforceable[11]. In this connection the Chief Justice referred to the judgments of Kempster JA in *Attorney General v Grape Bay Limited* [1998] Bda LR 6; Lord Hoffmann in *Grape Bay Limited v Attorney General* [2000] 1 WLR 574 (PC) at 58 BE; Stuart-Smith JA in *Inchcup (trading as Alexis Entertainment and Plush) v Attorney General* [2006] Bda LR 44 at paragraphs 11-12[12]; Lord Carswell in *Campbell-Rodriques v Attorney General* [2008] 4 LRC 526 (PC) at paragraph 11; and of Baker P in *Ferguson v Attorney General* [2019] 1 LRC 673 at paragraph 76.

25. The decision in *Farias* was that the liberty of the appellant to operate a commercial fishing vessel from which he could fish by all permissible methods, including the use of fish pots, pursuant to a license which would have expired on March 31 1963 was not something to be regarded as "*property"* within the meaning of the Constitution of Bermuda. But the Court held that the fact that the fish pots themselves would, under the Regulations, be illegal, so that the appellant would have either to destroy them or hand them over to the Fisheries Department could amount to a deprivation of property within section 1, which provided protection from deprivation of property without compensation. But the protection afforded by that section would give way should the public interest be prejudiced by its enforcement. The court held that, since fishermen had been among the beneficiaries of the preservation and development of fishing stock, of which the outlawing of fish pots was a part, it was not unreasonable that they should bear the cost of the fish pots.

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[10] It was described in *Amerally & Bentham v Att-Gen, DPP and another* (1978) 25 WIR 272, 294 as "*obiter dicta spoken at large and not even after full argument and citation of authority"* when their Lordships "*were not addressing their minds to the question*" of the direct enforceability of section 5 of the Constitution of Malta.

[11] The descriptions of its true nature in *Olivier* were that it was (a) [mainly] pre-ambulatory; (b) a declaration of the entitlement specified, and subject to the conditions set out, in the succeeding sections; and (c) an explanation of the scheme of those sections. It could also be said to be descriptive of the rights enacted in the following sections.

[12] In paragraph 13 of the judgment it was said that *Lewis* was a case where it did not appear to have been argued that section 13 of the Jamaican Constitution, the equivalent of section 1 of the Bermudian Condition, gave rise to an independent right. The reference is given to the Privy Council judgment. But it is plain that the argument was referred to, and accepted, in the Court of Appeal.

26. The decision that section 1 was applicable to the fish pots can, therefore, be seen to be a ground of the decision. But the reason why the appellant failed is not wholly clear. It appears to have been because section 1 ends with the words "*subject to such limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice…. the public interest*". The court appears to have interpreted these words as providing a general public interest exception from protection from deprivation of property if the public interest required it, without reference to the specific limitations specified in section 13: see the statement at page 13: "*That protection would give way should the public interest be prejudiced by its enforcement*".

Attorney General v Grape Bay Limited **[1998] Bda L.R. 6**

27. In this case Grape Bay Limited, which was seeking to bring the business of McDonalds restaurants to Bermuda, contended that the *Prohibited Restaurants Act 1977,* which prohibited new restaurants which were to be operated in such a manner as to suggest a relationship with a restaurant or group of restaurants operating outside Bermuda, was void because it violated Grape Bay's fundamental constitutional rights under section 1 of the Constitution to protection of property and from "*deprivation of property without compensatio*n".

28. In that connection Kempster JA had to consider whether section 1 was directly enforceable. He began by saying that:

> *"Reading the unambiguous terms of Chapter 1 as a matter of first impression and affording it a generous and purposeful construction I would be compelled by the language , authority apart, to find that section 1 contained a declaratory preamble and statement of rights enacting sections 2 to 13 but not itself, as the specific means of protecting the rights outlined "subject to such limitations of that protection as a [sic] contained in those provisions being limitations designed to ensure that the enjoyment of the said rights ..by any individual does not prejudice the rights of others… or the public interest". Section 13 (1) sets out the "Protection from deprivation of property" which the Constitution affords. It is not and could not be relied upon by Grape Bay. If this finding is correct the provisions of section 15 of the Constitutions provide a remedy for breach only of section 13 in its context of deprivation of property".*

29. He then cited Lord Morris in *Olivier* and two later decisions of the Privy Council on the Constitution of Mauritius and said:

> *"However I do not believe that these subsequent decisions of the Board detract from the binding effect of Oliver v Buttigieg on the proper construction of Chapter 1 of the Constitution*."

And continued:

> *"It is now necessary to consider the decision of this Court, only signed by two Justices of Appeal, in Faries* [sic] *v Malpas 1993 Criminal Appeal No 3 of 1992 (unreported) which found section 5 of the Constitution of Malta to be identical with section 1 of the Constitution of Bermuda. Lord Morris's observations were quoted. Nonetheless the*

Court held that section 1 "...provides protection from deprivation of property without compensation". Difficult as it is to follow the reasoning this decision might well ***bind*** *us*[13] *but for the higher authority of the Privy Council in Olivier v Buttigieg.*

> *The Prohibited Restaurant Act 1997 does not violate the right of Grape Bay not to be deprived of property without compensation since only section 13(1) has effect for the purpose of affording such protection."*

30. I agree with the observation of the Chief Justice that the holding by Kempster JA that section 1 was not directly enforceable was an essential element of the reasoning of the decision of the Court of Appeal to deny any relief under the Constitution because he concluded (a) that the effect of the Act was to deprive Grape Bay of property; but (b) that it did not amount to a breach of the prohibition within the terms of section 13 (a); and (c) that the wider provision in section 1 (c) was not directly enforceable. He reached the last conclusion on the authority of *Olivier.*

***Grape Bay Limited v Attorney General* [2000] 1 WLR 574**

31. Grape Bay went to the Privy Council. The Board concluded that, contrary to the decision of the Court of Appeal, the Prohibited Restaurants Act had not deprived Grape Bay of property within the meaning of section 1 (c) and did not find it necessary to express a concluded view on the enforceability of section 1.

32. Lord Hoffmann in his judgment drew attention to the difference in the wording of the Constitutions of certain United Kingdom Overseas Territories, which bear upon the question whether section 1 was directly enforceable. The general scheme of such Constitutions is that they have (i) an opening section stating rights and freedoms and their limitations in general terms; (ii) a series of sections dealing with particular rights and more detailed exceptions and qualifications; and (iii) an enforcement provision. In some Constitutions, such as that of Dominica, the enforcement section gives a right of application to the High Court for redress in relation to sections which do not include section 1. In others, such as Mauritius, the enforcement provision applies in terms to the opening section and thus makes clear that the opening section is intended to be separately enforceable: *Societé United Docks v Government of Mauritius* [1985] AC 585. In the latter case Lord Templeman distinguished the Constitution of Mauritius of 1966 from that of Malta (and thus of Bermuda) on the grounds that section 3 of the Mauritius Constitution was only consistent with it being an enacting section because it "*recognised and declared that in Mauritius there have existed and shall continue to exi*st" the human rights and fundamental freedoms therein set out; and, in consequence, distinguished the case before him from *Olivier.*

33. In *Grape Bay* in the Privy Council, in relation to the Constitution of Bermuda Lord Hoffmann said this:

> *"24. Mr. Diel, to whom their Lordships are indebted for a comprehensive written statement of Grape Bay's case and a succinct oral argument, invites the Board to construe*

[13] In the light of the fact that *Olivier* was not *ratio* this concern seems misplaced. The Court of Appeal is *prima facie* bound by a previous *ratio* decision of itself (such as *Farias*), notwithstanding previous observations in the Privy Council, such as *Olivier*. This is so even if those observations are *ratio*, but, *a fortiori,* if they are *obiter*.

section 1 of the Bermuda constitution in the same way. But there is an important difference in the language of the Bermuda and Mauritius constitutions. Section 1 of the Bermuda constitution begins with the words "Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say ...". The introductory word "whereas" is more indicative of a preamble to later operative words than a separate enactment. In Olivier v. Buttigieg [1967] 1 A.C. 115 the Privy Council considered the constitution of Malta, in which the general statement of rights in section 5 also began with the words "Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say ...". In giving the judgment of the Board, Lord Morris of Borth-y-Gest said (at p. 128): -

> *"It is to be noted that the section begins with the word 'Whereas'. Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow."*

25. It was these remarks which the Court of Appeal followed in the present case in holding that section 1, as a preamble, was an aid to the construction of section 13 but not separately enforceable. It had pointed out that the phrase "the subsequent provisions of this Chapter", which appears in section 1 of the Constitution of Bermuda did not appear in section 3 of the Constitution of Mauritius. On the other hand, Mr. Diel has drawn their Lordships' attention to other Commonwealth cases in which a different view has been taken of provisions beginning with the word "Whereas". For example, in Dow v. Attorney-General [1992] L.R.C. (Const). 623 the Court of Appeal of Botswana held by a majority that the general statement in section 3 of the Constitution, though also commencing with the word "Whereas", was not a preamble but a separate enacting section. There was however a persuasive dissenting judgment by Schreiner J.A, with whom Puckrin J.A. agreed. Even if the majority were right in treating section 3 as separately enforceable, the actual decision would appear to be contrary to the opinion of this Board in Poongavanam v. The Queen (unreported), 6th April 1992, Appeal No. 27 of 1989, to which reference was made in Matadeen v. Pointu [1999] 1 A.C. 98, 118

26. It is however unnecessary for their Lordships to decide in the present case whether the general statement in section 1 of the Constitution is to be a preamble or to have independent force, because their Lordships have no doubt that the effect of the Prohibited Restaurant Act 1997 on Grape Bay was in any event not a "deprivation of property" within the meaning of that section."

As the Chief Justice observed, Lord Hoffmann did not express any doubts about the correctness of the view taken by Kempster JA. Nor did he mention *Farias***,** which was cited.

***Neil Inchcup (trading as Alexis Entertainment and Plush) v Attorney General* [2006] Bda LR 44.**

34. In this case Mr Inchcup, had sought a declaration that sections 5 and 6 of the *Prohibition of Gaming Machines Act 200*1 were void for inconsistency (i) with section 1 (c) of the Constitution, in that their

effect was to deprive him of property without compensation; or alternatively (ii) with section 13 of the Constitution in that their effect was to deprive him of property without compensation in circumstances where such deprivation amounted to taking possession of his interest in, or right over, such property without the conditions of section 13 (1) being satisfied.

35. In the Supreme Court Ground CJ held that;

(a) Mr Inchcup had no valuable property right because his business had always been illegal as being contrary to the Criminal Court Act 1907[14] section 155 and the Lotteries Act 1944.

(b) Mr Inchcup was not deprived of the machines themselves.

(c) Accordingly, Mr Inchcup was not deprived of property within the meaning of section 1 or section 13 of the Constitution, even if section 1 gave a freestanding right.

(d) That section 13 was not engaged because no right had been taken into possession or compulsorily acquired.

(e) It was unnecessary to decide whether section 1 of the Constitution gave rise to a freestanding right.

(f) Section 8 of the Constitution dealing with the protection of freedom of conscience was not engaged.

(g) Section 10 of the Constitution dealing with freedom of association was not engaged.

Mr Inchcup challenged all of these findings on his appeal.

36. Stuart-Smith JA (with whom Zacca P and Nazareth JA agreed) cited the passages from the judgment of Lord Morris in *Olivier* set out in [22] and [23] above and then said:

> *"Dr Barnet focuses on the words "though the section must be given such declaratory force as it independently possesses" as supporting his submission. It is not altogether clear what is the meaning of these words, but in my judgement in the light of the rest of the passage, it cannot mean that the whole section has independent force regardless of the provisions of the remaining substantive sections. It seems to me that it probably means that the subsequent sections must be construed in the light of this preamble.*
>
> *Olivier's case was followed in Francis v Chief of Police [1973] AC 761, a decision on the Constitution of St Christopher, Nevis and Anguilla. In Attorney General v Grape Bay Ltd (Civil Appeal No 21/97) The Court of Appeal of Bermuda followed Olivier v Buttigieg and held that s1 was not a free standing enforceable right.*
>
> *When the Grape Bay case went to Privy Council ([2000] 1 WLR 574) the Board did not find it necessary to decide the question, but there is nothing in the opinion of Lord*

[14] A misnomer for the Criminal Code Act 1907.

Hoffmann to cast doubt on the correctness of the decision of the Court of Appeal. Dr Barnet submitted that the Court of Appeal's decision was not binding on us because it was not necessary for the decision in the case and was per incuriam because the Court misunderstood the effect of Olivier's case, and was in any event was contrary to the prior decision of this court in Farias v Malpas [1993] Criminal Appeal No 3 of 1992.

I cannot accept this submission. The ruling on section 1 was part of the decision of the Court, which gave careful consideration to the Olivier and Farias cases. It is true that the Farias case is an earlier decision, but though the court in that case referred to the Olivier case they reached a conclusion which is directly in conflict with it. There is no reasoning on which it could be distinguished. In my judgment the decision in the Farias case must be regarded as per incuriam and wrong".

37. As the Chief Justice observed it is plain that the Court of Appeal in *Inchcup* considered: (i) that section 1 of the Constitution was not directly enforceable; (ii) that in *Farias* Georges JA cited *Olivier* but reached a decision which was directly contrary to it; (iii) that there was no basis upon which *Olivier* could be distinguished (iv) that the decision in *Farias* must be regarded as *per incuriam*; and (v) that the decision of the Court of Appeal in *Grape Bay* was right.

38. I do not regard it as correct to say that the decision in *Farias* is to be regarded as given *per incuriam*. The fact that a later decision of the Court of Appeal wrongly construes a prior decision of the Privy Council is not a circumstance falling within the classic definition of *per incuriam* in Halsbury - see [79] below - to the effect that a Court is not entitled to depart from an earlier decision of the same Court because that earlier decision is said, itself, to have misconstrued a previous decision of the House of Lords. If so, it cannot be right for the earlier decision to be regarded as *per incuriam* on account of the misconstruction – for, if that were so, the Court would be entitled to depart from it.

39. At the same time, it is apparent that the Court in *Inchcup* decided that, of the two conflicting decisions, *Grape Bay* was to be preferred.

Ferguson v Attorney General **[2009] 2 LRC 621**

40. This case involved a challenge to the *Domestic Partnership Act 2018* which purported to void same-sex marriage and to revoke the decision in *Godwin v Registrar Genera***l** [2017]SC (Bda) 36 Civ. Part, albeit a small part, of the claim was that Mr Ferguson's rights under section 1 (a) had been infringed. As to that Baker P said this:

"76 Mr Pettingill, on behalf of Roderick Ferguson, submits that the DPA is void for additional reasons. He submits that his constitutional rights have also been breached under sections 1(a), protection of law, 9 freedom of expression and 10, freedom of association. Section 1(a) is not an independently enforceable right, see Inchup (trading as Alexis Entertainment and Plush) v The Attorney General [2006]

Bda L.R. 44 and breach of the other sections was, as the Chief Justice said, virtually unarguable."[15]

Is Farias (a) binding and (b) right?

41. The Corporation contends that the Supreme Court, and this Court, should follow *Farias* because, so it is said, it is the only case in this Court where the decision as to the independent enforceability of section 1 was part of the *ratio*, and also because of two subsequent decisions of the Privy Council to which I now turn.

***Campbell-Rodriques v Attorney General* [2008] 4 LRC 562**

42. This case concerned a road-building project in Jamaica which included the closure of an existing road between Kingston and Portmore and the construction of a substitute toll road. The appellants, well established Portmore residents, claimed that free and unrestricted access to and from Kingston was essential for the quiet enjoyment of their property and applied to the Constitutional Court claiming that the imposition of tolls was contrary to sections 13 and 18 of the Constitution of Jamaica, in its then form,[16] those sections being in similar (but not identical) terms to sections 1 and 13 of the Bermuda Constitution. Section 13 in its then from provided:

> *"Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right … to. (a) life, liberty security of the person, the enjoyment of property and the protection of the law."*

43. Section 18 made provision in respect of the compulsory acquisition of property in these terms:

> *"1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that*
>
> *a. prescribes the principles on which and the manner in which compensation therefore is to be determined and given; and*
>
> *b. secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of*
>
> *i. establishing such interest or right (if any);*
> *ii. determining the amount of such compensation (if any) to which he is entitled; and*
> *iii. enforcing his right to any such compensation"*

[15] Counsel for the Attorney General informed the Court below that whilst there was an appeal against the decision of the Court of Appeal in *Ferguson v Attorney General* to the Privy Council, there was no cross-appeal in relation to the Court of Appeal's decision relating to the direct enforceability of section 1, as set out in paragraphs 76 of the Judgment of Baker P.

[16] The Constitution was substantially amended in 2011.

44. Section 25 (1), as it then stood, provided that:

> *"If any person alleges that any of the provisions of* ***sections 14 to 24*** *(inclusive) of this Constitution has been, is being or is likely to be contravened relation to him, then ...that person may apply to the Supreme Court for redress".*

45. The appellants contended that section 13 had independent force. In his judgment Lord Carswell referred to Lord Hoffmann's summary in *Grape Bay* of the typical contents of chapters in Constitutions dealing with fundamental rights. He observed that there was a spectrum of constitutional provision ranging from Mauritius where section 3, the equivalent of section 1 in Bermuda, is one of the sections expressly mentioned in the redress section, and was held in *Societé United Docks* to be only consistent with an enacting section, to Dominica where the redress section referred to sections 2-15 and did not refer to section 1. Lord Carswell said that the provisions of the Constitution of Dominica, in its then form, which was, in the material respect, identical to that of Jamaica - in that the redress section referred to sections 2-15 and not to section 1, the opening section - were considered by the Board in *Blomquist v AG of Dominica* [1988] LRC Const 315 and that Lord Mackay rejected the submission that section 1 conferred an independent and wider power which was separately enforceable.

46. Lord Carswell regarded the Constitutions of Malta and Bermuda as being in an intermediate position. He referred to the passage of Lord Morris in *Olivier* and the consideration of the Constitution of Bermuda by the Board in *Grape Bay*. He no doubt regarded Malta and Bermuda as in an intermediate position arose because, although the opening section was of the "*Whereas* ..." variety, the redress section did not refer to previous numbered sections which either did or did not include the opening section.

47. In *Campbell Rodriques* the Board held, in relation to Jamaica, that the Constitutional Court and the Court of Appeal had rightly rejected the appellants' argument that section 13 conferred separate and independent rights. On the clear interpretation of the provisions of Chapter III the rights and freedoms enforceable under section 25 (repealed in 2011) were those set out in sections 14-24.

48. In the present case the Corporation argued before the Chief Justice that, as a higher court than the *Inchcup* court had subsequently held, in effect, that it was arguable that section 1 of the Bermuda Constitution was independently enforceable, the Bermuda Supreme Court was not bound by the conclusion in *Inchcup* that section 1 was unenforceable.

49. The Chief Justice felt unable to accept the submission that merely because a subsequent decision of the Privy Council had held that a particular point of law was arguable, that allowed the Supreme Court to ignore the earlier binding decisions of the Court of Appeal in relation to that point. I agree. He said that he was, in any event, not persuaded that *Campbell-Rodriques* cast any doubt on the decisions of the Court of Appeal in *Grape Bay* and *Inchcup* in relation to the direct enforceability of section 1. Further, there was nothing in the judgement of Lord Carswell to suggest that he had any disagreement with what was said by Lord Hoffmann in *Grape Bay*, and there was nothing said by Lord Hoffmann which suggested that he disagreed with *Grape Bay* in the Court of Appeal.

50. It also material to note what Lord Carswell said when deciding that, section 13 of the Jamaica, the equivalent of section 1 of the Bermuda Constitution created no separate rights:

> *"Both the Constitutional Court and the Court of Appeal rejected the appellants' argument that section 13 conferred separate and independent rights. They regarded it as in essence a preamble and accepted the respondent's submission that its declaratory force was* ***confined to declaring that the rights set out in Chapter III of the Constitution were not being created de novo but existed prior to the Constitution. Their Lordships are satisfied that section 13 does not confer any freestanding rights*** *and that on the clear interpretation of the provisions of Chapter III the rights and freedoms enforceable under section 25 are to be those set out in sections 14 to 24 inclusive. They agree with Cooke JA when he said (Record, p 379) that "a 'generous and purposive interpretation' does not permit a distortion of the explicit relevant constitutional provisions."*

51. Whilst the fact that the redress section of the Jamaican Constitution did not include section 13 was of obvious significance, it is noticeable that the Board (a) accepted that the section could properly be read as a preamble; and (b) identified the declaratory force which the section had.

52. In the case of Bermuda, the redress section provides:

> ***"Enforcement of fundamental rights***
>
> *15 (1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress"*

This provision begs the question as to which are the provisions which provide for a right which can be contravened. Section 1 makes plain that it is the provisions subsequent to section 1 which do so.

53. It is, also, to be noted, that Chapter II of the Constitution of Malta, considered in *Olivier*, provided in section 5 that *"the provisions of this Part of the Order,* i.e. Chapter II, *shall have effect for the purpose of affording protection to the aforesaid rights*"; and in section 16, the enforcement section said that there should be a right to apply for redress for any person who alleged that "*any of the provisions of this Part of the Order*" had been contravened. Notwithstanding the absence of the word "*subsequent*" before "*provision*" in section 5 the case has been taken to decide that that section conferred no independent right.

54. In my judgment the Chief Justice was right to hold (a) that it was wrong to hold that the decisions in *Inchcup* and *Grape Bay* could not stand with *Campbell-Rodriques* and (b) that the latter case cast no doubt on the two former cases.

55. The Board in *Campbell-Rodriques* also addressed the alternative submission that section 1 should be given effect as an aid to construction of section 18. As to that the Board said at [13]:

"That may in principle be so, since a statute has to be read as a whole, if there is any ambiguity in the meaning of any of those provisions and if the language of section 13 throws any light on the intention of the legislature as to their meaning. For the reasons which they will give, however, their Lordships do not consider that there is any ambiguity in the terms of section 18 on which the wording of section 13 would throw any light. They do not propose therefore to express an opinion on whether the words "enjoyment of property" in section 13 are intended to connote anything more than the individual's right not to be deprived of his or her property"

56. The Bermuda Constitution does not contain the words "*enjoyment of property*" in section 1. Even when the Jamaican Constitution did contain those words, the Board did not consider that there was any ambiguity in section 18 to resolve. Since the words in section 13 of Bermuda and section 18 of the Jamaica Constitution are identical, there is, on the Board's reasoning, no ambiguity that section 1 of the Bermuda Constitution might resolve. In addition, I cannot regard the fact that section 1 refers to "*deprivation of property*", as does the heading of section 13, means that section 13 (1) should be interpreted in any manner other than that which is apparent from its own words, as interpreted by the Privy Council. It is not appropriate to use section 1 to give an expanded meaning to section 13.

***Newbold v Commissioner of Police & Ors* [2014] 4 LRC 684**

57. This case concerned an extradition request by the United States America for extradition from the Bahamas of a suspected drug trafficker. The appeal concerned the legitimacy and constitutionality of interception by the Bahamian police of the appellant's telephone. In the course of the case the Privy Council had to consider Article 15 of the Bahamas Constitution which was in identical terms to section 1 of the Bermuda Constitution.

58. Article 28(1) of the Bahamas Constitution provides:

"If any person alleges that any of the provisions of Articles 16 to 29 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect same matter which is lawfully available, that person may apply to the Supreme Court for redress."

59. The Board had to consider whether Article 15 of the Bahamas Constitution contained some independent right. It decided that it did not. It did so in the following terms:

"[27] It is convenient next to consider article 15. This is the first article in Chapter III, which is headed "Protection of fundamental rights and freedoms of the individual" and comprises articles 15 to 31 of the Constitution. Article 15 is phrased as a recital, starting with the word "Whereas", proclaiming the entitlement of every person in The Bahamas to fundamental rights and freedoms which it summarises; it continues by saying that "the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of the protection as are contained in those provisions". The fundamental rights and freedoms summarised correspond with the headings and subject-matter of the ensuing articles.

[28]. In these circumstances, it is no surprise that Jamaican courts up to and including the Board have under the (for relevant purposes identical) provisions of Chapter III of the Jamaican Constitution rejected the argument that the Jamaican equivalent of article 15 conferred separate and independent or freestanding rights that could be relied upon to provide redress not available under the subsequent provisions of Chapter III of the Jamaican Constitution (more particularly the article protecting against deprivation of property): Campbell-Rodriques v Attorney General of Jamaica [2007] UKPC 65. There is earlier authority to the same effect on a similarly worded article in the Constitution of Malta: Olivier v Buttigieg [1967] 1 AC 115. But Mr Fitzgerald relied upon Thomas v Baptiste [2000] 2 AC 1 (an appeal from Trinidad and Tobago), Neville Lewis v Attorney General of Jamaica [2001] 2 AC 50 and Attorney-General v Joseph [2006] CCJ 3 (AJ) as indicating a different conclusion.

[29] All three were cases where the death penalty had been passed and the person sentenced had petitioned the Inter American Commission on Human Rights under the American Convention on Human Rights which the respective countries had ratified at the international level. The Constitution of Trinidad and Tobago was in very different form to that of The Bahamas. The provision invoked in Thomas v Baptiste was on any view an enacting provision[17], section 4, recognising and declaring fundamental rights which included the right not to be deprived of life "except by due process of law". There were no other provisions enacting fundamental rights. The Board (by a majority) reasoned that, by ratifying the American Convention which provided for individual access to the Inter American Commission, the state had made such access part of the domestic appellate process, to which the obligation of "due process of law" applied, so as to require the state to await the disposal of the appellants' petitions before executing them. A stay of execution was ordered accordingly.

[30] In Neville Lewis the circumstances were similar. The appellants contended that they should not be executed until the Inter American Commission and UN Human Rights Committee had reviewed and reported on their petitions. As already observed, the Jamaican Constitution is however in the same form as the Bahamian, rather than that of Trinidad and Tobago. Nonetheless, the Board, without commenting on this difference, treated "the protection of the law" to which article 13 of the Jamaican Constitution (article 15 of the Bahamian) refers as equivalent to the "due process of law" referred to in the Constitution of Trinidad and Tobago, Lord Hoffmann dissenting, it thus applied the reasoning in Thomas v Baptiste to reach a conclusion that execution should be stayed.

[31] Finally, in Attorney-General v Joseph the Caribbean Court of Justice was also concerned with a constitution, that of Barbados, in materially identical form to the Jamaican and Bahamian Constitutions. In paragraph 58 onwards, the Court accepted that section 11 of the Barbados Constitution, the equivalent of article 15 of the Bahamian Constitution, was basically a preamble, save, it concluded, in relation to

[17] As was section 3 of the Antigua and Barbuda constitution, which fell within section 18, the redress section: see *Williams v Supervisory Authority* [2020] 5 LRC 220.

the reference to protection of the law. That reference was elucidated only in section 18 (article 20 of the Bahamian Constitution), which on its face dealt only with aspects of the trial process. The Court thought that "the protection of the law" referred to in section 11 (article 15) "would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of article 18" (para 60). It did not agree with the Privy Council's conclusion in Thomas v Baptiste and Neville Lewis that the ratification of the American Convention could make the individual right to petition part of the domestic criminal justice system (para 76). But it considered that, by ratifying the Convention, the state had created a legitimate expectation that the death sentence would not be carried out while a petition to the international bodies was on foot, and that this should be enforced by a stay of execution.

[32] The Board does not consider that these three authorities assist the appellants in the present case. ***They are emphatically not authority for any proposition that article 15 of the Bahamian Constitution operates as and provides a general source of protection of human rights, overlapping with the substance of all the rights provided by the subsequent specific articles****. They address a completely different subject-matter to the present, and at best support the view that the concept of "protection of the law" can extend to matters outside the scope of article 18 of the 1973 Constitution. In the present case, the relevant substantive rights are to be found in articles 21 and/or 23 or not at all. Article 15 is in this respect no more than a preamble, as the Board held it to be in Campbell-Rodriques. There is a distinction between on the one hand constitutions in the form adopted in The Bahamas, Jamaica and Malta, in which the equivalent of article 15 is wholly or predominantly a preamble, and on the other hand constitutions in the form adopted in Trinidad and Tobago and Mauritius, which contain instead an enacting provision. The distinction was recognised by the Board in Société United Docks v Government of Mauritius [1985] 1 AC 585, 600D-G as well as in Campbell-Rodriques, paras 9 to 12. In re Fitzroy Forbes (no 498 of 1990), Hall J was in the Board's view wrong to conclude that that distinction did not, or did not any longer, exist, and wrong to treat the Société United Docks case as an authority applicable on its facts to article 15 of the Bahamian Constitution.*

[33] ***In short, Mr Fitzgerald's submission does not only run counter to the natural meaning of article 15. It also ignores the word "Whereas" and the recital in article 15 that it is "the subsequent provisions of this Chapter" which "shall have effect for the purpose of affording protection of the aforesaid rights". Finally, it ignores the clear implication of the restriction of the right of redress under article 28, and the restriction of the saving of existing laws from challenge to cases of alleged contravention of articles 16 to 27.*** *If article 15 had been understood as an independent enacting provision, the constitutional right of redress would have been extended to it. Similarly, to read article 15 as an enacting provision would undermine and make pointless article 30(1), the clear aim of which was that fundamental rights otherwise provided by the Constitution should not prevail over any contrarily expressed "existing law". The Board therefore considers that article 15 has no relevance or application in this case, save as a preamble and introduction to the subsequently conferred right."*

60. It seems to me that this case is authority for the proposition that the submission that the wording of Article 15 of the Bahamian Constitution, which is in the same terms as section 1 of the Bermudian Constitution, creates an independent right:

(a) is contrary to its natural meaning, and

(b) ignores the word "*whereas*" and the recital that it is "*the **subsequent provisions** of this Chapter* "which "***shall have effect** for the purpose of affording protection of the aforesaid rights".*

The Board held, in addition, that the submission:

(c) ignored the restriction in the Bahamass Constitution of the right of redress under Article 28 to Articles 16-27; and

(d) the restriction provided by the saving of existing laws from challenge on the grounds of inconsistency with Articles 16 to 27 which would be rendered pointless if existing laws could be impugned under Article 15.

The latter provision is not present in the Bermuda Constitution, which also does not contain a redress provision which expressly excludes section 1 from the section which it enumerates.

61. The absence of factors (c) and (d) does not seem to me to make the Board's conclusion inapplicable to Bermuda. The decision can stand as applicable to Bermuda on the basis of the Board's interpretation of the language of the section, which the Board held to be "*a preamble and introduction to the subsequently conferred right".* It is to be noted that that the provisions of the Bermuda Constitution as to rights of redress, or provisions to similar effect in Malta, were before the Court in *Olivier* (*"any of the provisions of this Part of this Order")*, *Grape Bay* ("*any of the foregoing provisions of this Chapter*") and *Inchcup* (ibid). Lastly, the fact that in the Bermuda Constitution redress is extended to any contravention of "*the foregoing provisions*" cannot, in my view, extend to a provision which does not, on its true construction, enact a right.

***Nervais v The Queen* [2018] CCJ 19**

62. In this case the Caribbean Court of Justice[18], on appeal from the Court of Appeal of Barbados, had to consider whether the mandatory death penalty for murder was constitutional. It determined that section 11 of the Constitution of Barbados (in similar terms to section 1 of the Bermuda Constitution) was an enacting section.

63. The reasoning in the case was helpfully summarised by the Chief Justice as follows, largely adopting the language of the judgment of the CCJ:

> "*70. In Nervais the Crown argued that the appellant was not entitled to rely on the right to the protection of law guaranteed by section 11 of the Constitution of Barbados (in similar terms as section 1 of the Bermuda Constitution) because the section is a*

[18] The decisions of which are not binding on us.

preamble and did not confer any enforceable rights. The Crown relied on a line of authorities of which the most recent decision was the Privy Council decision in Newbold v Commissioner of Police [2014] 4 LRC 684. The CCJ took a different approach from the Privy Council decisions in cases such as Newbold, Campbell-Rodriques and Olivier v Buttgieg and held:

> *(a) The Privy Council cases attribute an unusual meaning to the word "preamble". A preamble is defined by Halsbury as "a preliminary statement of reasons which have made the passing of statute desirable, and its positions [sic] located immediately after the title and the date of issuing the presidential assent." The CCJ accepted this as a reliable and acceptable definition of the word. The location of section 15 in the Constitution of the Bahamas and section 11 in the Constitution of the Barbados militates against them being categorised as a preamble. Neither of these sections was a preliminary statement at the commencement of the Constitution[19]. They were in the substantive portion (at paragraph 22).*
>
> *(b) The language of section 11 is not aspirational, nor is it plenary [sic][20] statement of reasons which make the passage of the Constitution, or sections of it desirable. The section is in two parts. The first part commences with the word "whereas", a word which it is contended implies that the section is merely preambular and ends at the end of sub-paragraph (d). This part gives effect to the statement in the preamble which states that the people have had the rights and privileges since 1652 and these have been enlarged since then. It declares the fundamental rights and freedoms of the individual to which every person in Barbados is entitled in clear and unambiguous terms. It is the only place in the Constitution that declares the rights to which every person is entitled (at paragraph 25).*
>
> *(c) The CCJ held in Attorney General v Joseph and Boyce [2006] CCJ 3 (AJ) that the right to protection of law contained in section 11 (c) of the Barbados Constitution (section 1 (a) of the Bermuda Constitution) was directly enforceable, separate and distinct from the provisions in section 18 dealing with protection of law (section 6 of the Bermuda Constitution). This is so because section 18 deals only with the impact of the rights in legal proceedings, both criminal and civil, and the provisions which it contains are geared exclusively to ensuring that both the process by which the guilt or innocence of a man charged with a criminal offence is determined as well as that by which the existence or extent of a civil right or obligation is established, are conducted fairly. But the right of the protection of the law is much wider in the scope of its application and section 18 is not intended to be an exhaustive exposition of that right (at paragraph 32).*

[19] The Barbados Constitution has six paragraphs of recital before Chapter 1. Bermuda has nothing before Chapter 1, which starts at section 1 with the "*Whereas…"* section.
[20] Presumable "a preliminary" was meant.

(d) The reasoning which applies to the provisions for the protection of law, section 11 (c), and unconstitutional deprivation of property, section 11 (b), is equally applicable to other subsections of section 11 (at paragraph 35}."

64. In addition to the points identified by the Chief Justice the judgment of the CCJ included the following points:

(a) Lord Morris had said that the section would appear "*in the main*" to be of the nature of a preamble but his words had been cited in support of the proposition that the provision was merely preambulatory [27];

(b) *Societé Generale* concerned a differently worded clause headed "3 *Fundamental rights and freedoms of the individuals*" and began "*It is hereby recognized and declared…"*. The Maltese Constitution (and hence the Bermudian) could easily have been construed so that "*whereas*" meant "*It is hereby recognized and declared that*" [30];

(c) The second part of section 11, which provides that the following provisions of Chapter III shall have effect for the purpose of affording protection to *those* rights and freedoms subject to such limitations of that *protection* as are contained in those provisions, must rebut the contention of the Crown and the reasoning of Lord Mance in *Newbold***;**

(d) The sections subsequent to section 11 contain only limited provisions when there are circumstances in which the rights specified in section 11 must have a wider reach than those specific provisions.

65. It is to be noted that Justice Winston Anderson powerfully dissented from the Court's conclusions on the independent enforceability of section 11. He held that it was clear from the structure of the Chapter that section 11 was not intended to be enforceable independently of the remainder of the Charter. It was a preambulatory declaration of the rights and freedoms to which every person in Barbados was entitled. The section *explicitly* stated that the very detailed provisions which followed *"shall have the effect*" of affording protection to those rights and freedoms subject to limitations contained in those provisions. Section 24 was framed on the understanding that only breaches of sections 12-23 would attract a remedy. Section 26 saved existing law from being held to be inconsistent with or in contravention of any provision of sections 12-23. The clear implication was that the framers of the Constitution did not intend that section 11 should be independently enforceable. He observed that these propositions formed the unstated premise of several past decisions including *Newbold*.

66. He also observed that, in a judgment of the CCJ in *Joseph and Boyce* [2015] CCJ 15, which was to the same effect as that of the majority in *Nervais*, there was no explanation as to how to reconcile the separate justiciability of section 11 with the architecture of the constitutional provisions, or how any external limits would apply to the protection of law clause, or how any internal limits on rights elaborated from section 11 could be established so as to ensure balance between the exercise of rights derived from section 11 and the protection of the rights of persons impacted by that exercise.

***Jamaicans for Justice v Police Service Commission* [2019] UKPC 12**

67. This appeal concerned an application by a human rights organisation for a judicial review of a decision of the Police Service Commission ("PSC") to recommend the promotion of a police officer who had been involved in a large number of questionable fatal incidents, which had never been the subject of independent investigation. The appellant sought an order requiring the PSC to cause such an investigation to be conducted before any promotion took place.

68. Chapter III of the Jamaica Constitution in its then form[21] began, in section 13 (1) with a "*Whereas* …" passage which ends with the words "*the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions*.". Sub-section (2) then guaranteed the rights and freedoms set out in subsections (3) and (6); subsection (3) listed some 19 separate rights; and subsection (6) another one. Sections 14 – 17 set out the rights to freedom of the person, protection of property rights, rights to due process, and the right to freedom of religion to which subsections (3) (p) – (s) referred. The scheme is similar to sections 2 to 14 of the Bermuda Constitution. Section 19 gave a right to apply for redress for anyone alleging that "*any of the provisions of this Chapter*" had been convened.

69. In the Privy Council Lady Hale, giving the judgment of the Board, referred to the decision in *Nervais* that section 11 of the Barbados Constitution, also beginning with "*whereas*…", was intended to have the force of law and referred to the fact that the court in *Nervais* said of the right to protection of the law in that Constitution that "*it affords every person…adequate safeguards against irrationality, unreasonableness, unfairness or arbitrary exercise of power*". She then observed [23] that "*the PSC, like all other organs of State must exercise its functions in a manner which is compatible with the fundamental rights of all persons, including the right to life, the right to equality before the law and the right to due process of law guaranteed in the Jamaica Constitution by sections 13 (2) and 3 (a)* [right to life]; *(g)* [right to equality before the law]; and (*r)* [right to due process]". Noticeably, section 13 (1) was not referred to in this sentence.

70. The Board was also disposed to accept that the right to equality before the law [in the Jamaica Constitution], like the right to the equal protection of the law in the Barbados Constitution, afforded every person protection against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power. These were, Lady Hale observed, in any event fundamental common law principles governing the exercise of the public functions and, as there was nothing in the statutory framework governing the PSC to contradict them, they were applicable in that case irrespective of whether or not they had the status of a constitutional right [24].

71. In the Board's view [28] the common law provided a straightforward answer to the question whether the PSC gave proper consideration to the Commissioners' recommendation for promotion, without exercising its powers to call for further enquiries, when serious allegations had been made against the officer concerned and no independent investigation had taken place, the answer being "no". In essence, therefore, the Board decided the case on a common law basis.

72. The Corporation suggested to the Chief Justice that this case showed a new approach in construing the "*Whereas*" provisions in Constitutions like that of Bermuda. In my view it does no such thing. The provisions of the Constitution to which the Court referred were subsections which <u>followed</u>

[21] As amended by the *Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.*

section 13 (1), these later subsections being the sections which guaranteed and enacted fundamental rights. The Constitution contained no provision for the "*protection of law*". Lady Hale referred to the definition of "*equal protection of the law*" in *Nervais* as of assistance in defining the words "*equality before the law*" in section 13 (3) (g) of the Jamaican Constitution (an enacting section) so as to embrace protection against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power, in a manner that the common law did as well. Since the common law did so, it did not matter whether those rights had the status of a constitutional right.

73. Thus it seems clear that, if the right not to be subject to fundamental unfairness was to be treated as a constitutional right it was one which arose under section 13 (3) (g) - an enacting section - as part of the right to equality before the law.

74. The Chief Justice was right to hold, as he did, that the Privy Council was not adopting the *Nervais* ruling that the "*Whereas*" provision in the Constitution was intended to have independent force and was directly enforceable. Had he been doing that he would have been reversing *Olivier* and *Newbold***,** and taking a position which had not been adopted in *Campbell-Rodriques*, but without any reference to those cases. None of them appear to have been cited.

Was the Chief Justice bound by what was decided in Grape Bay, Inchcup and Ferguson?

75. The Chief Justice held that he was. In my view he was right.

76. The position, so far as this Court is concerned, stands thus.:

(a) *Farias* determined that section 1 was directly enforceable on the basis that that was what was decided in *Olivier*;

(b) *Grape Bay* decided that section 1 was not directly enforceable and that *Olivier* so held;

(c) *Inchcup* decided that *Grape Bay* was binding authority and that *Farias* was wrong and decided *per incuriam;*

(d) *Ferguson* followed *Inchcup***.**

By what authority is this court now bound?

77. The Chief Justice decided that the Court of Appeal in *Inchcup* was entitled and bound to decide which of the two earlier authorities to follow; it chose *Grape Bay* and he was, thus, bound by the decisions reached in *Grape Bay, Inchcup* and *Ferguson.*

78. On this issue, the Corporation cited to us, and to the Chief Justice, the decision of the English Court of Appeal in *Young v Bristol Airplane Company Limited* [1944] KB 718, summarised in *Halsbury's Laws* in the following passage:

> *"The decisions of the Court of Appeal upon questions of law must be followed by Divisional Courts and courts of first instance, and, as a general rule, are binding on*

the Court of Appeal until a contrary determination has been arrived at by the Supreme Court. There are, however, three exceptions to this rule; thus:

(a) the Court of Appeal is entitled and bound to decide which of the two conflicting decisions of its own it will follow;

(b) it is bound to refuse to follow a decision of its own which, although not expressly overruled, cannot, in its opinion, stand with the decision of the Supreme Court; ***and further is not bound by one of its decisions if the Supreme Court has decided the case on different grounds, ruling that the issue decided by the Court of Appeal did not arise for decision****; and*

(c) the Court of Appeal is not bound to follow a decision of its own if given per incuriam."

79. The text in *Halsbury's Laws* goes on to explain "*per incuriam*" in following terms:

> *"A decision is given per incuriam when the court has acted in ignorance of the previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow (or when it has acted in ignorance of a Supreme Court decision, in which case it must follow that decision); or when the decision is given in ignorance of the terms of the statute or rule having statutory force, or when, in rare and exceptional cases, it is satisfied that the earlier decision involved a manifest slip or error and there is no real prospect of a further appeal to the Supreme Court. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument, and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority.* ***Even if a decision of the Court of Appeal has misinterpreted a previous decision of the Supreme Court, the Court of Appeal must follow its previous decision and leave the Supreme Court to rectify the mistake.****"* [22]

80. The Corporation submits that we are bound by *Farias* and not by any of the three later cases because the decision in *Inchcup* was *obiter dictum*, since it was sufficient to dispose of the case that Mr Inchcup had no valuable property right because his business had always been illegal, being contrary to the Criminal Code and the Lotteries Act 1944 [62].

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[22] In *Williams v Glasbrook Ltd* [1947] 2 All ER 884 Lord Greene MR made clear that the Court of Appeal was bound by its previous decision, and that, if it was said that, in that previous decision, the Court had misunderstood an earlier decision of the House of Lords, that was no justification for the Court of Appeal not to follow its earlier decision. But the position was different if a subsequent case in the House was found either expressly or by implication in effect to overrule an earlier decision of the Court of Appeal. Further, if the Court of Appeal is faced with two previous inconsistent decisions of that Court it must decide which one to follow; and must decline to follow a decision which is inconsistent with that of a higher court. The result of all that appears to be that, if there are two inconsistent decisions (by way of ratio), the Court can choose to follow the later one even though the decision of the higher court with which it thinks the earlier of the two decisions of the Court of Appeal to be inconsistent preceded that earlier decision: see *Bain-Thomas v Attorney General* [2018] 2 LRC 246.

81. It also submits that there was no need in *Inchcup* to make a choice between *Farias* and *Grape Bay* because *Grape Bay* went to the Privy Council, which decided the case on different grounds. As to that, the English Court of Appeal in the case of *R v Secretary of State for the Home Department ex parte Al-Mehdawi* [1990] 1 AC 871, decided that which is stated in Halsbury, namely that the court is *"not bound by one of its decisions if the Supreme Court has decided the case on different grounds, ruling that the issue decided by the Court of Appeal did not arise for decision"*. Paradoxically *Al-Mehdawi* itself went to the House of Lords which did not accept the invitation of Taylor LJ (as he then was) to rule on the *stare decisis* aspect of the case. As a result, *Al-Mehdawi* is not, on its own reasoning, binding even on the English Court of Appeal on the *stare decisis* issue, although in *Helena Partnerships Ltd v Revenue and Customs Comrs* [2012] PTSR 1409 the English Court of Appeal seems to have thought that it was, on the basis that the decision of the Court of Appeal on *stare decisis* was the last word on the subject.

82. So, on the basis of the decision on *stare decisis* in *Young v Bristol Aeroplane Company,* which did not contain the exception provided for in *Al-Mehdawi*, the Court of Appeal in *Al-Mehdawi* was bound by its previous decision. On that approach, which seems to me correct in English law, the decision in *Grape Bay* was *ratio*, *Young v Bristol Aeroplane* is to be followed, and the Court in *Inchcup* was bound to decide between *Farias* and *Grape Bay*. On that basis, which I would accept, the Chief Justice was right.

83. If, contrary to the above, the decision in *Al-Mehdawi* is to be followed, then, as a matter of English law, the decision in *Grape Bay* was *obiter* and *Inchcup* was bound to follow *Farias* rather than choose between *Farias* and *Grace Bay*.

84. In those circumstances I would be reluctant to accept that the decision in *Inchcup* to follow *Grape Bay* and not *Farias* cannot be regarded by this Court as the making of a choice between two opposing ratios – that of *Farias* and that of *Grape Bay*. So far as this Court was concerned there were at the time of *Inchcup* two different *rationes* and it seems to me profoundly unsatisfactory that the Court in Case C (*Inchcup*) should not be entitled to choose whether or not to follow A (*Farias*) or B (*Grape Bay*) but is bound by A, simply because a higher court in Case B did not address the issue. This is particularly so when the court in Case A reached its decision by misinterpreting the *obiter* decision of the Privy Council in *Olivier*.

85. In *Al-Mehdawi* in the Court of Appeal Taylor, LJ reached his conclusion because, *inter alia,* he thought that it would be strange if the Court of Appeal was bound by its previous decision, even though – as in *R v Diggines ex parte Rahmani* (1985) 1 AER 1073 - the case had gone to the House of Lords and that Court had declined to express even a provisional view on the soundness of the principle which the Court of Appeal had followed, holding that it would be dangerous to do so save in a case where the circumstances and the facts required it to be decided. (That is not what the Privy Council held in *Grape Bay*).

86. I can see some force in a rule which treats the Court of Appeal as not bound by a former decision of the same Court on an issue when the case has gone to the Privy Council, which has not decided the case on the issue in question, particularly if the Privy Council has expressed doubt as to the validity of the Court of Appeal's decision on the issue in question. But, when this Court has in fact reached

two conflicting decisions and then decides, in a third decision, which of the preceding two to follow, it seems to me that the Court should, thereafter, follow the third decision, even though the second went to the higher court which decided it on a different issue. Were it necessary to do so, I would decline to follow *Al-Mehdawi* in this jurisdiction.

87. It is not, however, necessary to reach a final conclusion on that because, even if in *Inchcup* (Case C) the Court did not have to choose *between Grape Bay* (Case B) and *Farias* (Case A), because it could not be regarded as bound by *Grape Bay*, and cannot, therefore, be regarded as having chosen between two different *rationes*, the fact is that the Court in *Inchcup* did decide that *Farias* was wrong and that *Grape Bay* was right. As a result, there were two decisions (*Farias* and *Inchcup*), the *rationes* of which conflicted on the section 1 point. Then in *Ferguson* the Court of Appeal had to determine whether to follow *Farias* or *Inchcup*, and must be taken to have determined, that it would follow *Inchcup* (and *Grape Bay*). And we are bound by that decision.

Was the decision in Inchcup in fact obiter?

88. The Corporation submits that the decision in *Inchcup* was, itself, *obiter.* The Chief Justice disagreed. Mr Inchcup had pursued seven separate grounds of appeal any one of which could have been dispositive of the entire appeal. The Court gave a reasoned decision on each ground and, as he held, when a judgment is based upon multiple reasons, all reasons are binding. Accordingly, there was no reason to consider the decision on section 1 as *obiter* simply because the Court gave other reasons justifying the same decision.

89. In my judgment the Chief Justice was right on that. I agree with him when he said that there is no rule of law which requires a court to treat a distinct and sufficient ground for a decision as a mere *obiter dictum* on the basis that the Court has given other reasons which are sufficient to decide the matter.

90. It is sometimes suggested (and was suggested by Mr Myers) that the question whether a decision on an issue forms part of the *ratio* depends on whether the decision was necessary in order to produce the result which the Court reached. In my judgment this is too simplistic a view. It would appear to mean that, in a case, where the Court decided that the plaintiff was entitled to recover $ x in damages both in contract and in tort, the decision in contract was *obiter* because the result would have been the same if there was only a claim in tort; and the decision in tort would be *obiter* because the result would have been the same if there was only a clam in contract. Similarly, in a case where three points were taken by the defence, any one of which, if decided in favour of the defence, would mean that the claim failed, and the Court decided all three points in the defendant's favour, it would appear that none of the individual decisions on each point was *ratio* because the same result would follow if that decision had gone the other way. Contrariwise if, in order to succeed, a plaintiff had to succeed on four points and failed on all of them, which, if less than all, of them is said to be the ratio? In each of these cases it would, of course, be necessary to decide one of the issues in order to produce the result– but not all of them.

91. In order to decide what was the *ratio* of any decision it is necessary, in my view, to examine the route which the Court took in order to see whether the point in issue was an essential part of the Court's reasoning.

92. In *Inchcup* the Court of Appeal began its analysis by asking whether section 1 gave a free standing and enforceable right, to which the answer was in the negative: [9] – [30]. It then asked itself whether the Appellant could rely on section 13 of the Constitution, to which the answer was also "No" because there had been no taking into possession of any property. Deprivation of the goodwill of a business was not sufficient for section 13 to apply. In addition, there was no goodwill of value because the business was illegal [14] -18]. Lastly the Court rejected the suggestion that the legislation hindered freedom of thought under section 8: [19].

93. In my judgement the decision on section 1 was an essential part of the reasoning of the Court. The case under section 1 failed *in limine* because the section had no independent force. The Court did not consider, nor did it need to consider, the question, whether, if section 1 did have independent force, there would be no possibility of relief thereunder because of the illegality of the gaming business. Since the Court decided that section 1 lacked independent force, any decision on the illegality point could, itself, properly be said to be *obiter* because, in the light of the former decision, the question whether, if the section did have independent force, it could have no application in relation to an illegal gaming business, did not arise.

94. In *Ferguson* this Court had to consider the following issues:

    (i) were the revocation provisions in section 53 of the *Domestic Partnership Act 2018* invalid because the statute was passed for a religious purpose; and

    (ii) whether the Act had violated the Respondent's rights under sections 8,12, 1 (a), 9 or 10 of the Constitution.

    The answer given was that the statute was, indeed, invalid because it was passed for a religious purpose (contrary to what the Chief Justice had decided) and that the Respondents' rights under sections 8 and 12 had been violated, but not those under sections 9 and 10. No rights had been violated under section 1 (a) because that section gave no independently enforceable right.

95. The decision that section 1 was not independently enforceable was a determination of one of the issues that arose for decision by the Court on the Appeal. The judgment of the Court on this issue did not, in my view, fail to be part of the *ratio* because, although that issue was decided adversely to the appellant, the appellant succeeded on other grounds, so that it was not necessary for success to succeed on this one. *Inchcup* was expressly referred to in the judgment as the ground for the decision on section 1 (a), which the Court plainly decided to follow; after, as we were told, most of the relevant cases had been referred to it at the hearing, including *Olivier, Grape Bay, Inchcup, Newbold, Lewis, Campbell, Farias, Nervais, AG v Joseon, Societé United Docks, Thomas v Baptise,* and *AG v McLeod*. The decision cannot be ignored because the Court said no more than that section I (a) "*was not an independently enforceable right: see Inchcup*". As was said in the Conclusion, after the finding that there had been a breach of section 8 of the Constitution: "*There is no substance in any of the other alleged breaches on which we agree with the Chief Justice".*

96. Thus, there were, at the time of *Ferguson* at least two inconsistent decisions (by way of *ratio*) of the Court of Appeal and the Court in *Ferguson* had to choose between the two. It chose *Inchcup* and we

are bound by that. In addition, even if, contrary to my view, *Inchcup* is to be ignored, for present purposes, as not being *ratio*, we, ourselves, are faced with the conflicting decisions of *Farias* and *Ferguson* and have to decide which to follow. For the reasons set out therein, and in the following paragraph, I would follow *Grape Bay* and *Inchcup.*

97. In addition, and in any event, it does not seem to me that the decision in *Farias* can stand with the subsequent decisions of the Privy Council in *Campbell-Rodriques* and *Newbold***.** I regard them both as authority for the proposition that, in the absence of a redress section which in terms applies to section 1 or its equivalent, the language which is to be found in section 1 and, in particular the use of "*Whereas*" and the provision that it is the "*subsequent provisions*" of the Chapter that "*shall have effect for protecting the rights*" which are declared in section 1 "*subject to such limitations of that protection as are contained in those provisions*", means, as it seems to me that it does, that section 1 is not an independent source of rights. The clear scheme of the Constitution is that the rights expressed in a general manner in section 1 shall obtain their efficacy from the subsequent provisions; and it is those provisions which are to contain the necessary limitations to which the declaration makes reference. To hold that section 1 has independent effect in relation to the rights it declares when it provides that it is the subsequent provisions that shall have that effect appears to me to be a contradiction in terms.

98. I do not regard this analysis as in any way confounded by the fact that it means that acts which may amount to a deprivation of property without being a taking or acquisition thereof are not unconstitutional. This is a necessary consequence of the fact that the package of constitutional rights with attendant conditions and exceptions was to be as contained in the provisions of the Constitution subsequent to section 1.

99. Nor is it affected by the fact that in many cases involving alleged constitutional invalidity use of section 15 is optional because the same relief can be obtained by an application for a declaration or injunctive relief (but not damages): *Centre for Justice v Attorney General and Minister for Legal Affairs* [2016] Bda LR 82 at [26] – [30].

100. I note also that in *Newbold* the Board observed [28] that the decision in *Olivier* that section 1 "*conferred no separate and independent or freestanding rights was to the same effect"* as other decisions by Jamaican courts which had also so decided. That observation stands as confirmation at the level of the Privy Council that the Court of Appeal in *Farias* misunderstood *Olivier.*

101. This construction avoids the difficulty that arises if section 1 is to have independent effect. Section 1, whilst recognising that the fundamental rights which it declares are "*subject to respect for the rights and freedoms of others and for the public interes*t", has no other qualification of, or limitation on, the rights there expressed. The rights referred to in section 1 are then addressed in much more detail and with specific qualifications and exclusions in the following sections, thus begging the question as to whether you can evade the limitations on a right set out in sections 2 -13 by simply relying on section 1.

102. Sir Jeffrey's answer to that, as I understood him, was that the Court should apply the approach of the Privy Council in *Sucrière de Bel Ordre* – see [170] below - where section 3 of the Mauritius Constitution (similar but not identical to Section 1 of Bermuda) was construed as a more general

provision subject to a broader restriction than section 8 (similar to section 13 of Bermuda) and section 8 was a more specific provision with narrower restrictions.

103. If that argument were correct, the result in this case would be that, if the right that you were asserting fell within sections 2-13, it would be necessary to show that you were not caught by the restrictions in the relevant section; but, if the right went beyond what was in sections 2 -13 (e.g. the right in section 1 to protection from deprivation of property as opposed to the right in section 13 to protection from having your property compulsorily possessed or an interest in or over it compulsorily acquired), it was only necessary not to come within the restrictions in section 1.

104. The Constitution of Mauritius has some significant differences from that of Bermuda. First, Article 3 is plainly an enacting section, providing, as it does, that it is "*the provisions of this Chapter*" (i.e. not the subsequent provisions) that shall have the relevant effect. Second, Article 3 is expressly referred to in Article 17, the enforcement provision.

105. I find it difficult to believe that the draftsman of the Bermuda Constitution intended that there should be two parallel sets of questions to be answered to determine whether there had been a breach of a constitutional right:

(i) (a) was there a deprivation of property without compensation which did not amount to a taking of possession or an acquisition of an interest? and if so,

(b) was that deprivation justified on account of the need to respect the rights and freedoms of others and the public interest? or

(ii) (a) was there a deprivation of property without compensation which did amount to a taking of possession or acquisition of an interest? and, if so,

(b) was that deprivation one which was not protected because one of the conditions in section 13 (1) was satisfied, or one of the conditions in 13 (2) or (3) applied?

On the contrary, the scheme of the Constitution is that the Constitutional protections are effected by the subsequent sections and it is those sections which set out the limitations which are designed to ensure that the enjoyment of the rights in question does not prejudice the rights and freedoms of others or the public interest, as the concluding words show.

Is the "protection of the law" provision in section 1 nevertheless directly enforceable?

106. Section 1 (a) of the Bermuda Constitution refers to the right to the protection of the law. Section 6 of the Constitution contains provisions to secure protection of law. These deal only with the protection of the law in relation to criminal proceedings and, to a very limited extent, civil proceedings[23]. The Corporation submits that, even if section 1 of the Constitution is not directly enforceable in its entirety, the right to protection of the law contained in that section is, and that there is authority to that effect.

[23] Section 6 (8) requires an independent and impartial hearing and a fair hearing within a reasonable time. Section 6 (9) requires all hearings to be in public, subject to the exceptions in section 6 (10).

107. I reject this argument. If, as *Newbold* holds, section 1 of the Constitution of Bermuda, is pre-ambulatory in character, providing" *an introductory declaration as to the scope of the rights referred to in the subsequent sections*"[24], it is illogical to hold, absent any indication in the wording of the section, that one sub-section of it (expressed in the most general of terms and without any expressed qualification, exception or conditions) is, alone, directly enforceable. Nor, in my view, do the cases compel us to any such conclusion.

Neville Lewis v Attorney General and Another (2001) 2 AC 50

108. In *Neville Lewis, v Attorney General* Lord Slynn, delivering the advice of the majority, referred to the decision of Forte JA in the Court of Appeal where he said this:

> *"In respect of all the rights and freedoms guaranteed by Chapter III of the Constitution* [of Jamaica]*, the redress offered by its very provisions is founded on the right to the 'protection of the law'. The words therefore like 'the due process' clause, speak to the right to involve the judicial processes to secure the rights and freedoms declared in the Constitution. So in spite of Section 20 which deal* [sic] *with litigious matters i.e. criminal charges, and civil disputes, the citizen has the right to seek the assistance of the court in circumstances, where his constitutional rights and freedoms have been, are/or* [sic] *likely to be breached. In my view the protection of law, gives to the citizens the very right to the due process of law that is specifically declared in Section 4(a) of the Trinidad and Tobago Constitution. You cannot have protection of the law, unless you enjoy 'due process of the law' – and if protection of law does not involve a right to the due process of the law, then a provision for protection of the law, would be of no effect. In my opinion the two terms are synonymous, and consequently as in Trinidad and Tobago the people of Jamaica through the 'protection of law' guarantee in Section 13 of the Jamaica Constitution are endowed with 'constitutional protection to the concept of procedural fairness' [see the case of Thomas v. Baptiste]."*

109. Later in his judgment Lord Slynn said:

> *"Their Lordships agree with the Court of Appeal in Lewis that "the protection of the law" covers the same ground as an entitlement to "due process". Such protection is* recognised *in Jamaica by section 13 of the Constitution and* *is to be found in the common law."*

110. I have some doubt as to whether Lord Slynn was intending to state that section 13 of the Jamaica Constitution, in its then form, which was the same as section 1 of the Bermudian Constitution, itself constituted a statutory provision creating an independent right.[25] The provisions of both Constitutions expressly provided that it was the subsequent provisions of Chapter III which should have effect for

[24] To use the words of Lord Woolf in *Sucrière de Bel Ordre v Mauritius Government.*

[25] I note that in *Newbold* – see [57] above – the Board observed, that in *Lewis* the Board did not comment on the fact that the Jamaican Constitution was in the same form as the Bahamian, rather than that of Trinidad and Tobago i.e. the Jamaican Constitution 's redress section did not apply to the "*Whereas* …". section.

the purpose of affording protection to the rights previously mentioned which included "*the protection of the law*". In addition, section 25 (1) of the Jamaica Constitution then provided a right of redress in relation to the provisions of sections **14** to 24. It is not surprising, therefore that Lord Slynn referred to the protection of the law as being found in the common law and recognised in section 13. Further, if the protection of the law was the same whatever its source, whether its source was the Constitution or the common law was of limited relevance.

111. At the same time, in a later part of his judgment Lord Slynn said:

> *"In their Lordships' view, when Jamaica acceded to the American convention and allowed individual petitions, the petitioner became entitled under the protection of the law provision in section 13 to complete the human rights petition procedure".*

That would appear to indicate that he was looking at section 13 as an independent right.

112. If "*the protection of the law*" provision in section 13 is to be regarded as having separate enforceability, that would (a) be inconsistent with, and contrary to, the provision in section 13, itself, that it was the subsequent sections which were to give effect to the rights referred to; (b) render that provision nugatory and unnecessary; and (c) create forms of constitutional rights more particularly addressed in the following sections, but bereft of any conditions or qualifications[26].

113. It is not clear whether the separate enforceability of section 13 was argued (it is not referred to by Lord Hoffmann in his dissenting judgment which summarised the issues); and the Board was not referred to *Grape Bay*, which the Privy Council had considered the year before. In addition, if the Privy Council in *Lewis* had intended to hold that section 13 created an independent right, that would be contrary to its subsequent decision in *Campbell-Rodriques*, in which *Lewis* is not referred to.

114. Further, in *Newbold* the Board emphatically rejected the proposition that *Lewis* and other cases were "*authority for any proposition that article 15 of the Bahamian Constitution* [in the same terms as Section 1 of the Bermuda Constitution] *operates as and provides a general source of protection of human rights".*

115. Lastly, it seems to me that a constitutional provision which grants to citizens "*the protection of the law*", affords them no further protection than the right to apply to the courts for redress. In *Attorney General of Trinidad & Tobago v McLeod* [1984] UKPC 2 Lord Diplock held that no one was deprived of the "*protection of the law*" within the meaning of section 4 (b) of the Trinidadian Constitution, which was an enacting provision, so long as the judicial system afforded a *procedure* by which any person could seek and, where justified, obtain a remedy from the court. He declined to supply a comprehensive definition of what was meant by "*the protection of law"* in section 4 (b) because the respondent was unrepresented.

Protection of the law and the Legislature

[26] In *Inchcup* Stuart-Smith JA said that it was *"perhaps unfortunate that the outcome should depend on presence or absence of the word "whereas" but it seems that this is the basis of the distinction adopted by the Privy Council".* If that were true, that might indeed have been unfortunate; but the outcome, in my view, depends on more than the existence of that word – important though it is as indicative of the introductory nature of what follows.

116. The protection of the law which is to be found in the common law, does not, as the Chief Justice rightly held, entitle the Courts to set aside an Act of the Bermuda Legislature on the basis that it was irrational, unreasonable unfair or arbitrary. These are criteria relevant to the validity of decisions or actions of public officials or public bodies. The protection of the law extends to enabling the citizen to challenge the acts of public bodies on any of those grounds[27]; but it does not extend to giving the courts the power apply those criteria to strike down legislative provisions which are not inconsistent with sections 2-13 thereof: see, generally, the passages in *The Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette and Others* [2005] 5 LRC 196, cited by the Chief Justice at [90]. Unless a statute contravenes sections 2 to 13 of the Constitution, or section 29 (1) of the *Human Rights Act 1981* apples, then, as Lord Nicolls observed, it is "*the duty of the courts to administer Acts of Parliament, not to question them*". That would also be the case if the protection of the law was a separate statutory right.

The Rule of Law Argument

117. The appellants advanced before us (but not below and not in their Notice of Appeal) an argument that a particular provision of the Municipalities Act, as amended by the 2015 and 2018 Amendment Acts, offends the Rule of Law.

118. Section 7AA of the *Municipalities Act 1923* now provides as follows:

> *"Minister may give directions to Corporation*
>
> *(1) The Minister may give written directions to a Corporation, whether of a general or of a specific character, if he considers it to be in the best interests of Bermuda for him to do so, and the Corporation shall carry out any such directions.*
>
> *(1A) Any act or thing required to be done, or done, by a Corporation in pursuance of directions given under subsection (1)—*
>
> (e) *shall be deemed to be for municipal purposes; and*
>
> (f) *is a function of the Corporation.*
>
> *(2) Before the Minister gives directions to a Corporation under subsection (1), he shall consult the Corporation with respect to the content and effect of the directions*
>
> *(3) Without prejudice to the generality of subsection (1), the Minister may direct a Corporation—*
>
> (e) *to do anything that appears to the Minister necessary to secure that the Corporation's functions are exercised and performed in the most efficient manner;*

[27] Amongst others, including the obligation of statutory bodies to act within their powers.

(aa) to do any acts or things that the Minister, acting under the general authority of the Cabinet, requires the Corporation to do;

(f) *to give to the Minister, whether periodically or not, such information relating to the activities of the Corporation as the Minister may specify in the directions;*

(c) to discontinue or restrict any of its activities; or

(d) to give effect to anything required of the Corporation in pursuance of this Act,

and the Corporation shall give effect to any such directions.

(4) Forthwith after carrying out any directions, the Corporation shall inform the Minister in writing that the directions have been carried out."

119. The Corporation contends that sub-section 1A above offends the Rule of Law in that it provides for any act done pursuant to the Minister's directions to be deemed to be for municipal purposes and a function of the Corporation. By this means, as it was said in the skeleton argument, "*a body with inevitably limited powers themselves ...posess[es] the power to define the scope of those powers which is a contravention of the rule of law*". In fact, it is the Minister who has the power to make a direction.

120. Reliance is placed on *R (Privacy International) v Investigatory Powers Tribunal* [2019] 2 WLR 1219, in which Lord Carnwath observed:

> *"34. Authorities dating back at least to the 17th century (see eg Smith, Lluellyn v Comrs of Sewers (1669) 1 Mod 44, 86 ER 719) leave no doubt as to the hostile attitude of the High Court to attempts by statute to restrict its supervisory role. In such cases, conventional principles of statutory interpretation, based on the ordinary meaning of the words used by Parliament, have yielded to a more fundamental principle that no inferior tribunal or authority can conclusively determine the limits of its own jurisdiction".*[28]

121. Lord Carnwath referred to the fact that it was clearly established by the time of *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, that there are certain fundamental requirements of the rule of law which no form of ouster clause (however "*clear and explicit*") could exclude from the supervision of the courts. He went on to say [123] that:

> *"Parliament cannot entrust a statutory decision-making process to a particular body, but then leave it free to disregard the essential requirements laid down by the rule of law for such a process to be effective."*

and, at 144:

[28] The Corporation relies on this as confirming that a Minster cannot be allowed to expand the powers of the Corporation, as would be the case if the Minister's order was conclusive. It must also indicate that if he purports to order the Corporation to do what the Corporation has no power to do, that order may be ruled unlawful by the Court.

"144. In conclusion on the second issue, although it is not necessary to decide the point, I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law."

The first issue in that case was whether section 67 (8) of the *Regulation of Investigatory Powers Act 2000* ousted the supervisory jurisdiction of the High Court to quash a judgment of the Investigatory Powers Tribunal for error of law, to which the answer was that it did not. The second issue was whether Parliament could by statute "oust" the supervisory jurisdiction of the High Court to quash the decision of an inferior court or tribunal of limited statutory jurisdiction.

122. Mr Duncan submits that this point is misconceived for two principal reasons:

(a) section 7 AA 1 (A) does not purport to exclude or remove, either expressly or impliedly, the jurisdiction of the Court over the scope and exercise of the power of the Minister to make directions; and

(b) the criticisms levelled at the section are remedied by the exercise of statutory interpretation and the presumptions and principles that operate so as to limit the power of the Minister to give directions to the Corporation. That power does not enable the Minister to give to the Corporation powers that it does not, by statute, possess.

123. As to the latter, Mr Duncan raises a number of points. Firstly, general words in a statute are impliedly limited on the basis that the ordinary rules and principles of the common law will apply to the express provisions. Thus, as Lord Browne-Wilkinson said in *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539:

"I *consider first whether there is any principle of construction which requires the court, in certain cases, to construe general words contained in the statute as being impliedly limited. In my judgment there is such a principle. It is well established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions: see Cross on Statutory Interpretation 3rd ed., pp. 165-166; Bennion on Statutory Interpretation 2nd ed., p. 727; Maxwell on The Interpretation of Statutes, 12th ed., p. 116."*

124. Lord Browne-Wilkinson cited with approval the following passage from *Cross*, *Statutory Interpretation* (1976). 142-3, 3rd Ed:

"Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. ***Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules*** *. . . Long-standing principles of constitutional and*

administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament. Examples are the principles that ***discretionary powers conferred in apparently absolute terms must be exercised reasonably, and that administrative tribunals and other such bodies must act in accordance with the principles of natural justice****. One function of the word 'presumption' in the context of statutory interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles. There is a 'presumption' that mens rea is required in the case of statutory crimes,* ***and a 'presumption' that statutory powers must be exercised reasonably****. These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction, and they may be described as 'presumptions of general application'. . . . These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text…."*

125. Later he said:

> *"From these authorities I think the following proposition is established. A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."*[29]

Accordingly, the power of the Minister to give a direction must be seen in the context that that power must be exercised in conformity with the statute as a whole.

126. Secondly, the common law principles referred to above include the principles set out by Lady Hale in *Jamaicans for Justice*, being the normal principles by reference to which judicial review is carried out, namely the obligation of a public authority to observe the rules of natural justice, to use powers for the purpose for which they were given, not to act irrationally etc.

127. Thirdly, the Corporation's powers are laid down by Statute and include, for instance, the following powers under the 1923 Act:

(a) the power to obtain and dispose of real and personal property: section 20, subject to the requirement of approval by the Cabinet and the Legislature for any sale of land or of any lease thereof exceeding 21 years;

(b) the power to compulsorily acquire land within certain parameters: section 22;

[29] To similar effect, Lord Steyn said (page 34): "*Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantial and procedural."* See, also Lord Hoffmann at page 341 in *R V Home Secretary ex parte Simms* [1999] 3 WLR 328 in relation to legislation contrary to fundamental human rights.

(c) the power to levy rates on valuation units within the limits of Hamilton (for one or more specified purposes): section 23 (1);

(d) the power to levy wharfage on all goods imported into and exported from the Port of Hamilton: section 31; and

(e) the power to borrow money or provide a guarantee, subject to certain limits: section 37.

Some of those powers refer to the purposes for which the power may be used. Thus the power in section 23 (1) to levy rates is to be exercised for all or any one of the purposes set out in (a) to (g) of subsection (1); and subsection (1) (f) describes one category of purposes as "*such municipal purposes, being purposes of an extraordinary nature, as the Minister may in any particular case approve*". But he cannot create a power to levy rates for some purpose not mentioned in 23 (1).

128. Under section 7 AA the Minister has a power to give directions. The section does not confer on the Minister the ability to confer on the Corporation powers that it does not by statute possess, or to direct it to do an act or thing that the Corporation is not already empowered to do. He can only direct it to do something in accordance with those powers. Thus the Minister could not, in reliance on section 7AA (1) (A) direct the Corporation to sell land without the approval of the Cabinet and the Legislature (as required by section 20 (1A); or to borrow in terms that would circumvent the restrictions set out in section 37, namely a limit of $ 30 million in the absence of authority from the Legislature.

129. Fourthly, the power of the Minister under section 7AA requires the Minister (a) to consider the direction to be in the best interests of Bermuda; and (b) to consult with the Corporation with respect to the content and effect of the proposed direction before it is given. The adequacy of the consultation exercise is open to challenge by the Corporation, as to which see *Matthie v The Minister of Education* [2016] Bda LR 64 and the cases there cited.

130. Fifthly, there are numerous examples of widely drafted statutory powers conferred on Ministers being subject to challenge on the basis of interpreting the scope or application of the power, or breaches of common law rules in relation to its exercise, such as the obligation to act reasonably and in accordance with the rules of natural justice, or a failure properly to consult; see, for instance: *Sharifi v Minister of Home Affairs***:** [2015] SC (Bda) 60 App.

131. I regard the points made by Mr Duncan, as summarised in the preceding paragraphs, as well founded.

132. Lastly, it is said that the proper time to make a challenge is when the Minister purports to give a direction under section 7AA which is claimed to be unlawful for any reason. If the Corporation took the view that the mere existence of the power was a breach of the rule of law it should have made that challenge in 2018 when the 2018 Amendment Act came into force, or at the very latest before the Chief Justice below.

Constitutional issues

133. The matters addressed in the preceding paragraphs relate to directions which, if adhered to, would offend common law protections. The positon is *a fortiori* in relation to directions which, if complied

with, would offend a person's constitutional rights. There is a presumption that the court should interpret a statute so that it does not conflict with constitutional requirements and that a statute is constitutionally compliant unless the contrary is shown: *Apprentice Timberland Ltd V Minster of the Cook Islands National Superannuation Fund* [2016] UKPC 32. In those circumstances section 7AA 1 (A) cannot be regarded as enabling the Minister to give a direction which offends a constitutional right, e.g. a direction that the Corporation should compulsorily take possession of the property of another otherwise than as allowed by section 13. And if the section could only be interpreted as having that effect it would itself be constitutionally invalid.

134. The particular concern of the Corporation is that the Minister could by direction require the Corporation to do something which was not municipal at all, and, therefore, not within its powers, and that section 7AA 1 (A) shields from jurisdictional challenge both the exercise of the discretionary power and the act or thing done in response. It, therefore, offends the Rule of Law, one aspect of which is the (qualified) separation of powers (as to which see Lord Sumption at [14]- [15] of *Ferguson v AG* [2019] 1 LRC 673[30]), and is "*constitutionally offensive"*. The power of the Legislature to permit a broader purpose than "municipal" is a <u>legislative</u> power which, cannot be exercised by, or delegated by the Legislature to, the Minister.

135. I do not share this concern for a number of reasons. First, as I have said, I accept the submission made by Mr Duncan that the provision does not empower the Minister to direct the Corporation to do that which it lacks power to do under the Municipalities Act, which is the source of its powers. The Corporation may complain to the Courts that an act directed by the Minister is one that the Corporation has no power to carry out.

136. Secondly, such acts as the Corporation does pursuant to the powers conferred on it by the Act are implicitly to be carried out only for municipal purposes, since the fulfilment of such purposes, is an essential function of the Corporation. This is apparent from the power of the Corporation under Section 23 of the *Municipalities Act 1923* to levy rates which may be either for the purposes set out in sub-paragraphs (a) – (e) or "*for such municipal purposes, being purposes of an extraordinary nature, as the Minister may in any particular case approve*".

137. Whether the carrying out of some act is or is not to be regarded as the fulfilment of a municipal purpose, and thus a fulfilment of the function of the Corporation, may be open to debate. The direction of the Minister will create a presumption that that which is ordered to be done is for municipal purposes[31] and will fulfil a function of the Corporation. But the presumption is not expressed as an irrebuttable presumption, and should not be regarded as such. It is, therefore, open to a court to hold, on the facts of a particular case, that the presumption is rebutted; or that the

[30] See also Lady Hale at [39] of *R (Milller) v Prime Minister* [2020] AC 37 on the application of principles of law, including the need to determine whether the legal limits of powers conferred on each branch of government have been exceeded, notwithstanding the absence in the UK of a written Constitution; and the fact that the courts cannot shirk that responsibility merely on the grounds that the question raised is political in tone or content. The decision also made plain that one of the principles was that the law could not be altered except in accordance with an Act of Parliament; and another was the separation of powers between the executive, Parliament and the courts.

[31] Defined by the majority in *Mexico Infrastructure Finance LLC v The Corporation of Hamilton* [2019] UKPC 2 as "*the provision by the Corporation of a service for the benefit of inhabitants of Hamilton*".

Ministerial decision is irrational; or that the process by which it was arrived at is defective[32]. If that makes the clause less useful than the draftsman had hoped, so be it; the section need not, and should not, be interpreted to say the contrary.

138. One matter which concerned us was that the effect of the Amendment Acts and of the Bill, if enacted, would be that the directions of the Minister were, in practice, free from challenge, because (a) the challenge would require a resolution of the Council, which would require the Minister's consent (which he was highly unlikely to give); and (b) that, under the Bill, if enacted, the Corporation would consist of persons appointed by the Minister or by a body appointed by him, who would be equally unlikely to make the challenge.

139. I do not regard these considerations as determinative. As to the former it appears that the Council, as presently constituted, passed a resolution to launch this litigation which the Minister declined to approve. But the litigation has continued, no doubt in the light of the decision of Kawaley CJ in *The Corporation of Hamilton v The Attorney General* [2015] Bda LR 28 where he decided that the Minister did not have power under section 7B (6) of the *Municipalities Act 1923*, to discontinue an action brought by the Corporation against him and, thus, effectively to be the judge in his own cause.

140. As to the latter, it is obvious that those appointed to the Corporation by the Minister are likely to be strongly inclined not to challenge any decision of his. But that is not necessarily so. Further any such persons, however appointed, would be required to exercise their independent judgment, whatever that may dictate; and we cannot assume that they will abandon that duty. Lastly, it would seem to me that a member of the public, at any rate if an inhabitant of Hamilton, should be regarded as having *locus standi* to make such a challenge.

141. There is no need for us to declare that 7 AA 1 (A) does not permit the Minister to do anything which offends the Constitution. That is (a) obvious and (b) accepted. Nor, absent an actual direction, can (or should) we address the myriad of circumstances in which a particular direction might be said to be unconstitutional[33], or its making a contravention of common law duties or restrictions, or the range of defences, both under the Constitution and at common law, which might be put forward.

142. So far as the protection of the law afforded by the common law is concerned, the Corporation has it, since it may challenge any direction that the Minister may be minded to give, by way of judicial review on common law principles or on the ground that it offends the Constitution. Section 7 AA 1 (A) does not, *per se* and without more, infringe the rule of law, whereas a particular direction given thereunder might do so.

143. In those circumstances it is not necessary to decide whether, if the Corporation was right that it was entitled, under the common law, but not by way of a constitutional right, to the protection of law and that such protection rendered section 7AA (1A) void or unenforceable, then any application for relief (a) had to be brought by way of judicial review, for which leave would be required; and (b) did not fall to be dealt with because no leave had ever been sought nor had the point been raised below (the

[32] One example raised in the course of argument of where the presumption would be readily rebuttable is if the Minister decided that the Corporation should give part of its income from the rates to some international charity for the relief of refuges from Afghanistan.

[33] Such as would be the case if the Minster directed the Corporation to transfer its property to another for no reward.

application before the Chief Justice being under section 15 of the Constitution); and/or (c) should not be dealt with because the application was out of time.

Consultation

144. There was an issue between the parties, not pursued on appeal, as to whether there was adequate consultation about the proposed legislation. As to that the Chief Justice decided that the Court could not set aside primary legislation on the ground that it considered that there was inadequate consultation [93]. Whether there was adequate consultation was a matter for the Legislature and there was no legal duty on the Executive to consult on proposed changes in the law: see *Unison v The Secretary of State for Health* [2010] EWHC (Admin) 2655.

145. In my judgement what the Chief Justice said was correct. In the case of primary legislation, unless the legislation is in breach of sections 2 -13 of the Constitution, the Court is, as the Chief Justice said [95], not concerned with whether it is arbitrary, or an unfair exercise of power without rationale or compensating benefit or unwise. In relation to legislation there is no duty of fairness or prior consultation: per Lord Sumption in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38 at [39].

Is there a breach of section 13 (1) of the Constitution?

The cases

146. In *Inchcup* the Court had to decide whether there had been any taking into possession or compulsory acquisition of the gaming machines, as to that Stuart-Smith JA held that:

> *"The question therefore is whether any property belonging to the Appellant has been "taken possession of" or "compulsorily acquired". The gaming machines themselves are obviously property. But they have not been taken or acquired; they are still in the possession of the Appellant. Subject to the question of illegality there is no doubt that goodwill of a business can amount to property. Manitoba Fisheries V Queen (1978) 88 ALR (30) 462. But although it may be said that the effect of the legislation is to "deprive" the Appellant of the goodwill within s1, that is not sufficient for s13. In my judgement nothing has been taken into possession or compulsorily acquired. The case of Belfast Corporation v OD Cars Ltd [1960] 1 All ER 65 is of some assistance on the meaning of the word "take": the speech of Viscount Simonds supports the Respondent's submission (see pages 68 H to 71 E). But the words of s13 are even stronger, since there must be not only a taking, but a taking into possession."*

Mr Duncan submits that the Government has clearly not taken possession of or compulsorily acquired the Corporation's property.

147. Mr Diel accepted before the Chief Justice that the Amendment Acts and the proposed Reform Act do not purport directly to transfer property or property rights to the Government, with the result, the Chief Justice observed, that, if *Inchcup* was binding, the section was not engaged.

148. Reliance was, however, placed by Mr Diel on a number of subsequent cases, which were said to have overtaken *Inchcup*. The first was *Campbell-Rodriques*, to which I have referred at [42] ff above. In that case Lord Carswell held as follows:

> "*15. It may be observed, first, that there may be a taking which is not a direct physical appropriation of property or an ouster of possession: cf the remarks of Scalia J in Lucas v South Carolina Coastal Council (1992) 505 US 1003. Nor does it appear necessary to show that there has been a transfer or change of ownership or possession from one person to another person or body: see OD Cars Ltd v Belfast Corporation [1959] NI 62, 84, per Lord MacDermott LCJ in the Northern Ireland Court of Appeal. Some limitation of the apparent breadth of legislative provisions prohibiting the taking of property without compensation must be implied: ibid, p 88.*
>
> ...
>
> *17. It has been generally recognised, both in a long series of cases in the United States and in other jurisdictions, that taking is not limited to direct appropriation, but may encompass regulation of the use of land which adversely affects the owner to a sufficiently serious degree: see, eg, Lucas v South Carolina Coastal Council, supra; Penn Central Transportation Company v New York City (1978) 438 US 104. It is equally well recognised that states may pass legislation regulating the use of land in the public interest which does not carry the right to compensation as a taking of property, even though it may have significant adverse economic effects for property owners. The American cases are constantly cited in this context and examples may be found from other jurisdictions. It may be necessary to use such authorities with a degree of caution, bearing in mind the differences in wording of the applicable constitutional provisions, but a common thread is visible in a number of developed systems. The principle was approved by the House of Lords in Belfast Corporation v OD Cars Ltd [1960] AC 490, which was concerned with planning restrictions on the use of land. Viscount Simonds, at p 519, cited with approbation a passage from the judgment of Brandeis J in Pennsylvania Coal Co v Mahon (1922) 260 US 393, 417:*
>
> > *"Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use."*
>
> *The qualification which Viscount Simonds made was that adumbrated by Holmes J in the same case (260 US 393, 415), that if regulation goes too far it will be recognised as a taking, it being a question of degree".*

149. But, as the Chief Justice observed, *"taking*" by regulatory control has its limits. As Lord Carswell said at paragraphs 18 and 19:

"[18] *The cases on regulation provide analogies which give a measure of assistance in approaching the issues in the present appeal. It is always necessary to exercise a degree of care in relying on analogies, not to press them too far, but their Lordships consider that they provide some useful guidance in deciding the issues before them. They establish clearly that there are limits to the concept of taking property and that some types of state action which could linguistically be so regarded are not to be regarded as justiciable. It is well established that measures adopted for the regulation of activity in the public interest, such as planning control or the protection of public health, will not constitute the taking of property, notwithstanding the fact that they may have an adverse economic effect on the owners of certain properties*[34]*. So too in the Jamaican appeal of Panton v Minister of Finance (No 2) (2001) 59 WIR 418 the Board held that the assumption under statutory powers by the Minister of Finance of the temporary management of certain companies whose affairs were under investigation did not constitute a taking of the appellants' property. It is the respondent's case that the replacement of an existing highway by an improved road on which a toll is charged is governed by the same principle.*

[19] Their Lordships regard the analogy as persuasive. The project involved the replacement of an inadequate public road and bridge by an improved road and a new bridge, designed to enure for the benefit of the public in general by speeding the flow of traffic and relieving congestion. It was to be financed, not by the taxpayers as a whole, but by charging tolls to be paid by those using the road. Their Lordships consider that the words of Viscount Simonds in the OD Cars case at p 517 were apt, when he asked rhetorically whether anyone using the English language would say that this meant that the authority had taken property. The appellants cannot in their Lordships' opinion establish that the construction of the new road and the charging of a toll for its use constituted a "taking" or acquisition of any proprietary right capable of coming within section 18."

150. The Corporation draws attention to a number of features of the facts in *Campbell-Rodriques* which distinguish its facts from this case and provide reasons as to why it was held in that case that there was no taking. They are:

(i) The complaint about the new toll road's infringement of the property rights of persons for whose benefit it was constructed so as to enable better and more convenient access was weakened considerably by the fact that on the evidence there was a suitable free alternative route: see [4];

(ii) The construction of the road was in the interests of the complainants and the public at large;

[34] To similar effect, Lord Hoffmann in *Grape Bay* said at 583 C-E that "*restrictions on the use of property in the public interest by general regulatory law do not constitute a deprivation of that property for which compensation should be paid"* and that the principles that underlie the right of the individual not to be deprived of his property "*do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit. This is so even if, as will inevitably be the case the legislation in general terms affects some people more than others."*

(iii) The property right relied on, namely the right to obtain access to one's property without economic burden was shared by every member of the public because every member of the public was entitled to pass over a highway and was not appurtenant to any particular property nor could it easily be determined which properties the imposition of the new toll road would affect.

By contrast in the present case there is a specific entity (the Corporation) which owns specific property which it has a right to maintain and control; and there is no demonstration of a proportionate public interest justification.

151. The Chief Justice observed that United States cases referred to in the judgment of Lord Carswell indicate that the regulatory control complained of must result in diminution in value of the property in question and the claim for compensation is the quantum of the diminution in value of that property. The United States cases also recognise that there are some forms of regulatory control which are in the public interest and are not justiciable and do not result in any claim for compensation.

152. Examples of the cases involving a diminution in value of property were *Lucas v South Carolina Coastal Council* (1992) 505 US 1003 (ban on construction of any permanent habitable structure on land amounted to a "*taking*" under the 5th and 11th Amendments because the ban rendered the parcels of land "*valueless*"); *Penn Central Transportation Co v New York City* (1978) 438 US 104 (property of Penn Central railways company diminished in value because it could no longer build a multi-storey office building above Grand Central Terminal because it had been designated an historic landmark); *Pennsylvania Coal Co v Mahone* (1922] 260 US 393 (diminution in value of property as a result of state law which forbade mining in such a way as to cause subsidence to any human habitation or public street or building).

153. The Chief Justice recorded [108] that the complaint of the Corporation was that essentially every decision of the Corporation had to be approved either by the Minister or the Cabinet and that, under the Reform Act, the Mayor and Councillors will be appointed by the Minister or by a Committee selected by the Minster. This, it was said, the effective management of the Corporation lies and would lie indirectly with the central government as opposed to the independent management consisting of the Mayor and Corporation elected by the voters of the City of Hamilton. He then proceeded to consider, as shall I, the cases relied on.

Attorney General v Lawrence [1985] LRC 923

154. The principal case relied on by the Corporation before the Chief Justice was the decision of the St Christopher and St Nevis Court of Appeal in *Attorney General v Lawrence*. The Chief Justice summarised that case as follows:

> "*109 Mr Lawrence, the applicant, was Managing Director and Chairman of the Board of Directors of the St. Kitts/Nevis/Anguilla National Bank Ltd ("the Bank"). On 8 and --March 1982 the House of Assembly passed through all its stages a bill which received the Governor's assent the same day and it became the St. Kitts/Nevis/Anguilla National Bank Ltd (Special Provisions) Act 1982. On the afternoon of the same day six members of the Police Force, including the Commissioner of Police, entered the*

head office of the Bank and purported to hold meetings there. On the same afternoon Mr Lawrence received three letters: one, from the Minister of Finance, purported to remove him as a Director of the Bank; others (signed by a "Chairman" of the Board) notified him that a new Board of Directors had been appointed under the Act and that the Board had decided to terminate his services with immediate effect, requiring him to vacate the premises.

110. As a result of these actions Mr Lawrence ceased to be a director and Chairman of the Bank. The Court found, at page 929, that he was not just a paid employee of the Bank, "but that he drew a percentage of the profits annually. At one stage this was as high as 50%[35]." In the circumstances Mr Lawrence challenged the validity of the Act based upon section 6[36] of the Constitution of the St. Kitts and Nevis alleging that he had been deprived of property by the Government without compensation. In upholding Mr Lawrence's claim, the Court of Appeal, in the Judgment delivered by Peterkin CJ, held at page 930: "I am of the view that section 6 applies equally to concrete as well as abstract rights of property[37], and I would hold that management is an important incident of holding property. Accordingly, I would accept that the learned trial Judge was right in concluding that such deprivations as Lawrence had alleged and shown fell within the purview of section 6 of the Constitution."

155. The Corporation contended that, whilst the Corporation as an entity remains in place and continues to own its property as before, the effect of the Amendment Acts and the proposed Reform Act, is to remove the current independent management of the Corporation by the elected Mayor and Councillors and replace them by persons selected directly (the majority) or indirectly by the Government; the position is on all fours with **Lawrence.** This control of the Corporation amounts to a control of the Corporation's assets.

Panton v Minister of Finance [2001] UKPC 33,

156. As to that the Chief Justice considered the applicability of *Panton v Minister of Finance*, a case on the Jamaica Constitution, the facts of which he summarised as follows:

"*112…. The appellants were shareholders in three financial institutions, namely, a trust company, a merchant Bank and a building society. During 1993 and 1994 various investigations were carried out by the regulatory authorities of the Bank's activities. After further discussions with the directors of the Bank, the position remained unsatisfactory and on 18 December 1990 the Minister of Finance and Planning assumed temporary management of the Bank under section 25 of the Financial Institutions Act 1992. The appellants commenced proceedings alleging that the Act of 1992 was unconstitutional because it made no provision for compensating them as*

[35] The Court of Appeal inferred that "*his original status continued, perhaps at something less than 50%*".
[36] This section provided, as in Bermuda, under the heading *"Protection from deprivation of property*", that "*No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired*" save as provided for therein.
[37] Quaere whether the judge meant to say "*applies equally to abstract as to concrete rights of property*" since. the right to ownership or possession of a thing is plainly a concrete right, whereas a right of management is abstract.

shareholders for the actions taken by the Minister. The case came before the Constitutional Court and was dismissed by that Court. The appellants then appealed to the Court of Appeal which dismissed the appeal. The appellants finally appealed to the Privy Council arguing that the Act makes no provision for compensation in a case where the Minister assumes temporary management of the Bank and that constitutes an infringement of action 18 (1) of the Jamaican Constitution (materially [the] same as 13 (1) of the Bermuda Constitution)"

157. In relation to that submission the Privy Council did not accept that taking control of the management of a commercial enterprise amounted to deprivation of property of the owners of the enterprise. Lord Clyde said [22]:

> *"The point here is a short one and admits of an immediate answer. The appellants have to show that the statutory provision constitutes a taking of their property. But what the Act empowers, and what the Minister did, was a taking over of the control of the company.* ***The appellants were and remained shareholders of the company. Their shares would doubtless qualify as property, but their shares were not taken away. They no longer had the control of the company which was inherent in the shareholdings which they possessed. But the assumption of temporary management by the Minister did not involve the taking of any property of the appellants. That the regulation of the company was in the hands of the Minister did not mean that the appellants had had any of their property taken away from them.*** *A comparable situation can be found in Belfast Corporation v O.D. Cars Ltd [1960] AC 490, where a restriction imposed by a local authority on the use to which land could be put was held not to be a taking of property without compensation. Viscount Simonds (p. 517) stated that anyone using the English language in its ordinary signification "would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called 'property' and to come to the instant case, he would deny that the right to use property in a particular way was itself property, and that the restriction or denial of that right by a local authority was a 'taking', 'taking away' or 'taking over' of 'property'".*

158. As the Chief Justice observed, in *Panton* the appellants had relied, unsuccessfully, on *Lawrence*, as authority for the proposition that the mere taking control of the management of a commercial enterprise amounted to the taking of property The Board rejected that. At paragraph 22 Lord Clyde said:

> *"The appellants sought to found upon Attorney-General of St. Christopher and Nevis v Lawrence (1983) 31 WIR 176.* ***But that case concerned the removal from office of one who was not only a shareholder but a managing director who drew a percentage of the profits from the business. In that case a taking of property could be identified. In the present case no one has been dismissed and nothing has been taken.*** *The shareholders remained holding their shares. The statutory provisions were, as the Court of Appeal recognised, of a regulatory not a confiscatory nature, and no obligation for compensation arises."*

Lawrence was, therefore, distinguished on the basis that Mr Lawrence had not merely lost control of the management of the Bank but had also lost the prospect of obtaining up to 50% of its profits, which was presumably to be treated as a taking away from him of the right to acquire profits. It was the taking of the profits that was the taking of property. This was not the basis on which the Court of Appeal had found for Mr Lawrence, which was that his right of management had been acquired.

159. The Chief Justice rightly regarded *Panton* as binding upon him, as it is on us, and regarded it [115] [120] as authority for the proposition that mere loss of control, even total loss of control, without more, does not amount to deprivation of property. The allegations of control made by the Corporation were very much in line with the allegations made in *Panton***.** There must be a taking by reference to a loss in the value of identifiable property. In the present case the Corporation continued to own the assets as before and there was no suggestion that there had been any diminution in their value.

160. In fact, Mr Duncan submits, the measures taken in *Panton* – where there was a complete takeover of management – were markedly less than anything that has yet happened in relation to the Corporation whose management still lies with the Mayor and Councillors. The requirement of approval for certain resolutions constitutes oversight as opposed to management, and any decision whether or not to give approval is subject to the common law constraints to which I have referred.

Paponette v Attorney General of Trinidad & Tobago [2010] UKPC 32.

161. The Chief Justice again helpfully summarised the facts of this case as follows:

> *"The applicants were members of an association who owned and operated maxi-taxis, public service vehicles with seating for 9 to 25 passengers, on two out of the five maxi-taxi routes in Port-of-Spain, Trinidad. Until 1995 they controlled and managed their own affairs and did not pay for the use of their taxi stand, which was located on a public road. In 1995 the Government proposed moving the taxi stand for their routes to a new location at a transit Center on land owned by P Corporation, which owned and operated the bus service in Trinidad and was regarded as a competitor by the maxi-taxi owners and operators. The maxi taxi owners and operators were reluctant to move but eventually agreed to do so in reliance on Government assurances that, inter-alia, they would not be under the control or management of the P Corporation and the management of the Centre would be handed over to them within 3 to 6 months. However, following the relocation, management of the transit Centre was not handed over to the Association. Instead the Government introduced regulations which gave P Corporation responsibility for managing the Centre and power to charge for its use and required members of the Association to apply to it for a permit to operate from the centre.*

162. The applicant sought declarations that the Government's conduct contravened their right to "***enjoyment of property and the right not to be deprived thereof except by due process of law***" as guaranteed under section 4 (a) of the Constitution of Trinidad & Tobago.

163. Lord Dyson, giving the judgment of the Board, said this:

"23 ...In order to prove an infringement of the right to enjoyment of property, it is not necessary to show in a business context that the infringement makes the operation of the business impossible. That was not the effect of the Traktörer decision. The infringement must, however, reach a certain level of significance. The regulation cases such as Traktörer should be applied with some care. In many of the cases relied on by the Court of Appeal, the principle that was being applied was not that a regulatory restriction could not of itself involve the taking of property. Rather it was that, as Lord Hoffmann put it in Grape Bay Ltd v Attorney General (1999) 57 WIR 62, at p72 ([1999] UKPC 43, at para27):

"It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid."

24 Indeed, in Traktörer the ECtHR said at para 55 that the withdrawal of the licence to serve alcohol "constituted a measure of control of the use of property, which falls to be considered under the second paragraph of article 1 of the Protocol". The court then considered the lawfulness and purpose of the interference. It concluded that the withdrawal of the licence was done in the public interest in furtherance of the social policy of controlling the sale of alcohol.

It was not necessary for the appellants in the present case to show that the effect of what the PTSC did pursuant to the 1997 Regulations was to deprive them of their businesses altogether. There is no warrant for interpreting section 4(a) of the Constitution in this way, any more than article 1 of Protocol No 1 of the European Convention on Human Rights is to be so construed. The interference with their businesses was substantial. They had previously managed and controlled their own affairs. Now they were subjected to the control and management of their competitor, who, pursuant to the authority conferred by the 1997 Regulations, charged them a fee for every exit journey and decided whether they were "fit and proper" persons to be granted a permit to use the City Gate facility at all. Prima facie, therefore, there was an infringement of the members' section 4(a) rights. In these circumstances, it was for the government to justify the interference as being in the public interest. If they failed to do so, the breach was established."

164. At [48] the Board recognised that the "real complaint" concerned the deprivation of the management and control of their own affairs in these terms:

"Their real complaint is that the 1997 Regulations placed them under the management and control of their rivals the PTSC. The specific complaint that they were required to pay $1.00 per exit journey is of less significance since the PTSC were only entitled under regulation 3(2) to make "reasonable" charges. If the charges were not reasonable, the members of the Association did not have to pay them."

165. The Chief Justice pointed out that in that case the interference with business was substantial. The three factors identified by Lord Dyson - maxi-taxi drivers now subject to the control and management of their competitors; fee charged for every exit journey; competitors to decide whether the maxi-tax

owners and operators were "fit and proper" persons to be given a permit to use the facility – clearly had a significant impact upon the maxi-taxi business (being property within the meaning of the Constitution).

166. The facts in *Paponette*, in his view, bore no relationship to the allegations of existing control and proposed control of the Corporation's affairs made by the Corporation in the present case None of the three factors identified in *Paponette* arose[38] and the allegations of regulatory control in this case were very much in line with those made in *Panton*. There had, as the Corporation accepted, been no transfer of property from the Corporation to the Government. *Panton* held that assumption of management control without more did not amount to deprivation of property. In those circumstance he was satisfied that the Corporation's challenge under section 13 (1) of the Constitution could not succeed [120].

167. It is, also, necessary to bear in mind that section 4 (a) of the Trinidad & Tobago Constitution, which is a separately enforceable provision, referred to the right to "*enjoyment of property and the right not to be deprived thereof except by due process of law".* The Bermuda Constitution contains no reference to a right not to be deprived of a right to "*enjoyment of property".*

168. The Corporation contends (i) that the degree of control which the Minister has over the Corporation in this particular case is sufficient to amount to a deprivation of property within section 1 and/or a compulsory taking of possession of property or acquisition of an interest in or right over property; and (ii) that the controls provided for by the Amendment Acts were not in the nature of permissible regulation.

169. As to (i), the Corporation submits:

    (a) firstly, that a constitutional right may be breached by a constructive, rather than an actual deprivation of property that is sufficiently disproportionate in its reduction of the value of the property: *La Compagnie Sucrière de Bel Ombre Ltée v Government of Mauritius* [1995] 3 LRC 494; and

    (b) secondly, there may, as has often been held, be an unconstitutional interference with property rights even though there has been no appropriation of property or a transfer or change of ownership or possession from one person to another; *Campbell Rodriques***.**

170. In *La Compagnie Sucrière de Bel Ombre* the question was whether new statutory controls, which gave the metayers (leaseholders of land where sugar cane was grown, the rent for which was a proportion of the price of the cane harvested from the land) the right to renew their leases with planters, required planters to re-let to a metayer, and confined the use of the land to the growing of sugar cane, infringed the rights of the planters to protection from deprivation of property. The provisions of section 8 of the Constitution of Mauritius were in identical terms to section 13 of the Constitution of Bermuda. Section 3 which provided for a right to protection from deprivation of property without compensation had separate enacting force.

[38] This may be questionable. The appellants were said to have become subject to the control and management of their competitors.

171. The Privy Council held that these restrictions "*could not even on a generous interpretation be considered as the "compulsorily" taking possession or acquiring possession of a right in or an interest over property which was the subject of the protection provided by section 8 (I)"* of the Constitution. Nor did the increased control of land provided for by the relevant section contravene the protection in section 3 of the Constitution by the lack of any provision for compensation, since a fair balance between the interests of the community and the rights of the individuals whose property interests were adversely affected had been achieved.

172. As to (b) the Corporation refers to *AG v Lawrence*, where an assumption of managerial control was held to constitute a deprivation of property. In *Panton v Ministry of Finance* there was only a temporary takeover of management whereas in the present case the 2018 Amendment Act permits permanent management by the Government. In *Papponette* Lord Dyson held that where loss of control, rather than expropriation of assets or possession, was alleged to interfere with property rights a contravention would require the control taken to be "*significant"* and "*substantial* "as was the case here.

173. The Chief Justice was wrong to hold that the infringement of the Corporation's rights in the present case was not substantial and was within the bounds of conventional regulation. The degree of control taken was intended significantly to reduce the right of the Corporation to manage its affairs, utilise its resources and control its assets and came close to nullifying the central features of ownership. What has occurred in the present case is a deprivation of property falling both within section 1(c) and section 13 of the Constitution.

174. As to (ii), the Corporation submitted that "*regulation"* means some form of "*authoritative direction*" whereas what has happened amounts to a central takeover of the powers and assets of a local democratic function Further what is being done does not fall within the exception of restrictions imposed by general regulatory laws in the public interest. The provisions of the Amendment Acts relied on are not laws of general application applying to everyone, or to all corporations or all financial institutions (as in P**anto**n). Nor are the impugned provisions of temporary effect.

The Attorney General's submissions

175. Mr Duncan, for the Attorney General, submits that the Chief Justice's conclusion was correct. In order to establish a violation of section 13 (1) it was necessary for the Corporation to prove that the legislation deprived them of their property. Neither the Amendment Acts nor the proposed Reform Act makes any change in the identity of the Corporation or in the Corporation's ownership rights. Deprivation of property within the meaning of the Constitution has received a broad interpretation in cases which have involved restrictions on the use or the taking of private property. But no interpretation is so broad as to encompass circumstances such as the present where the Legislature imposes regulatory oversight over a public body.

176. *Paponette* is quite different from the present case, being concerned with actions by the Government which affected the private interests of the taxi drivers. In the present case the Corporation is a public body created and limited entirely by statute.

177. Insofar as the Amendment Acts between 2010 and 2018, and the 2019 Bill, may interfere with the Appellant's control of its property, such control is authorised by the Legislature's control over statutory bodies. The Legislature's control of the Appellant is effected by provisions in the 1923 Act, as amended, such as Ministerial approval of council resolutions (section 7 (11)), Ministerial Directions (section 7AA), and temporary stewardship (section 7B (6)). The approvals (or otherwise) of resolutions are made on the record.Directions are required to be in writing, and require prior consultation with the Appellant, and temporary stewardship orders are required to be published in the Official Gazette. That is what the statute permits and what is authorised by the Executive's authority to regulate public bodies. Such control is not a taking of property.

178. None of the changes to the law since 2011 have altered the legal status of the Corporation or have involved any acquisition or taking possession of any of its property by someone else. Nor will the Reform Act. It will remain a statutory Corporation – and a public authority as defined in section 3 of the *Interpretation Act 1951* - consisting of the "*Mayor and Councillors of the City of Hamilton*" (which has been its defined meaning since the 1923 Act), those persons now to be appointed by the Minister or a body appointed by the Minister, rather than elected ones. As a result of the amendments the Minister may now approve or disapprove resolutions of the Council, give directions and, in extraordinary circumstances, assume stewardship of the Corporation.

179. The Corporation is entirely the creature of statute. It is not like a natural person or a private body. Its powers are derived from statute. It has no residual authority or implied power to do anything which is not within the powers prescribed by its enabling Act. As Baker P observed in *Corporation of Hamilton and Attorney General v Centre for Justice* [2017] CA (Bda) 4 Civ, citing Laws J, as he then was, in *R v Somerset Council, ex parte Fewings et al* [1995] 1 All ER 513 at 524 "*A public body has no heritage of legal rights which it enjoys for its own sake; at every turn all of its dealings constitute the fulfilment of duties which it owes to others*".

180. The scope of those statutorily derived powers and the regulation of the Corporation's affairs have evolved over the years by a raft of statutory changes. The Legislature which is the plenary law-granting authority, subject to the provisions of the Constitution, granted those powers, which are not entrenched, and it can limit or alter them. The present statutory regime providing for temporary or indefinite control of governance, general regulatory oversight, requirements for Ministerial authority and provision for ministerial directions, and a change in governance structure, are all the result of similar legislative action and all involve regulation in the public interest. In such circumstances, the Legislature is to be given wide latitude by the courts, and no further authority is required for that proposition than the Privy Council decision in *Grape Bay.*

Conclusions

181. Whether the effect of the provision of the Amendment Acts relied on, or the Reform Bill, if passed, amounts to a taking of possession of the property of the Corporation or the acquisition of an interest in or right over its property must be looked at in the light of the cumulative effect of the provisions relied on.

182. As to that, the Corporation owns, and is in day to day control, of its property. Any disposition of its property or a right in respect thereof, must be effected by the Corporation. Under the 2015 and 2018

Amendment Acts**,** if a disposition needs a resolution of the Corporation, as it would, that requires the approval of the Minister, which he may withhold; and he may give directions to the Corporation to do (or not do) anything that he considers to be in the public interest, which may, itself, involve the disposition of property.

183. Those facts mean that, to the extent that the Minister chooses to do so, he may restrict the Corporation from acting, or require it to act, in a particular way in relation to its property. But that does not, in my view, mean that the Minister is, on account of his possession of such powers, to be regarded as, in effect, taking possession of the property of the Corporation or acquiring the rights of the Corporation in or over it. In essence the Minister can choose to direct the Corporation as to how it shall use the property, and property rights, which it owns and possesses. As Lord Woolf said of the comparable section 8 of the Mauritian Constitution in *Sucrière de Bel Ombre* the section is "*limited to protecting property and property interests from interference which in a broad sense involves some formal compulsory taking of possession or acquisition of property or of what loosely corresponds to a right over property"*.

184. Under the Amendment Acts the management of the Corporation remains with the Corporation but that management is subject, so far as resolutions are concerned, to the approval of the Minster, who may also give directions and may take control of its governance either temporarily or otherwise, if he considers that it is being mismanaged or that its governance is otherwise in a poor state and that it is in the best interests of Bermuda, until he is satisfied that such control is no longer necessary. The ability of the Minister to control the management of the Corporation, which is by no means absolute, but subject to conditions, as well as the need to comply with classic public law rules, is not, in my view, sufficient to amount, actually or constructively, to a taking possession of its property or acquiring an interest in or right over that property: *Panton***.**

185. The position in this respect seems to me stronger in favour of the contentions of Mr Duncan than was the case in *Sucrière de Bel Ombre*, where even the fact that the planters were bound to renew leases to the metayers did not mean that the planters lost, or the metayers acquired, a right or interest in or over the property within the meaning of the Constitution.

186. Further, as Lord Clyde said in *Panton:*

> *"The appellants were and remained shareholders of the company. Their shares would doubtless qualify as property, but their shares were not taken away. They no longer had the control of the company which was inherent in the shareholdings which they possessed. But the assumption of temporary management by the Minister did not involve the taking of any property of the appellants. That the regulation of the company was in the hands of the Minister did not mean that the appellants had had any of their property taken away from them*[39]*."*

The position of the Corporation is analogous. The Corporation has no shareholders: but the Mayor and Councillors are its members, who no longer have the same degree of control of the Corporation as they had before the Amendment Acts. That does not mean that the Minister has taken any of the Corporation's property or acquired any rights in or over it. Further the position does not see to me

[39] The Board must have been of the view that neither property nor an interest in or right over property had been taken.

to alter if the assumption of the control of the governance of the Corporation is more than temporary but is to last until he is satisfied that such control is no longer necessary.

187. Some Courts in some jurisdictions have been prepared, within limits, to regard the imposition of restrictions or controls, if they go beyond a certain point, as amounting to a (constructive) taking of possession or deprivation of property. But the circumstances in which they have been prepared to do so – usually where a private individual has suffered appreciable loss from the restrictive activities of public authorities – are not applicable here and, in my judgment, in a case of this kind, the Court should adopt a stricter approach.

188. In relation to private individuals or business the property of the potential claimants is entirely their own; they do not hold it in any public capacity; and they are *prima facie* entitled to dispose of it without regard to any public interest considerations.

189. In the case of a corporation established by statute for the purposes of municipal government, questions may arise as to what is the control if any, which, in the public interest, the Executive i.e. central government should have in relation to local government. These are questions which are most appropriately left within the remit of the Legislature and the Executive. A statutory change which increases the control of the Executive over local authority corporations because the Legislature has agreed to it on the basis that the Minister is to take control when he regards it as in the national interest, should not readily merit the conclusion that there has been a constructive taking of possession or acquisition of an interest in or over the Corporation's property.

190. I incline to the view that legislation such as the Amendment Acts should be treated as falling within the regulatory exception, and not treated as confiscatory, on the grounds that the Amendment Acts provide express restrictions on how the Corporation can act. Such legislation is not a general regulatory law in the sense of applying to all members of the public; but the *Municipalities Act 1923* is the general regulatory law, enacted for the public benefit, in respect of the municipalities of Bermuda and the manner in which their affairs should be conducted. It is not, however, necessary to make a decision on this.

191. Lastly, the proposals in the Reform Bill will, if enacted, mean that the Corporation is composed of 4 members appointed by the Minister and by a body appointed by him, instead of elected councillors. But that does not mean that there will have been any taking of possession of the property of the corporations or any acquisition of its rights in or over its property by another. What it does mean is that the composition of the Corporation will change.

Section 13 (3)

192. Section 13 (3) of the Constitution provides:

> *"(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that the law in question makes provision for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by*

a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided from public funds."

193. In the light of his conclusion that there was no deprivation of property without compensation in breach of section 13 (1) it was not necessary for the Chief Justice to decide whether section 13 (3) disapplied the operation of section 13 (1). But since both parties had made submissions on the point, the Chief Justice expressed his views on the topic briefly.

194. The Chief Justice accepted that the Corporation was a body corporate established by law for public purposes, municipal purposes being in the present context to be equated with public purposes; and that all funds **received** by the Corporation other than third party commercial investments in the acquisition of property with the Corporation became public funds. But he was of the view that section 13 (3) was limited to the operation of laws which expressly allowed for the compulsory acquisition of property, such as section 4 of *the Acquisition of Land Act 1970*. Since the Amendment Acts and the proposed Reform Act did not provide either expressly or impliedly for "*compulsory taking of possession in the public interest of any property*" the sub-section was not applicable. The Corporation submits that the Chief Justice was right on that. I agree.

195. The Corporation also submits that the Chief Justice was wrong to hold that the exception potentially applied because all the monies received by the Corporation, other than the ones he identified, became public funds. The test was not whether the moneys <u>received</u> became public funds but whether the <u>source</u> of any funds was other than moneys provided from public funds. There is no evidence that the source of the Corporations funds is exclusively public, and some of it, such as rentals and car parking fees, is certainly not. The term "*public funds*" is not defined in section 13 (3) but, it is submitted, they are to be confined to the sort of "*public money*" or "*public funds*" which are covered by sections 36 to 39 of the Constitution. Section 39 (1) defines a "*money bill*" and provides that, in that subsection:

"the expressions "taxation", "debt", "public money" and "loan" do not include any taxation imposed, debt incurred, money provided or loan raised by any local authority body for local purposes".

196. I would accept that the question under section 13 (3) is whether the source of monies <u>invested</u> was from anywhere other than public funds. That begs the question as to what monies are to be taken as having been invested in the Corporation, an expression which would not appear to me to be apt to cover rentals and car parking fees. We do not, however, have the necessary evidence to determine that question

197. Section 39 of the Constitution provides:

"39 (1) In sections 36, 37 and 38 of this Constitution "money bill" means a public bill which, in the opinion of the Speaker, contains only provisions dealing with all or any of the following matters, that is to say—

(a) the imposition, repeal, remission, alteration or regulation of taxation;

(b) the imposition, for the payment of debt or other financial purposes, of charges on public money, or the variation or repeal of any such charges;

(c) the grant of money to the Crown or to any authority or person, or the variation or revocation of any such grant;

(d) the appropriation, receipt, custody, investment, issue or audit of accounts of public money;

(e) the raising or guarantee of any loan or the repayment thereof, or the establishment, alteration, administration or abolition of any sinking fund provided in connection with any such loan; or

(f) subordinate matters incidental to any of the matters aforesaid:

and in this subsection the expressions "taxation", "debt", "public money" and "loan" do not include any taxation imposed, debt incurred, money provided or loan raised by any local authority body for local purposes."

Mr Duncan submits that it is plain that the exemption of local authorities from the restrictions on money bills in sections 36-38 relates only to the definition of "money bill" in its application to financial measures before the Senate. The definition is irrelevant for any other purpose. I agree.

Section 9 of the Constitution

198. Before us, but not before the Chief Justice (nor in the original Notice of Appeal), the Corporation has sought to argue that the proposed Reform Act will contravene the right of expression under section 9 of the Constitution. Because this submission was a latecomer to the proceedings we indicated that we would consider the submission *de bene esse* on the basis that if we came to the conclusion that the claim could not fairly be determined without further evidence, we would decline to entertain the point.

199. Section 9 provides:

"9 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) 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 provision—

(a) that is reasonably required—

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the rights, reputations and freedom of other persons....

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

200. The proposed Reform Act will replace the existing democratic structure and replace it by members who are either (a) directly appointed by the Minister (the majority); or (b) are appointed by a Minister-appointed board. In respect of the latter the general public will have a right to make nominations to the Selection Committee. The Corporation contends that the Act thereby seeks to sweep away the existing democratic structure under which the Corporation manages the City on the basis of policy decided by its members, who are voted in by, and accountable to, the City's electors; and that the changes to be introduced by the proposed Act will hinder those electors in the enjoyment of their freedom to express, by their votes, their opinions as to who should govern the affairs of their City and determine the policies that the City should adopt. and thus, indirectly, as to what those policies should be.

Motive

201. The Corporation also submitted that the, or a, motive for the promotion of the proposed Reform Act was that the decisions and opinions of the Corporation have offended, or are likely to offend, an opposing party, now in government, and that the new administration wishes to stifle dissent. This has been dressed up as a desire to establish "*a more deeply co-operative relationship with central government"*. In the course of the argument Sir Jeffrey indicated that it was not necessary for the Corporation to pursue the issue of motive (Day 3/126). In those circumstances, I do not propose to consider the question of the motive for the proposals further, rather than the effect_of what is proposed.

Whose freedom of expression?

202. It is of some importance to identify whose freedom of expression is said to be being hindered. As to that the Corporation said, originally, as I understood it, that it was the freedom of expression of (a) the electors, who will not be able to express their political opinion by voting and whose agents, the Mayor and Councillors, will not be able to do so either and (b) the Corporation itself which will be deprived of its rights of freedom of expression. Day 1/203.

203. As to that, it does not seem to me that the Mayor and Councillors, although voted in by the electors, are properly to be regarded as their agents. Further, whilst those who are presently the Mayor and Councillors will, if the Bill becomes law, no longer be able to express opinions in that capacity, unless they are appointed under the proposed Reform Act, they will still have full freedom of expression; and section 9 will not be infringed because their opinions will not be able to be expressed in their former capacity. And the Corporation as such (i.e. the Mayor and Councillors for the time being) will

not be hindered in the expression of any opinion. Nor are the erstwhile electors hindered in expressing their opinion in any way that they choose other than by their inability to do so by voting.

204. It became clear in the course of the submissions that the gravamen of the Corporation's case is that it is the electors whose freedom of expression is being hindered, and it is that case which I propose to address.

205. Mr Duncan had two fundamental objections to our entertaining the section 9 argument at all. First, it was submitted that the Corporation had no standing to bring a claim based upon a supposed hindrance of expression of the electors because although some, possibly all, of the members of the Corporation were electors, the Corporation was not bringing this claim in that capacity. I address this question below.

206. Secondly, Mr Duncan submitted, the way in which the Corporation had chosen to put its case in this court, namely that the motive of the government was to still the electors' voices and override their policy preferences , to bring about, as the Corporation put it, a *"more obedient relationship of the local authority under central government*", to stifle dissent and to produce a "*top-down suppression of inconvenient local opinion*" needs to be addressed and confronted in evidence, which the Attorney General had never had the opportunity to adduce. Reliance was placed on the authority which I summarise in the following paragraph.

207. If a litigant raises, for the first time, on appeal a question of law which applies to facts either admitted or proved beyond controversy the Court can hear it: *Connecticut Fire Insurance v Kavanagh* [1892] AC 473, affirmed in *Tieh Yieh Commercial Bank Ltd v Kwai China Cold Storage Co. Ltd* [1989] LRC (Comm) 52, 539h – 540c. Otherwise the Court ought not to do so unless the Court is satisfied that the evidence before it establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. See also *Susilawati v American Express Bank Ltd* [2009] 2 SLR (R) and *Abhilash s/o Kunchian Krishnan v Yeo Hock Huat and another* [2019] 1 SLR 873 cited in *JWR Ltd v Edmond Pereira Law Corporation* [2020] SGCA 68. That cannot be the case here. There was evidence below which contradicted that of the Corporation; and the Chief Justice has never been asked to make findings on that evidence or on the rationale of the proposed Reform Act.

208. I agree that, if it is necessary to reach conclusions as to the motive behind and the reason for the introduction of the proposed Reform Act, this is not something that should be attempted, for the first time, in this appeal. But insofar as the complaint is that the effect of the proposed Reform Act is that electors will have been denied their voice as voters, that is something which requires no evidence, being an inevitable and immutable feature of the Reform Act, and is a matter whose significance we should, *prima facie*, consider. If, however, we were of the view that the proposed Reform Act constituted a hindrance to the electors' freedom of expression which fell within section 9, the question would then arise as to whether the Minister should be afforded the opportunity, denied him below, of submitting and adducing evidence to the effect that such hindrance was reasonably required for the purpose of protecting the rights, reputations or freedoms of others. I consider that question below.

Rights to local government and freedom of speech

209. The Corporation made clear in its submissions that it does not assert that under the terms of the Constitution there is a right to local government or a right to a democratic election of a local government corporation sole. That fact does not, it says, undermine its argument. Whatever might be the position if there was currently no right to vote for Councillors, there **now** exists, and has existed for many years, a right to vote under the Municipalities Act[40] which is being threatened with withdrawal. The contravention of the Constitution lies in the removal of an extant democratic mechanism, amounting to a clear hindrance of the expression of the current electors' opinions and a classic example of suppression of political speech.

210. That voting is to be regarded as a form of political expression is underlined in the judgment of Abella J (dissenting but without demur on the principle from the majority) in *Toronto (City) v Ontario (Attorney General):*

> "[86] *Elections are to democracy what breathing is to life, and fair elections are what breathe life into healthy democracies. They give the public* ***a voice*** *into the laws and policies they are governed by, and a chance to choose who will make those laws and policies. It is a process of reciprocal political discourse.*
>
> *[87] The rules of an election, including the electoral boundaries and the timelines for campaigns, structure the process of reciprocal dialogue between candidates and voters in their electoral districts. The final act of voting****, itself a form of political expression, is*** *the culmination of the process of deliberative engagement throughout an election. The stability of the electoral process is therefore crucial not only to political legitimacy, but also to the rights of candidates and voters to meaningfully engage in the political discourse necessary for voters to cast an informed vote and for those elected to govern in response to the expressed views of the electorate."*

211. In this connection the Corporation observes that it is important to note that expression rights, such as those contained in Article 10 of the ECHR, are freestanding rights which are not (as is the case with Article 14), dependent or parasitic on other rights and freedom of expression is one of the essential foundations of a democratic society: *Handyside v UK* [1976] ECHR 5493 [59]. Further, as the ECtHR held in *Bowman v UK* (1998)26 ECHR at [42]:

> "*Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system…. The two rights are inter-related and operate to reinforce each other: for example, as the court has observed in the past, freedom of expression is one of the conditions necessary to ensure the freer suppression of the opinion of the people in the choice of the legislature… For this reason, it is particularly important in the period preceding on election that opinions and information of all kinds are permitted to circulate freely."*

212. The Corporation is right to accept that there is no constitutional right to a democratic election for local government. Entitlement to elections is addressed in Protocol 1, Article 3 of the ECHR, which provides that:

[40] Although those who have enjoyed it have varied over the years from landlords to business owners and residents.

"*The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature"*

The Article has no application to municipal councils: *Xureb v Malta* (Application No 52492/99) ECHR; *Molka v Poland* (Application No 56550/00).

213. That provision, itself, suggests that the High Contracting Parties to the ECHR did not think that the right to freedom of expression under Article 10 of the ECHR meant that there had to be regular elections to the Legislature or*, a fortiori*, to municipal councils. If that were so there would be no need for the Protocol.

214. If, therefore, there is no constitutional right to municipal elections and, if the Council was presently appointed by some non-electoral means, it does not seem to me that the residents or business ratepayers could claim a right to municipal elections on the grounds that otherwise their freedom of expression would be hindered.

215. But there is, of course, and has been for many years, a democratically elected Council. I do not, however, find it possible to reconcile the acceptance by the Corporation that there is no constitutional right to a democratic election for the Corporation with the proposition that an enactment of the Legislature that abolishes the democratic vote is constitutionally invalid because it contravenes the right of the electors to freedom of expression.

216. The method of constituting municipal authorities, and even whether there should be such authorities, is a matter for the Legislature, and is untouched in the Constitution. Such authorities are entirely the creature of statute; and it is for the Legislature to decide whether to create, change or abolish them. The right of freedom of expression which is here invoked is the right of freedom of expression in municipal elections and, if such elections may be abolished, as, in my view, they can, the right is no longer relevant, unless it can be said that there is a right to those elections, which there is not. Any right to freedom of expression of opinion as to who should be on an elected council cannot subsist if the council ceases to be an elected one. There is a right to an election now, because that is what the Legislature has ordained; but that ordinance is not perpetual; and that which the Legislature has ordained it can also revoke.

217. Sir Jeffrey was, I think, minded to accept that a full scale abolition of the Municipalities and the Mayor and Corporation might be permissible some time; but submitted that whilst the Corporation remains with its statutory purposes, one of which is to reflect the views of its constituents, the right of the constituents to vote cannot be abolished. I do not accept this (and the result contended for seems to me inconsistent with the point accepted).

218. While the composition of the Corporation is the product of the views of its constituent electors, it does not seem to me right to say that the statutory purpose of the corporation is to reflect the views of its constituent electors; and, in any event, the effect of the Bill is that there will be no constituent electors, whose views it could be the statutory purpose of the Corporation to reflect.

219. If it were otherwise it would appear to follow that, upon any change in the composition of the municipal electorate (e.g. the removal of the business or the residents' votes) those then deprived of their former vote would be able to complain that the change was unlawful because it deprived them of it. It would thus be, *prima facie*, unconstitutional for the Legislature even to amend the composition of the electorate.

The position in Canada

220. In *Toronto (City) v Ontario (Attorney General)* 2021 SCC 34, the Supreme Court of Canada had to consider whether Ontario legislation which reduced the number of wards in Toronto from 47 to 25[41] for the purposes of a forthcoming municipal election was unconstitutional as being contrary to section 2 (b) of the Charter of Rights and Freedoms. The Charter provides:

> *"2 Everyone has the following fundamental freedoms:*
>
> > *b) Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication*
>
> *3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."*

221. The Supreme Court, by a majority, held that Ontario had acted constitutionally. The relevant Act imposed no limit on freedom of expression. Section 2 (b) could, in certain circumstances, impose positive obligations on the government to facilitate expression. But to succeed in a positive claim it was necessary to establish that by denying access to a statutory platform the government had either substantially interfered with freedom of expression, or had the purpose of so doing (the latter not being in issue), and substantial interference with freedom of expression only occurred where lack of access to a statutory platform had the effect of radically frustrating expression to such an extent that meaningful expression was effectively precluded. Meaningful expression did not have to be rendered absolutely impossible but effective preclusion represented an exceedingly high bar that would be met only in extreme and rare cases.

222. The City, which sought restored access to a particular platform (i.e. the electoral structure that existed before the amending Act), had failed to show, the Supreme Court held, that there had been a radical frustration of the expression of election participants because the participants had had a substantial period to re-orient their message and freely express themselves according to the new ward structure. That decision rests on the examination of a line of Canadian jurisprudence distinguishing between negative and positive obligations under the Charter, which I do not propose further to examine.

223. It is necessary to note that in that case municipal elections were to continue but with different ward boundaries. But the case contains material observations on whether the right to freedom of expression provides (indirectly) any right to a municipal election. As to that the Chief Justice of Canada observed that section 3 of the Canadian Constitution guaranteed citizens the right to vote and run for office in provincial and federal elections but that the text of section 3 made clear that it did not extend to

[41] The electors were not deprived of their vote but did not necessarily enjoy it in the same constituencies as before. There was, in effect, a rejigging of the electoral boundaries.

municipal elections. (Similarly, in Bermuda, section 28 of the Constitution provides for an elected House of Assembly; but the Constitution contains no guarantee of municipal elections).

224. The Chief Justice held [44] that:

> "***Effective representation is not a principle of section 2 (b) of the Charter; nor can the concept be imported wholesale from a different Charter right****... [81] ...Section 3 democratic rights were not extended to candidates or electors to municipal councils. This is not a gap to be addressed judicially. The absence of municipalities in the constitutional text is, on the contrary, a deliberate omission…. [84] The text of the Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and accordingly no role to be played by the unwritten principles."*

225. Later in his judgment [25], which was the judgment of the majority, Wagner CJ observed:

> "*To be clear, s. 2(b) does not remove the authority that a legislature has to create or modify statutory platforms, because it does not include the right to access any statutory platform in particular. However, when a legislature chooses to provide such a platform, then it must comply with the Charter (Haig, at p. 1041)."*

Since, as the Court held, a province had, subject to the Charter, an absolute and unfettered legal power to legislate with regard to municipalities and there was no freestanding right to effective representation by democratic election at municipal level, it would seem to me that it was plainly entitled to choose not to provide any form of platform.

226. In my judgment we should adopt the same approach here and hold, as I do, that section 9 cannot be invoked in order to mandate democratic elections to municipalities. It would seem to me entirely inapposite for it to do so in circumstances where the restrictions on the application of section 9 do not, with any clarity, address the position where a democratically elected government decides that municipal elections should be abolished or restricted.

227. If, contrary to my view, the Corporation was right and the proposed Reform Act is *prima facie* to be treated as hindering freedom of expression for the purposes of section 9 of the Constitution, the question would arise as to whether the case falls within section 9 (2). This would involve considering whether any hindrance of free expression, if such there was, was reasonably required for any of the purposes stated in the section. That would involve the Minister establishing that the legislative objective is sufficiently important to justify limiting the right to freedom of expression; that the measures designed to meet the legislative objective were rationally connected to it; and that the means used to impair the right were no more than was necessary to accomplish the objective: *Barbi Bishop v The Queen* [2021] SC (BDA) 70 Civ 127 [42] If the Minister establishes that, the Corporation would then bear the burden of showing that the measure was nevertheless not reasonably justifiable in a democratic society.

[42] The Corporation suggested that this might involve considering whether the objective could have been fulfilled with a less offensive alternative.

228. This, Mr Duncan submits, is not as an exercise upon which the Court should contemplate embarking now. The Chief Justice had not made, or been asked to make, any findings on the rationale behind the proposed Reform Act[43]; or any assessment of the matters referred to in the previous paragraph.

229. Mr Duncan contends that any hindrance, if there was one, was reasonably required because the removal of municipal elections gives the entirety of Bermuda, as opposed to just the electors of the City of Hamilton, an indirect voice in who should comprise the Corporation (because the entirety of Bermuda would vote for the politicians they seek, the winning party selects Ministers and makes up a Government, which includes the Minister, who is to appoint the Mayor and four Councillors and the members of the selection committee for the remaining four). In that sense, the proposed Reform Act would provide more people in Bermuda, including but not limited to, the residents of Hamilton, with the right to freedom of expression, by their votes in national elections, as to how the Corporation is managed. Representation of the wider community in municipalities is of importance when such municipalities have within their boundaries among the most important infrastructure in Bermuda where most Bermudians and work permit holders work but do not live: see the evidence to that effect of Mr Rochester, the Permanent Secretary for the Ministry of Works[44].

230. The Attorney General would seek to adduce evidence from members of the community who support his view, although a survey already conducted by the Government indicated that many responders did not wish the Government to change the Corporation. Relevant evidence was said by counsel[45] to include evidence of (i) the economic impact on the wider community of extending the vote; and (ii) evidence from the government that extending the vote would mean that they could allow a greater number of people to participate in the determination of the use of the resources currently held by the Corporation.[46] That the government takes the latter view is already apparent from the evidence of Mr Rochester; and the basis upon which it is said that there would be the extension of participation to which the government refers is apparent from what is said in brackets in the previous paragraph.

231. This deprivation of evidentiary opportunity is particularly important given that the issue is said to be, fundamentally, a social and macro-economic issue in relation to which the Legislature should be afforded a wide margin of appreciation; as was confirmed by the Privy Council in *Arorangi Timberland Ltd V Minister of the Cook Islands National Superannuation Fund* [2016] UKPC 32, followed by the Bermuda Supreme Court in *Akeroyd v Attorney General and the Tax Commissioner* [2020] SC (Bda) 22 Civ, at [38] in the following terms:

> "... *When it comes to policy choices of a social and macroeconomic nature, the courts should be particularly diffident about interfering, given the nature of the functions, expertise and experience of the judiciary as against the executive or (as in this case)*

[43] Whose objective, as the Chief Justice recorded [38], was described by the Attorney General below as being "*to create a governance system for the Corporation whereby the many challenges in the provision of public service's in Bermuda may be dealt with in an orderly way upon establishing a more deeply co-operative relationship with the central Government*",

[44] The Attorney General submits that, if the Government had extended the municipal vote for Hamilton to all residents of Bermuda, there could be no objection and that the Reform Bill does the equivalent. Not quite: if that extension had been made the electors would get a direct vote.

[45] As he put it "*off the top of my head*" as he had not taken instructions.

[46] By which I take counsel to have meant altering the system so that the Mayor and Councillors were chosen by the Minister or his Committee; and the Minster was the product of a democratic election to the Legislature.

the legislature - see eg R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills [2015] UKSC 6; [2015] PTSR 322, paras 22-23 and 61-65."

The extent of the diffidence needed will depend on evidence that is not before the Court of Appeal because the point was not argued below, and the Court of Appeal cannot therefore properly measure the wide interest community factors and the rights of others against the rights of the appellant, should the Reform Bill become law.

232. To similar effect, in *Grape Bay* in the Privy Council the Board said:

> *"The unique identity of Bermuda, which as the background shows, it was the object of the legislation to preserve, may be a somewhat intangible concept, not easy to reduce to a few propositions. But feelings about what gives a community its identity are powerful and important. The issues which they raise are pre-eminently matters for democratic decision by the elected branch of government. The members of the legislature are not required to explain themselves to the judiciary or persuade them that their view of the public interest is the correct one. Their Lordships note that in the Court of Appeal Kempster J.A. commented that "the legislature rather than the courts is in the best position to assess the requirements of the public interest and should be allowed a wide margin of appreciation". Their Lordships agree."*

The Supreme Court affirmed this approach, with enthusiasm, in *Akeroyd.*

233. In response to that the Corporation submits that there can be no question of reliance by the Attorney General on restriction on the grounds of public order since that term has, in this context, a narrow meaning, extending to a breakdown of law and order, affray, riot and the like: see *Bermuda Telephone* #. It does not extend to a supposed remedying of administrative inefficiency. Mr Duncan indicated to us that the "public order" qualification is not being relied on.

234. Further the exception where restricting freedom of expression is reasonably necessary "*for the purpose of protecting the rights, reputations and freedoms of other persons....*" applies only where the rights of freedoms of others are meaningfully implicated by the exercise of freedom of expression. Classic examples of the applicability of this exception are in cases of defamation, hate speech and infringement of privacy, all of which are far removed from the ambit of the present case. There is no prospect of the Minister establishing the need for abolition of elections for any of the purposes mentioned in the section.

235. I doubt however that the question would be as clear cut as that. If the current electors of Hamilton are relying on their right of freedom of expression, as a reason for holding the proposed Reform Act to be unconstitutional, it would seem relevant also to consider the rights of freedom of expression of the electorate as a whole.

236. The Corporation also submits that the margin of appreciation in this context only applies at the level of the ECtHR in respect of the different cultural values of different countries: *Handyside* at [48] – [49]. There is no similar margin of appreciation in a case in the domestic courts.

237. In the light of the decisions cited at [231] and [232] above, I do not accept that there is no room in Bermuda for a margin of appreciation as referred to therein; and I note that in *Handyside* the ECHR referred specifically at [47] and [48] to a margin of appreciation of the Contracting States "*given both to the domestic legislator ... and to the bodies, judicial among others, that are called upon to interpret and apply the laws in force*".

238. Whilst I entertain doubt as to whether the Minster would successfully establish that any hindrance of freedom of expression was reasonably required for the purposes set out in section 9 (2) , I would not regard it as right to hold that there is no possibility of him doing so; and I would regard it as unfair and undesirable to do so in circumstances where the matter was never considered below; no evidence or submissions specifically directed to the point were filed (although there was evidence addressing the contention that the entire exercise was irrational[47]); and the Minister had had no real opportunity to deal with the claim evidentially.

239. If, therefore, I had held that the rights of the electors under section 9 of the Constitution were *prima facie* infringed I would have ordered that the section 9 issue be referred back to the Supreme Court for a determination as to the applicability or otherwise of section 9 (2) (a) of the Constitution.

Locus standi

240. Mr Duncan also submitted that the Corporation had no standing under section 15 of the Constitution to assert that its freedom of expression rights had been infringed since, although the Mayor and Councillors may well be electors, they were not before the Court in that capacity, and there were no suggestions that the right to freedom of expression of the Corporation itself will have been hindered.

241. The Corporation submitted that we should adopt the *(obiter*) approach of Kawaley CJ in *Centre for Justice v Attorney General and Minister for Legal Affairs* [2916] Bda LR 62 T [34] where he inclined to the view that section 15 of the Bermuda Constitution should be construed in "*a broad and purposive manner capable of embracing a claim by a public interest litigant*".

242. After the conclusion of the argument we received applications to join Gosling Brothers Ltd and City Holdings Ltd as appellants in their capacity as registered business ratepayers, and, therefore, electors; and to join Sarah Thompson, a municipal resident and elector. Mr Duncan submits that it is far too late for them to be joined and that the proposal mooted at the hearing was for the addition of Mr Gosling in his personal capacity as an elector.

243. I would however give leave for such joinder since it seems to me that the section 9 claim, insofar as it is based on the loss of an electoral voice, should not be allowed to fail *in limine,* on the basis that the case had not previously been brought by the Corporation i.e., the Mayor and Councillors as electors, (although that is no doubt that some or all of them are such), as opposed to being dealt with on its merits or lack of them.

Finale

[47] The Corporation points out that it was not suggested in that evidence that abolition of elections was necessary for public order or to preserve the rights, reputations and freedoms of others.

244. In short, in my judgment:

(a) Section 1 of the Bermuda Constitution does not have independent force;

(b) There has been no breach of the Corporation's common law right to the protection of the law;

(c) Section 7 AA 1 (A) of the Municipalities Act 1923 does not deny the Corporation the protection of the law;

(d) Neither the Amendment Acts, nor the proposed Reform Act, if enacted contravene Section 13 of the Constitution;

(e) The Reform Bill, if enacted will not contravene section 9 of the Constitution.

245. I would, accordingly, dismiss the appeal. Subject to any further submissions, which are to be filed within 14 days, the Corporation shall pay the Respondents their costs of and occasioned by the appeal, to be taxed on the standard basis

BELL JA:

246. I agree

GLOSTER JA:

247. I, also, agree.

APPENDIX 1

The legislation to which the Chief Justice referred was as follows:

(a) In **1812 and 1830 Acts** were enacted confirming prior Ordinances regulating the harbours and the police.

(b) By the **Harbour Preservation Act 1831** the jurisdiction of the Corporation was extended over Hamilton harbour so as to enable it to deal with "*wrecks*" and "*hulks*".

(c) By an **Act of 1868**, the Corporation having purchased certain shores and lands, petitioned the Legislature to extend port privileges to such shores and lands and to include such shores and lands within the boundaries of the township which was granted.

(d) By the **Hamilton Corporation Ordinances (Wharves and Streets) Confirmation Act 1875**, certain Corporation Ordinances concerning the regulation of the streets and wharves of Hamilton were confirmed. Further Ordinances concerning landing place on the wharves and pedestrian safety in the city were confirmed by another Act of 1878.

(e) By the **Hamilton Corporation Act 1894** the Corporation was empowered to borrow money.

(f) By the **Municipal Election Act 1896** the process of selecting a Mayor, Aldermen and the Common Council by holding elections was reaffirmed, provision was made for the keeping of a Municipal Register and provision was made whereby all freeholders within the Town of Hamilton were entitled to run for office and vote in the elections.

(g) By the **City of Hamilton Act 1897** the Town of Hamilton was constituted the City of Hamilton; the Mayor, Aldermen and the Common Council were confirmed as a body corporate under the name of The Corporation of Hamilton, and it was enacted that under this name it shall have perpetual succession, with power to sue and be sued in all courts of law and equity, and to have use of a common seal with power to renew, vary or change the same at pleasure.

(h) In 1905, the **Hamilton Fire Brigade Act, 1905** rationalised the fire service which have previously been provided by the Corporation under previous Acts of 1851 and 1883.

(i) By the **Corporation Taxes Act 1905** the Corporation was empowered to levy and collect rates on real and personal property for the purposes of carrying out the services and functions of the City.

(j) By the **Hamilton Ordinance Act 1905** the Corporation was empowered to regulate the deposit of goods on Front Street and on the wharves and under the sheds of the City.

(k) By the **Hamilton Improvement Act 1908** the Corporation was empowered to levy and collect a rate on real and personal property in the City to aid in the maintenance, improvement, repairs and lighting of the streets of the City.

(l) By the **Hamilton Corporation Act 1911** the borrowing limit of the Corporation was increased, and the Corporation was given power to increase wharf rates.

(m) The **Hamilton Sewerage Act 1912** and the **Hamilton Sewerage Act 1917** were enacted dealing with powers in relation to the sewerage system and permitting a tax in respect of the service.

(n) By the **Hamilton Corporation Act 1920** the Corporation was empowered to increase rates of wharfage on goods and to deal with the levying and collecting of wharfage on goods and ships, and the borrowing powers of the Corporation were increased.

(o) By the **Municipal Corporation Act 1922** the Corporation was empowered to pass ordinances (subject to review by the Governor in Council and the Legislature) to regulate buildings and the supply of specified services in the City.

(p) The **Municipalities Act 1923** ("**the 1923 Act**") consolidated a number of previous enactments, repealing and replacing, and in some cases amending, many of them in whole or in part as a result. The existence of the Corporation of Hamilton as a body corporate with perpetual succession was reaffirmed. Section 39 confirmed that the corporation was vested with seisin in all lots not sold at the prior auction, as well as unoccupied and unclaimed lots.