Civil Appeal No.2022/39,40,41,41A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. ASSSISTANT JUDGE SOUTHEY
CASE NUMBER 2022: No. 39, 40 & 41A

Date: 12 June 2026

Before:

SIR CHRISTOPHER CLARKE AJA

IAN KAWALEY P

SIR ANTHONY SMELLIE JA

Between:

COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Appellant

- and –

RAYMOND GERALD DAVIS

First Respondent

MYRON ADWIN PIPER

Second Respondent

MYRON PIPER and RAYMOND GERALD DAVIS

Appellants

- and –

THE PREMIER OF BERMUDA

COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Respondents

Mr Raymond Davis as Litigant in Person
Mr Ryan Hawthorne of Trott & Duncan Limited for the Commission of Inquiry
Ms Lauren Sadler-Best of the Attorney General's Chambers for the Premier of Bermuda

Hearing date **3 July 2025**
Latest formal supplementary submissions **14 January 2026**

RULING ON COSTS

SIR CHRISTOPHER CLARKE JA (ACTING)

1. We have now to decide what order as to costs, if any should be made in the present case. In the light of its history and because Raymond Gerald Davis ("Mr Davis") is a litigant in person the issue gives rise to a number of somewhat complicated questions.

2. It is necessary first to record a brief history of the matter. On **3 March 2022**, Southey AJ ("Justice Southey" or "the judge") gave Mr Davis and Myron Adwin Piper ("Mr Piper") leave to apply for judicial review on three grounds, the first of which was in two parts. Those grounds were as follows:

    (i) that the Commission of Inquiry into Historic Land Losses in Bermuda ("the Commission") was *ultra vires* section 1 of the *Commissions of Inquiry Act 1935* ("the 1935 Act") because the Terms of Reference were so broad that, in effect, they gave the Commission an absolute discretion as to what it would or would not inquire into – ground 1 (a).
    .

    (ii) that the Commission was *ultra vires* section 6 of the 1935 Act in that the Commission had unlawfully restricted the remit of the Commission by excluding certain claims from consideration and thereby not making a "full, faithful and impartial inquiry into the matters specified in their commission"– ground 1 (b).

    (iii) that it was unreasonable and irrational for the Premier not to have given more detail and specificity to the parameters and persons covered by the Terms of Reference – ground 2.

    (iv) that, to the extent that the Terms of Reference were lawful, the Commission had failed to apply the true breadth of the remit – ground 3.

3. I would observe, in this connection, that the phrase "*ultra vires*" - beyond the powers - has to be looked at with some care. It is necessary to identify which are the powers which the relevant person has gone beyond. In the case of Section 1 of the 1935 Act, the power to appoint the Commission was exercised by the Premier under section 1A thereof. If the Terms of Reference were so broad as to be unlawful then the Premier exceeded his

powers in appointing the Commission on those terms. If the Terms of Reference were lawful but the Commission decided to exclude from their consideration something that fell within the Terms, then they acted beyond their powers under section 6 (which requires a "*full, faithful and impartial inquiry*") in doing so. The claims under Section 1 and section 6 are distinct. They relate to the actions of different persons doing different things, and success in relation to one of the claims does not mean that the other claim is untenable[1].

4. It is not essential to express the position in terms of *ultra vires*. If the Terms of Reference were too wide the Premier will have acted unlawfully in specifying them. If the Commission has wrongly refused to entertain a claim that falls within the Terms of Reference, it can be said simply to have "*failed to apply the true breadth of the Terms of Reference*". And the latter characterisation may be more appropriate in a case where the Commission simply erred in deciding that a matter did not fall within the Terms of Reference, rather than intentionally excluding what they knew to be within its Terms or deciding to exclude a matter without regard to whether or not it fell within them. This was something that no doubt caused Justice Southey to allow a new ground 3, which was not in the original Form 86A and was in wording that he chose. The declaration that Justice Southey made and that we amended was to the effect that the Commission had wrongfully excluded consideration of matters that fell within the scope of the Terms of Reference.

5. The application for leave to commence judicial review was filed on **27 January 2021**. The application was not heard until **March 3 2022**. On **18 February 2022** joint submissions of Mr Piper and Mr Davis had been filed (Tab 9 of the Record of Appeal in Appeal No 41 A of 2022[2]). Included in them was a clear contention that the appointment of the Commission by the Premier was *ultra vires* the 1935 Act citing, *inter alia*, the cases of *Bermuda Emissions Control Ltd v The Premier of Bermu*da [2016] SC (Bda) 82 Civ; and *Ratnagopal v. Attorney General* [1970] AC 194 (JCPC). These submissions also included the contention that the Commission had exercised an absolute discretion to determine the scope of the inquiry because the terms of reference were so broad; had "*flip-flopped*" in constantly changing its decision as to whether or not the Applicant's cases fitted within the remit of the Terms; and had unlawfully failed to perform its duty under section 6 of the 1935 Act which was a duty to make a "*full, faithful and impartial*" inquiry into the matters specified in the Terms.

6. At the hearing on **3 March 2022**, which Mr Davis and Mr Piper attended, an application was made by them for a Protective Costs Order. This application was denied: see the order of that date at Tab 14. The judge gave his reasons for refusal in his oral ruling of 3 March 2022 (Tab 13), in which he relied on three factors. The first, which the judge regarded as a "*significant*" factor even if not a "*knock-out blow*", was that both

[1] In addition, care may be needed with phraseology. The statement that the "Commission **is** *ultra vires"* may readily be understood to mean that the appointment of the Commission was beyond the powers of the Premier under section 1 of the 1935 Act (see e.g. [4] of the judgment of 22 October 2022). But it may be used to mean that the Commission acted beyond its powers under section 6. Thus, both ground 1 (a) and 1 (b) said that the Commission was *ultra vires*.

[2] Hereafter reference to "Tabs" is a reference to Tabs of that Record.

applicants had a personal interest in the outcome of the litigation. The second was that, although he accepted that both applicants were of limited means, he had no detail as to their means. The third was that on the material before him he had little reason to doubt that the claim would proceed to a substantive hearing without a Protective Costs Order.[3]

7. In submissions dated **13 June 2022** for the July 2022 hearing (Tab 30) Mr Piper said at 2.4: "*For the sake of avoiding duplication, the second applicant agrees with the first applicant filings that the COI is ultra vires as outlined in Rajah Ratnagopal v The Attorney General*." In his submissions of **11 June 2022** (Tab 29), Mr Davis advanced the case that the Commission had unlawfully restricted its remit because it believed the Terms of Reference to be too broad.

8. In his judgment of **5 August 2022**, following a hearing on **11-13 July 2022**, Justice Southey addressed the Bermuda Housing Corporation ("BHC") and the Bank of Bermuda claims. These two matters had been raised by Mr Davis in his affidavit in support of his application for leave to apply for judicial review as matters which he said the Commission had wrongly failed to address. It had done so on the basis that Mr Davis's two complaints amounted to commercial disputes.

9. The contents of that judgment will be familiar to the parties. It is sufficient to say that the judge's conclusion was that Mr Davis had failed to establish that the establishment of the Commission was *ultra vires* the 1935 Act. At paragraphs [104] – [105] of his judgment the judge said that he had read the skeleton arguments and listened carefully to the oral arguments of the parties and recorded that Mr Davis had argued, *inter alia*, that the Commission's statement that it needed to determine the parameters of its inquiry demonstrated that the terms of reference were too vague. Mr Davis had pointed to the absence of any definition of terms such as "*historic*" or "*irregular*". He had also argued that the Commission had no authority to reduce the scope of its remit and had misunderstood the scope of its Terms of Reference. It is apparent from what he said that the judge took Mr Davis to be advancing what amounted to a claim that the appointment of the Commission was beyond the powers of the Premier because of the vagueness of the terms of reference as well as a claim that the Commission had wrongly reduced the scope of its remit[4].

10. Justice Southey held that the Terms of Reference were drafted in a manner that was far from perfect, but they were sufficiently clear. But, as he held [121 b], the Commission, by holding that there must be some "*systemic failure*" had diverted its focus from consideration as to whether there was a power imbalance. The Commission had also erred [121 c] in deciding that Mr Davis's cases were outside the Terms of Reference because they amounted to a commercial dispute.

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[3] The transcript contains the words "*I have no evidence before me that either applicant will be willing to pursue this claim"*. In the light of the words that follow the judge must have meant (and may have said) that he had no evidence that either applicant "will not be willing" to pursue this claim.

[4] I have little doubt but that Mr Davis's principal submission was that the Commission had unlawfully reduced the scope of its remit. That does not however mean that he abandoned before the judge the contention that the appointment of the Commission was *ultra vires* the Premier because of the vagueness of its terms.

11. On either **22** or **24 October 2022**, following a hearing on **21 October 2022**, the judge gave a ruling on the form of order and costs. He held [4] that, given his conclusion that the terms of reference were not unlawful, there was no basis for declaring that the Commission was *ultra vires* the 1935 Act, which was part of the relief sought in ground 1 in Form 86A. He proposed to declare that the Commission unlawfully excluded Mr Davis's BHC and Bank of Bermuda Claims from the Terms of Reference by requiring the loss of land to be the result of some "*systemic*" issue and by excluding those claims as being "*commercial disputes*"[6]; and held that there was no basis for a claim by Mr Davis for damages for a loss of opportunity [10].

12. On costs the judge observed that Mr Davis had achieved a significant degree of success [33]. He had shown that the Commission had erred in law but had failed to demonstrate that the Premier had erred [30].He thought it highly likely that, if Mr Davis had to pay the costs of the Premier and the COI had to pay his costs, he would be significantly out of pocket because, as a litigant in person, he would recover a much smaller amount of costs [37]. That result, he thought, would be unjust. He resolved this problem by ordering that the Commission should pay the Premier's costs on the standard basis but made no other order [39].

13. I note that in his skeleton argument of **30 September 2022** (Tab 55) Mr Davis had submitted:

> "12 …. *The first ground when read properly was an either or, the premier either did not put limiting guidelines to prevent the COI using its own discretion or it was intended to be broad and if intended to be broad they failed to deliver on its breadth".*

This was a concise summary of ground 1(a) and (b). In essence Mr Davis failed on the "*either*" but succeeded on the "*or*". There was no suggestion that he had abandoned the "*either*" i.e. ground 1 (a).

14. On **7 December 2022** Mr Davis filed a notice of appeal from the judgment of 22 October 2022. As to that, I said in my judgment of **22 February 2024:**

> "*42 On 7 December 2022 Mr Davis filed with the Registry of the Court of Appeal a notice of partial appeal against the decision of October 2022, which had been distributed on 26 October 2022. The notice contends, inter alia, that:*
>
> *a) the Commission should have considered his Case No 51 as well as No 39.*
>
> *(b) the appointment of the Commission by the Premier should be regarded as ultra vires:*
>
> *(c) he should have been awarded costs and damages.*

That, at any rate, is what I understand Mr Davis to be saying. The notice is, however, lengthy, discursive (and therefore not always easy to follow) and does not conclude by specifying with clarity the relief sought. This appeal has not been given a separate case number."

15. In reaching the conclusion in (b) I relied on passages contained in paragraph 3 of the Notice of Appeal of 7 December 2022 where:

    (i) Mr Davis referred to the Privy Council case of *Ratnagopal v Attorney General* [1970] AC 974, the classic case on what, in the present case, would be section 1 *ultra vires*. He did so after saying:

    > "3 *The Hon judge Southey admitted that the Grounds 1 and his advised amendment of Ground 3 were in fact, interrelated. When read together it says, "**Either the Premier's remit was too broad and lacked specificity therefore causing the Commission to write its own terms of reference** or The Premier's remit was lawful and the COI failed to deliver the breadth of the remit". **I as plaintiff, claimed either circumstance leads to ultra-Vires**. In the supreme court case Bermuda Emissions Control versus the Premier and others, Justice Ian Kawaley carefully ruled that the focus must be on the appointment of the COI and ruled*[5]:..."

    There then followed a summary of the decision of the Privy Council in *Ratnagopal*[6].

    (ii) A further passage read:

    > "3 (b) *The premier **should not have won the case on the basis that the words were comprehensible**, he lost because the COI interpreted the remit as **too broad** and causing them to narrow the remix using their own discretion. **Having to use their own discretion was the crime that made it ultra vires**. The Premier cannot claim he did not know they wanted or needed to narrow the remit or be ignorant of the fact that they did, because he "ought" to have known.... The Hon Justice Ian Kawaley's ruling* [in Bermuda Emissions Control v the Premier] *is binding on the court therefore the ruling of Hon Justice Southey must be set aside and **the Premiers appointments ruled as ultra vires."***
    >
    > **Bold added.**

    In the same paragraph Mr Davis said that that he had "*argued that the remit granted by the Premier was comprehensible, therefore lawful and that the COI failed to deliver the breadth of the remit. However, that argument did not mitigate or overrule the reason the*

[5] Spelling as in the original.
[6] Mr Davis said in his email of 11 October 2025 that he relied on *Ratnagopal* for the proposition that no one, but the appointing authority can change the warrant. It is not apparent from paragraph 3 of the Notice of Appeal that that was the limit of his reliance on the case.

COI took the view they needed to narrow what they deemed as a remit that was too broad, then made changes that were ruled by [the judge [as "misdirecting themselves" and illegal".

16. In relation to what I said at paragraph 42 (c), the position was that at paragraph 5 Mr Davis said that both Mr Piper and he had applied to the judge for relief from adverse costs and he set out the basis on which they did so. The effect of his submission was that they should have been afforded that protection. At paragraph 6 Mr Davis advanced a claim for the costs of coming to Bermuda in October 2020 and remaining there for six months (during the course of which he became ill) for the purpose of pursuing before the Commission his claims to have suffered a loss of land or property by irregular means, working with an investigator and giving evidence to the Commission. Save in that respect, the notice did not address the costs order that the judge had made. At paragraph 7 he claimed that he should have recovered damages as a result of the Commission dismissing his cases.

17. The Notice of Appeal of 7 December 2022 also contains in paragraph 5 what is, in essence, a complaint about the fact that Mr Davis should have had the benefit of a PCO.

18. On **22 February 2024**, following a case management/directions hearing from 15-17 November 2023 in relation to the five Commission of Inquiry appeals therein referred to, we gave a ruling in which we gave Mr Davis and Mr Piper an enlargement of time for filing their Notices of Appeal from the judgment of Justice Southey of 5 August 2022 [56] - [57] and waived the requirement to make a deposit or to pay fees in relation to their appeals [80]. We also made a Protective Costs Order in favour of Mr Davis, Mr Piper, Ms Junos and Mr Moulder in relation to any costs that might otherwise have been awarded against an unsuccessful appellant in the terms set out in [84].

19. On **17 March 2024** Mr Davis filed a Notice of Appeal (described as from the judgment/order of 22 October 2022). Paragraph 3 was headed "*Grounds of Appeal*". On **14 April 2024** Mr Davis filed what appeared to be a second Notice of Appeal, in which paragraphs 1 and 2 were in the same terms as those paragraphs in the 17 March 2024 Notice. However, paragraph 3 was headed "*Skeleton Argument*", which was what the document was plainly intended to be. Both documents are lengthy and discursive. Much of what is in the 17 March 2024 Notice is in the 14 April 2024 notice; but the latter has additions.

20. Mr Davis's Notice of Appeal contained five grounds which can be summarised as follows:

(a) Ground 1

Case 51

Mr Davis's case in relation to the Darrell matter had been wrongly dismissed by the Commission.

(b) Ground 2

Justice Southey had failed to take account of the fact that on the first day of the trial (*semble* 3 March 2022) Mr Davis had sought to amend his pleading (i.e. Form 86A) so as identify that the *ultra vires* upon which he was relying was that the Commission had acted beyond its authority in determining its own scope of inquiry, when the Commission had no authority to change the Terms of Reference. This was in accordance with a document dated March 2 2022 submitted by Mr Davis headed "*Additions to First Respondents skeleton Submissions".*

In this ground Mr Davis referred again to *Ratnagopal.*

(c) Ground 3

The COI had unlawfully created a new remit different in meaning to that given by the Premier and had thus acted *ultra vires.*

(d) Ground 4

Justice Southey wrongly calculated the date of any pecuniary costs to commence on March 3rd 2022. That date failed to take account of the fact that the Commission had invited Mr Davis to Bermuda in 2020 where he arrived on October 16. He came to meet with an investigator in respect of what he claimed to be land or property loss by irregular means, and to stand and give evidence. He had spent six months in Bermuda trying to get the attention of the Commission. But all the cases that he came to testify on were dismissed before they were investigated, with no legal reason given in respect of case number 51 and with the others being dismissed for the wrong reasons.

(e) Ground 5

Justice Southey wrongly refused to award Mr Davis damages for misfeasance.

21. In paragraph 59 of our decision of **11 October 2024**, I set out the relief that was sought in the Notice of Appeal, some of which was not within the Court's power (e.g. the removal of any time restraints on any of the 18 grandchildren of Emelius Darrell from making any claims on behalf of his estate or the estate of members of the Darell family associated with Emelius Darrell). One of the remedies sought - at [5 c] under the heading "*Ground 5 remedies*" (Ground 5 being the claim for damages for misfeasance) - was expressed in the following terms:

"c *Should the court agree with my claim that the COI was ultra vires I want all my costs legal and other reasonable considerations for the tremendous waste of time and effort."*

22. On **11 October 2024** we delivered our judgment in the Commission of Inquiry and Davis and Piper cases. In paragraph [61], I recorded that in his submissions to us Mr Davis said that we should declare that the Commission was *ultra vires* and that a new Commission should begin again. On that issue Mr Davis lost[7].

23. My judgment contained the following paragraphs:

> ***3 Mr Piper***
>
> *62. The relief sought by Mr Piper in his Notice of Appeal of 20 September 20[8] was, primarily, a declaration that the COI was ultra vires section 1 (1) of the 1935 Act "by way of the exercise of an absolute discretion due to a lack of proper specificity" in the TOR and/or that the Commission was ultra vires section 6 of the Act because of the decision of the Commissioners to restrict the ambit of the Terms. Mr Piper said in his skeleton argument of 29 April 2024 that, for the sake of avoiding duplication, he agreed with Mr Davis' filings that the COI was ultra vires for the reasons outlined in Ratnagopal v Attorney General [1970] AC 194. The Commissioners were in effect wrongly exercising an absolute discretion with regard to the terms of reference. In addressing us he told us that he was not looking for any relief in relation to his own matter.*
>
> ***4 The Premier***
>
> *63. The Appellant, Mr Davis, does not in his grounds of appeal expressly appeal the judge's decision that there was no basis for declaring that the Commission of Inquiry was ultra vires the Premier because of a lack of proper specificity in the Terms of Reference. In his Ground 2 the Appellant suggests that the judge was in error in determining that he did not seek, as part of his application, the appointment of a new Commission of Inquiry[9] and appears at first to repeat his*

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[7] In his oral submissions to us on 3 July 2023 Mr Davis said (as I understand him, despite some of the wording) that he was asked by the judge whether he was conceding that the appointment of the Commission was not *ultra vires* the Act and he said that he was not: page 18. He also said that he had argued "*that the Commission of Inquiry as a function was ultra vires and so it was illegal what they did. But there is a discretion of the court to determine whether or not it rises to the level of ultra vires, and I did not convince the court about that*": page 22. Further in an email of 4 July 2025 Mr Davis said: "*I have been asked on three occasions: 1, the Supreme Court, 2.Appeal Court, 3. By Ms Sadler Best in the cost hearing, whether or not I hold to the claim a) on the Form A86 or deny claim a), I testified and gave evidence on b) never gave claim to a)* ***but refused to say no to a****) because the court consider a and b mutual to deny one is to deny the other. Ms Best is adamant that I lost a case to prove a) when I have proven from March 2nd, 2022, to have only argued b)."* Claim (a) is the claim that the appointment of the Commission was ultra vires the Premier,

[8] This should be 2022: (Tab 67)

[9] This is, at any rate, my understanding of ground 2 which begins by citing from the Ruling the following: "*In his written submission, Mr Davis seeks the appointment of a new Commission of Inquiry. That is not the relief sought in form A 86* ". Mr Davis then goes on to say that "*The ruling by [the Judge] was an error on the facts of this case*". As appears from paragraph [61] of my October 2024 judgment the appointment of a new inquiry appeared

objections to the COI narrowing of the scope of the inquiry and alleges that by doing so the COI acted ultra vires. But he then appears to refer to the first ground of his application in the Court below, namely that the COI was ultra vires by virtue of the breadth of the original Terms as framed by the Premier – see the citation of the case of Ratnagopal v Attorney General [1970] AC 194. But he does not seek, in his claim to relief, the reversal of the judge's decision confirming the vires of the Terms of Reference. And he repeatedly expresses throughout his Notice of Appeal his approval of the original Terms."

24. As is apparent from those passages Mr Piper expressed agreement with what he described as Mr Davis's filings that the Commission was *ultra vires* for the reasons outlined in *Ratnagopal* without any apparent understanding that that contention was no longer pursued by Mr Davis, and I made reference to Mr Davis's citation of *Ratnagopal* and his apparent reference to his first ground of application in Form 86A. *Mr Davis* had set out under Ground 2 the headnote in *Ratnagopal* and also referred to a passage in the decision of Justice Ian Kawaley, as he then was, in *Corporation of Hamilton v AG and Center for Justice* in which he observed that the fact that there might be inconvenient consequences afforded no answer to a valid complaint that a statutory authority had exceeded its powers in a fundamental respect in a case where the argument was that the instruments in question were invalid.

25. In the event, we reached the following conclusions:

    (i) the establishment of the Commission was not *ultra vires* the Premier [73].

    (ii) the Terms of Reference did not require the loss of land to result from either systemic conduct or an imbalance of power [76].

    (iii) there was no implied power on the part of the COI to limit its considerations so as to exclude consideration of something which in fact fell within the terms of reference [79].

    (iv) the complaints in relation to the BHC case and the Bank of Bermuda case, if established, would, or at the least could, fall properly to be regarded as amounting to irregularity [90].

    (v) the COI had not taken into account the essential basis of these two complaints [94].

    (vi) the appeal of the Commission would be dismissed, and the appeals of Mr Davis and Mr Piper would be allowed in part.

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to be exactly what Mr Davis was seeking; and in both his Notices of Appeal and in his 3 March 2022 document Mr Davis claimed that the COI "*must be struck down".* He did not succeed on that issue.

(vii) the court would make a more extensive declaration in the terms set out at [102].

(viii) the court would reserve for further consideration any question relating to costs [106]

Costs

In the Court of Appeal

26. In relation to the costs in the Court of Appeal the Commission accepts that it must pay Mr Davis's costs of resisting the Commission's appeal; but does not accept that it should pay any other costs and in particular the costs of Mr Davis's appeal. It accepts that, because of the Protective Costs Order, it is not entitled to any of its costs of resisting Mr Davis's appeal.

27. Mr Davis contends that it is necessary for the court to look at the "*real winner*" before it, and that it is inappropriate to look at the Commission's appeal and his appeal separately. The proceedings before the Court of Appeal were, he submits, in effect, a composite whole and Mr Davis was the real winner. The crux of the appeal focused on whether or not the Commission had acted lawfully. I do not agree. In my judgment it is necessary to look at the matters raised in each appeal and consider who won, and who lost, and on what issues.

28. As to that, in the Court of Appeal the Commission lost on its contention that it did not wrongly exclude the BHC and the Bank of Bermuda claims. Mr Davis lost in respect of Ground 1 of his appeal, namely the Darrell matter, which had covered some 12 pages of his Notice of Appeal. As is set out at paragraphs [57] and [58] of our October 2024 judgment, in the course of the hearing leading to the October 2024 judgment we indicated to Mr Davis that we did not regard it as open to us to deal with this matter. It had never formed part of what was contained in his Form 86A by which the judicial review was initiated. No leave had ever been granted to Mr Davis to apply for judicial review in relation to it; nor has any application ever been made to amend Form 86A to include the Darrell matter. Nor had the judge addressed it. He decided that any specific issues arising from the Darrell family matter could not be determined before him: see [106] of his judgment. The fact that we gave this indication to Mr Davis meant that little time was spent at the hearing on the Darrell matter.

29. In relation to Ground 2 Mr Davis relied on the addition of 2 March 2022 which he had filed, and which reads:

> "*The Commission of Inquiry under the chair of Justice Normal Wade Miller (respondent) acted beyond their authority, which under the 1935 Inquiry Act such authority falls under the responsibility … of the Premier. She in her own words [said] "One of the primary challenges faced by the COI was to determine its own scope of inquiry" (page 9 of the COI report). That was beyond her*

powers of discretion and such power is reserved for the office of premier. Therefore, the Commission of Inquiry is "ultra vires". On that action alone the COI cannot be said or held to be servicing the welfare of the country and must be struck down.
(Case law Ratnagopal as provided)"

It is to be noted that the document of 2 March 2022 was an "*addition*" and not an amendment. But as I observed at footnote 13 of the October 2024 judgment the original grounds 1 (a) and (b) had, in fact, included the contention that the COI was or acted *ultra vires* both under section 1 (1) and section 6 of the 1935 Act.

30. The transcript does not reveal that any application was made by Mr Davis on 3 March 2022 to amend the Form 86A to show that he no longer sought a decision that the Premier had acted beyond his powers in section 1 A of the 1935 Act. Nor is it apparent to me that he indicated that that was so. Some of the discussion on 3 March 2022 between Mr Davis and Mr Piper and Counsel, on the one hand, and the judge, on the other, is not wholly easy to follow; but in the course of it:

(a) Mr Davis described the matter of the Commission of Inquiry being [sic] *ultra vires* as "*the kernel of the matter*" - page 4; and the judge described the *vires* of the Commission as the critical issue – page 5. At that stage the judge said that he had just received an email, which must have been the one with the 2 March 2022 addendum. Mr Davis said that what he wrote there was the kernel of the issue: page 6.

(b) the judge observed that the suggestion that the Commission had flip-flopped might be relevant to the grounds because it might suggest a lack of certainty and thus be relevant to the issues in Form 86A on which the Court should focus (this I take to be a reference to the possibility that the establishment of the Commission was *ultra vires* the Premier because of the looseness of the terms of appointment of the Commission) ; but that there was no application to amend the grounds (*semble* by advancing a case on flip-flopping) – pages 6-7;

(c) the observations of Mr Piper and Mr Davis and the response of the judge at pages 8 and 9 indicated that there was a challenge to the decision of the Premier to appoint the Commission on the terms that he did. Mr Piper referred in terms to "***our*** *claim that the remit by* ***the Premier*** *is actually ultra vires*". At page 8 Mr Davis is recorded as saying that "The *Commission had no authority. They went beyond their authority".* In context he was, I think, adding that the remit of the Inquiry was for the Premier and that the Commission had no authority to alter it.

(d) the judge observed that it seemed to him that there was a fairly strong argument that what was actually being challenged was the decision of the Premier and that what the two applicants had just said to him to a large extent confirmed that: page 9.

And, in the presence of Mr Davis, the judge plainly decided, *inter alia*, that ground 1 of Form 86A (which is in two parts covering both section 1 and section 6) was properly arguable: page 45. No suggestion was made that Mr Davis was not arguing ground 1 (a). Further the Notice of Appeal which was filed by Mr Davis after the October 2022 decision contended*, inter alia*, that the appointment by the Premier of the Commission on the Terms of Reference was beyond his powers: see [14] and [15] above; as had, in essence been submitted by Mr Davis in July 2022 in submitting that the terms of reference were too vague: see [13] above.

31. The matters raised in Ground 2 relate to what was the ambit of the judicial review. Mr Davis did not, in my judgment, enjoy much "success" on this ground. The points raised in the additional grounds were already within the scope of the judicial review. He did not establish before us that the judge erred in treating it as part of his case that the establishment of the Commission was *ultra vires* the powers of the Premier under Section 1. I recognize that Mr Davis's principal case was that the Commission had acted beyond its powers in restricting the ambit of the Inquiry. But as it seems to me (and as it seemed to the judge) he maintained the contention set out in Form 86A that the appointment of the Commission was beyond the powers of the Premier. At any rate it was plainly not apparent to the judge that he did not.

32. In relation to Ground 3, we made a more extensive declaration than Justice Southey had made in which we declared as follows [102]:

> *"The Commission of Inquiry into Historic Losses in Bermuda unlawfully excluded Mr Davis' Bermuda Housing Corporation and Bank of Bermuda claims from the Terms of Reference in the Official Gazette dated 1 November 2019 by (a) requiring the loss of land to be the result of some "systemic" issue and (b) by excluding them as being "commercial disputes".*
>
> *The exclusion was wrongful in relation to (a) because the Inquiry was not limited to considerations of systemic issues and in relation to (b) because the Commission failed to take account of all relevant considerations and wrongly, and without good reason, decided that there was no evidence of any irregularity, as explained in the judgment of the Court of [insert date]."*

33. The first paragraph of that declaration was in the same terms as the order of the Supreme Court. The second paragraph was designed to set out how, in our judgment, the Commission had gone wrong (which was not because it failed to consider the question of power imbalance). In effect we held that the judge had reached the right decision, but for different reasons.

34. Further at 101 I had said:

> *"I would, accordingly, dismiss the appeal of the Commission, and allow (in part) appeals of Mr Davis and Mr Piper. Mr Davis has succeeded insofar as I have found he advanced three complaints which the COI should have heard (the Judge referred only*

to two). In addition, I propose below a somewhat expanded form of declaratory relief. Mr Piper succeeds to the extent that he supported Mr Davis's position."

Accordingly, Mr Davis was successful in relation to Ground 3, in a manner which was, in essence, upholding the judgment on this matter at first instance.

35. In relation to Ground 4 Mr Davis's complaint was in essence that he should have been compensated for the time spent when he engaged with the Commission with a view to advancing his claims, including the costs of flying to and from Bermuda and staying there for a period of six months from October 2020. There is however, in my judgment, in the absence of misfeasance in a public office, no legal basis on which he can recover in respect of such pecuniary costs, which are not the same as costs incurred in advancing his appeal or resisting that of the Commission.

36. In relation to Ground 5 we rejected Mr Davis's claim that he was entitled to damages for misfeasance.

37. In my judgment the Davis Appeal and the COI appeal were indeed separate and, for the most part, the Davis Appeal raised matters which were not the subject of the Commission's appeal at all.

38. In those circumstances it seems to me that the appropriate order is that the Commission should pay Mr Davis his costs of resisting the Commission's appeal, and any costs incurred in relation to ground 3 of his appeal. Save to that extent he should not recover any of the costs of his appeal. The limited respects in which he succeeded on his appeal were, in my judgment, in no way sufficient to entitle him to the whole of his costs of it. And his costs in relation to ground 3 are, in substance, part of his costs of resisting the Commission's appeal.

Assessment of costs

39. The making of such an order gives rise to the difficult question as to how the amount of such costs are to be determined. If Mr Davis was not a litigant in person, the hours worked by his attorneys would be recorded by them, probably in meticulous detail. There might be difficulties in determining what proportion of those hours was spent on what activity. But there would be no difficulty in determining the total hours spent. Unfortunately, Mr Davis has kept no running record of his hours worked and told us that attempting to construct one retrospectively was too much of a burden having regard to his significant health problems.

40. In order to address this problem Mr Davis suggested that we should award him 2/3rd of the amount that would be awarded to Mr Hawthorne (he originally suggested Mr Delroy Duncan KC) on assessment in respect of the comparable work carried out by him. There are, however, a number of problems with that suggestion. The first is that the hours spent by Mr Hawthorne in unsuccessfully advancing the Commission's appeal are unlikely to be the same as those of Mr Davis in successfully resisting it. That may not matter too

much because Mr Hawthorne is likely to have spent less time than Mr Davis did in dealing with the matters which are the subject of the Commission's appeal. The second is that the basis for choosing a 2/3 figure may be unfounded.

The Rules of the Court of Appeal

41. The Court of Appeal Rules do not include any Rule dealing specifically with the costs of litigants in person. Order 2 Rule 31 of the Rules provides:

> **"*2/31 Costs***
>
> *31 Where the costs of an appeal are allowed, they may either be ordered to be taxed (in which event the provisions of Order 4 shall apply) or be fixed at the time when the judgment is given."*

Taxation

42. In relation to taxation Order 4 Rules 6 and 7 provide as follows:

> ***"4/6 Discretion of Registrar***
>
> *6. On every taxation the Registrar shall allow all such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the Registrar to have been incurred or increased through overpayment, extravagance, over-caution, negligence, or mistake or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.*
>
> ***4/7 Basis of taxation***
>
> *7. All bills of costs incurred in proceedings in the Court and in proceedings in the Supreme Court preparatory or incidental to, or consequential upon, proceedings in the Court shall be taxable according to the scales in the Fourth Schedule: Provided that, as regards proceedings in the Supreme Court for which no provision is made in these Rules or the said scales, the Rules and scales applicable to the Supreme Court shall be followed."*

43. The Fourth Schedule includes the following provisions:

> ***FOURTH SCHEDULE***
>
> ***SCALE OF COSTS PAYABLE TO BARRISTERS AND ATTORNEYS***

SCALE A

(CIVIL CAUSES AND MATTERS)

Unless otherwise specified, costs payable to barristers and attorneys shall be taxed at the following rates per hour or any fraction thereof (hereinafter called the "Hourly rate")—

Number of Years Called to the Bar	***Hourly Rate***
(a) not less than one year, but less than three years:	*$350 to $450 (at the discretion of the Registrar);*
(b) three years or more, but less than nine years:	*$400 to $550 (at the discretion of the Registrar);*
(c) nine years or more:	*$550 to $650 (at the discretion of the Registrar)*

44. The Schedule then specifies eleven activities for the majority of which the amount to be paid is the hourly rate. Item 12 is as follows:

> *"(12) Where no costs are specified by these Rules in respect of any matter or thing the Registrar may allow the costs applicable to such matter or thing as is laid down in the rules in force in the Supreme Court."*

Fixing

The Rules of the Court of Appeal do not say anything about the basis upon which any costs which are fixed should be assessed.

45. In the present case it is, in my view, appropriate that the costs which we have allowed should be fixed by us (as Mr Davis sought). This will avoid the need for a taxation, which would have to be carried out by the Registrar, and will enable us to take a broad-brush approach to determination of the costs which, as it seems to me, is necessary in the present case.

46. That, however, begs the question as to the basis upon which we should fix Mr Davis's costs. A similar question would arise as to the basis upon which the Registrar should tax Mr Davis's costs, if we were to order that they should be taxed. Although, if we fix the costs, the latter question does not fall to be decided, I think it right to express a view as to the correct approach in relation to the costs of litigants in person when they fall to be taxed as well as when they fall to be fixed.

Assessment of costs which fall to be taxed

47. The proper interpretation of Order 4 Rules 6 and 7 and the Fourth Schedule is not without difficulty. In relation to that my view is as follows:

(i) The Registrar has a clear duty under Order 4 Rule 6 to allow such costs, charges and expenses as seem to him to have been necessary or proper for the attainment of justice or defending the rights of a litigant in person.

(ii) Whilst the Fourth Schedule might be regarded as limited in application to the taxation of the costs payable to barristers and attorneys, paragraph (12) of the Fourth Schedule, which deals with the position where no costs are specified "*by these Rules*" (and not simply by the Fourth Schedule), should be treated as meaning that, where the Rules do not specify anything in respect of any costs of a litigant in person, the Registrar "may allow *the costs applicable to such matter or thing as is laid down in the rules in force in the Supreme Court."*

(iii) The relevant rules of the Supreme Court are those contained in Order 62/18, as set out below. They are the only guidance to the costs of litigants in person in the Rules and, in those circumstances, even if what I have said in (ii) above is completely wrong, because paragraph (12) can only apply to the fees of barristers and attorneys, it is appropriate, in relation to litigants in person, to follow the Supreme Court Rules by analogy with the provision in paragraph (12) in relation to barristers and attorneys that if the Fourth Schedule does not cover the costs in question, you look to the Rules of the Supreme Court.

(iv) In any event, regardless of the considerations above, I would adopt the Rules of the Supreme Court as the appropriate Rules for the assessment of a litigant in person's costs. It would be odd if the approach to costs differed as between the Supreme Court and the Court of Appeal.

48. Order 62/18 of the Rules of the Supreme Court of Bermuda provides as follows:

"***62/18 Litigants in person***

18 (1) Subject to the provisions of this rule, on any taxation of the costs of a litigant in person there may be allowed such costs as would have been allowed if the work and disbursements to which the costs relate had been done or made by an attorney on the litigant's behalf together with any payments reasonably made by him for legal advice relating to the conduct of or the issues raised by the proceedings

(2) The amount allowed in respect of any item shall be such sum as the Registrar thinks fit but not exceeding, except in the case of a disbursement, ***two-thirds of***

the sum which in the opinion of the Registrar would have been allowed in respect of that item if the litigant had been represented by an attorney.

(3) Where it appears to the Registrar that the litigant ***has not suffered any pecuniary loss in doing any item of work*** *to which the costs relate, he shall be allowed in respect of the time reasonably spent by him on that* ***item not more than $50.00 per hour.***

(4) A litigant who is allowed costs in respect of attending court to conduct his case shall not be entitled to a witness allowance in addition.

(5) Nothing in Order 6, rule 2(1)(b), or in rule 17(3) of, or Part III to, this Order shall apply to the costs of a litigant in person.

(6) For the purposes of this rule a litigant in person does not include a litigant who is a practising attorney.

(7) This rule shall apply, with the necessary modifications, to the summary assessment of costs by the court under paragraph 4A of rule 7."

Assessment of costs which fall to be fixed

49. As I have said the Court of Appeal Rules do not specify any basis upon which a litigant in person (or a represented litigant)'s costs should be fixed and, in deciding what approach to take, I would regard it as appropriate to have regard to how the costs of litigants in person would be taxed in the Supreme Court (see above) and also to have regard to how assessment would be carried out in England and Wales.

50. As to that the relevant English Rule is CPR 46.5 which provides:

"*Litigants in person*

46.5

(1) This rule applies where the court orders (whether by summary assessment or detailed assessment) that the costs of a litigant in person are to be paid by any other person.

(2) The costs allowed under this rule will not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative.

(3) The litigant in person shall be allowed –

(a) costs for the same categories of –

(i) work; and

(ii) disbursements,

which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf;

(b) the payments reasonably made by the litigant in person for legal services relating to the conduct of the proceedings; and

(c) the costs of obtaining expert assistance in assessing the costs claim.

(4) The amount of costs to be allowed to the litigant in person for any item of work claimed will be –

(a) where the litigant can prove financial loss, the amount that the litigant can prove to have been lost for time reasonably spent on doing the work; or

(b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in Practice Direction 46."

51. Practice Direction 46 includes the following:

> ***"3.2** Where a self-represented litigant wishes to prove that the litigant has suffered financial loss, the litigant should produce to the court any written evidence relied on to support that claim, and serve a copy of that evidence on any party against whom the litigant seeks costs at least 24 hours before the hearing at which the question may be decided.*
>
> ***3.3** A self-represented litigant who commences detailed assessment proceedings under rule 47.5 should serve copies of that written evidence with the notice of commencement.*
>
> ***3.4** The amount, which may be allowed to a self-represented litigant under rule 46.5(4)(b), is £24 per hour.*

52. As is apparent there is a strong congruence between the analogous Rules of the Supreme Court in Bermuda and the Civil Procedure Rules in England & Wales, with each having either a sterling or a dollar amount per hour.

53. In my judgment we should, for the purpose of fixing the amount of costs, follow the approach of the Bermuda Supreme Court Rules and use a figure of $ 50 per hour (in the absence of proved pecuniary loss).

54. As is apparent, I decline to hold that the Legislature deliberately intended that successful litigants in person in the Court of Appeal should not be entitled to any costs at all. Such a result would have a severe impact on the ability of non-represented litigants to have

access to justice. And it is difficult to understand what policy justification there could be for allowing litigants in person costs in the Supreme Court but disallowing them in the Court of Appeal.

55. In order to secure more than $ 50 per hour it is necessary for the Court to be satisfied that Mr Davis has suffered pecuniary loss in doing any item of work for which costs are claimed. This is, in my judgment, an item-by-item question. Mr Davis needs to show that because he spent x hours on a particular item or items of work, he lost money.

56. That is something which, in my judgment, Mr Davis has not established. He has told us that over the time in question, during which he was not earning a salary, he was engaged in the launching of a major $ 4.5 billion project by Atlantic Bermuda Transhipment Co Ltd, of which he is the 100% owner, for the establishment of a transhipment port[10] in relation to which his companies were being charged very large sums of money by other companies providing services to them; and that the work he did on the present case amounted to time wasted and subtracted from productive time. But such a generalised assertion is not enough. He has to show an identifiable loss (either of earnings or some other gain which was lost by reason of his being unable to take advantage of some opportunity) caused by having to do a specified piece of work, which was part of the work he had to undertake in order to resist the Commission's appeal or advance Ground 3 of his appeal. (In this respect there is no real need to distinguish between time spent by Mr Davis in resisting the Commission's appeal and time spent in advancing ground 3 of the Davis appeal. They are part and parcel of the same exercise, namely refuting the contention that the Commission did not misinterpret its remit).

57. There then remains the question as to how we are to determine the hours spent on the matters in relation to which Mr Davis is entitled to recover his costs. This is difficult in the complete absence of any form of timesheet. Mr Hawthorne kindly agreed to endeavour to assist the Court by (a) giving us some indication of the time that he had spent in advancing specific aspects of the Commission's appeal (in respect of the resistance to which Mr Davis is entitled to recover costs) and (b) commenting on the sort of time that he would accept would reasonably have been spent by Mr Davis in dealing with the various matters involved in that appeal.

58. That is an exercise which is potentially helpful. As I have said, the time spent by Mr Hawthorne in preparing for and presenting the Commission's appeal – which was to the effect that the Commission did not misinterpret its remit – may be less than Mr Davis may have spent in resisting that appeal by contending that it did. Mr Hawthorne's time may thus be capable of being regarded as a minimum for the purpose of estimating Mr Davis's time. But even that is not certain. For instance, Mr Hawthrone may have spent x hours on researching and preparing the authorities and Mr Davis may have read none or few of them.

[10] A Transshipment Port, in comparison with a Gateway Port, is a deep-water port at which the bulk of the business consists of large ships offloading their cargo onto smaller vessels which then travel to shallower water ports.

59. Another difficulty is that costs have to be fixed **at the time when judgment is given**. If we do not do so then, it would seem that we could not do so thereafter.

60. In order to address that problem, we indicated that we would hand down (as we did) a draft of this judgment with a view to obtaining such assistance as might be available from the parties in determining the number of hours for which $50 per hour should be allowed to Mr Davis.

61. In our draft judgment we said that we proposed the following sequence of events:

(i) Mr Hawthorne should produce a breakdown of the times of his work in progressing the Commission's appeal. That breakdown is likely to include, but may not necessarily be limited to, the following matters:

(a) perusing the judgment of 5 August 2022;

(b) drafting a Notice of Appeal from that judgment – the notice was dated 14 September 2022 (Tab 65 in the ROA of Appeal No 39 of 2022);

(c) preparing for the hearing in June 2024 insofar as such preparation related to the prosecution of the Commission's appeal (but not insofar as it related to resisting Mr Davis' appeal); this would include compilation of the skeleton argument of 14 April 2024

(d) arguing the Commission's appeal at the 3-day hearing in June 2024 (but not the time in resisting Mr Davis 'appeal).

(ii) He should also produce a breakdown of the quantity of time that he would regard it as reasonable for Mr Davis to have spent resisting the Commission's appeal.

(iii) Mr Davis should then produce as good a breakdown as he can of the times of his work in resisting the Commission's appeal. That breakdown is likely to include the following matters:

(a) perusing the judgment of August 2022;

(b) considering the Commission's Notice of Appeal from that judgment and the response to be made to it;

(c) preparing for the hearing in June 2024 insofar as such preparation related to the prosecution of the Commission's appeal (but not insofar as it related to promoting Mr Davis' appeal); this would include

considering the Commission's skeleton argument of 18 April 2024; and preparing his own of 5 May 2024

(d) arguing the Commission's appeal at the 3-day hearing in June 2024 (but not the time in promoting his own appeal).

(iv) Mr Davis should itemise any disbursements that he seeks to recover, such as photocopying, printing and the like.

62. We said, in our draft, that when that had been done, we would invite the parties to make whatever submissions they wished as to the appropriateness or otherwise of taking the number of hours put forward by their counterparties.

63. There are further complications. We have to decide whether the Commission should be responsible for any of Mr Davis's costs in relation to the 3-day case management hearing in November 2023 which gave rise to the ruling in February 2024. The ruling related to the five subsisting appeals. The issues determined in relation to them included the following:

(i) Whether any of the three members of the Court of Appeal due to determine the appeals should recuse themselves;

(ii) Whether an extension of time and/or leave to appeal was needed by any of the would-be appellants;

(iii) Whether the Court should grant a waiver of the payment of fees and of the obligation to provide security;

(iv) Whether the Court should grant a PCO in relation to the appeals

(v) Case management directions in relation to the different cases.

64. We have received very little argument on this question. It seemed to me, however, at the time of the draft judgment that there was very limited scope for ordering the Commission to pay Mr Davis any of his costs in relation to this hearing. The application for recusal, in which Mr Davis indicated that he left it to Justice Bell to decide whether he should recuse himself, was refused. There seems to me no sound basis on which the Commission should be required to bear any of Mr Davis's costs in relation to the recusal issue.

65. Mr Davis was granted an extension of time and leave to appeal in relation to the judgment of 5 August 2022 and granted a waiver of fees and of the obligation to provide security. It does not seem to me appropriate that the Commission should pay the costs of those issues since he was claiming an indulgence and, later, his appeal substantially failed.

66. In my draft judgment I said that the matter on which it seemed to me that Mr Davis may be entitled to costs from the Commission was in relation to his application for a PCO. The granting of that application prevented him from having costs awarded against him if his appeal failed (as to a considerable extent it did). Since the making of such an order had not been agreed to by the Commission, and we thought it appropriate to make it, it seemed to me arguable that the Commission should pay the costs attributable to the making of an application for it. I said, therefore, that we would need, some estimate of the time spent in November 2023 in relation to the making of PCO Orders.

67. In the draft Judgment, I made it clear that what I had said in the previous paragraphs about the costs of the November 2023 hearing was not to be regarded as definitive. The parties were at liberty to make further submissions on this point. I remain, however of the view that Mr Davis should be awarded his costs of the successful application before us for a PCO.

68. In relation to the costs awarded to the Commission in respect of the judge's grant of costs in relation to his ruling of 6 June 2022 in which he rejected the applicant's application for further disclosure and oral evidence (see below), Mr Hawthorne offered to set out details of the costs that he would claim, which, he told us, would involve review of the application, a skeleton argument and maybe half a day of hearing. We had it in mind that we would then assess an appropriate figure which we would then deduct from any costs to be awarded to Mr Davis on the Commission undertaking that it would not enforce the costs order made on 6 June 2022.

69. A draft of this Judgment was circulated to the parties on or about 6 September 2025 accompanied by an email inviting them to address various queries before the draft Judgment was finalised, including the matters addressed in [61] above. Other questions were designed to clarify whether there were grounds for taking the exceptional step of considering at the costs stage, points which had not been considered in the substantive appeal hearing. Mr Davis did not provide the breakdown requested and effectively agreed that the Court should place primary reliance on Mr Hawthorne's assessment of the time the Commission's counsel had spent on the relevant items of work. That helpful assessment was provided to the Court on or about 14 January 2026 in the form of a draft Bill of Costs and a Note. The Note stated most significantly as follows:

> "*5. It is submitted that reasonable costs (expressed in hours in the same format as the Bill of Costs) for resisting the appeal should be as follows:*
>
> *(a) Reading the Supreme Court judgment:* ***2.5.*** *Mr. Hawthorne's time was 1.5 but it would likely have taken Mr. Davis longer to digest the judgment.*
>
> *(b) Considering the Commissions Notice of Appeal:* ***4****. The Commission's Notice of Appeal was relatively straightforward as it was primarily based on the construction of the Terms of Reference.*

(c) Consideration of the Commission's skeleton argument and preparation of Mr Davis's skeleton argument in response: ***20*** *The Commission's skeleton argument set out the law by citing relevant paragraphs from the authorities relied on. The Commission's appeal was mostly legal principle, for example, whether the relevant standard was misdirection or irrationality; the correct test for materiality of a misdirection; and whether an implied power exists to broaden or narrow scope as a matter of law. There was no engagement by Mr. Davis in his skeleton argument or at the substantive hearing on these issues.*

(d) Preparing for hearing in June 2024: ***30****. It is not clear that Mr. Davis read (or even accessed) any of the authorities or the ROA electronically and the hard copies were not collected from the AG's Chambers as Mr. Davis was abroad. Mr. Davis's skeleton argument is factual and does not engage with the authorities or reference the ROA. This is not intended to be a criticism but to make clear that reasonableness must be assessed by what was in fact done.*

(e) Attendance at the substantive appeal: ***12****. While the substantive appeal was 3 days, most of that time was taken up with Mr. Davis's appeal. The time suggested amounts to more than 1.5 days of Court time given there was some overrun at the end of each day.*

(f) Review of the draft Court of Appeal judgment for the June 2024 hearing: ***4****. Mr. Hawthorne's time was 3 but it would likely have taken Mr. Davis longer to digest the judgment.*

6. The reasonable number of hours for resisting the Commission's appeal is therefore ***72.5****…*

8. It is submitted that a reasonable costs for the PCO aspect of the November 2023 hearing is ***10.*** *This is comprised 4 hours for the hearing, 3 hours for Mr. Davis's skeleton argument and 3 hours reviewing the Commission's…*

9. Items 1-3 of the Bill of Costs sets out the costs incurred in responding to Mr. Davis's application in the Supreme Court dated 24 May 2022 and heard on 6 June 2022.

10. The total is 16 hours at $650 per hour totalling $10,400.00. This would usually be taxed by the Registrar to ascertain a reasonable proportion of costs reasonably incurred. So that time is not wasted on that exercise, the Commission is prepared to accept 65% of those costs as a reasonable proportion, being $6,760.00."

70. The Commission's counsel therefore accepted that the amount that Mr Davis was entitled to recover in respect of the costs of the appeal which the Court provisionally indicated he was entitled to recover was $50 x 72.5 hours or **$ 3,625.** He proposed that 10 hours be allocated to the PCO costs. There was no concession that this costs item

should be awarded to Mr Davis. However, Mr Hawthorne also contended that the recoverable untaxed costs awarded in favour of the Commission in the Supreme Court on 6 June 2022 (which this Court has no jurisdiction to assess and expected the Commission to undertake not to enforce) were far in excess of that amount, i.e. $ 10,400 (16 hours x $ 650 per hour) of which the Commission was prepared to accept 65%, making **$ 6,760** to avoid the need for the matter to be dealt with by the Registrar on taxation, when a reduction of the larger figure would probably be ordered.

71. The following day, 15 January 2026, Mr Davis responded by email as follows:

> "*1. The only thing I can accept in his offer is the rate of $650 per hour.*
> *2. We went to trial on March 3rd, 2022, for at least 4 hours. We were presented with a bundle of case law documents, all of which indicate preparation by T&D beforehand.*
> *3. Then there were case management hearings, the creation of an agreed bundle.*
> *4. There was a hearing on the 5th of June, as mentioned, that case, as I recall, was for 3 or 4 days.*
> *5. Mr. Hawthorn proposes that he was not present at the March 3rd hearing.*
> *Mr. Hawthorne posits that he spent 3 hrs at the 3-day hearing (I saw him every day)*
> *6. This exercise was meant to help recreate my time spent on this matter. What I see here is an attempt to take a "skeleton" performance of the work relied upon by the Senior counsel on his Jr., simply because I agreed to the rate of the Jr. Counsel. The principle I agreed to was to accept the rate of the Jr. and hopefully recreate the time I should have spent on this matter.*
>
> *It makes no sense for me to critique Mr. Hawthorne's proposal any further because it bears no resemblance to my time or effort spent, particularly not the time I would have spent, or that, if I had a lawyer representing me. I therefore respectfully reject this proposal of 16 hrs as representing the time I would have spent between March 3rd, 2022, to current.*
>
> *As known, I am waiting for the PATTI report, which was ordered to indicate the full billing of the T&D law firm for the cost against Raymond Davis. We should examine its findings. I have always argued that the best reference for my own time would be time spent against me.*
>
> *a) I will accept the same rate ($650.00), which was established by Mr. Hawthorne as the base rate to be applied to all the time in and out of court spent by T&D on my matter, as the basis of my costs.*
>
> *b) I believe the court would agree with me that the intent was to establish what reasonably should be the hours spent by me on this case. The Court would also agree that it would have taken more time for me, as a litigant in person, than a*

trained lawyer. Therefore, to accept a legal firm's account of time and effort is already a savings.

c) I believe our constitution or the Act suggest that compensation for litigants in person is to be based on the cost had they been represented by a lawyer at 66% of that cost.

My Lord, that's all we have been trying to replicate. Due to my illness, I cannot do so without causing further health complications. The pro bono lawyer, given his experience in a highly reputable firm (by my account), believed that because the Jr Counsel appeared each time in court, he typically would have spent more time than the senior counsel, therefore providing a better reflection of my time…"

72. There are two main difficulties with Mr Davis's supplementary submissions. First, he contends that the Commission's estimate of the time he would have spent on the matters to which his costs award relates is inadequate but has been unable to particularise what time he contends he actually spent. Second, he contends that his time should be assessed at the same rate as a lawyer ignoring the fact that such an approach would be inconsistent with the Rules which I regard as applicable and which allow for $50 per hour. However, accepting that the Commission's counsel's estimate probably leans somewhat to the lower end of the relevant scale, the most generous assessment which can be made is that Mr Davis spent 100 hours[11] on the relevant part of the appeal i.e. resisting the Commission's appeal and pursuing his ground 3, and so could be awarded $5,000.

73. It remains necessary to consider what amount (if any) should be deducted from the amount assessed in favour of Mr Davis ($5,000) to take into account the costs the Commission has been awarded in the Supreme Court. Because of the disparity between counsel's hourly rate and the rate applicable to Mr Davis as a litigant in person, the amount recoverable by the Commission is far greater than that recoverable by Mr Davis for lesser time. In these circumstances, it would be unjust for Mr Davis as the beneficiary of a PCO in this Court to recover no costs as against the Commission despite his significant success in defending the Commission's appeal. On the other hand, some deduction seems appropriate if, as we hoped would be the case, the Commission was willing to undertake not to enforce its Supreme Court costs order in respect of the 6 June 2022 hearing. In that respect our hope has been fulfilled because the Commission has now given that undertaking.

74. I would in all the circumstances reduce Mr Davis's principal award of $5,000 by 25% ($1250) and order that he is entitled to receive $3,750 from the Commission in respect of the appeal to us, approximately the same amount the Commission conceded he was entitled in principle to recover for successfully opposing its appeal. In addition, I would order that he should receive 10 x $ 50 i.e.$ 500 for his costs of seeking the PCO. I take the figure of 10 hours from the estimate of Mr Hawthorne of 4 hours for the hearing, 3

[11] The number of hours spent by Mr Hawthrone on the appeal, as set out in his Bill of Costs, is, by my mathematics, 87

hours for Mr Davis's skeleton argument and 3 hours for reviewing that of the Commission. Thus, the total award that I would order is $ 4,250 ($ 3,750 + $ 500).

Costs before the Supreme Court

75. Mr Davis did not recover any of his costs before the Supreme Court because Justice Southey thought that the Premier was entitled to receive his costs from Mr Davis and that Mr Davis would be assisted if, instead of ordering that Mr Davis should pay the Premier's costs, he ordered that the Commission should pay the Premier his costs.

76. Mr Davis contends that that was an erroneous approach because he sought, and should have been given, a protective costs order which would have had the effect that he was under no liability to the Premier in respect of his costs so that the course taken by Justice Southey would have been unnecessary, or, at the least, that the judge should have proceeded as if a PCO had been granted. He also contends that the judge failed to take account of his 3 March 2022 "addition" and erred in proceeding on the basis that he challenged the vires of the Premier, when that was, in effect, Mr Piper's case and not his. There are a number of problems that arise from these submissions.

77. First, Mr Davis needed leave to appeal the October 2022 costs order of Justice Southey, which he has neither sought nor obtained: see section 12 (2) (b) of the *Court of Appeal Act 1964*. His application to the Supreme Court for leave needed to be filed by a notice of motion filed with the Registrar not later than 14 days after the date of the decision of the Supreme Court: *Order 2 Rule 3 (a).* If it had been made it would have become necessary for submissions to be filed in support. If leave was refused, he needed to apply to the Court of Appeal within seven days of the refusal: *Order 2 Rule 3 (b).* Even if leave was not required there would need to be a Notice of Appeal against the order for costs.

78. The actual terms of the Supreme Court costs order of October 2022 were not referred to in the Notice of Partial Appeal of 7 December 2022 or in the Notice of Appeal of 17 March (filed on 25 March) 2024. Nor were they the subject of written or oral submissions at the hearing of the appeal in June 2024. They were not, therefore, addressed by us in our October 2024 judgment. In particular, nothing was said as to why the judge was wrong to make the costs order that he actually made.

79. Ground 5 in the March 2024 Notice of Appeal contended that Mr Davies should have been awarded damages for misfeasance. Under the heading "*Ground 5 Remedies*" Mr Davis said that "*should the court agree with my claim that the COI was ultra vires. I want all my costs legal and other reasonable considerations for the tremendous waste of time and effort*" see [20]. This relief relates to Ground 5, on which Mr Davis was not successful. Further such leave as was given in February 2024, which led to the March 2024 Notice of Appeal, was leave to appeal from the judgment of 5 August 2022 and not the Order of October 2022.

80. Second, Mr Davis needed leave to appeal the refusal by Justice Southey of a PCO within the same time limit. There was a reference at paragraph 5 of the Notice of Appeal of 7

December 2022 from the judgment of 22 October 2022 to the refusal by Justice Southey of relief from adverse costs. But the judgment of 22 October 2022 did not deal with the question of a PCO. Nor did the judgment of 5 August 2022. It was the judgment of 3 March 2022 which did so; and no leave has ever been granted to appeal from that.

81. The application for a PCO was refused on **3 March 2022**. What exactly happened thereafter in respect of the application for leave to appeal that refusal is not entirely clear.

~~82.~~ What is clear - from the judge's judgment of 5 August 2022 – is that an *ex parte* application by Messrs Davis and Piper (wrongly directed to this Court) dated **21 June 2022** for leave to appeal against the judge's judgment of **6 June 2022** in favour of the Commission regarding further disclosure and oral evidence (Tab 35) had been listed for **5 July 2022**; but was, according to the judge, overlooked "*in part because no party alerted the Court to the matter*": see [58] and [62] of the judgment of 5 August 2022. The application was stamped at 12:03 pm on **30 June 2022**. In the event, that application was heard by the judge at the start of the hearing on 11 July 2022 when leave to appeal was refused. The Commission had on 6 June 2022 been awarded its costs of resisting the application in relation to disclosure and oral evidence: see [58] of the 5 August 2022 judgment and [11] of the 22 October 2022 judgment.

83. By an *ex parte* Notice of Motion to the Supreme Court for Leave to Appeal out of time, dated **28 June 2022**, and stamped on **30 June 2022** at 12:03 pm i.e. the same time as the application referred to in the previous paragraph (Tab 41), Messrs Davis and Piper asked the Supreme Court to reverse itself or grant leave to appeal out of time on two matters which were the subject of the judge's decision of 3 March 2022 namely (i) the right to proceed on the issue of bias and conflict of interest; and (ii) [the claim] to be granted a Protective Costs Order "*so that this matter can move forwarded unimpeded*."

84. On **1 July 2022 (**at a Zoom hearing, involving, so it would seem, Mr Davis and Mr Piper and counsel for the Commission - Mr Delroy Duncan KC and Mr Hawthorne - and for the Premier Ms Sadler-Best**)** and on **5 July 2022** at an in-person hearing attended by Messrs Moulder, Junos, Piper and Davis, and counsel for the Commission and for the Premier, the judge heard and refused an application that there should be an adjournment of the judicial review applications by Messrs Davis and Piper until after the determination of the applications for leave to bring judicial review made by Messrs Moulder and Junos on 13 June 2022: see [59] of the judgment of 5 August 2022.

85. What happened in relation to the motion for leave to appeal the refusal of a PCO was the subject of an Originating Summons for relief under section 15 (1) of the Bermuda Constitution Order which has the Court stamp of 11 July 2022 at 09:27. The Plaintiffs in the Summons were Messrs Davis, Piper, Junos and Moulder. The respondents were the Registrar and the judge. I discovered this document by looking through the Record of Appeal in Case No 39 of 2022 where it is at Tab 50 of that Record, but it is also at Tab 50 in the Record of Appeal in Case No 41A. Neither party had referred us to it at the hearing on 3 July 2025.

86. The information contained in that document included the following:

(i) On **28 March 2022** Messrs Davis and Piper filed an appeal against the judge's decision in his judgment of 3 March 2022 to disallow (a) ground 4 of their judicial review application for leave and (b) their request for a PCO. No leave had been sought to file that appeal.

(ii) The Registrar informed Mr Piper that Mr Davis and Mr Piper would have to get leave to appeal and they were sent a copy of the Rules of the Supreme Court.

(iii) It was on **1 July 2022** that the Registrar of the Supreme Court issued a return date for the two applications for leave to appeal referred to in [82] and [83] above of Tuesday 5 July 2022 at 3.00 pm. That is the date and time that appears in manuscript on the Notices of Motion.

(iv) As I have said, there was a hearing on **5 July 2022** attended by Messrs Davis, Piper, Junos and Moulder and counsel for the Commission and the Premier.

(v) On 5 July 2022 Ms Junos and Mr Moulder put forward strenuous arguments in objection to the case management decision of the judge which had been made on 1 July 2022 to press ahead with the proceedings on 11 July 2022. Miss Junos offered to provide an affidavit with evidence in support of Mr Davis and Mr Piper. The judge took a 5-minute break to consider these oral submissions.

(vi) The judge rendered his decision, which was to the effect that the hearing on 11 July 20222 should go ahead, orally. At the end of the hearing Mr Davis informed the judge that he believed that there were other matters involving himself and Mr Piper that were before the court in that hearing. The judge said that there were no other matters before him that day. This was not in fact correct, although the judge may not have been aware of that[12].

87. The Originating Summons under which Messrs Davis, Piper, Junos and Moulder were the Plaintiffs, and the Registrar and the Judge were the Defendants sought the following relief:

(a) that the two applications of Mr Davis and Mr Piper for leave to appeal, stamped on 30 June 2022, be heard before the commencement of the trial on 11 July 2022; and

[12] In his oral submissions to us on 3 July 2025 Mr Davis said – page 5 of the transcript - that the judge asked what the other matter was and was told by him that it was the hearing for leave to appeal the protective costs matter. The judge said that he had not seen it and a secretary entered the room saying that there was another matter and the judge said "Well I have not read it".

(b) that the Court should give directions for the progress of the applications and grant a stay of the trial proceedings (in whole or in part) until there was a decision on the applications by the Court of Appeal.

88. In the event the first of these two applications for leave to appeal was heard and determined at the commencement of the trial on 11 July 2022[13]. That application, we were told, was heard with Counsel for the Commission and the Premier out of the room. Leave to appeal was refused: see [62] of the judgment of 5 August 2022. The second application, which related *inter alia* to the refusal of a PCO, was not addressed and the Court does not appear to have been invited to do so.

89. As to the Originating Summons it appears that the judge and the Commission were not aware of its existence until the commencement of the 11 July 2022 hearing. This is not surprising because it was stamped at 9.27 on 11 July 2022. It appears however from [63] of the judgment of 5 August 2022 that it was shown to the judge and that he proposed a way of dealing with it. In that paragraph the judge said:

> *"63 At the start of the hearing, an originating motion was issued arguing that I had denied the Applicants (and Mr Moulder and Ms Junos) a fair hearing. I initially proposed a way forward to the parties. In light of the fact that the parties were uncertain about my proposal, I decided that the originating motion should be case managed by another Justice of the Supreme Court. I have made arrangements for this and will say nothing more about the originating motion.*

90. That seems to be a reference to the Originating Summons. But Mr Davis's evidence (in an email of 10 October 2025) was that no reference was made at the 11 July hearing to an appeal in relation to a PCO and that the judge's reference to an originating motion related to some application of Ms Junos and possibly Mr Moulder, and not to the Originating Summons. That seems to me unlikely given what the judge said and that he was referring to an originating motion with four plaintiffs. Mr Hawthorne also indicated – in an email of 22 July 2025 - that the PCO was not addressed by anyone during the 11 July hearing. I do not regard it as necessary to reach a conclusion on this topic because it appears that the Originating Summons was listed for a hearing before Froomkin AJ in September, at which it was withdrawn.

91. Third, the question of a PCO in respect of proceedings in the Supreme Court was not addressed by us in our judgment of 22 February 2024 following a hearing in November 2023, when we made a PCO in respect of the proceedings in the Court of Appeal. This is not surprising since the judgment dealt with case management directions in relation to the various appeals and included consideration of an application for a waiver of the obligation to pay fees or give security in respect of the appeal. Mr Davis had filed a document dated 6 November 2023 headed "*Partial appeal against parts and omission*

[13] The evidence is confusing as to whether or not this application had been listed for hearing on 11 July 2022 or whether or not Mr Davis simply raised his extant appeal at the start of the hearing. In paragraph [62] of his judgment the judge recorded that it was listed "*at the start of the substantive hearing on 11 July 2022*".

of the Judgment rendered by Judge Hugh Southey" and "*Appeal Case Against Adverse Costs*" in which he recorded that he and Mr Piper had applied to Justice Southey for relief from adverse costs. This document is in the same terms as paragraph 5 of the Notice of Appeal of 7 December 2022. However, no application was made to us at the November 2023 hearing to deal with the failure of the judge to grant leave to appeal from his refusal of a PCO[14], or to make a retrospective PCO (if that was feasible) in relation to the costs in the Supreme Court. Nor was it suggested when the February 2024 Ruling was handed down that we had overlooked any such application. Nor was the question of a PCO referred to in (a) the 17 March 2024 Notice of Appeal, (b) the 14 April 2024 skeleton argument; or (c) at the hearing in June 2024.

92. Mr Davis told us that when we made our PCO in February 2024 he thought that we were granting him a PCO in respect of the case including proceedings in the Supreme Court. But that is plainly not what we were doing: see paragraphs [80] and [85].

93. Whilst we no doubt have power to do so, I am not minded to make an order giving Mr Davis permission to appeal Justice Southey's refusal to grant a PCO, or to send the question back to the judge for a decision on leave to appeal, not least because of the failure to raise any question in relation to the PCO at first instance with the Court of Appeal at the hearing in November 2023 or in the March 2024 Notice of Appeal or at the hearing in June 2024. In this respect I would observe that, if we were to take either of these courses, the question as to what order should be made would be highly debatable. The judge's decision on a PCO was an exercise of discretion. The fact that we made such an order in respect of the appeal to us is not determinative.

94. As to the October 2022 costs order, no application for leave to appeal the order as to costs made in it has ever been made or granted; and the notice of appeal of 7 December 2022 only alleges that the judge "*wrongly calculated the dates of any pecuniary cost to commence on March 3, 2022.*". It is not, in my judgment appropriate that, over three years later, we should grant leave or send the matter back to the judge for him to consider doing so, each of which would require yet further submissions from the parties.

95. Most of Mr Davis's supplementary submissions were directed to supporting the argument that he did not in fact unsuccessfully pursue the argument that the appointment of the Commission itself was *ultra vires* the Premier. This argument was unrealistic because in the course of the oral costs hearing he accepted that he had not formally abandoned the initial *ultra vires* point: see page 3 of Part II of the Bill of Costs Hearing transcript. It was in any event too late, at the costs stage, to pursue a point which should have been pursued in the context of the main appeal hearing and was not. Having explored what happened in the Supreme Court in relation to this issue, it has been impossible to identify any injustice clear enough to justify considering afresh at this late stage an issue which was not canvassed during the actual appeal.

Mr Davis's new proceedings

[14] It is not clear to me whether the judge was apprised of the Notice of Motion for Leave to Appeal.

96. Mr Davis began further proceedings by way of Originating Summons of May 2025 against the Attorney General of Bermuda in which he seeks, *inter alia*, (a) a determination that the Commission of Inquiry and the 1935 Act are both contrary to the Constitution by reason of the absence of a right of appeal; (b) a declaration that the Commission should reject or remove from its Report false and defamatory statements portraying Mr Davis as attempting to represent case number 39; (c) a declaration that it was unconstitutional for the Commission to use the discarded rule of primogeniture to determine succession rights, such that all the survivors and descendants of Emilius Darryl are lawful heirs and not merely those descended through his son; (d) a declaration that the "*wrongly excluded*" (not defined) must now be heard and determined by the Supreme Court of Judicature; and (e) damages.

97. Mr Davis invited us to consider whether to direct the Supreme Court to hear the claims that were unlawfully excluded by the Commission. It does not seem to me that we can or should make any such order. The Supreme Court has no power to take the place of the Commission. Its only power is to determine legal claims that are brought before it in accordance with the law. In any event it would be wrong for us to take the place of the Supreme Court and to exercise its jurisdiction. Our function is to hear appeals from its judgments.

KAWALEY P

98. I agree. I would merely add three small observations of my own.

99. Firstly, subject to one *caveat*, I agree that the approach adopted by Sir Christopher Clarke of using the Supreme Court Rules approach to assessing the costs of litigants in person may usefully be viewed by the Registrar as a welcome guide as to how to approach the taxation of costs in relation to litigants in person . However, the ideal solution is for the Rules themselves to be amended to make clearer provision for how the costs of litigants in person should be taxed in this Court.

100. Secondly, in my judgment it is self-evident that the power to fix costs rather than ordering them to be taxed (O.2/31) is intended to provide a summary basis for achieving a result approximating to what would be achieved at greater expense through a formal taxation. Having regard to the taxation regime is not only appropriate but an essential part of the summary assessment process. While I consider much modern drafting of procedural rules to be overly prescriptive, consideration could be given in a revision process to elaborating upon how the jurisdiction to fix fees may be exercised.

101. Thirdly, in the ordinary case, the summary process of fixing costs would not take as long as it has in the present case. The former President has, however, taken scrupulous care to fairly evaluate and investigate the merits of Mr Davis's belated invitation to us to reopen a point which ultimately ought not to have been raised at the costs stage of an appeal hearing which was substantively determined long ago.

SMELLIE JA

102. I also agree with the judgment of the former President and join with the President in expressing appreciation for the scrupulous care with which he deals with the several and various issues.