In The Supreme Court of Bermuda

CIVIL JURISDICTION
2019: No. 92

IN THE MATTER OF AN APPLICATION UNDER SECTION 15 OF THE BERMUDA CONSTITUTION 1968

AND IN THE MATER OF THE MUNICIPALITIES ACT 1923 (AS AMENDED BY THE MUNICIPALITIES REFORM ACT 2010, THE MUNICIPALITIES AMENDMENT ACT 2013, THE MUNICIPALITIES AMENDMENT ACT 2014, THE MUNICIPALITIES AMENDMENT ACT 2015, THE MUNICIPALITIES (NO 2) ACT 2015, THE MUNICIPALITIES AMENDMENT (NO 3) ACT 2015, THE MUNICIPALITIES AMENDMENT ACT 2018) ("THE AMENDMENT ACTS")

IN THE MATTER OF THE AMENDMENT ACTS

IN THE MATTER OF A DECISION BY THE BERMUDA GOVERNMENT TO EITHER DISSOLVE THE CORPORATION OF HAMILTION AND ABSORB IT OR ALTERNATIVELY TO CONVERT IT TO A "QUANGO"

IN THE MATTER OF THE BILL ENTITLED THE MUNICIPALITIES REFORM ACT 2019 TABLED IN THE HOUSE OF ASSEMBLY ON 1 MARCH 2019 ("THE BILL")

BETWEEN:

THE CORPORATION OF HAMILTON

Applicant

-and-

(1) THE ATTORNEY GENERAL

(2) THE GOVERNOR OF BERMUDA

Respondents

Before: **Hon. Chief Justice Hargun**

Appearances:	**Mr Mark Diel and Mr Ronald Myers of Marshall, Diel & Myers Limited for the Applicant** **Mr Gregory Howard and Ms Lauren Sadler-Best, Crown Counsel, for the Attorney General**
Dates of Hearing:	**24 - 25 February 2021**
Date of Judgment:	**31 March 2021**

JUDGMENT

Whether section 1 of the Bermuda Constitution is directly enforceable; if section 1 is not directly enforceable, whether the provision relating to "protection of law" contained in section 1(a) is nevertheless directly enforceable; the proper scope of the right to the "protection of law"; proper scope of section 13 (1) of the Constitution dealing with a deprivation of property; whether there could be "taking" by regulatory control exerted by central Government over a municipal corporation

Index of Topics

HARGUN CJ

A. Introduction

1. These proceedings, commenced by Originating Summons dated the 20 March 2019, issued on behalf of the Corporation of Hamilton ("**the Corporation**") in respect of the decision of the Government of Bermuda to convert the Corporation to a "Quango" ("**the Decision**"), as implemented by the Municipalities Reform Bill 2019 ("**the Bill**" or **"the proposed Reform Act**") against the Attorney General seek an order declaring that the Decision, the Amendment Acts[1] and the Bill, if enacted, contravene (or would contravene) sections 1 and 13 of the Bermuda Constitution Order 1968 ("**the Constitution**"), in that and insofar as:

   (a) the Amendment Acts, the Decision and the proposed Reform Act deprive (or would deprive, as the case may be) the Corporation of property without compensation or are or would be likely to do so; or

   (b) deny (or would deny or have the effect of denying, as the case may be) the Corporation the protection of law, or are or would be likely to do so,

   (c) and to that extent are therefore void and of no effect. The relief, if granted, would not only affect the Corporation but also the Corporation of St. George**'s** as the legislation complained of affects both municipal Corporations.

2. These proceedings were commenced with a degree of urgency given that the House of Assembly had passed the Bill and the Senate was expected to debate the Bill on the 20 March 2019. In the circumstances, the Court heard an urgent application by the Corporation, on 24 - 25 February 2019, to restrain His Excellency the Governor from

[1]The main Amendment Acts complained of at the hearing of are 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**").

giving assent to the Bill. In the event, it was unnecessary to deliver a Ruling in relation to that application as the Senate decided not to pass the Bill on 20 March 2019.

3. The Corporation has decided to proceed with the relief sought in the Originating Summons against the Attorney General given that the Government has signaled that it will table the Bill again in substantially the same form, which will not require the approval of the Senate for its passage.

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.

6. The proposed Reform Act is controversial and has generated highly emotive debate in the community. Indeed, in the written submissions filed on behalf of the Corporation, the Court is asked to conclude that the legislative proposals are irrational, arbitrary and unfair. In considering this application the Court reminds itself of the separation of powers between the Legislature, the Executive and the Judiciary enshrined in the Constitution. The responsibility for considering, debating and passing legislation, such as the proposed

Reform Act, lies solely with the Legislature. In the ordinary case the Courts do not express any opinion in relation to the merits or wisdom of adopting a particular legislative measure. The practice of self-restraint on the part of the judicial branch is of long standing and continues to be relevant to this day. Accordingly, this Court is only concerned with the legal challenge to the Amendment Acts and the proposed Reform Act and in particular in relation to the legal issues of whether the Amendment Acts and the proposed Reform Act are in breach of the Constitutional rights of the Corporation relating to (i) the protection of law under section 1; and (ii) deprivation of property under section 13 (1). Beyond these legal issues it would not be proper for this Court to express any view as to the merits of the Amendment Acts and the proposed Reform Act. The merits of the Amendment Acts and the proposed Reform Act are matters of political debate and are to be debated and decided upon by the Legislature. Beyond the determination of legal issues arising out of the alleged breaches of section 1 and section 13 of the Constitution, the merits of the Amendment Acts and the proposed Reform Act are not the proper subject matter of the judicial determination.

B. **The background**

Historical background

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*[2], 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.

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

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 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.

10. The Corporation is a creature of statute and by necessity has to work closely with the central Government. Both the Corporation and the Government seek to provide governance and public services within their respective jurisdictions, which necessarily requires close working relationship and co-operation. It is inevitable that the central Government would wish to ensure that the Corporation is well-run and its long-term development objectives are broadly consistent with the policies of the central government. Over the last 250 years, there have been frequent legislative changes in relation to many issues affecting the Corporation including voter qualifications for electing the governing body of the Corporation; the powers of the Corporation; and changes to its operations. Included in those changes are the following:

    (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.

11. The Corporation challenges the validity of the Amendment Acts. The Government maintains that the impetus for these legislative changes emanates from some of the issues and events which have bedeviled the Corporation in the recent past.

Issue of voting in the municipal elections

12. One such issue is the right to vote in the municipal elections. As set out in the affidavit of Rozy Azhar on behalf of the Attorney General, 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 in the municipal elections has always been established by an Act of the Bermuda Legislature. The municipal franchise, both individual and business ratepayers, is entirely a creature of statute. The earliest vote in the "*infant town of Hamilton*" was under the supervision of Commissioners appointed by the central Government, who were granted authority by the 1793 Act to conduct a vote by a "*plurality of voices or votes*" to elect the Mayor, Aldermen, and a Common Council.
13. For most of its history, voting in Hamilton was through a one person, one vote system. The business ratepayers vote was not in place in 1834, and was introduced only in 1978, when the Municipalities Amendment Act 1978 gave a vote to any kind of business entity

occupying a valuation unit in the municipality: corporations, partnerships, and "*associations of persons corporate or incorporate, or their nominees."*

14. The Attorney General contends that the effect of the business ratepayers franchise is to concentrate the votes in the hands of property owners or those who may have controlling interests in businesses that occupy valuation units within the municipal area. The result of the practice is shown in the difference in the total number of votes cast for the Mayor in the 2010 election (without the ratepayers votes) and the election next after the 2013 amendments (with the ratepayers votes) when, in 2015, 370 more votes were cast for the office of the Mayor than in the previous election. The Attorney General argues that the business-interests franchise is a voting bloc that dominates municipal politics. The policy goal behind the Municipalities Reform Act 2010, submits the Attorney General, was to establish a one person one vote franchise in Hamilton.

15. Potential disenfranchisement through the property vote has been an emotive issue in Bermudian political discourse. In relation to this issue Ms. Azhar points out that the first enactment of the 1834 term of the Bermuda Legislature was an Act entitled "*An Act for the Abolition of Slavery in these Islands, in the consideration of Compensation*." It was followed immediately by a second enactment, No. 83, 1834, No. 2 "*An Act to repeal Laws exclusively to Free Black and Coloured Persons…and to Fix that Qualification for Jurors, Voters and the Electors and Candidates for certain officers and Places of Trust*." Ms Azhar contends that the second enactment undermined the effect of emancipation legislation. It ensured that only land-owning class could vote or perform public functions such as standing for offices of Mayor, Aldermen or Common Councilor of the Corporation. As former Chief Justice Kawaley noted, writing extrajudicially, in "*Equal Rights and the Courts in Post-Emancipation Bermuda: Achievements and Challenges in the First 180 Years (1834-2014),"* the focus of Constitutional reform was on "*achieving greater scope for the "collective rights" of the majority population, who had been discriminated against through legally tolerated policies of racial segregation and disenfranchisement through the property vote*."

Wharfage levy

16. Another issue which has been controversial is whether the Corporation should continue to collect a levy referred to as "wharfage" on imported goods. The 1790 Act established a "*Collection of Trade*" and provided that the landing and loading of goods in Bermuda would be exclusively at the wharves in Hamilton where customs duties would be levied, thereby establishing a single point of entry for all goods and vessels. The Corporation was authorised to collect wharfage on imported goods.

17. The 2010 Reform Act removed the Corporation's right to levy wharfage, and replaced it with a grant from the central Government. The 2010 Reform Act, by virtue of section 8, also amended the Land Valuation and Tax Act 1968 to exclude municipal property from the tax rolls. The policy objective for this change, according to the Attorney General, was to consolidate the power to levy fees and taxes in the central Government. It is argued that the regime for fees and taxes on goods and vessels entering Bermuda through the principal ports was and remains a patchwork of legislative provisions and ad hoc arrangements.

18. Ms. Azhar explains that a container ship, for example, arriving at the dock with goods, would be subject to the following: custom duty in accordance with the Customs Tariff, supervisory fees charged under the Customs Department Act 1954 ($324 per ship up to a maximum of approximately three times that, and $50 per container, specified in the Government Fees Regulations 1976), a charge imposed by Stevedoring Services for the terminal services (unknown), wharfage, which historically relates to the use of the port, under the 1923 Act, and port dues under the 1923 Act.

19. Government's policy direction changed with a change in the Government, and Hamilton's right to levy wharfage was restored by the 2013 Amendment Act. Ms. Azhar states that the efforts to rationalise wharfage, customs duties, and fees remains a Government policy objective.

The Waterfront Development

20. Ms. Azhar refers to the long-term lease of the entire waterfront in Hamilton to a developer for a term of 262 years, without an adequate bid process, as further flashpoints of conflict between the Corporation and the central Government. The proposed Waterfront project, entered into by the Corporation, was retroactively voided by the 2013 Amendment Act, and a method of compensation was provided by legislation to the lessee of the land. In the *Special Report into Governance at the Corporation of Hamilton particularly with respect to the development of the Waterfront (2013)*, the Ombudsman noted:

> *"If there were only three or four mishaps in governance or just a few technical gaps in the Waterfront Development process, then everyone would readily forgive normal human failings, ignorance, lapses and misconceptions. However, the maladministration that permeated the Outerbridge Administration, especially as reflected in the Waterfront Development, seems to have crept up at every corner in a dazzling, infinite, relentless variety and willfulness of ways.*
>
> *…*
>
> *Bermuda's waterfront development is a public project of national interest and unprecedented proportions. The people of Bermuda deserve government and city administrations that are looking after all of our interests. In concept, construction and eventual usage and operations, redevelopment of the waterfront must consider the diversity of all of our needs and the common sense of our actual capacity."*

21. The voiding of the lease by legislation triggered an arbitration proceeding provided for in the 2013 Amendment Act. A statutory process was available to determine adequate, appropriate compensation, but the court found that the lessee had intentionally delayed and refused to cooperate in the statutory process, and the arbitration was concluded without an award. Nevertheless, the Attorney General contends, that monies have been paid out of a stretched public purse in arbitration and court costs because the Corporation embarked on an ill-advised attempt to deal with an important piece of national infrastructure that it treated as if the infrastructure was its own without regard to the national interest.

The Democracy Trust

22. Another development which attracted the attention of the Ombudsman was the creation of the "*Democracy Trust*" by the Corporation. Among the responses of the Corporation to the increased exercise of oversight by the central Government following the enactment of the 2010 Reform Act was a purported transfer of the assets of the Corporation to a trust. The creation of the Democracy Trust is described in the Ombudsman's Special Report (2013):

> *"The Gosling Administration feared that the intended reforms would abolish the Corporation's traditional control of the management of its property. It was the Corporation's view that any Government action to take over the property without compensation would be for purposes that were "repugnant to the principle of elected city Government, contrary to the rights of the Corporation as a body with perpetual succession rights whose mind and management rests with elected members of city Government, and contrary to the original intention and purpose for which the property was acquired." The Government, on the other hand, was motivated by a view, informed by considered opinion, that the waterfront is a national asset which should be developed nationally.*
>
> *The Gosling Administration was not confident that the Government intended to respect the Corporation's authority. The Gosling Administration took the unprecedented step, by resolution dated 30 April 2010, of transferring ownership of leases for most of city's properties to Democracy Trust ("**the Trust**"). The settlor of the Trust was the Corporation of Hamilton - that is, the elected members acting in their collective capacity. The Trustees were the elected members of the Corporation, acting in their individual capacities. The beneficiaries of the Trust were the beneficial owners of the leases - the electors and the ratepayers of Hamilton.*
>
> *Essentially, the Gosling Administration leased some $500 million worth of properties to the Trust. The Trust then leased back all of this property to the*

Corporation for a period of 20 years, renewable for another 20 years but with an option for the Trust to purchase the properties in 40 years' time. The Corporation would control the assets for at least 40 years. Their thinking was that a 20 year period in the first instance would guard against the immediate politics of the day. The intention of the Trust was to create a legal knot that would forestall an asset grab by the Government. It was hoped that the Government would be incentivized to enter into negotiations regarding the Corporation's continued and central role in dealing with City assets.

…in anticipation of a possible legal battle from the Government regarding the creation of the Trust, the Gosling Administration also set aside $1 million of Corporation money to fund a retainer with its lawyers - "Defence Fund". Evidence was submitted to me that the Gosling Administration felt that it was within their fiduciary duty not only to create but also to defend Democracy Trust. Accordingly, this amount was based on an estimate of how much would be required to fight the case up to the level of the Privy Court… This retainer was non-refundable as long as there was a risk of litigation expenses."

23. The report of the Ombudsman concluded that "*Despite its name, the existence of Democracy Trust seems to up end the very concept of democracy that the Trust was intended to defend - as it was no longer elected body but rather persons acting in their individual capacity who would ultimately own the leases to the bulk of the city's assets*." The Ombudsman's Report concluded with 42 findings of maladministration by the Corporation.

Par-La-Ville Hotel development

24. Another issue, referred to by Ms. Azhar, which, the Attorney General contends, has cast doubt on the Corporation's ability to manage its own affairs, is the Corporation's attempt to develop the Par-la-Ville car park as a luxury hotel in the City. In this regard, on 9 July 2014 the Corporation, acting through its Mayor and Secretary, provided a guarantee for a

loan to provide funds for the payment of expenses associated with the permanent loan for the funding of a hotel development in Hamilton on lands owned by the Corporation, the Par-la-Ville parking lot. The amount of the guarantee was US $18 million.

25. The guarantee was in fact called in accordance with the terms of the written document and the Corporation was required to honour the guarantee. After a series of Court decisions, the Corporation was able to successfully defend the claim on its guarantee on the basis that, despite the signature of the Mayor of the Corporation on the document evidencing the guarantee, the guarantee was in fact *ultra vires* because the Corporation never had, under the relevant statutes, the power to give guarantees for the purposes of developing hotels. The reasoning which led to that result is set out in the majority decision (Lord Sumption and Lord Lloyd-Jones dissenting) of the Privy Council in *Mexico Infrastructure Finance LLC v The Corporation of Hamilton (Bermuda) [2019] UKPC 2 (21 January 2019).*

C. **The Amendment Acts and the proposed Reform Act**

26. With this background of some of the issues which have occupied the administrations of the Corporation in the recent past, I turn to consider the main features of the Amendment Acts complained of and the main features of the proposed Reform Act.

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.

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.

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 installments 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 ashortfall in the region of $4 .5 million.

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.

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:

    (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 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 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.

(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

37. The main features of the proposed Reform Act are as follows:

    (a) Municipal elections are abolished and replaced by selection and appointment of Members.

    (b) The Members comprise the Mayor and eight Councilors.

    (c) The Mayor and four Councilors are to be appointed by the Minister, acting in his discretion, and shall be persons he is satisfied have the skills and experience to carry out the duties of Mayor or Councilor effectively and efficiently.

    (d) The remaining four Councilors are to be appointed by the Minister acting on the recommendation of the Selection Committee.

    (e) The members of the Selection Committee are 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.

38. The Corporation contends that this level of control amounts to unlawful deprivation of property contrary to sections 1 and 13 of the Constitution. The Attorney General contends that the objective of the proposed Reform Act is to create a governance system for the Corporation whereby the many challenges to the provision of public services in Bermuda may be dealt with in an orderly way upon establishing a more closely co-operative relationship with the central Government.

Was there adequate consultation?

39. The parties disagree whether there has been adequate consultation in relation to the proposed legislation. According to the Attorney General consultation started in May 2018 under the then Minister, the late Hon. Walton Brown. One town hall type meeting was held in St. George's on 3 May and with the Corporation on 22 and 23 August 2018. Periodic meetings were held with both Corporations where the subject was raised by the members. An on-line survey was also created and invited comments. A promotional video was created and the policy was published on the citizens forum inviting comment. The Minister had a private meeting with Mayor Gosling on 11 February 2019 with public consultation starting on 12 February 2019.

40. According to the Attorney General, the Minister met with collective bargaining agents for the Corporations, the Bermuda Industrial Union and the Bermuda Public Service Union, and with the staff of those Corporations to answer any questions. The Minister held a meeting with the CEO of Polaris to answer questions of how this would affect Stevedoring Services. The Minister met with the Councilors of the Corporations. Town Hall meetings were held on 5 March 2019 with the Corporation of St. George's and on 7 March 2019 with the Corporation of Hamilton. The Attorney General contends that there was a wide variety of opinions which the Government took into account in its presentation of the Bill.

41. The Corporation denies that there was any meaningful consultation. According to Mayor Gosling, consultation on the Bill consisted of one meeting held on 22 August 2018 at which generalised questions such as those which have been asked of the public were discussed in a general way. At the private meeting on 11 February 2019 the Minister did mention the upcoming legislation, without giving any details whatsoever, which was being presented in the House a couple of days later. Mayor Gosling states that this one private meeting hardly constitutes consultation of any consequence.

42. The Corporation contends that over its long history it has performed well in providing municipal services to the inhabitants and business owners in the City of Hamilton and that

it should be allowed to carry on providing those services independent of the central Government. The Government, on the other hand, contends that the authority devolved to the municipality is a matter for the central Government. The Government points out that, unlike the local government in other jurisdictions, the Corporation's responsibilities are limited to infrastructure. The Attorney General contends that the Government's policy aim in the amendments since the 2010 Reform Act has been to increase accountability, reduce expenditure for City residents, consolidate scarce resources, and modernise taxation. The Attorney General further contends that the Government's policy objective of harmonising services and facilitating the sharing of resources has been made very difficult to implement as a result of resistance by the Corporation. These conflicting views form the essential backdrop to the present constitutional challenge by the Corporation to the proposed legislation by the Government.

D. **The Constitutional provisions, facts relied upon and the legal issues raised**

The Constitutional Provisions

43. The Constitutional provisions relied upon by the Corporation are sections 1 and 13 of the Constitution and the relevant provisions provide:

> *"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:*
>
> *(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,

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.

...

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 –

(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

(ii) 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."

The facts relied upon by the Corporation in support of the constitutional challenge

44. It will be seen below that the main submission made on behalf of the Corporation is that deprivation of management and control can amount to an interference with the right to property and amounts to deprivation of property contrary to section 1 (1) and section 13 (1) of the Constitution. In support of that legal submission the Corporation, in its written submissions, relies upon the following facts and circumstances:

(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.

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

(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.

(d) All of the Corporation's powers, functions or activities are qualified by the Minister's overarching power to approve or disapprove of it or its exercise.

(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*".

(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 therefore, the Corporation contends, 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.

Legal issues raised by the constitutional challenge

45. The consideration of the Corporation's constitutional challenge requires the Court to consider the following legal issues:

(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 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.

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

E. **Discussion**

(a) Is section 1 directly enforceable?

46. The Corporation submits that section 1 of the Constitution is independently enforceable, and breach of the rights protected under it may be asserted in a claim under section 15 of the Constitution.

47. There are a number of decisions of the Bermuda Court of Appeal dealing with the issue whether section 1 is directly enforceable. It is contended on behalf of the Corporation that all the decisions which hold that section 1 is not directly enforceable are not binding on this Court because the actual decision in each case in relation to the issue of direct enforceability of section 1 was either *per incuriam* or merely *obiter dictum.*

48. Mr. Diel, on behalf of the Corporation, referred the Court to *Halsbury's Laws of England,* Volume 11 (2020), paras 1-496, in relation to the binding nature of the decisions of the Court of Appeal and in particular in relation to the decision of the English Court of Appeal in *Young v Bristol Airplane Company Limited* [1944] KB 718, summarised in *Halsbury* 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."

49. The text in *Halsbury's* 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 manifests 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 for 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 have the Supreme Court to rectify the mistake."*

50. The earliest decision of the Court of Appeal to deal with the issue of direct enforceability of section 1 is *Farias v Malpas* [1993] Bda LR 18. This case concerned the legal issue whether a regulation made in 1990, under the Fisheries Act 1972 banning fish pots amounted to deprivation of property under the Constitution and whether section 1 of the Constitution was directly enforceable.

51. In considering this issue Georges JA referred to a passage in the judgment of Lord Morris in *Olivier v Buttgieg* [1967] AC 115 and appears to have concluded that section 1 was indeed directly enforceable. The relevant passage is at page 10 of the Judgment and states:

> *"The effect of section 5 of the Constitution of Malta 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 of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest'.*

Section 1 of the Constitution of Bermuda thus declares the right of the individual not to be deprived of his property without compensation and prescribes the limitations on that right. Section 8 deals with a particular form of deprivation of property viz. compulsory acquisition and taking of possession and sets out exceptions—the nature of which fall within the broad language defining the purpose of limitation in section 1."

52. The difficulty with this conclusion arrived at by Georges JA is that the relevant passage in the judgment of Lord Morris in *Olivier v Buttgieg* is universally understood to have the opposite effect. In support of this proposition reference can be made to the judgment of Kempster JA in *Attorney General v Grape Bay Limited* [1998] Bda LR 6; the judgment of Lord Hoffman in *Grape Bay Limited v Attorney General* [2000] 1 WLR 574 (PC) at 58 B-E; the judgment of Stuart-Smith JA in *Inchcup (trading as Alexis Entertainment and Plush) v Attorney General* [2006] Bda LR 44 at paragraphs 11-12; the judgment of Lord Carswell in *Campbell-Rodriques v Attorney General* [2008] 4 LRC 526 (PC) at paragraph 11; and the judgment of Baker P in *Ferguson v Attorney General* [2019] 1 LRC 673 at paragraphs 76.

53. Following the judgment of Georges JA in *Farias v Malpas*, the issue of direct enforceability of section 1 was again considered by the Court of Appeal in *Attorney General v Grape Bay Limited* [1998] Bda LR 6. In that case Grape Bay Limited contended that the Prohibited Restaurants Act 1977 was void in that it violated Grape Bay's fundamental constitutional rights under section 1 of the Constitution to protection of property and from "*deprivation of property without compensation."* In light of this submission, Kempster JA considered whether section 1 was directly enforceable and did so by reference to the judgment of Lord Morris in *Olivier v Buttgieg* cited by Georges JA in *Farias v Malpas.* At page 18 Kempster JA held:

"It is now necessary to consider the decision of this Court, only signed by two Justices of Appeal, in Faries 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 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."

54. The holding of Kempster JA that section 1 is not directly enforceable would appear to be an essential element of the reasoning which resulted in the decision of the Court of Appeal to deny any relief under the Constitution. Kempster JA concluded that the effect of the Prohibited Restaurants Act 1997 was to deprive Grape Bay of "*property*" but it did not amount to the breach of the prohibition within the terms of section 13 (1) and the wider provision in section 1 (c) was not directly enforceable. Kempster JA justifies not following the earlier decision of Georges JA in *Farias v Malpas* on the basis that the Court of Appeal was bound to follow "*the higher authority of the Privy Council in Olivier v Buttgieg*."

55. The judgment of the Court of Appeal in *Attorney General v Grape Bay Limited* was appealed to the Privy Council. The Privy Council upheld the decision of the Court of Appeal and it did not find it necessary to express a concluded view on the direct enforceability of section 1. However, there is no suggestion in the judgment of Lord Hoffman that the Privy Council entertained any doubts about the correctness of the view expressed by Kempster JA in the Court of Appeal. At paragraphs 24-26 Lord Hoffman dealt with this issue as follows:

"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 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."

56. The issue of direct enforceability of section 1 was again addressed by the Court of Appeal in 2006 in *Neil Inchcup (trading as Alexis Entertainment and Plush) v Attorney* General [2006] Bda LR 44. The appellant, Mr Inchcup, had sought a declaration that sections 5 and 6 of the Prohibition of Gaming Machines Act 2001 were void for inconsistency (i) with section 1 (c) of the Constitution, in that their effect was to deprive Mr Inchcup of property without compensation; or alternatively (ii) with section 13 of the Constitution in that their effect was to deprive Mr Inchcup of property without compensation in circumstances where such deprivation amounts to taking possession of his interest in or right over such property without the conditions of section 13 (1) being satisfied.

57. In the Supreme Court, the Chief Justice had 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 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 section13 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.

58. In the Court of Appeal Mr Inchcup challenged all these holdings of the Chief Justice. In relation to the issue of direct enforceability of section 1 Stuart-Smith JA cited the familiar passage from the judgment of Lord Morris in *Olivier v Bottgieg* and held at pages 4-5:

"The first case in point of time is Olivier v Buttigieg [1967] AC 115. The provisions of the Malta Constitution are the same as those in Bermuda. Lord Morris of Borth-y-Gest giving the opinion of the Board, said at p128E:

(the passage at paragraph 51 above is then set out)

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.

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.

Oliviers 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 Hoffman to cast doubt on the correctness of the decision of the Court of Appeal. Dr Barnet submitted that the Court of Appeals 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."

59. The above passages in the judgment of Stuart-Smith JA (agreed to by Zacca P and Nazareth JA) leaves no doubt that in 2006 the Court of Appeal considered that (i) section 1 of the Constitution was not directly enforceable; (ii) in the earlier decision in *Farias v Malpas*, whilst Georges JA cited the passage from the judgment of Lord Morris in *Olivier v Buttgieg*, Georges JA reached the conclusion which was directly in conflict with it; (iii) there is no reasoning on which the decision in *Olivier v Buttgieg* could be distinguished; (iv) the decision of the Court of Appeal in *Farias v Malpas* must be regarded as per

incuriam and wrong; and (v) in contrast the earlier decision of the Court of Appeal in *Grape Bay* following *Olivier v Buttgieg* and holding that section 1 was not a freestanding enforceable provision was right. It is to be noted that the decision in *Farias v Malpas* was cited by counsel in argument before the Privy Council in *Grape Bay* but was not mentioned in the judgment of Lord Hoffman. The Court of Appeal in *Inchcup* was entitled and indeed bound to decide which of the two earlier conflicting authorities should be followed.

60. It is said on behalf of the Corporation that the Court of Appeal was wrong in *Inchcup* to characterise its earlier decision in *Farias v Malpas* as *per incuriam.* It appears that the Court of Appeal in *Inchcup* considered its earlier decision in *Farias v Malpas* as *per incuriam* on the ground that *Farias v Malpas* "*involved a manifest slip or error*" in that having cited the relevant passage from the judgment of Lord Morris in *Olivier v Buttgieg* it reached a decision which was directly in conflict with it and without any reasoning which explains the obvious conflict.

61. Counsel for the Corporation also argues that the Court of Appeal's decision in *Inchcup* was *obiter dictum* as it was sufficient to dispose of the appeal on the sole ground that Mr Inchcup had no valuable property right because his business had always been illegal as being contrary to the Criminal Code and the Lotteries Act 1944.

62. However, it seems to me that it is unrealistic to assert that the Court of Appeal's considered decision on the issue of direct enforceability of section 1 was merely *obiter dictum*. The position was that Mr Inchcup pursued seven separate grounds of appeal (see paragraphs 57-58 above) and any one of the grounds of appeal could have been dispositive of the entire appeal. The Court gave a reasoned decision which engaged with all relevant pre-existing authority. In the circumstances the Court of Appeal's reasoned decision on the enforceability of section 1 cannot, in my judgment, be dismissed as merely *obiter dictum*.

63. The correct legal position, in my judgment, is that when a judgment is based upon multiple reasons, all reasons are binding. There is no reason in principle why the Court of Appeal's decision in relation to section 1 should be considered *obiter dictum* simply because the

Court has given other reasons justifying the same decision. There is no rule of law which requires a court to treat a distinct and sufficient ground for a decision as mere *obiter dictum* on the basis that the Court has given other reasons which are sufficient to decide the matter. In the circumstances I consider that the judgment of the Court of Appeal in *Inchcup*, in relation to the enforceability of section 1 of the Constitution, is binding on this Court.

64. It is further argued on behalf of the Corporation that the Court of Appeal in *Inchcup* was bound to follow its earlier decision in *Farias v Malpas* and reliance is placed on *Young v Bristol Airplane Company Limited* [1944] KB 718. I am unable to accept the submission. First, as noted earlier, the Court of Appeal in *Inchcup* was entitled to take the view that its earlier decision in *Farias v Malpas* was *per incuriam*. Secondly, *Bristol Airplane* recognises that the Court of Appeal is entitled and bound to decide which of the two earlier conflicting decision of its own it will follow. The Court of Appeal in *Inchcup* was confronted with two earlier conflicting decisions on the direct enforceability of section 1, namely, *Farias v Malpas* and *Attorney General v Grape Bay Limited.* The Court of Appeal was entitled to decide that it should follow the decision and the reasoning in the *Grape Bay* case for the reasons given by Stuart-Smith JA.

65. The issue of enforceability of section 1 also came before the Court of Appeal in *Ferguson v Attorney General* [2009] 1 LRC 673. It was the basis of a distinct ground of appeal and the issue was fully argued before the Court. The Court of Appeal rejected the contention that section 1 was directly enforceable seemingly on the basis that the contrary position was in fact now settled law. In any event the Court of Appeal in *Ferguson* was entitled and indeed bound to decide which of the earlier conflicting decisions should be followed. At paragraph 76 of the Judgment of Baker P the Court of Appeal held:

> *"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."[3]

66. Counsel for the Corporation further argues that the Court should follow *Farias v Malpas* on the ground that neither *Inchcup* nor *Grape Bay* can stand with the subsequent decisions of the Privy Council in *Campbell-Rodriques v Attorney General* [2008] 4 LRC 526 or *Jamaicans for Justice v Public Service Commission* [2019] 4 LRC 117.

67. In *Campbell-Rodriques*, Counsel correctly points out that the Privy Council analysed various categories of Commonwealth constitutions in relation to their respective provisions concerning deprivation of property and the enforceability of those provisions, concluding that there were in essence three categories of constitutions: those where the general deprivation provision was clearly not enforceable, those where it clearly was enforceable, and an intermediate category, where the matter was not clear. It placed the Constitution of the Bermuda in the intermediate category. Accordingly, Counsel for the Corporation argues, as a higher court than the *Inchcup* Court has subsequently held in effect that it is arguable that section 1 of the Bermuda Constitution is independently enforceable the Bermuda Supreme Court is not bound by *Inchcup* to find that section 1 is unenforceable.

68. I am unable to accept the submission that merely because a subsequent decision of the Privy Council has held that a particular point of law is arguable, it allows the Supreme Court to ignore the earlier binding decisions of the Court of Appeal in relation to that point of law. In any event, I am not persuaded that *Campbell-Rodriques* casts any doubt on the Court of Appeal decisions in *Grape Bay* and *Inchcup* in relation to the direct enforceability of section 1. In this regard it is to be recalled that *Farias v Malpas* was cited in argument by counsel before the Privy Council in *Grape Bay* but the case was not cited by Lord Hoffman in his Judgment. As noted at paragraph 55 above, Lord Hoffman referred to the reasoning of the Court of Appeal below and there is nothing in his judgment which suggests

[3] Counsel for the Attorney General informed the Court 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.

that Lord Hoffman disagreed with it. The judgment of Lord Hoffman in *Grape Bay* was referred to in the judgment of Lord Carswell in *Campbell-Rodriques* and there is nothing in the judgment of Lord Carswell which suggests any disagreement with what is said by Lord Hoffman in *Grape Bay*.[4]

69. The importance of the Privy Council decision in *Jamaicans for Justice* lies in the Privy Council's consideration of the decision of the Caribbean Court of Justice ("**CCJ**") in *Nervais v The Queen* [2018] CCJ 19 (AJ).

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 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 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

[4] In *Campbell-Rodriques* Lord Carswell stated at paragraph 11:
"The provisions of the Constitution of Bermuda are very similar in material respects to that of Malta. They were considered by the Board in Grape Bay Ltd v Attorney General [2000] 1 LRC 167. Lord Hoffman, giving the judgment of the Board, did not find it necessary to decide whether the general statement in section 1 was to be a preamble or to have independent force, but review the cases to which their Lordships have referred and drew a clear distinction between provisions such as those in sections 13 and 25 of the Constitution of Jamaica and those contained in the Constitution of Mauritius."

commencement of the Constitution. They were in the substantive portion (at paragraph 22).

(b) The language of section 11 is not aspirational, nor is it plenary 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).

(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).

71. Counsel for the Corporation submits that in the *Jamaicans for Justice* case, the Privy Council has adopted a new approach to construing the "*Whereas*" provisions in the Constitutions as set out in the judgment of the CCJ in *Nervais*. The issue in this case was what steps the Police Service Commission ("**PSC**"), which was charged with deciding upon the appointment and promotion of police officers, should take to inform itself about officers recommended for promotion who have been involved in fatal incidents before making its decisions. In particular, was there a duty to ensure that allegations of extra-judicial killings against such an officer are fully and independently investigated before accepting a recommendation that he be promoted?

72. In this connection the Privy Council discussed whether bodies such as the PSC were bound to ensure that no action is taken by such bodies which infringed the fundamental rights and freedoms enshrined in the Jamaican Constitution. As part of that discussion the Privy Council referred to *Nervais* and stated at paragraph 22:

> *"22. The Caribbean Court of Justice, in Nervais v R [2018] 4 LRC 545, when construing section 11 of the Constitution of Barbados, which also begins with the word "whereas", held that this did not mean that the section was merely "aspirational [or] a preliminary statement of reasons which make the passage of the Constitution, or sections of it, desirable" (para 25). It was intended to have the force of law. The court went on to say, of the right to the protection of the law, that it "affords every person . . . adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power" (para 45). This is an echo of the words of the Caribbean Court of Justice in Maya Leaders Alliance v Attorney General of Belize [2015] CCJ 15 (AJ), para 47, in turn citing Attorney General v Joseph and Boyce [2006] CCJ 3 (AJ), (2006) 69 WIR 104, 226, para 20."*

73. Then under the section headed "*DISCUSSION*" Lady Hale referred to the obligations of the parties such as the PSC to act in conformity with the fundamental rights and freedoms enshrined in the Constitution and held at paragraph 23:

"23. It is clear to this Board that the PSC, like the JCF and INDECOM and other organs of the 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 by section 13(2) and (3)(a), (g) and (r). As Morrison JA put it, at para 89,

> *"...given that all organs of the State are specifically enjoined by the Constitution to take no action which 'abrogates, abridges or infringes those rights', it must surely be equally uncontroversial to insist that all such organs are bound to respect and seek to protect the fundamental rights and freedoms guaranteed by the Constitution in all aspects of their activities.""*

74. Thereafter Lady Hale considers the content of the fundamental right relating to protection of law discussed in the *Nervais* case and states at paragraph 24:

> *"24. The Board is also disposed to accept that the right to equality before the law, like the right to the equal protection of the law, affords every person protection against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power. These are, in any event, fundamental common law principles governing the exercise of public functions. As there is nothing in the statutory framework governing the PSC to contradict them, they are applicable in this case irrespective of whether or not they have the status of a constitutional right.* (Emphasis added)

75. In my judgment the Privy Council, in the passage cited above, was not adopting the *Nervais* holding that the "*Whereas*" provisions in the Constitution was intended to have independent force and was directly enforceable. If that was indeed the position it would be a reversal of the Privy Council's earlier decisions in *Campbell-Rodriques v Attorney General* [2008] 4 LRC 526 and *Newbold v Commissioner of Police* [2014] 4 LRC 686, and yet these decisions are not referred to in the judgment of the Privy Council. Lady Hale accepts at paragraph 24 that the right to equal protection of law affords every person

protection against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power, as stated in *Nervais*, on the basis that they reflect "*fundamental common law principles*". Lady Hale qualified the application of these rights when she stated "*As there is nothing in the statutory framework governing the PSC to contradict them, they are applicable in this case irrespective of whether or not they have the status of a constitutional right*." This qualification in paragraph 24 makes clear that Lady Hale did not decide that the equal protection of law referred to in the "*Whereas*" provision of the Constitution was directly enforceable in this case, the position adopted by the CCJ in the *Nervais* case.

76. In the circumstances, I conclude that the Court is bound to follow the decisions of the Court of Appeal in *Grape Bay*, *Inchcup* and *Ferguson* in relation to the issue whether section 1 of the Constitution is directly enforceable and is bound to accept the position that section 1 does not provide the Corporation with a freestanding right. I accept that, assuming the Court is not bound by the earlier decisions, a case can be made as to why the Bermuda courts should adopt the more expansive interpretation of section 1 for the reasons given by the CCJ in the *Nervais* case. However, it seems to me that given the decisions of the Court of Appeal in *Grape Bay*, *Inchcup* and *Ferguson*, such a change in the law can only be made by the Privy Council.

(b) Is the "protection of law" provision nevertheless directly enforceable?

77. The Corporation argues that even if the Court determines that section 1 is not directly enforceable in its entirety, there is a specific line of authority, which treats that particular right as separately enforceable, whether or not the remainder of section 1 may be. The Corporation relies upon the Privy Council decisions in *Lewis v Attorney General* [2000] 57 WIR 275, *Newbold v Commissioner of Police* [2014] 4 LRC 684 and *Jamaicans for Justice v Police Service Commission* [2019] 4 LRC 117.

78. Recent cases recognise that protection of law provision, contained in section 6 of the Bermuda Constitution, was unnecessarily narrow in scope dealing only with the protection of law in the context of civil and criminal proceedings. As the CCJ noted in *Attorney*

General v Joseph and Boyce [2006] CCJ 3 (AJ) "*the right to protection of law is so broad and pervasive that it would be well-nigh impossible to encapsulate in a section of the constitution all the ways in which it may be invoked or can be infringed."* Yet, section 6 of the Bermuda Constitution, dealing with protection of law, is only concerned with ensuring that the process by which the guilt or innocence of a person 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.

79. The Privy Council decisions dealing with the scope of the fundamental right to protection of law seem to accept that its application is wider than the terms of section 6 of the Bermuda Constitution. However, it is not clear whether the source of the expanded right to protection of law is derived from the terms of the Constitution or is based upon existing protections at common law.

80. In *Lewis and Others*, appeals from Jamaica, the issues before the Privy Council were (a) whether on a petition for mercy (after all other domestic attempts to set aside the conviction or to prevent executions have been exhausted) the appellants were entitled to know what material the Jamaican Privy Council had before it and to make representations as to why mercy should be granted; and (b) whether they have a right not to be executed before the Inter-American Commission on Human Rights of the UN Human Rights Committee had finally reported on their petitions.
81. Lords Slynn, delivering the advice of the majority, referred to a passage in the Judgment of Forte JA in the Court of Appeal below at page 227:

> *""In respect of all the rights and freedoms guaranteed by Chapter III of the Constitution, 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 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 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]."

82. Dealing with this passage from the judgment of Forte JA, Lord Slynn held at page 303 a-b *"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."* (Emphasis added)

83. In *Newbold v Commissioner of Police* counsel for the appellants argued that the cases of *Thomas v Baptiste* [1999} 2 LRC 733 (an appeal from Trinidad and Tobago), *Lewis v Attorney General* [2000] 5 LRC 253 and *Attorney General v Joseph and Boyce* [2006] CCJ 3 (AJ) indicated that the *"Whereas"* provisions in the constitutions have direct enforceability. It is clear from paragraphs of the judgment of Lord Mance that whilst the Privy Council accepted that the concept of protection of law can extend to matters outside the scope of section 6 of the Bermuda Constitution, the submission that section 1 of the Bermuda Constitution was directly enforceable was emphatically rejected:

"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."

84. I have already noted at paragraph 75 above that the *Jamaicans for Justice* case does not support the proposition that the expanded scope of the protection of law provision is based upon the direct enforceability of section 1 of the Bermuda Constitution.

85. I accept, in accordance with the reasoning of the Lady Hale in *Nervais*, that the concept of protection of law is a wider in scope than the terms of section 6 of the Bermuda Constitution and accept that it "*affords every person protection against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power*."

86. In order to appreciate the context of the judicial pronouncements in relation to the protection of law in the Privy Council it is instructive to note the background facts of the cases in which those statements were made. The cases of *Thomas v Baptiste*, *Lewis v Attorney General* and *Attorney General v Joseph and Boyce* were all 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 issue was whether they had a right not to be executed before the Inter American Commission on Human Rights had finally reported on their petitions.

87. In *Newbold v Commissioner of Police* the appellants were the subject of extradition requests by the United States on suspicion of having committed drug trafficking offences. Following the commencement of extradition proceedings the respondents sought to adduce evidence obtained by the interception by the Bahamian police of the appellants' telephone conversations, relying on authorisations issued by the Commissioner of Police under section 5(2)(a) of the Listening Devices Act 1972 (the "**LDA**"), which provided for the Commissioner to give such authorization "*after consultation with the Attorney General*" and made it an offence for any person to use a listening device "*to hear, listen to or recording a private conversation to which he is not a party*" other than unintentionally or "*where the person using the listening device thus served in accordance with an authorisation given to him under section 5 of the Act*". The appellants challenged the validity of the LDA and/or authorisations issued thereunder and relied upon, inter alia, article 15 of the Constitution of The Bahamas (section 1 of the Bermuda Constitution).

88. As noted at paragraph 71 above, the issue in *Jamaicans for Justice* was what steps the PSC, which was charged with deciding upon the appointment and promotion of police officers, should take to inform itself about officers recommended for promotion who have been involved in fatal incidents before making its decisions and whether there was a duty to ensure that allegations of extra-judicial killings against such an officer are fully and independently investigated before accepting a recommendation that an officer be promoted.

89. It can be seen that all these cases involved a challenge against the decision of a public official or public body on grounds that the decision was irrational, unreasonable, fundamentally unfair or otherwise was an arbitrary exercise of power. The challenge in the present case is not a challenge to a decision of a public official or public body but to the proposed action by the Bermuda Legislature. It is not clear how, if at all, the expanded

scope of the right to the protection of law, as accepted in cases such as *Jamaicans for Justice*, applies to the legislative process and in particular whether an Act of the Bermuda Legislature, duly assented to by the Governor, can be set aside by a Court on the ground that the legislation was irrational, unreasonable, unfair or constituted arbitrary exercise of power. It is of course accepted that an Act which infringes the fundamental rights and freedoms set out in sections 2 to 13 of the Bermuda Constitution, which includes the fundamental right to the protection of law in section 6, can be modified or set aside by the Court. However, the submission that an Act of the Bermuda Legislature, which is not in breach of any of the fundamental rights and freedoms set out in sections 2 to 13, can be set aside by a Court on the grounds of irrationality, unreasonableness, unfairness, or arbitrary exercise of power, is, in my judgment, contrary to the long-standing position as to the respective roles of the Judiciary and the Legislature.

90. The Privy Council addressed the respective roles of the Judiciary and the Legislature, in the context of written constitutions such as the Bermuda Constitution Order 1968, in *The Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette and Others* [2000] 5 LRC 196. Lord Nicholls held at paragraphs 26-31:

> *"26. This prematurity argument raises questions concerning the relationship of the courts and Parliament. Two separate, but related, principles of the common law are relevant. They are basic, general principles of high constitutional importance. The first general principle, long established in relation to the unwritten constitution of the United Kingdom, is that the Parliament of the United Kingdom is sovereign. This means that, in respect of statute law of the United Kingdom, the role of the courts is confined to interpreting and applying what Parliament has enacted. It is the function of the courts to administer the laws enacted by Parliament. When an enactment is passed there is finality unless and until it is amended or repealed by Parliament: see the well known case of Pickin v. British Railways Board [1974] AC 765.*

27. The second general principle is that the courts recognise that Parliament has exclusive control over the conduct of its own affairs. The courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions: see Prebble v. Television New Zealand Ltd [1995] 1 AC 321, 332, where some of the earlier authorities are mentioned by Lord Browne-Wilkinson. The law-makers must be free to deliberate upon such matters as they wish. Alleged irregularities in the conduct of parliamentary business are a matter for Parliament alone. This constitutional principle, going back to the 17th century, is encapsulated in the United Kingdom in article 9 of the Bill of Rights 1689: "that ... proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". The principle is essential to the smooth working of a democratic society which espouses the separation of power between a legislative Parliament, an executive government and an independent judiciary. The courts must be ever sensitive to the need to refrain from trespassing, or even appearing to trespass, upon the province of the legislators: see Reg. v. Her Majesty's Treasury, Ex parte Smedley [1985] 1 Q.B. 657, 666, per Sir John Donaldson M.R.

...

29. That is the basic position in the United Kingdom. In other common law countries their written constitutions, not Parliament, are supreme. The Bahamas is an example of this. Article 2 of its Constitution provided that "This Constitution is the supreme law of the Commonwealth of The Bahamas". Article 2 further provided that, subject to the provisions of the Constitution, if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. Chapter V of the Constitution made provision for a Parliament of The Bahamas, comprising Her Majesty, a Senate and a House of Assembly. Article 52 provided that "subject to the provisions of this Constitution" Parliament may make laws for the peace, order and good government of The Bahamas. Thus, in The Bahamas, the first general principle mentioned above is

displaced to the extent necessary to give effect to the supremacy of the Constitution. The courts have the right and duty to interpret and apply the Constitution as the supreme law of The Bahamas. In discharging that function the courts will, if necessary, declare that an Act of Parliament inconsistent with a constitutional provision is, to the extent of the inconsistency, void. That function apart, the duty of the courts is to administer Acts of Parliament, not to question them.

30. Likewise, the second general principle must be modified to the extent, but only to the extent, necessary to give effect to the supremacy of the Constitution. Subject to that important modification, the rationale underlying the second constitutional principle remains as applicable in a country having a supreme, written constitution as it is in the United Kingdom where the principle originated.

31. Their Lordships consider that this approach points irresistibly to the conclusion that, so far as possible, the courts of The Bahamas should avoid interfering in the legislative process. The primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void. This may be coupled with any necessary, consequential relief. However, the qualifying words "so far as possible" are important. This is no place for absolute and rigid rules. Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise, the need to give full effect to the Constitution might require the courts to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the courts' duty to give the Constitution the overriding primacy which is its due. (Emphasis added)

91. The judgment of Lord Nicholls makes clear that the principle that Bermuda Parliament is supreme is only displaced, to the extent necessary, to give effect to the fundamental rights

and freedoms set out in sections 2-13 of the Constitution. Otherwise, it is "*the duty of the courts to administer Acts of Parliament, not to question them*." Further, the English law principle that the courts recognise that Parliament has exclusive control over the conduct of its own affairs applies with equal force in Bermuda.

92. In relation to the fundamental right to the protection of law it is the Corporation's factual case that (i) there was no proper consultation with the party most affected by the proposed legislation, the Corporation, despite the government promises to do so; (ii) the Government's rationale is entirely fatuous, the City is being well-run without Government interference; (iii) Governmental interference in the recent past undertaken by successive Amendment Acts has been unhelpful, if not counter-productive; (iv) the public recognises this and is largely strongly in favour of leaving the Corporation as is; and (v) in the circumstances, the fact that the Government has decided to press ahead notwithstanding can only be described as an arbitrary and unfair exercise of power without rationale or compensating benefit to the public interest.

93. In relation to the issue of consultation, I have already set out the conflicting position of the parties at paragraphs 39-42 above. The Government maintains that there was adequate and sufficient consultation whilst the Corporation denies this to be the case. In any event, it seems to me, that this Court cannot set aside primary legislation passed by the Legislature, assented to by the Governor, on the ground that this Court considers that there was inadequate consultation. As the decision of Mitting J in *Unison v The Secretary of State for Health* [2010] EWHC 2655 (Admin) shows the issue whether there has been adequate consultation in relation to proposed legislation is exclusively a matter to be considered by the Legislature. At paragraphs 17-18 Mitting J held:

> *"17. In the case of the Immigration Rules and secondary legislation, primary legislation lays down the procedure for scrutinising and "consulting on" proposed changes, orders and regulations. No statute provides for any method of scrutinising or consulting on primarily legislation. This is unsurprising. It is the standing orders of Parliament which provide the means of doing so. It is just as illegitimate to*

attempt to superimpose on Parliamentary standing orders judge-made requirements for external or prior consultation, as it is to impose such requirements when Immigration Rules or secondary legislation are to be considered by Parliament. This formed the starting point for Sedley LJ's consideration of the position in relation to Immigration Rules in BAPIO. At paragraph 34, having cited Megarry J's observations in Bates v Lord Hailsham [1972] 1 WLR 1373, he said this:

> *"What he says about primary legislation of course holds true: the preparation of Bills and the enactment of statutes carry no justiciable obligations of fairness to those affected or to the public at large. The controls are administrative and political."*

18. For those reasons, in addition to the need for judicial restraint already referred to, I hold that, irrespective of the facts to which I will turn in a moment, the Secretary of State is not under any duty to consult on the principle of proposed changes to the National Health Service before introducing legislation to Parliament."

94. Furthermore, beyond considering whether the proposed legislation is in breach of sections 2 to 13 of the Constitution, the Court is not concerned with issues such as whether the proposed legislation is arbitrary or unfair exercise of power. These are issues to be considered by the Legislature. As Lord Sumption pointed out in *Bank Mellat v HM Treasury (no 2)* [2013] HKSC 38, at paragraph 39, there is no duty of consultation in relation to primary legislation and in any event Parliament is not required to be fair:

> *"The Treasury submit that the legislative form of a Schedule 7 direction takes it out of the area in which the courts can imply a duty of fairness or prior consultation. This is self-evident in the case of primary legislation. There is not yet a statute into which such a duty of consultation can be implied. Parliament is not in any event required to be fair. Even if a legitimate expectation has been created, the courts cannot, consistently with the constitutional function of Parliament, control the right*

of a minister, in his capacity as a member of Parliament, to introduce a bill in either house: R (on the application of Wheeler) v Office of the Prime Minister [2008] EWHC 1409 (Admin) at para 49; R (on the application of UNISON) v Secretary of State for Health [2010] EWHC 2655 (Admin)."

95. In my judgment, the issues raised by the Corporation as to whether there has been adequate consultation by the Government; whether the City of Hamilton is well-run; whether Governmental interference has been unhelpful and counterproductive; whether the general public is in favour of maintaining the status quo; and whether the proposed legislation is arbitrary or unfair exercise of power without rationale or compensating benefits to the public interest, are all issues which belong to the realm of politics and public debate and are not a proper subject matter of judicial determination, save to the extent they constitute a breach of the Corporation's fundamental rights enshrined in section 2 to 13 of the Constitution. Thus, in *Unison* the judicial review proceedings related to the Secretary of State for Health's intention to introduce legislation in Parliament to effect a radical reorganisation of the National Health Service. Mitting J, holding that a challenge based upon lack of consultation could not succeed, explained at paragraphs 12-14:

12. There is a further reason why this challenge cannot, as a matter of principle, succeed. The claim is founded on legitimate expectation. Mr Beloff QC submits that the case is a paradigm case, as explained by Sedley LJ in Bhatt Murphy v the Independent Assessor [2008] EWCA 755Civ at paragraph 29:

"The paradigm case arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice that, it will give notice or embark upon consultation before it changes an existing substantive policy."

13. There are two difficulties with his submission on the facts of this case:

(1) the subject matter of the claim and expectation places it squarely in the realm of politics and not of the courts; (2) there is an established means of giving consideration to different views about the merits of the proposals - the passage of the Bill through Parliament.

14. As to (1), the facts are indistinguishable in principle from those considered in Wheeler, and my answer is the same as that given by the Divisional Court at paragraph 41:

"Even if we had accepted that the relevant ministerial statements had the effect of a promise to hold a referendum in respect of the Lisbon Treaty, such a promise would not in our view give rise to a legitimate expectation enforceable in public law, such that the courts could intervene to prevent the expectation being defeated by a change of mind concerning the holding of a referendum. The subject-matter, nature and context of a promise of this kind place it in the realm of politics, not of the courts, and the question whether the government should be held to such a promise is a political rather than a legal matter. In particular, in this case the decision on the holding of a referendum lay with Parliament, and it was for Parliament to decide whether the government should be held to any promise previously made."

96. The proper scope of the right to the protection of law in the context of a challenge to legislation passed by the Legislature is to afford an aggrieved party the right to challenge that legislation in the courts. The Corporation or another party with requisite standing has and will continue to have that right. As explained by Lord Diplock in *Attorney General of Trinidad and Tobago v McLeod* [1984] 1 WLR 522, at page 10, the right to protection of law is satisfied as long as the judicial system affords a procedure by which any person interested in establishing the invalidity of that law can obtain remedy from the courts:

*"In his originating motion however the only infringement of his fundamental rights that Mr. Mcleod alleged was his right to "the protection of the law" under section 4(*b*) of the Constitution. The "law" of which he claimed to have been deprived of*

*the protection was section 54(3) of the Constitution, which he contended (successfully in the Court of Appeal) prohibited Parliament from passing the Amendment Act, except by the majorities specified in that subsection. This argument, although it was accepted by Hyatali C.J. and Kelsick J.A. in the Court of Appeal, is in their Lordships' view fallacious. For Parliament to purport to make a law that is void under section 2 of the Constitution, because of its inconsistency with the Constitution, deprives no one of the "protection of the law," so long as the judicial system of Trinidad and Tobago affords a procedure by which any person interested in establishing the invalidity of that purported law can obtain from the courts of justice, in which the plenitude of the judicial power of the state is vested, a declaration of its invalidity that will be binding upon the Parliament itself and upon all persons attempting to act under or enforce the purported law. Access to a court of justice for that purpose is itself "the protection of the law" to which all individuals are entitled under section 4(*b*)."*

97. For the reasons set out above, I am unable to accept the submission that there has been a breach of the right to the protection of law referred to in section 1 of the Constitution and as a result the Court should declare that the proposed Reform Act and the Amendment Acts are void and of no effect.

(c) Breach of section 13 (1) of the Constitution

98. As noted at paragraph 43 above, section 13(1) provides that no property of any description shall be compulsorily taken possession of, and that no interest in or right over property of any description shall be compulsorily acquired, except in the circumstances set out in sub-sections (a) to (d).

99. In considering the scope of section 13(1), Mr. Diel for the Corporation submits that in *Inchcup*, the Court of Appeal gave a very restrictive interpretation of these provisions. The Court drew a distinction between the concept of "*deprivation*" (in section 1) and "*taking into possession*" or "a*cquisition*" (in section 13) in language clearly suggesting that the

Court's view was that in order that there be a "*taking into possession*" or "*acquisition*" there had to be either a direct appropriation of the property or an ouster of possession, and a transfer or change of ownership or possession from one person to another person or body. The relevant passage referred to is paragraph 14 in the Judgment of Stuart-Smith JA holding 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 pages68 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."*

100. Mr Diel accepts that the Amendment Acts do not purport and the proposed Reform Act would not purport to directly transfer either property or property rights to the Government. Thus, if *Inchcup* is binding, that ends the matter. However, Mr. Diel submits that *Inchcup* has been entirely overtaken by *Campbell-Rodriques v Attorney General* [2008] 4 LRC 526 and the court should apply the reasoning in *Campbell-Rodriques* to this case.

101. In *Campbell-Rodriques,* the Jamaican Government initiated a road-building project which included the closure of an existing road between Kingston and Portmore and the construction of a substitute toll road. The appellants, who were all established Portmore residents, claimed that free and unrestricted access to and from Kingston was

indispensable to Portmore residents and necessary for the residents to have peaceful and quiet enjoyment of their properties. They applied to the Constitutional Court, claiming that the imposition of tolls breached section 18 (1) of the Constitution (in materially identical terms to section 13 (1) of the Bermuda Constitution). The Privy Council confirmed that there could be taking which did not involve the physical appropriation of property or an ouster of possession and in that regard relied upon, by analogy, the United States cases dealing with regulatory control of property which adversely affects the owner to a sufficiently serious degree. If the regulation goes too far it will be recognised as a taking, it being a question of degree. Lord Carswell so held at paragraphs 15 and 17:

> *"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.

102. "*Taking*" by regulatory control has its limits. Regulation of activity in the public interest, such as planning control of 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. At paragraph 18 Lord Carswell held:

> *"18….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. 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."

103. In light of the above passages from the Judgment of Lord Carswell I accept that in principle there could be "*taking*" by regulatory control despite the restrictive terms of section 13 (1) of the Bermuda Constitution.

104. The United States cases referred to in the judgment of Lord Carswell in *Campbell-Rodriques* 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 form of regulatory control which are in the public interest and are not justiciable and do not result in any claim for compensation.

105. Thus in *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, the petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. At that time, Lucas's lots were not subject to the State's coastal zone building permit requirements. Two years later, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels. He filed action against respondent state agency, contending that, even though the Act may have been lawful exercise of the State's police power, the ban on construction deprived him of all "*economically viable use*" of his property and therefore effected a "*taking*" under the Fifth and Fourteenth Amendments that required the payment of just

compensation. The Court held that Lucas was entitled to compensation because the ban rendered Lucas's parcels "*valueless*".

106. In *Penn Central Transportation Co. v New York City* (1978) 438 US 104, the claim for compensation was based on the diminution in value of the property owned by the railway company Penn Central upon which it could no longer build a multistory office building above the Grand Central Terminal, which the Landmark Preservation Commission had designated as historic landmark under the Landmark Preservation Law in New York.

107. The "*taking*" in *Pennsylvania Coal Co. v Mahon* (1922) 260 US 393, was the diminution in value of the property as a result of state law which forbade mining in such a way as to cause subsidence of any human habitation or public street or building and thereby made commercially impracticable the removal of a very valuable coal deposits still standing unmined.

108. The facts relied upon by Corporation in support of its claim for deprivation of property are set out at paragraph 44 above. It will be seen that the Corporation as an entity remains in place and continues to own its property as before. The regulatory control complained of does not directly affect the property owned by the Corporation. What is complained of by the Corporation is that essentially every decision made by the management of the Corporation has to be approved either by the Minister or by the Cabinet. Furthermore, under the proposed Reform Act the Mayor and Councilors are appointed by the Minister or by a selection committee appointed by the Minister. It is said that the effective management of the Corporation lies and would lie indirectly with the central Government as opposed to by the independent management comprising of the Mayor and Councilors elected by the voters of the City of Hamilton.

109. The main case relied upon by the Corporation in relation to its allegation of regulatory control is the decision of the St. Christopher and Nevis Court of Appeal in *Attorney General V Lawrence* [1985] LRC 923. 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 them 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%."* In the circumstances Mr Lawrence challenged the validity of the Act based upon section 6 of the Constitution of the St. Kitts and Nevis (materially identical to section 13 (1) of the Bermuda Constitution) 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, 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."*

111. Relying upon *Lawrence* Mr Diel argues the effect of the Amendment Acts and the proposed Reform Act is in effect to remove the current independent management of the Corporation by the elected Mayor and Councilors and replace them by the persons selected directly or indirectly by the Government. He submits that the position of the

Corporation is on all fours with the facts and that the holding of the Court of Appeal in *Lawrence* therefore applies.

112. The issue whether taking control of the management of a company amounts to "*taking*" of property of the company was addressed by the Privy Council in an appeal from Jamaica in *Panton v Minister of Finance* [2001] UKPC 33. 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 Institution's Act 1992. The appellants commenced proceedings alleging that the Act of 1992 was unconstitutional because it made no provision for compensating them as 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 same as 13 (1) of the Bermuda Constitution).

113. The Privy Council did not accept that the mere taking control of the management of a commercial enterprise amounts to deprivation of property of the owners of that enterprise. At paragraph 22 Lord Clyde held:

> *"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'". (Emphasis added)

114. In *Panton* the appellants expressly relied on *Lawrence* and argued that *Lawrence* was an authority for the proposition that mere control of the management of a commercial enterprise amounted to "*taking*" of property. That point was expressly rejected by the Privy Council and *Lawrence* was distinguished on the basis that Mr. Lawrence not merely lost control of the management of the Bank but lost the prospect of obtaining up to 50% of the profits generated by that Bank. It was the loss of the profits which amounted to "*taking*" of the property. At paragraph 22 Lord Clyde held:

"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." (Emphasis added)

115. In my judgment *Panton,* which is binding on this Court, is authority for the proposition that mere loss of control, even total loss of control does not amount to deprivation of property. There must be "*taking*" by reference to loss in the value of identifiable property. This was the basis upon which the Privy Council distinguished the decision of the Court of Appeal in *Lawrence*. Here, the Corporation as a legal entity continues to own the assets as before and there is no suggestion that there has been any diminution in value of those assets.

116. Mr Diel for the Corporation also relies upon the Privy Council decision in *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32. 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.

117. The applicants sought declarations that the Government's conduct contravened their right to enjoyment of the property as guaranteed under section 4 (a) of the Constitution.[5]

[5] Section 4 (a) of the Constitution of Trinidad and Tobago provides for "*the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law*" (emphasis added). Section 1 (c) of the Bermuda Constitution differs in that it merely refers to protection from "*deprivation of property without compensation*" without any reference to the phrase "*enjoyment of property*".

Lord Dyson referred to the European Court of Human Rights decision in *The Traktorer AB v Sweden* [1989] 13 EHRR 309, where the Court rejected the argument that a licence to serve beverages could not be considered a "*possession*" within the meaning of article 1 of the Protocol. The Court held that the economic interests connected with the running of the restaurant were "*possessions*" and that the withdrawal of the licence had adverse effects on the goodwill and value of the restaurant and that it constituted an interference with the applicant's "*peaceful enjoyment of [its] possessions*".

118. Lord Dyson held at paragraph 23 that in order to prove an infringement of the rights to enjoyment of property, it is not necessary to show in a business context that the infringement makes the operation of the business impossible and the decision in *Tractorer* does not so hold. The infringement must, however, reach a certain level of significance. Here, the interference with the businesses of maxi-taxi owners and operators was substantial. First, they had previously managed and controlled their own affairs but now they were subjected to the control and management of their competitor. Secondly, pursuant to the authority conferred by the regulations, the competitor charged the maxi-taxi owners and operators a fee for every exit journey. Thirdly, under the regulations the competitor decided whether the maxi-taxi owners and operators were "fit and proper" persons to be granted a permit to use the facility at all. In the circumstances Lord Dyson held that, *prime facie*, there was an infringement of the members' section 4 (a) rights (see paragraph 25). The three factors identified by Lord Dyson clearly had significant negative impact upon the maxi-taxi businesses (being "property" within the meaning of the Constitution).

119. The facts in *Paponette* bear no relationship to the allegations of existing control and proposed control of the Corporation's affairs made by the Corporation in this case. None of the three factors in the *Paponette* case, mentioned in the previous paragraph, which formed the basis of the finding that there was a breach of section 4 (a) rights, are present in this case. The allegations of regulatory control made by the Corporation in this case are very much in line with the allegations made in the *Panton* case.

120. The Corporation's challenge based upon deprivation of property, contrary to the constitutional right under section 13 (1) of the Constitution, is based entirely on the basis of control exerted by the central Government over the affairs of the Corporation. The Corporation accepts that this is not a case where there has been any transfer of property from the Corporation to the Government. The Privy Council decision in *Panton* clearly holds that assumption of management control without more does not amount to deprivation of property. Significantly, the Privy Council in *Panton* distinguished *Lawrence*, the main case relied upon by the Corporation, on the basis that the loss of property in that case could be identified (loss of up to 50% of the dividend from the Bank). In the circumstances I am satisfied that the Corporation's challenge based upon section 13 (1) of the Constitution cannot succeed.

121. In light of the conclusion that there is no deprivation of a property without compensation in breach of section 13 (1) of the Constitution, it is unnecessary to consider whether section 13 (3) disapplies the operation of section 13 (1) in these circumstances. However, as both parties have made submissions in relation to the scope of section 13 (3) I will express my view briefly.

122. As noted earlier section 13 (3) seeks to disapply section 13 (1) to all body corporates established by law for public purposes from the operation of section 13 (1), in certain circumstances, where the property in question is solely funded by public funds and where the acquisition of property in question was done under the authority of law. Section 13 (3) provides:

> *"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."*

123. Mr Howard for the Attorney General submits that the Corporation was unquestionably a body corporate established by law for public purposes. Mr Howard submits that all property of any kind held or owned by the Corporation becomes, once in its possession, public property to be used for public purposes. He argues that by virtue of the legislative constraints imposed on the Corporation, any real and personal property vested in the Corporation are public property to be used for municipal purposes. In this regard Mr Howard relies upon *Hazell v Hammersmith and Fulham London Borough Council* [1991] 1 All ER 546 where Lord Templeman expressly rejected the submission that property which may have been gratuitously donated to the council could be used for purposes other than municipal purposes. At page 563 a-b Lord Templeman held:

> *"It is conceded that neither the borough nor the council could lawfully devote moneys held as part of the general rate fund in order to comply with swap transaction obligations because the general rate fund may only be expended by the council and solely for purposes authorised by the Act of 1972 and other statutes. But it is contended that there might be some property perhaps generously donated to the borough which was in some way not held by the borough acting by the council for the benefit of the ratepayers or which, although held for the benefit of the ratepayers was not subject to the same inhibitions as the general rate fund and other property held for the benefit of the ratepayers. This argument strikes me as being not so much arcane as absurd."*

124. Mr Howard submits that if the Court finds that there has been deprivation of property, section 13 (3) applies and any acquisition in the public interest would not be a breach of section 13 (1).

125. Mr Diel for the Corporation submits that section 13 (3) has no application as the Corporation is not funded by public funds and the Corporation is not established for public purposes. He says the Corporation was originally funded by the City merchants and not the central Government and now is funded by the ratepayers. He also asserts that the Corporation is established for the benefit of residents and businesses in the City

of Hamilton and not for public purposes. In any event, Mr Diel argues that as section 13 (3) is an exception to the rule, it is for the Government to establish that "*no monies have been invested other than moneys provided from public funds ".*

126. I accept Mr Howard's submission that the Corporation is a body corporate established by law for public purposes. In my view, municipal purposes, in the present context, are to be equated with public purposes. I also accept, as held by Lord Templeman in the *Hazell* case, that all funds received by the Corporation, other than third-party commercial investments in the acquisition of property with the Corporation, become public funds.

127. However, it seems to me, that the purpose of section 13 (3) is limited to operation of laws which expressly allow for compulsory acquisition of property and to provide that such an acquisition does not amount to deprivation of property and breach of section 13 (1). Thus, under section 4 of the Acquisition of Land Act 1970, where the Minister of Public Works is of the opinion that compulsory taking of possession in the public interest by the agreement is impracticable, he may make a compulsory purchase order in the prescribed form in respect of the land to be acquired. In my view the intended scope of section 13 (3) is to provide for statutory provisions such as section 4 of the Acquisition of Land Act 1970. The Amendment Acts and the proposed Reform Act 2021 do not provide either expressly or impliedly for "*compulsory taking of possession in the public interest of any property*." Indeed, the Attorney General disavows that this was the intention or the effect of this legislation. In the circumstances, I do not consider that section 13 (3) has any application in the circumstances of this case.

128. Finally, for the sake of completeness, I should also the record that I do not accept the Attorney General's submission that as the Corporation does not possess and enjoy all the powers and capacity of a natural person it is not subject to the terms of section 13 (1) of the Constitution. The decision of the Privy Council in *Attorney General v Antigua Times Ltd* [1975] 3 WLR 232 holds that this submission is not well founded.

F. **Conclusion**

129. As noted at paragraphs 6, 12-15, 39-42 and 44 above, the proposed legislation by the Government has generated highly emotive debate. In these proceedings the Corporation has charged the Government that its legislative proposals concerning the municipal corporations are irrational, arbitrary and unfair. The Court reminds itself that its jurisdiction in relation to Acts of Parliament and proposed legislation is limited to considering whether the legislation infringes fundamental rights and freedoms set out in sections 2 to 13 of the Bermuda Constitution. Beyond that the merits of any legislation belong to the realm of politics and are not the proper subject matter of judicial determinations.

130. In relation to the Constitutional challenge pursued by the Corporation the Court has concluded that:

(1) Section 1 of the Bermuda Constitution does not have independent force and therefore is not directly enforceable by the Corporation.

(2) Whilst the Court takes the view that the right to the protection of law at common law is wider than the terms of section 6 of the Bermuda Constitution, the Court dismisses the Corporation's claim that, in the circumstances of this case, there has been breach of the right to the protection of law.

(3) The Court dismisses the Corporation's claim that having regard to the control exerted by the Government over the Corporation under the Amendment Acts and to be exerted under the proposed Reform Act, the Government has deprived the Corporation of its property under section 13 (1) of the Bermuda Constitution.

(4) The Corporation's claim for a declaration that the Amendment Acts and the proposed Reform Act be declared null and void is dismissed.

131. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 31st day of March 2021

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NARINDER K HARGUN

CHIEF JUSTICE