



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

**2014: 438**

IN THE MATTER OF THE BERMUDA CONSTITUTION ORDER 1968

AND IN THE MATTER OF THE OMBUDSMAN ACT 2004

AND IN THE MATTER OF THE MUNICIPALITIES AMENDMENT ACT 2013

AND IN THE MATTER OF THE MUNICIPALITIES AMENDMENT ACT 2014

AND IN THE MATTER OF THE BERMUDA GOVERNMENT'S EXERCISE OF  
CONTROL OVER VARIOUS FUNCTIONS OF THE CORPORATION OF HAMILTON  
AND ITS GOVERNANCE

THE CORPORATION OF HAMILTON

Applicant

-v-

(1) THE ATTORNEY-GENERAL

(2) THE MINISTER OF HOME AFFAIRS

(3) THE OMBUDSMAN OF BERMUDA

Respondents

## **RULING**

(In Chambers)

Date of Hearing: March 11, 2015

Date of Ruling: March 19, 2015

Mr. Eugene Johnston and Ms. Dawn Johnston, J2 Chambers, for the Applicant

Mr. Gregory Howard, Attorney-General's Chambers, for the 1<sup>st</sup> Respondent

Mr. Alan Dunch, MJM Limited, for the 2<sup>nd</sup> Respondent

## Introductory

1. The present proceedings were issued on December 22, 2014 by the Applicant (“the Corporation”) seeking declarations that, *inter alia*, various amendments to the Municipalities Act 1923 (“the Act”) between 2010 and 2014 (pursuant to which the Government collected wharfage fees previously collected by the Corporation and cancelled certain contracts previously entered into by the Corporation) were unconstitutional. The primary complaint was that the implementation of the impugned enactments constituted a compulsory acquisition of the Corporation’s property rights in violation of section 13 of the Bermuda Constitution.
2. By Notice dated January 26, 2015 (“the Stewardship Notice”), the 2<sup>nd</sup> Respondent (“the Minister”) assumed temporary stewardship of the Corporation under section 7B(6) of the Act. On January 29, 2015, the Minister applied for leave to discontinue the present proceedings on the grounds that he was now empowered to instruct lawyers on behalf of the Corporation as a result of the Stewardship Notice.
3. On January 29, 2015, the Minister’s application was first heard together with a strike-out application on behalf of the Ombudsman. I struck-out the claim against the Ombudsman summarily. That claim was based on the central averment that the Ombudsman in preparing a report was required to comply with section 6(8) of the Bermuda Constitution. I considered that it was plain and obvious this complaint was bound to fail because the Ombudsman is not judicial or adjudicatory authority in the requisite sense.
4. As regards the application by the Minister for leave to discontinue the present proceedings in circumstances where the Corporation’s attorneys were seemingly instructed only by certain members of the Council but not the Mayor, I directed that the following issues be determined as preliminary issues:
  - (a) whether J2 Chambers had due authority to commence the present proceedings; and
  - (b) whether the Stewardship Notice conferred authority on the Minister to seek leave to discontinue the present proceedings.
5. In the course of argument, however, in light of the Minister’s submissions to the effect that the Court had the option of either dismissing or merely staying the present proceedings, the following supplementary question arose for consideration. If question (a) was answered in favour of the validity of the commencement of the proceedings and question (b) answered in the negative, did the Court possess jurisdiction to stay the prosecution of the present proceedings on the grounds that the

Corporation not properly capable of continuing the proceedings in light of the undoubted deadlock?

6. The Corporation also filed an application for leave to amend, which has not been formally considered, with a view to challenging the constitutionality of the Stewardship Notice itself. In the course of the hearing of the preliminary issues determination, I indicated that I would assume that leave had been granted in this respect.
7. The Act on its face envisages that the Corporation can only make valid decisions with the assent of the Mayor and a minimum number of other Council members. The present standing to sue dispute arose in circumstances where:
  - (a) the relationship between the Mayor and the majority of Council members had broken down;
  - (b) the stewardship powers contained in the Act did not explicitly contemplate the Minister standing in the shoes of the Mayor and Council for all purposes; and
  - (c) the specific power asserted by the Minister was the power to instruct counsel with a view to discontinuing public law proceedings brought by the Corporation against him on constitutional grounds, in circumstances where it was contended that the Stewardship Order was motivated by a desire to bring these proceedings to an end.

### **Legal findings: the Corporation's key constitutional powers**

8. Section 7 of the Act defines the constitution of the Corporation as follows:

#### **“Constitution of Corporations**

*7. (1)The Corporations of Hamilton and St. George's shall each consist of a Mayor, three Aldermen and five Common Councillors.*

*(2)The Mayors and Aldermen for the time being shall be ex officio Justices of the Peace for their respective municipalities, but shall not exercise any judicial functions in any cause or matter wherein the Corporation of which such Justice is a member is a party.*

*(3)Whenever either Mayor is, by reason of absence from Bermuda, illness or accident, absent from any meeting of the Corporation, or unable to or incapacitated from calling any such meeting, or from doing any act, or executing or signing any deed, instrument or writing, or discharging any other duty, requiring the act, execution or signature of the Mayor, it shall be lawful for the Senior Alderman of the Municipality concerned in Bermuda or present*

at such meeting, to call or preside at such meeting, and to perform every act, and execute and sign every deed, instrument or writing on the part of the Mayor, and discharge every duty pertaining to the office of Mayor, as fully, validly and effectually to all intents and purposes as the Mayor could do if personally present and acting; and all acts done and all ordinances, deeds and instruments purporting to be executed or signed by such Senior Alderman acting as Mayor shall be of the like force, validity and effect as if executed or signed by the Mayor:

*Provided that such execution or signature must be attested by the Secretary of the Corporation.*

*(4)The Senior Alderman acting as Mayor shall whenever he signs as such add after his signature the words “Senior Alderman acting as Mayor”.*

*(5)Any Senior Alderman acting as Mayor at any Corporation meeting shall not by reason of his so acting be deprived of his status and vote as Alderman.*

*(6) Every Mayor, Alderman and Common Councillor elect, before assuming the duties of his office, shall be sworn before any Justice of the Peace in the form prescribed for the judicial oath within the meaning of the Promissory Oaths Act 1969 [title 2 item 21].*

*(7) No act or resolution of a Corporation shall be valid unless it is assented to by not less than two Aldermen and by the Mayor.*

*(8)The Mayor, two Aldermen, and not less than two Common Councillors shall be a quorum for the transaction of business at a Corporation meeting.”*  
[emphasis added]

9. Very clearly, section 7 of the Act on its face provides for the following:

- (a) the offices of Mayor, three Aldermen and five Common councillors are created;
- (b) a meeting quorum of the Mayor, two Alderman and two Common Councillors is provided for;
- (c) a *de facto* veto power is conferred on any two of the three Aldermen and the Mayor in that no valid resolution can be passed without their support. This appears to effectively require consensus between the Mayor and the majority of the Aldermen for any significant business to be conducted.

10. Section 8 of the Act provides as follows:

***“Legal status of Corporations etc.***

*8. The Corporations of Hamilton and St. George’s and their successors in office shall be bodies corporate under the names of ‘The Corporation of*

*Hamilton’ and ‘The Corporation of St. George’s’ respectively, and shall have perpetual succession, with power to sue and liability to be sued under the aforesaid names and to have and use common seals respectively, with power to renew, vary or change the same as either such Corporation may from time to time determine.”*

11. Mr. Howard for the Attorney-General rightly submitted that the Corporation was not simply a “public authority” as defined by section 3 of the Interpretation Act 1951, but that its powers to sue and be sued were more narrowly expressed than in the case of limited companies, which enjoy “*the capacity, rights, powers and privileges of a natural person*” (Companies Act 1981, section 11(1)(b)). And while the Corporation has some of the attributes of a private company, its management structure is distinctive in that its ‘board’ does not operate by majority vote but requires the support of the Mayor and at least two Aldermen. Moreover, its officers are all elected:

*“17. (1) Subject to this Act, the Mayor, Aldermen and Common Councillors of either Corporation shall hold office from the date of their election until the declaration of the results of the next ordinary municipal election.”*

12. The Corporation is ultimately controlled by those who elect its officers. The following persons are eligible to vote in municipal elections:

*“9. (1A) An ordinary municipal election consists of a mayoral election, a business ratepayers’ election and municipal residents’ election conducted concurrently...”*

*9A(1) All persons for the time being listed in the parliamentary register as resident in the municipal area of Hamilton are entitled to vote in a municipal election for the Mayor, Aldermen and Common Councillors of the Corporation of Hamilton....”*

13. In summary, the Corporation is a public corporation whose officers are democratically elected to run the municipal affairs of the city of Hamilton. It is an instrument of local government exercising powers devolved upon it by the central Government. Its constitution, somewhat like that of the United Nations Security Council as regards the five permanent members, requires all significant decisions to be approved by the Mayor and the majority of Aldermen. Where those officers cannot agree upon a proposed course of action, the Corporation will be deadlocked and incapable of authorising any action.

### **Legal findings: the scope of the Minister’s Stewardship Powers**

14. Mr. Howard submitted that a “*power should only be implied to exist where it is so integral to a company’s statutory mandate as to be obvious*”: *Corporation of Hamilton-v- Minister of Home Affairs* [2014] SC (Bda) 84 Civ (5 November 2014). He relied on this rule of construction to support the argument that the Corporation had no power to challenge the validity of its own governing legislation, but implicitly contended that it had no operation when construing the Minister’s own stewardship powers. Perhaps to justify this seemingly inconsistent approach, Mr. Howard sought to buttress the Minister’s authority under the Act itself by reference to general

Ministerial powers vested in the Executive branch of Government. In what I considered to be somewhat improbable reliance on section 61(5) of the Constitution, Crown Counsel made the important and intuitively appealing following submission:

*“The Minister may exercise robust oversight in cases of necessity, as in the case at bar, where the Mayor has decided not to convene meetings of Council.”*

15. While it is tempting to construe section 7B(6) in a pragmatic manner which enables the Minister to do whatever is necessary in an exceptional situation of deadlock, it was not contended that any canon of construction supported such a fluid and practical approach to interpreting the stewardship powers. On the one hand, there may well be an overlap between what Mr. Howard referred to as “*necessity*” and the circumstances which would be embraced by the term “*force majeure*”, explicitly used in section 7B(6) itself.

16. In typically lucid written submissions, Mr. Dunch advanced the following points, after citing Greenberg, ‘*Craies on Legislation*’, Tenth Edition, paragraph 18.1.14:

*“15. In construing section 7B(6) therefore, it is necessary to apply its plain meaning as read in the context of the section as a whole, and the section in the context of the Act as a whole, and the Act in the context of its purpose and legal, political and social background, Acts in pari material and the common law....*

*20. Section 7B of the Act, which is headed ‘Good governance’, contains a number of provisions directed to that purpose...*

*21. This is the context of section 7B(6) which provides:*

*‘Where, due to the poor state of any of a Corporation’s infrastructure or services (as a result of force majeure, maladministration, disrepair or lack of funding), the Minister believes that it is in the public interest for the Government to temporarily assume stewardship of Corporation’s infrastructure, function or service, in order to repair or maintain it, those particular items may, with the approval of Cabinet, be temporarily removed from the stewardship of the Corporation.’...*

*23. Accordingly, under this section, what the Government is doing is removing stewardship of particular infrastructure, function or service from the stewardship of the Corporation and temporarily assuming such stewardship itself. The scope of the power is therefore dependent on the scope of the meaning of ‘stewardship’ in context...*

*25. Given the foregoing, we would submit that it is clear, firstly, that section 7B(6) can be read as permitting the Government to assume stewardship over the governance function of the CoH, and, secondly, that the governance function includes litigation decisions...”*

17. Mr. Johnston, however, accurately identified seven features in section 7B(6):

*“51.1. The first feature is that the discretion is only available to the MHA if ‘any of a Corporation’s infrastructure or services’ are in a ‘poor state’;*

*51.2 The second feature is that the “poor state” must be caused by some ‘force majeure, maladministration, disrepair or lack of funding’;*

*51.3 The third feature is that where such “poor state” exists, the MHA must believe ‘it is in the public interest’ for the Government to assume “temporary Stewardship’;*

*51.4. The fourth feature is that the “temporary stewardship” in question relates to some part ‘of a Corporation’s infrastructure, function or service’;*

*51.5. The fifth feature is that the Government is only allowed to assume this temporary stewardship “in order to repair or maintain” the “infrastructure, function or service” in question;*

*51.6. The sixth feature is that only the “particular items” identified by the MHA may be “temporarily removed from the stewardship of the Corporation”; and*

*51.7. The seventh feature is that the Government can only assume this measure of control over those ‘particular items . . .with the approval of Cabinet.’”*

18. The Corporation’s counsel used this analysis to support the following conclusory submission:

*“52. It is of great importance that it is the Government which assumes ‘temporary Stewardship’ over ‘particular items’ that were originally under the ‘stewardship of the Corporation.’ Once this is identified, then ‘stewardship’ (be it transient or otherwise) is seen as something that is applied to the ‘particular items’; it is not one of the items that the Government can exercise control over. In other words, stewardship is the method used by a Corporation to either care for its ‘infrastructure’, carry out a ‘function’, or deliver a ‘service’. Put another way, ‘stewardship’ and governance are synonymous terms in s.7B(6) of the 1923 Act. Thus, the Government cannot assume stewardship over the CoH’s governance, because to do so would mean to usurp the power of the CoH in its entirety.”*

19. Does section 7B(6) only empower the Minister to assume stewardship of specific aspects of the governance or administrative functions or structures of the Corporation but not to assume stewardship of the governance or administrative structures altogether? As I indicated in the course of the hearing, at first blush this statutory provision does not appear designed to do more than to place discrete aspects of the Corporation’s function under the Minister’s stewardship. The stewardship power

appears more akin to the power of a receiver to take control of specific secured assets rather than the power of a liquidator to displace a company's management altogether. Moreover, the nature of the Corporation as a democratically elected and accountable body suggests that any regulatory power should be presumed not to interfere with citizens' rights. Mr Johnston rightly argued that the Court should have regard to the importance of the right of access to the Court. But this impacts more on the application of the statutory provision to the facts of the present case rather than on determining the primary meaning of the statute.

20. On the one hand, one is bound to ask, would it not lead to absurd results if the Minister was empowered to assume stewardship of all functions except the governance functions if all functions including the governance functions were in a "poor state" due to "*force majeure, maladministration, disrepair or lack of funding*"? Imagine a bankrupt Corporation which can no longer afford to pay its staff and whose Mayor and Aldermen have been arrested or resigned, leaving it incapable of performing any of its functions. This is, of course, a deliberately dramatic example which bears no resemblance whatever to the facts of the present case. Must section 7B(6) be read as permitting the Minister to assume stewardship of all functions except the governance functions because this would impermissibly entail assuming full control of the Corporation? In my judgment such a meaning would be inconsistent with the natural and ordinary meaning of the words of the subsection in their context.

21. Accordingly, I accept Mr. Dunch's submission on behalf of the Minister that:

- (a) the scope of the stewardship power falls to be determined on a case by case basis depending on the factual context in which the power is engaged;
- (b) the administration as a whole may potentially become subject to the Minister's stewardship powers; and
- (c) where the Minister assumes control of the governance of the Corporation as a whole, he potentially also assumes the competence to control litigation brought by and against the Corporation. However, the extent of such control will depend on the character of the litigation and all the circumstances of the case because of the importance of the statutory presumption that legislation is not intended to interfere with fundamental rights including the right of access to the Court.



**Findings: were the present proceedings commenced by J2 Chambers with due authority from the Corporation?**

**Background to the present litigation**

22. Since in or about 2010 when a previous Government was in power and a previous administration was in charge of the Corporation, the validity of Government's attempts to exercise increased control over the Corporation has been controversial. That previous administration contemplated legal steps to protect the Corporation's assets from being acquired by Government altogether, steps which perhaps were not needed when the feared repeal of the Act did not materialise, and port dues alone were appropriated to the Crown. An April 30, 2010 Resolution of the Corporation memorialised the concerns about the feared abolition of the Corporation.
23. Accordingly, the attempt in these proceedings by the Corporation to obtain a declaration that the Government appropriation of port revenues in 2010 may be somewhat delayed. But the underlying grievance cannot be dismissed out of hand as merely the product of the litigation-happy imaginations of the present Corporation administration. It forms part of an increasingly combative relationship between central Government and the Corporation of Hamilton, which has evolved since then.
24. Whether or not it is fair to characterise the Corporation in recent years as 'litigation-happy', the litigation the Corporation has spawned of late has certainly contributed to the development of Bermuda public law. The Corporation has been involved (sometimes passively or defensively) in the following considered judgments over the last two years:
- *Re the Corporation of Hamilton* [2013] Bda LR 74 (contempt proceedings brought by the Ombudsman in relation to an investigation);
  - *Corporation of Hamilton –v- Ombudsman for Bermuda* [2014] Bda LR 1 (costs sought by the Ombudsman against the Corporation in relation to judicial review proceedings);
  - *Benevides-v-Attorney-General and Corporation of Hamilton* [2014] Bda LR 33 (an application to determine whether management workers could form part of a collective bargaining unit);
  - *Corporation of Hamilton-v- Minister of Home Affairs* [2014] Bda LR 39 (an attempt to judicially review the "First Stewardship Decision" after the stewardship was over in early 2014).
  - *Corporation of Hamilton-v- Minister of Home Affairs* [2014] SC (Bda) 84 Civ (5 November 2014).(an application to clarify the legality of the clamping policy).
25. It is easy to see why the Minister in or about the end of the first quarter of 2014 apparently formed the view that the Corporation was becoming a nuisance. On the

other hand, it is equally easy to see why the Corporation's leading lights may well have felt that, in light of its long and proud history dating back to at least 1897, Government's legislative incursions on its autonomy were themselves abusive. The building pressure might perhaps have been diffused by communications couched in delicate diplomatic terms. On April 10, 2014, however, the Mayor sent J2 Chambers, who were by this point working on the present application, an email which communicated a message that was neither delicate nor diplomatic:

*“Please do not drop any more writs against Government until we can talk. I have been warned by the Minister that if any more writs are dropped the COH Board will be replaced with an appointed Board as early as May...”*

26. Assuming the Mayor was accurately conveying a message conveyed to him by the Minister in April, 2013, the contents of which was ultimately communicated to other members of the Corporation administration, it is not difficult to imagine how this somewhat paternalistic and/or imperious missive might have stoked the fires of discontent rather than dampening them. In 2013 Government had further amended the Act to empower the Legislature to invalidate contracts entered into by the Corporation. In March, 2014, the Legislature had rejected high profile contracts entered into by the Corporation in relation to the Hamilton waterfront. These were significant changes to the constitutional fabric of the Corporation, a form of 'reverse-devolution', which one would reasonably expect (in the absence of consensus) to be controversial in the extreme.
27. How should the Corporation respond to these recent legislative 'attacks', combined with threats of further legislative 'attacks' if the past legislative attacks were legally challenged? The Mayor posited the highly pragmatic response of acknowledging the legislative might of Government and seeking to work with the Minister. The majority of his Council favoured a more aggressive approach over what they seem to have regarded as an unpalatable policy of appeasement favoured by the Mayor. This dichotomy of views provided the foundation for what by early 2015 would be manifested as a complete breakdown of working relations between the Mayor and the majority of his Council members. In failing to resolve their own internal differences, the Corporation's key elected officials effectively created the perfect justification for the Minister to take further regulatory action.

**Authority and/or instructions given to J2 Chambers in connection with the present proceedings**

28. Whether the commencement of the present proceedings were duly authorised ought in my judgment to be determined based on an analysis of the substantive factual and legal position, as opposed to on an artificial or technical basis. I approach the evidence with two legal policy considerations in mind. Firstly, the importance of the right of access to the courts suggests a cautious approach to invalidating the commencement of legal proceedings. And secondly, since the Corporation is a public authority, the presumption of validity in relation to official acts is potentially engaged.

29. It is true, as Mr. Dunch pointed out, that the Mayor was duly authorised on October 24, 2012 by the Corporation “to engage the services of Lawyers/Legal Representatives, as needed...” However, the Board subsequently (July 24, 2013) itself approved retaining Marshall Diel & Myers in connection with potentially suing Government over the wharfage fees issue. And on October 25, 2013, the Corporation formally resolved as follows:

*“That the Board approve to engage J2 Law Chambers in concert with Blackstone Law Chambers as per the terms of the letter of engagement dated October 11 2013 by J2 Chambers, to advance the challenge to Government on the 2010 and 2013 Municipality Reform Acts and their total impact on the Corporation of Hamilton on their autonomy and finance . Also that the Board approve to pursue all avenues of remedy and redress before the Court.”*

30. It is unrealistic to suggest, as Mr. Dunch argued, that the Mayor’s authority under the 2012 resolution to engage lawyers was still fully operative. It is equally unrealistic to suggest, as Mr. Johnston argued, that the October 25, 2013 Resolution was sufficient authority for him to file proceedings which had not yet been drafted in December 2014, over a year later, without further instructions. Accepting the contention that the deadlock made it impossible for (a) the October 25, 2013 general authority to J2 to be revoked, and (b) anyone to validly stop J2 from filing would in my judgment amount to writing a litigation lawyer’s charter. The crucial question really is: when the present proceedings were filed, were J 2 Chambers properly authorised to do so by the Corporation, despite the fact that by this juncture the Council was hopelessly split? I do not ignore the striking fact that on December 3, 2014 the Mayor had instructed J2 not to file the draft proceedings.

31. Nevertheless I find, based on the somewhat imprecise evidence before me, that J2 were properly authorised; and I accept the following key submissions advanced by Mr. Johnston on the Corporation’s behalf:

- (1) the proceedings were commenced following a November 2014 meeting while the Mayor was overseas. Under the Act, in the absence of the Mayor overseas, the Senior Alderman (in this case the Deputy Mayor) is competent to act both for himself and the Mayor. It is, just, possible to infer from post-filing communications between the Mayor and other Council members (together with paragraph 16 of the Mayor’s own Affidavit), that J2 received instructions to file from persons with actual authority to act on the Corporation’s behalf;
- (2) when there is real doubt as to whether persons purporting to enjoy authority to act for a body corporate possesses that authority, the most prudent course is to seek declaratory relief from the Court. However, on balance, the combination of the October 25, 2013 Resolution with a split on the Council resulting in the majority of the Council favouring litigation was, very marginally, sufficient apparent authority for J2 to file the present proceedings; and

- (3) further and in any event, the Mayor himself appears to have elected not to regard the proceedings as having been invalidly filed, despite consistently insisting that J2 was wrong to ignore his own instructions and other Council members were wrong to instruct J2. On January 8, 2015 he wrote J2 requesting them to “stay” the constitutional proceedings. The next day he forwarded this letter to the Court requesting the Registrar to stay the proceedings pending “*a full discussion of the Council at a properly called meeting*”. After a meeting at which “all hell broke loose”, the Mayor on January 21, 2015 reported to the Minister that it was impossible for any further Council meetings to take place for the duration of the administration.
32. J2 was sailing very close to the wind by taking instructions from one faction of the clearly divided administration in circumstances where the true legal position was that, in terms of the ability to actually authorise the specific filing which was made, the deadlock rendered such authorisation impossible—at least as long as the Mayor was on the Island and able to discharge his functions. As ‘*Cordery on Solicitors*’, 4<sup>th</sup> edition at paragraph 114, states in a passage cited by the Minister’s counsel:

*“A special authority is essential to entitle a solicitor either to commence an action in his client’s name or to appear for and represent him as a defendant in an action, or to take part, on his behalf, in any proceedings. It is, however, open at any time to a purported plaintiff to ratify the act of the solicitor who started the action, to adopt the proceedings and to instruct him to continue them.”*

33. It is impossible to identify any compelling urgency for filing these proceedings when they were filed, although the delay in seeking some aspects of the relief has, in the event been raised as a reason for viewing at least one of the constitutional complaints as lacking merit. However, Mr. Johnston invited the Court to distinguish the questions of authority to commence proceedings generally and instructions to approve the filing of the Court papers which were eventually filed in December 2014. While these two questions overlap and the distinction is somewhat blurred, I find that the October 25, 2013 Resolution combined with J2’s related retainer letter do evidence a special retainer to prepare and file the present constitutional proceedings. However, by necessary implication, that retainer can only be read as including an implied term that the Corporation would be able to control the proposed litigation by giving supplementary instructions by way of approving final court papers, deciding whether and if so when to proceed with filing, and generally giving instructions with respect to the conduct of the litigation.

### **Conclusion on authority issue**

34. I decline to find that the proceedings were filed without authority fully accepting that the evidential picture is somewhat murky in terms of elucidating precisely who gave J2 what instructions when and what authority they possessed to bind the Corporation. The relevant officers declined to waive privilege in the relevant communications as they were entitled to do. In analysing the evidence, I have consciously leaned towards a finding of authority to file primarily because of the importance of the constitutional

principle of access to the Court. Save in clear cases, it seems to me that the Court should take a cautious stance towards invalidating the filing of proceedings.

35. There are potentially an infinite variety of circumstances where lawyers whose authority to do so may be uncertain ought to be free to file proceedings, most obviously to preserve limitation proceedings and valuable causes of action, without undue anxiety about the risk of facing personal liability in costs for commencing proceedings without proper authority. Indeed, in the present case the perception appears to have been on the part of those instructing J2 that the Mayor was improperly seeking to facilitate the Minister's desire to halt what the instructing parties had been advised was entirely valid and important public law proceedings against the Government. The Mayor, in contrast, clearly perceived that his collaboration with the Minister was essential to preserve the existing democratically elected governance structure. Irrespective of the merits of these opposing perceptions, there was some credence to the argument that those instructing J2 had the better claim to be carrying out the will of the Corporation as expressed in the October 25, 2013 Resolution, somewhat rigidly viewed as the last formal word on the litigation authority issue.
36. The authority question can for all practical purposes be resolved in cases of doubt in the context of considering who has authority to control the prosecution of the action, as has occurred in the present case where the Minister has sought to instruct attorneys to take over the action, albeit with a view to its discontinuance.

**Findings: does the Stewardship Notice confer authority on the Minister to seek leave to discontinue the present proceedings?**

37. For the reasons set above, I find that the stewardship powers contained in section 7B(6) of the Act may as a matter of law be deployed to assume responsibility for the governance functions of the Corporation including the right to control litigation in relation to the Corporation. Also for the reasons set out above, I find as a matter of law that the Corporation's statutory constitution requires all significant decisions to be approved by the Mayor and at least two Aldermen, so that the governance function potentially breaks down altogether where those key officials are unable to agree.
38. It is clear from the Stewardship Notice in the present case and the undisputed fact of ongoing deadlock based on the inability of the Mayor and the majority of his Council to work together, that the Minister has used the relevant statutory power to assume temporary control of the governance function, a function which carries with it the power to instruct attorneys on behalf of the Corporation in general terms.

39. The Stewardship Notice provides as follows:

*“DATED this 26<sup>th</sup> day of January 2015*

*Pursuant to section 7B(6) of the Municipalities Act 1923 (“the Act”), the Minister responsible for municipalities hereby gives notice that:*

*WHEREAS*

*The Minister charged with responsibility for municipalities under section 61 of the Constitution being the Minister of Home Affairs, is authorized under section 7B (6) of the Municipalities Act 1923, with the approval of Cabinet, 'Where, due to the poor state of any of the Corporation's infrastructure or services' to 'temporarily assume stewardship of a Corporation's infrastructure, function or service, in order to repair or maintain it.'*

*AND WHEREAS*

*As a result of maladministration, exacerbated by the inability of the Corporation to work together, the Minister believes that municipal governance services offered by Common Councillors, Aldermen, and the Mayor of the Corporation of Hamilton have broken down, such that the governance of the Corporation cannot be effectively carried out without the stewardship of the Minister;*

*AND WHEREAS*

*The Minister believes that, in accordance with section 7B(6) of the Act, it is in the public interest to temporarily assume control of the governance functions of the Corporation of Hamilton.*

*NOW THEREFORE*

*THE MINISTER ASSUMES TEMPORARY STEWARDSHIP OF THE GOVERNANCE FUNCTIONS OF THE CORPORATION OF HAMILTON FROM THE DAY AND DATE HEREINBEFORE STATED UNTIL FURTHER NOTICE.*

*SIGNED this 26<sup>th</sup> day of January 2015*

*Minister of Home Affairs*

*Government of Bermuda"*

40. The draft Amended Originating Summons seeks declarations that the Stewardship Notice is invalid because it contravenes section 6(8) and 13(1) of the Constitution and that section 7B(6) itself is (for reasons which I do not presently understand) void and of no legal effect. These prayers for relief at first blush seem highly tenuous, and a somewhat self-serving attempt to justify the continuance of the present proceedings. It is not seriously arguable that the Stewardship Notice is wholly invalid on the facts of the present case which cried out for the Minister to use section 7B(6) to affix a temporary regulatory rudder to an otherwise rudderless municipal ship.
41. This interlocutory view does not mean that, given the opportunity, Mr. Johnston might not be able to find technical faults with the Notice. It might, perhaps, be fairly contended, that the better peg to hang the Stewardship Notice hat on was "*force majeure*", rather than "*maladministration*". In the context Mr. Howard's contention that the Minister ought to have competence to act by dint of necessity may well have considerable merit. But these are highly technical concerns when it is an affront to

common sense to suggest that in substantive terms the Minister's intervention was not clearly justified.

42. On the other hand, based on statements made in a press release when the Minister announced the issuing of the Stewardship Notice, draft paragraph 31 of the Originating Summons alleges that the Notice "*was designed to prevent CoH's access to court*". This plea has far more substance, for present purposes, because of the following supportive facts:

(a) on various occasions in 2014, the Mayor reported to his fellow elected officials the Minister's alleged threat to further amend the Act to effectively abolish the elected governance structure if the Corporation did not cease suing the Government at a time when the present proceedings were in contemplation;

(b) the Minister in his January 26, 2015 press release acknowledged that the heart of the deadlock within the Corporation was a dispute over whether litigation should be commenced against the Government and appeared to imply that the present proceedings (as well as the decision to issue them) "*make absolutely no sense and they have resulted in a misuse of taxpayer's funds*".

43. Is it consistent with the rule of law for the Minister to be viewed as empowered by section 7B(6) not simply to assume control of the governance functions of the Corporation when they have undoubtedly broken down (together with the right to control litigation in general), but further to deploy that power to discontinue proceedings that have brought against the Minister himself? Is it possible to infer that Parliament must have intended the Minister himself, when exercising a temporary regulatory power, to be able to effectively be a judge in his own cause and free to decide the merits of litigation brought by the Corporation against the Minister and other emanations of the Crown? These questions only have to be asked to demonstrate that section 7B(6) cannot be construed as conferring on the Minister such extraordinary implied powers. Such a construction would be inconsistent with the letter and/or spirit of section 6(8) of the Constitution, which guarantees a right of access to an independent and impartial court for the adjudication of civil rights and obligations, including the right to seek relief under section 15 for breaches of the fundamental rights protected by the Constitution.

44. In the case of an ambiguous statutory provision, there is a presumption that Parliament did not intend to interfere with constitutional rights. Where Parliament is alleged to have enacted legislation which unambiguously interferes with constitutional rights, the citizen has a constitutional right to have a court determine whether or not his or her rights have been infringed and this Court may in appropriate cases declare the offending legislation to be void and of no legal effect. It is well settled that bodies corporate (artificial persons) can invoke some constitutional rights including fair hearing rights. Section 6(8) of the Constitution provides:

*"Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and*

*where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”*

45. Mr. Johnston cogently supported his submission that the Minister could not validly discontinue proceedings brought against himself by citing the second paragraph of the following passages in the speech of Lord Hoffman in *Matthews-v-Minister of Defence* [2003] 1 AC 1163:

*“28.... A right to the independence and impartiality of the judicial branch of government would not be worth much if the executive branch could stop you from getting to the court in the first place. The executive would in effect be deciding the case against you. That would contravene the rule of law and the principle of the separation of powers.*

*29. These principles require not only that you should be able to get to the court room door. The rule of law and separation of powers would be equally at risk if the executive government was entitled, as a matter of arbitrary discretion, to instruct the court to dismiss your action. There are different ways in which one could draft a law to give the executive such a power. It might say that the cause of action was not complete without the government's consent. That would look like a rule of substantive law. Or it could provide that the government could issue a certificate saying that the action was not to proceed. That looks like a procedural bar. But provided one holds onto the underlying principle, which is to maintain the rule of law and the separation of powers, it should not matter how the law is framed. What matters is whether the effect is to give the executive a power to make decisions about people's rights which under the rule of law should be made by the judicial branch of government.”*

46. It is equally possible to support the same conclusion by demonstrating that the general principle that the holders of any office ought not to act where they have a conflict of interest enjoys very wide recognition. In company law there is a rule in favour of fair dealing and against self-dealing. In the insolvency context, it is well recognised that committee of inspection members who are generally empowered to assist liquidators to adjudicate creditors' proofs of debt cannot participate in the adjudication relating to their own claims. Section 7B as a whole is designed to promote good governance. Similar rules apply in relation to public offices as well, albeit that they are often expressly formulated in a way which is designed to prevent conflicts between personal and public duties. Looking at the matter in substantive and simple practical terms, there is a glaring conflict between the interests of the Executive branch of Government in bringing hostile litigation against it to an end and the interests of the claimant in enjoying access to the court.

47. Applying the rules of construction which Mr. Dunch invited the Court to be guided by, it is impossible to sensibly construe section 7(B)(6) as conferring on the Minister, by necessary implication, the power to use his stewardship powers to discontinue



proceedings brought against himself and or any other limb of the Executive Branch of Government which, broadly viewed, is being sued.

**Findings: should the present proceedings be stayed?**

48. It does not follow that because the Minister has no right to take over the control of the present proceedings that he cannot invite the Court to impose a stay until such time as the temporary stewardship comes to an end. Such relief would be wholly consistent with the temporary nature of the stewardship power, the inability of the Corporation's elected management to validly direct the course of the present litigation, and the fact that the very root of the deadlock is a division of views as to whether or not the present proceedings should be pursued. A stay would also preserve the Corporation's right of access to the Court, which implicitly includes the right for its duly elected officers to decide (whenever they can) whether to exercise or relinquish these access rights.
49. A similar remedy is often granted in the private law context of proceedings which cannot validly be pursued because of difficulties in obtaining the requisite authority and/or instructions. Indeed, such relief was granted in a case where it was clear that no authority to commence the proceedings had been given. In *Breckland Group Holdings Ltd.-v- London and Suffolk Properties Ltd and others* [1989] BCLC 100, which Mr. Dunch placed before the Court, Harman J stayed unauthorised proceedings to see whether the board of directors might approve the commencement of the proceedings the following month.
50. In the present case it seems likely (at the present juncture at least) that the stewardship is likely to last until the next municipal election takes place in early May this year. It is to be hoped that after those elections the deadlock will be broken and the Corporation's duly elected officers will be able to instruct lawyers to take control of the present litigation. On the facts of the present case, it cannot sensibly be argued that the majority of the Council who wish to pursue the litigation have any residual authority to pursue the challenge on an urgent basis before the deadlock is broken because:
  - (a) having regard to the legal findings recorded above on the proper interpretation of the stewardship jurisdiction as applied to the largely uncontested facts of the present case, the interests of justice do not require the Corporation faction which is opposed to the Mayor to be able to pursue what appears to be a very weak challenge to the Stewardship Notice at the present time ;
  - (b) none of the other constitutional challenges appear on their face to require urgent relief; and/or
  - (c) the Stewardship Notice in all the circumstances of the present case does not justify following by analogy the exceptional approach of allowing a board of directors which has been displaced by provisional liquidators to instruct lawyers to oppose the petition. The winding-up remedy is a far more draconian form of relief which potentially brings the life of a

company to an end. The Minister's stewardship powers in the present case are being exercised in circumstances where:

- (i) there is no evident prospect of the governance function deadlock being broken before the next municipal elections, due in less than two months' time;
- (ii) the relevant powers can only validly be used to either maintain the status quo or to heal the breach between the deadlocked parties. Section 7B(6) cannot be used to bring the life of the Corporation to an end;
- (iii) the Minister has undertaken to consult with the Mayor during the life of the Stewardship Notice. No doubt he will consider consulting with the other side of the administrative 'divide' as well, to the extent that appropriately civil and collaborative communications appear to be possible.

51. The merits of the constitutional challenges to various recent amendments to the Act based on section 13 of the Constitution were addressed in argument. It was submitted on behalf of the Minister that because the Corporation was financed through "*public funds*", it was clear that these claims were bound to fail (Constitution, section 13(3)). Mr. Johnston rightly pointed out that only statutory corporations which are wholly financed by public funds are debarred from seeing relief under section 13; the Corporation is not solely dependent on such funds. So these complaints cannot be dismissed out of hand at this stage, even if one suspects that they are far from straightforward claims.

### **Conclusion**

52. In summary, I find that section 7B(6) of the Act empowers the Minister to assume stewardship of the governance functions of the Corporation in circumstances where those functions have broken down. In the present case this breakdown has occurred because of deadlock which prevents valid resolutions being passed. I further find that the governance power includes the right to instruct lawyers on behalf of the Corporation.

53. However, in the present case, where the proceedings have been brought against the Minister, the Minister may not validly assume control of the present proceedings and bring them to an end. Because the purpose of the present proceedings is to challenge decisions made by the Minister and the Executive and Legislative branches of Government and the Corporation has a fundamental right to:

- (a) determine for itself whether or not to pursue its litigation claims; and

(b) have the Judicial branch of Government decide whether or not its claim against the Government is meritorious, should it decide to pursue the present action.

54. The Minister is, however, entitled to an Order staying the present action until further order, in the hope that when the deadlock is broken the Corporation's duly elected officers can decide for themselves whether or not to proceed. It presently appears that the deadlock may not be broken until after the next municipal elections, but those elections are only a matter of weeks away. Having regard to the nature of the claims, there is no apparent reason why those members of the Mayor's Council who are in favour of pursuing the present claim should be permitted on exceptional grounds of public policy to continue to prosecute the present action while they lack the statutory authority to properly instruct the firm of attorneys which was initially retained to conduct the present proceedings.

55. I will hear counsel if necessary on any issues arising from the present Ruling. However, unless any party applies within 21 days by letter to the Registrar to be heard as to costs, I would make no order as to costs.

Dated this 19<sup>th</sup> day of March, 2015 \_\_\_\_\_  
IAN R.C. KAWALEY CJ