IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

CICA Civil Appeal No. 006 of 2020
(Formerly G 0195 of 2019)

B E T W E E N:

(1) THE CABINET OF THE CAYMAN ISLANDS

(2) THE LEGISLATIVE ASSEMBLY OF THE CAYMAN ISLANDS

Appellants

-and-

SHIRLEY ELIZABETH ROULSTONE

Respondent

-and-

THE NATIONAL TRUST OF THE CAYMAN ISLANDS

Intervener

BEFORE:	**The Rt. Hon Sir John Goldring, President** **The. Hon Sir Richard Field, JA** **The Rt. Hon Sir Jack Beatson, JA**
Appearances:	**Mr. Alan Maclean QC and Ms Jessica Boyd instructed by Mr. Michael Smith of the Attorney General's Chambers for the Appellant** **Mr. Chris Buttler instructed by Ms Kate McClymont of Broadhurst LLC for the Respondent** **Mr. Tom Lowe QC instructed by Nelson & Co for the Intervening Party**
Heard:	**6-7 May 2020**
Draft Circulated:	**15 June 2020**
Judgment delivered:	**2 July 2020**

JUDGMENT

The Rt. Hon Sir Jack Beatson, JA

I. Overview

1. This is an appeal by the Cabinet and the Legislative Assembly of the Cayman Islands ("the Government") against the order dated 2 March 2020, and filed on 11 March 2020, of Justice Tim Owen QC, Acting Judge of the Grand Court, quashing the ***Referendum (People-Initiated Referendum Regarding the Port) Law 2019*** (the "***Port Referendum Law***"). ***The Port Referendum Law*** made provision for the first ever "people-initiated" referendum under section 70 of the ***Cayman Islands Constitution 2009*** ("***the Constitution***"). The referendum concerns the Government's plan to develop a cruise port terminal in George Town and to enlarge and refurbish the cargo port. The judgment that follows is the judgment of the Court to which all three members have contributed.

2. Section 70 of ***the Constitution*** (set out at [18] below) provides *inter alia* that, where a petition calling for a referendum on a matter or matters of national importance is signed by 25% of Caymanians qualified and registered to vote, "a law enacted by the Legislature shall make provision to hold a referendum amongst persons registered as electors in accordance with section 90" of ***the Constitution***. Where more than 50% of those registered to vote assent, the outcome is binding on the Government and the legislature.

3. The sole question before the Judge and this court is whether the ***Port Referendum Law*** is compatible with ***the Constitution***. Mr Alan Maclean QC on behalf of the Government submitted that the Judge erred in interpreting section 70 as requiring the Legislative Assembly to enact a general law providing for the holding of people-initiated referendums because there was neither textual support nor a purposive justification to so interpret it. He also submitted that, if a general law is required, the Judge erred in quashing the ***Port Referendum Law*** because declaratory relief would have been adequate and would have better respected the separation of powers.

4. Mr Chris Buttler on behalf of the Respondent, Ms Shirley Roulstone, supported by Mr Tom Lowe QC on behalf of the Intervening Party, the National Trust for the Cayman Islands, submitted that the ***Port Referendum Law*** is unconstitutional for one of two reasons. The first is that, as the Judge held, it is a specific law regulating this particular referendum rather than a general or "framework" law regulating all people-initiated referendums. The second and alternative reason (raised by a Respondent's Notice) is that, even if an issue specific law providing for a particular referendum is not necessarily unconstitutional, the ***Port Referendum Law*** is constitutionally flawed because (for the reasons summarized in [9] – [10] below) it

created an unequal playing field which was heavily stacked in favour of the Government side to an extent which failed substantively to secure the constitutional right under section 70 of ***the Constitution*** to a fair and effective vote.

5. The factual background and history of these proceedings are clearly and fully set out by the Judge below in paragraph [6] of his judgment and its 22 sub-paragraphs to which reference can be made. Accordingly, for the purposes of this judgment the shorter summary below suffices.

6. The Government has been developing its plan for a cruise port terminal since 2013. It was a manifesto commitment of the Progressive Party in the general election in 2013 which it won, and in the 2017 election, after which it formed a coalition government. The plan aroused strong feelings on both sides for various reasons including environmental, financial and employment related ones. In August 2018, a group calling itself Cruise Port Referendum Cayman ("CPR Cayman") started collecting signatures for a petition calling for a referendum on the issue. The introductory section of the petition documents stated that "The aim of this petition is … to start a people-initiated referendum, via petition, on whether the country should move forward with the proposed Cruise Berthing Facility in George Town Harbour". The petition itself stated that the signatories prayed that "The proposed cruise berthing facility, a matter of national importance, be decided solely by referendum pursuant to the Constitution". There was what is described in the evidence as an "increasingly vitriolic and antagonistic atmosphere" (Stran Bodden, 2nd Affidavit §26) and an "aggressive campaign" (Renard Johan Moxam, 1st Affidavit §§9 and 17) in all types of local media including social media. On 12 June 2019 CPR Cayman informed the Government that it had obtained the signatures required and presented the signed petitions to the Elections Office. In August it informed the Elections Office that it intended to challenge the process the Office had adopted to verify the signatures as impairing the constitutional right to petition but later stated that it would not do so because it had become clear that the required number of verified signatures would be achieved. On 11 September 2019 the Elections Office announced that the verification process had been completed and that the 25% threshold required by section 70 had been met.

7. On 3 October 2019 the Government put the Referendum (People-Initiated Referendum Regarding the Port) Bill 2019 before the Legislative Assembly. That day it also announced that the referendum would be held on 19 December 2019, and that it had settled the referendum question as "Should the Cayman Islands continue to move forward with building the cruise berthing and enhanced cargo port facility?" The Respondent's lawyers maintained that aspects of the Bill published were incompatible with section 70. In particular it was said that there was no basis in law for settling the question and the date without first enacting a law prescribing

how to do so, that the referendum question was not neutral, and that the date gave insufficient time to find and train referendum observers and its proximity to Christmas would discourage voter participation because of electors who would be away from the Islands on leave. At the hearing, Mr Maclean accepted that there had been a number of false starts. On 29 October 2019 government amendments to the Bill, which the Judge stated (at [6(q)] and [60]) were "clearly designed to meet some of the objections" but made no change to the question, were passed. The Legislative Assembly passed the Bill on 30 October, and on 31 October the Governor assented to it and it was published in the Gazette. On that day the Government revoked its previous decisions settling the referendum question and the date of the referendum and made new decisions on those matters in exactly the same terms as those it had announced on 3 October. The decisions were published in the Gazette on 1 November 2019.

8. The Respondent, a member of CPR Cayman, and the National Trust for the Cayman Islands launched separate judicial review proceedings on 21 and 25 November 2019. The grounds of challenge and the way they narrowed as the result of concessions by the Government and changed at the start of the substantive hearing before the Judge, are described below. At a hearing on 3 December 2019, the Judge gave the Respondent the necessary leave and ordered that the referendum was not to take place until the determination of these proceedings. At that hearing the National Trust withdrew its own challenge and became an Intervening Party in these proceedings. After leave had been given, the Cabinet revisited its refusal to change the referendum question in the light of the Respondent's concerns. At a meeting on 17 December 2019 it resolved to change the question to "Should the Cayman Islands continue to proceed with building the cruise berthing and enlarged and refurbished cargo port facility?" and on 18 December 2019 published that question in the Gazette.

9. When these proceedings were launched the challenge did not include a ground maintaining that section 70 of ***the Constitution*** required a general or "framework" law for people-initiated referendums so that the ***Port Referendum Law*** as a specific law regulating this particular referendum did not qualify. The ground based on section 70 was that the ***Port Referendum Law*** undermined the purpose of section 70 to afford the Caymanian electorate a free, fair and informed opportunity to exercise the right to a referendum given to them by it. The other pleaded grounds were: the Government's decisions about the date of the referendum and the wording of the question had been unlawfully pre-determined; in passing the Port Referendum Law the Government had failed to have due regard to the need to protect the environment as required by section 18 of ***the Constitution***; and the original wording of the question was not neutral as required by section 4(3) of the ***Port Referendum Law***, and involved formulating the question differently to the way it was in the petition.

10. The issues narrowed as a result of the Government's agreement to change the referendum question, acceptance that it was under a duty to have regard to environmental concerns, and the stay granted on the referendum date. The original grounds that remained at issue were the absence in the ***Port Referendum Law*** of specific provision for voter registration for people-initiated referendums, and rules governing campaign finance, broadcasting, and the provision of objective information. These absences, it was submitted, undermined the purpose of section 70 because they gave the Government an advantage and decreased the prospects of its position being defeated in the referendum. The proposition that a general framework law was constitutionally necessary was first articulated in Mr. Buttler's skeleton argument shortly before the substantive hearing, and the claim was amended at the beginning of the hearing to reflect this.

11. The Government has stated that it agrees that as a matter of policy it is preferable to enact a framework Bill regulating all section 70 referendums and intends to introduce and promote one later this year but maintains that it is not required to do so by section 70. Its skeleton argument for this appeal states (at paragraph 22) that, as the issue of a referendum on the cruise port project arose at a time when there was no such general law, it was "certainly permitted, indeed probably bound, to honour the petition by passing a referendum-specific law".

12. In the conclusion to his detailed and clear judgment, the Judge, at [66], summarized his decision as follows:

> "*For reasons of legality and on the basis that such a law will best guarantee the constitutional right to a fair and effective vote in a people-initiated, binding referendum, I find that the [Port] Referendum Law 2019 is incompatible with s.70 of the Constitution because it fails to satisfy the requirement for a general law governing all s.70 referendums and is itself not in accordance with such a law.*"

He stated (at [65]) that on the materials before him there was a range of measures which may be considered for inclusion in a general framework law to ensure a fair and effective right to vote but that there was no obvious consensus on what these must be. He expressed no view on this but stated that "it must be for the Legislature to decide what a general Cayman Referendums Law should contain". He ordered that the ***Port Referendum Law*** be quashed.

13. The judge had previously referred (at [62] – [65]) to the specific features of the ***Port Referendum Law*** which Mr. Buttler submitted were legally and constitutionally flawed as providing support for the arguments for a requirement that there be a general "framework" law.

But his decision was that section 70 of ***the Constitution*** required a general framework law rather than a specific law, a deficiency described by Mr Maclean as a deficiency "in form". It was therefore not necessary for him to reach a decision on those matters, which, if established could be characterized as substantive deficiencies, and he did not do so. He stated (at [65]) that he did "not intend to rule on whether the absence of a general law has resulted in substantive unfairness in the context of the campaign to date".

14. The remainder of this judgment is organised as follows. The constitutional and legislative framework and relevant guidance in the Code of Good Practice on Referendums adopted by the Venice Commission is in Part II. Parts III and IV summarise the Judge's decision and the parties' submissions. Part V contains the analysis and the reasons for the overall conclusion that section 70 does not require the enactment of a general referendums law and that the ***Port Referendum Law*** is not constitutionally flawed on the grounds advanced in the Respondent's Notice, and Part VI summarises the conclusions.

II. Constitutional and legislative framework

The Constitution

15. Negotiations between representatives of the United Kingdom and the Cayman Islands concluded in February 2009 with agreement on the text of a new constitution for the Cayman Islands. In May 2009 there was a referendum on the constitution and 62% of the Caymanians who voted approved the proposed Constitution. On 10 June 2009, the Cayman Islands Constitution Order 2009 SI 2009 No. 1379 was enacted by the Privy Council. The Constitution is in Schedule 2 to the Order.

16. Under ***the Constitution***, the powers of the Legislative Assembly, which consists of the Speaker; 18 elected members; and the Deputy Governor and the Attorney-General *ex officio*, are limited and not exclusive. By section 59(2) the Assembly may only legislate "subject to" ***the Constitution***, and by sections 80, 81 and 125 the Governor and the Queen have reserved powers. The Government (see sections 49, 51-52) consists of the party or parties commanding the support of a majority of the elected members of the Assembly.

17. Section 70, the provision at the heart of this appeal, which empowers people-initiated referendums, introduces an element of direct democracy into what remains principally a system of representative democracy. The Court was told that it is the only example of such direct democracy in British Overseas Territories. It is one of two constitutional provisions on

referendums on "a matter or matters of national importance". The other is section 69 which deals with referendums initiated by the Legislative Assembly. Both are in Part IV of ***the Constitution***, headed "The Legislature", which is primarily concerned with the competence and powers of the Legislative Assembly, including qualification for membership and tenure of office, and elections.

18. Sections 69 and 70 provide:

> ***"Power to provide for a referendum***
>
> ***69***
>
> *A law enacted by the Legislature may make provision to hold a referendum amongst persons registered as electors in accordance with section 90, on a matter or matters of national importance, when so resolved by the majority of the elected members of the Assembly; but the question of whether the Cayman Islands should seek any amendment to this Constitution that may result in their independence shall be deemed to be a matter of national importance.*
>
> ***People-initiated referendums***
>
> ***70***
>
> *(1) Without prejudice to section 69, a law enacted by the Legislature shall make provision to hold a referendum amongst persons registered as electors in accordance with section 90 on a matter or matters of national importance that do not contravene any part of the Bill of Rights or any other part of this Constitution.*
>
> *(2) Before a referendum under this section may be held-*
>
> *(a) there shall be presented to the Cabinet a petition signed by not less than 25 per cent of persons registered as electors in accordance with section 90;*
>
> *(b) the Cabinet shall settle the wording of a referendum question or questions within a reasonable time period as prescribed by law; and*
>
> *(c) the Cabinet shall make a determination on the date the referendum shall be held in a manner prescribed by law.*
>
> *(3) Subject to this Constitution, a referendum under this section shall be binding on the Government and the Legislature if assented to by more than 50 per cent of persons registered as electors in accordance with section 90."*

19. Section 90 of ***the Constitution*** deals with the qualifications of electors and entitlement to be registered as such. Those who are entitled to be registered as electors under it are persons who

were so entitled before its date of commencement and Caymanians who are eighteen years old and (disregarding certain periods of absence) have been resident in the Cayman Islands for not less than two out of the four years preceding the date of registration. Those who on the date of a writ ordering an election are otherwise qualified, have not attained the age of eighteen years, but will do so before the polling day are also entitled to be registered. The process by which persons may register as electors in elections to the Legislative Assembly is to be found in the ***Elections Law (2017 Revision)***, as summarized at [25] below. Section 5 of the ***Port Referendum Law*** summarized at [30] below provides that persons registered to vote under the ***Elections Law*** may vote in the referendum on the cruise port terminal and cargo port.

20. Part VIII of ***the Constitution*** provides for "Institutions Supporting Democracy". One of the institutions in it is the Constitutional Commission required by section 118. The Commission is appointed by the Governor after consultation with the Premier and the Leader of the Opposition and is "not to be subject to the direction or control of any other person or authority", i.e. is to be independent. Its functions are to advise the Government on questions concerning constitutional status and development in the Cayman Islands, to publish reports and other documents on constitutional matters, and to promote the understanding and awareness of ***the Constitution***. It appears that in the course of considering what legislative response was needed to CPR Cayman's petition the views of the Constitutional Commission were not sought or taken into account by the Cabinet or the Legislative Assembly. It is, as the Judge stated (at [17]) surprising that before deciding how to respond to this the first people-initiated referendum the Government did not consult the body whose functions under ***the Constitution*** include advising the Government on questions concerning constitutional matters.

21. Although not part of the legislative framework, it is convenient at this point to refer to two documents emanating from the Constitutional Commission in 2011 and 2014 to which there has been no response by Government. They were relied on by the Respondent in support of her submission that the wording of section 70 is ambiguous on the issue of a general versus a specific referendum law, and they were referred to by the Judge. The first is a research or discussion paper on people-initiated referendums dated 13 October 2011. The judge stated (at [62]) that the views of the Commission were "of course not determinative" but he described the paper (at [65]) as "thoughtful and well-reasoned" and he had regard to it. It stated that "the legislation required by ***the Constitution*** to govern referendums has not yet been implemented", noting that "some key elements to be included" have been described in section 70(2)(b) and (c). It set out the "basic process" it contemplated for the administration of such referendums and what legislation was needed. That included standardized petition forms, clear definition of the petition question approval process, disclosure of financing, matters concerning the

promotion of the petition, the timetable, the collection and verification of signatures, and the referendum itself. The paper recommended that legislation be passed "as soon as possible" to govern the referendum process whether initiated by the legislature pursuant to section 69 of ***the Constitution*** or by the people of the Cayman Islands under the provisions of section 70. It also stated that the context in which the right to a people-initiated referendum under section 70 should be viewed was one of movement to include elements of direct democracy in a representative democracy.

22. The judge stated at [16] that he was informed that it was not known whether the 2011 paper, which was in the public domain, was provided to the Government of the day, that there is no record of such provision or receipt by the current government, and that it was believed that Government did not respond to the paper. He stated that, in the light of the constitutional status of the Commission, he found it difficult to believe that the Government was not formally served with a copy of the paper.

23. The second document is a letter dated 14 October 2014 from a differently constituted Commission to the Governor and copied to the Premier and Leader of the Opposition. It raised 34 short points about ***the Constitution*** and was "strongly recommending" that the Premier and Leader of the Opposition establish a committee to consider them in further detail. One of the points concerned section 70. The letter stated that "it is unclear as to whether this section requires that a law be enacted which governs all people-initiated referendums or simply a law enacted providing for each individual referendum when it is petitioned for". The judge stated (at [65]) that it was surprising that the Government did not take up the Commission's suggestion or make any response to the Commission's concerns. This history of non-responsiveness and more recently apparent non-engagement with the Constitutional Commission is indeed very surprising. Reference has been made (at [11] above) to the Government's stated intention to promote and introduce a general referendum law later this year. It remains to be seen whether the Government will consider the impressive previous work of the Constitutional Commission and consults it as to the way forward.

The Elections Law (2017 Revision)

24. The issue before the court is the constitutionality of the ***Port Referendum Law***, but that law makes provision for the application of the ***Elections Law (2017 Revision)*** to the referendum, albeit with modifications. The provisions of the ***Elections Law*** are thus an important part of the context and it is appropriate first to summarise those of its provisions which are relevant to the rival submissions on the constitutionality of the ***Port Referendum Law***. On behalf of the

Government it is submitted that there is no constitutional gap in the provisions for the referendum. Its case is that, on proper analysis, the complaints of the Respondent either concern matters (such as campaign finance and the provision of objective information) on which there is substantial international variation, or (in relation to broadcasting), relate to the application of the ***Elections Law*** as modified and questionable behaviour by the Government, rather than the constitutionality of the ***Port Referendum Law***. The Respondent's case is that there is a constitutional gap in the provisions for the referendum because of the absence of a general law governing people-initiated referendums or alternatively because flaws in the ***Port Referendum Law*** unacceptably undermine the right of Caymanians to determine whether or not to veto the cruise port project.

25. Section 11(1) of the ***Elections Law*** deals with the process by which individuals may register as electors. It provides that qualified persons who are not registered in the current register and wish to have their names placed on the Register of Electors shall "on or before the registration date" apply to have their names entered in the register for the following quarter. By section 2(1), the "registration date" means "the first day of January, April, July or October" next occurring after the last Register of Electors came into force or such other day as the Governor may by Notice published in the Gazette appoint. By section 11(3) the registration date specified in section 2 is deemed to be the date of registration for the purposes of section 90 of the Constitution. The lead time between the announcement of an election and the date of the poll is governed by sections 28 and 29. Once the Governor issues a writ calling an election, by section 29(2) the date for the receipt of nominations is to be at least seven clear days after the Returning Officer publishes a notice specifying the date and, by section 28(2) the date of the poll shall be not less than six weeks after the day fixed for nominations. The total lead time is therefore a minimum of seven weeks. Section 52 makes provision for postal voting for those unable to vote in person due to their absence outside the Islands.

26. Part V of the ***Elections Law*** deals with election expenses. Sections 65 and 72 prohibit "third party financing" by any person other than a candidate for election to the Legislative Assembly, his election agent, or persons authorized in writing by the candidate from incurring expenses with a view to procuring the election of the candidate save where this is permitted by section 72. Section 67 limits the amount of expenses in respect of a candidate to CI $ 40,000. Candidates are required by section 69 to make returns to the Supervisor of Elections as to election expenses within thirty-five days of the result.

27. Part VI of the ***Elections Law*** deals with political broadcasts. Section 74 provides that no political broadcast or political announcement shall be made except in accordance with Part VI, and section 75(1) prohibits a political broadcast or political announcement from including any of the matters listed. They include abusive comment on any race or religion; blasphemous, indecent, profane, and defamatory matters; scenes of nudity, crime or violence, and matters contrary to Cayman Islands law. Section 75(2) requires such a broadcast or announcement to indicate the name of the political party or candidate responsible for it and the fact that the broadcast or announcement has been paid for. Section 78 provides that nothing in Part VI shall be construed as precluding a Minister from broadcasting "an explanation of legislation passed or action taken or to be taken or Government policy or policy approved by the Assembly" or "an appeal on a matter of national importance".

The Port Referendum Law

28. The ***Referendum (People-Initiated Referendum Regarding the Port) Law 2019*** was passed by the Legislative Assembly on 30 October 2019 and published on 31 October. It is, as the Judge stated at [18], "a bespoke item of legislation exclusively directed at a single referendum with no wider application to potential future referendums".

29. Section 3(1) provides that a referendum shall be held on the matter of national importance that is specified in section 4. Section 3(2) provides that the Cabinet shall appoint and publish a day for the referendum not earlier than the thirtieth day after such publication. As well as setting out the matter of national importance that is to be decided by the referendum, section 4 also states by when and subject to what parameters the Cabinet is to settle and publish the wording of the referendum question and deals with the form of ballot paper and when the result will bind the Government, in this last respect duplicating section 70(3) of ***the Constitution***. Section 4 provides:

> "***4.***(1) *The matter of national importance is whether the Islands should continue to move forward with the building of the cruise berthing and enhanced cargo port facility.*
>
> (2) *The Cabinet shall, in accordance with section 70(2)(b) of the Constitution, settle the wording of the referendum question for determining the matter of national importance under subsection (1) within thirty days of the coming into force of this Law.*
>
> (3) *In settling the wording of the referendum question the Cabinet shall, as far as possible, ensure that the referendum question is —*
>
> *(a) clear and simple;*

(b) directed at the core matter of national importance under subsection (1);
(c) unambiguous; and
(d) neutral.

(4) Upon settling the wording of the referendum question under subsection (2), the Cabinet shall promptly publish the referendum question —

(a) by regulations in the Gazette;
(b) in at least one newspaper circulating in the Islands; and
(c) on Government websites.

(5) Cabinet shall prescribe the form of the ballot paper to be used for the purpose of the referendum in the regulations made under subsection (4)(a).

(6) The outcome of the referendum shall be binding on the Government and the Legislature if more than fifty per cent of persons registered as electors pursuant to the Elections Law (2017 Revision) vote in the referendum in favour of, or against, the referendum question."

30. Section 5 provides that those registered as electors in accordance with section 90 of ***the Constitution*** and would be entitled to vote as electors in an electoral district in accordance with the ***Elections Law (2017 Revision)*** are entitled to vote. Section 6 deals with the conduct of the referendum and section 7 empowers the Governor, the Premier and the Leader of the Opposition to appoint observers at the poll and the counting of the votes. Sections 8 to 11 provide for legal challenges to the ballot papers or votes cast in the referendum to be by petition to the Grand Court.

31. Section 12 makes provision for the application of the ***Elections Law (2017 Revision)*** to the referendum:

"12.(1) For the purposes of the referendum, votes shall be cast, and the proceedings shall be conducted, so far as may be, as if the referendum was an election of members to the Legislative Assembly and the Elections Law (2017 Revision) and any rules in force under that Law shall, for those purposes, be construed accordingly, but any reference to a candidate, nomination, agent, election agent, polling agent or counting agent shall, unless the context otherwise requires, be disregarded.

(2) Without prejudice to subsection (1), the provisions of the Elections Law (2017 Revision) and the Elections Rules (2017 Revision) specified in column 1 of the Schedule shall apply in connection with the referendum, subject to the modifications or exceptions specified in relation to those provisions in column 2 of that Schedule.

(3) Unless the contrary intention appears in this Law and in the provisions of the Elections Law (2017 Revision) applied by this Law —

(a) a reference to an election or poll shall be construed as a reference to the referendum;

(b) a reference to an electoral district shall be construed as a reference to the area for which the relevant returning officer acts;

(c) a reference to polling day shall be construed as a reference to the day appointed for holding the referendum; and

(d) a reference to a ballot paper shall be construed as a reference to the ballot paper to be used for the purpose of the referendum.

(4) The Cabinet may by Order amend the Schedule."

32. The modifications and exceptions to the application of the ***Elections Law*** made in the Schedule to the ***Port Referendum Law*** include omitting Part V on "Election Expenses" and in Part VI, on Political Broadcasts, and substituting a reference in section 74(2) to "a referendum" for the reference to "a by-election". As so amended, section 74(2) states "that the provisions of this Part shall, with the necessary changes being made, apply in respect of a referendum as they apply to an election". The consequence of the omission of Part V is that, whereas in elections to the Legislative Assembly there is a limit to the permitted amount of expenses, no limit is imposed as to what the Government or anyone else may spend in this referendum. The effect of the modification to Part VI of the ***Elections Law*** means that, subject to "necessary changes" its provisions apply to the port referendum as they would apply to an election including (see [27] above) the name of the person or organization responsible for the broadcast or announcement and the fact that it has been paid for.

The International Covenant on Civil and Political Rights

33. This Covenant was extended to the Cayman Islands on 20 May 1976. Article 25 provides that "every citizen" shall have the right take part in the conduct of public affairs, and to vote by secret ballot guaranteeing the free expression of the will of the electors. The UN Committee on Human Rights states that Article 25 applies to referendums: para 6 of General Comment No 25 adopted on 12 July 1996. Paragraph 19 of this General Comment states that "reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined, or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party".

The Venice Commission

34. The European Commission for Democracy through Law, also known as the Venice Commission, was established in 1990 as the Council of Europe's advisory body on constitutional matters. In 2006 and 2007 it adopted guidelines set out in a Code of Good Practice on Referendums as to how States should guarantee an effective right to vote in referendums, and in 2008 the Committee of Ministers invited public authorities to be guided by the Code. As well as guidance on general principles and the conditions for implementing those principles, guidelines III.4 and III.6 contain specific rules applicable to referendums held at the request of a section of the electorate.

35. The Code is not legally binding but has been accepted by 47 European democracies. The Respondent placed significant weight on it in support of the argument that the ***Port Referendum Law*** is unconstitutional. The Government announcement on 3 October 2019 referred to at [7] above stated that the Cabinet had taken account of it when settling the referendum question and the Premier's paper prepared for the Cabinet meeting on 31 October 2019 which redetermined the referendum question and date stated at para. 13 that "[i]n considering settling the question for the Referendum Cabinet should be guided by, where applicable, the Venice Commission Code of Good Practice on Referendums". The judge also referred to the Code and observed (at [22]) that the UK Supreme Court "has in the past attached weight" to the opinions of the Venice Commission.

36. The guidelines on the principles in the Code relied on by the Respondent include:

Guidelines I.2.2(a), (d) (g) and (h)): Equality of opportunity

> "*a. Equality of opportunity must be guaranteed for the supporters and opponents of the proposal being voted on. This implies a neutral attitude by administrative authorities, in particular with regard to... ii. coverage by the media, in particular by the publicly owned media; iii. public funding of campaign and its actors ...*
> ...
>
> "*d. Equality must be ensured in terms of public subsidies and other forms of backing. It is advisable that equality be ensured between the proposal's supporters and opponents. Such backing may, however, be restricted to supporters and opponents of the proposal who account for a minimum percentage of the electorate. If equality is ensured between political parties, it may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections.*
> ...

g. Political party and referendum campaign funding must be transparent.

h. The principle of equality of opportunity can, in certain cases, lead to a limitation of spending by political parties and other parties involved in the referendum debate, especially on advertising."

Guidelines I.3.1 (b) and (d): Freedom of voters to form an opinion

"b. Contrary to the case of elections, it is not necessary to prohibit completely intervention by the authorities in support of or against the proposal submitted to a referendum. However, the public authorities (national, regional and local) must not influence the outcome of the vote by excessive, one-sided campaigning. The use of public funds by the authorities for campaigning purposes must be prohibited.

...

d. The authorities must provide objective information. This implies that the text submitted to a referendum and an explanatory report or balanced campaign material from the proposal's supporters and opponents should be made available to electors sufficiently in advance [of the vote] and ... iii. the explanatory report must give a balanced presentation not only of the viewpoint of the executive and legislative authorities or persons sharing their viewpoint but also of the opposing one."

37. The guidelines on the conditions for implementing these principles include:

Guideline II 2(b): Regulatory levels and stability of referendum law

"The fundamental aspects of referendum law should not be open to amendment less than one year before a referendum or should be written in the Constitution or at a level superior to ordinary law."

Guideline II 3.4(a) and (b): Funding

"a. The general rules on the funding of political parties and electoral campaigns must be applied to both public and private funding.

b. The use of public funds by the authorities for campaigning purposes must be prohibited."

38. There is an explanatory memorandum to the guidelines. Paragraph 24 of that states that guideline II.3.4(a) means that "national rules on both public and private funding of political parties and election campaigns must be applicable to referendum campaigns". With regard to guideline II.3.4(b) paragraph 24 states that "in the event of a failure to abide by the statutory

requirements, for instance if the cap on spending is exceeded by a significant margin, the vote may be annulled" and that "the principle of equality of opportunity applies to public funding; equality should be ensured between a proposal's supporters and opponents".

39. The specific rules applicable to referendums held at the request of a section of the electorate in guidelines III.4 and III.6 include:

Guideline III.4:

> "*a. Everyone enjoying political rights is entitled to sign a popular initiative or request for a referendum.*
>
> *b. The time-limit for collecting signatures (particularly the day on which the time-limit starts to run and the last day of the time-limit) must be clearly specified, as well as the number of signatures to be collected.*
> ...
>
> *f. All signatures must be checked. In order to facilitate checking, lists of signatures should preferably contain the names of electors registered in the same municipality.*"

Guideline III.6: Opinion of Parliament

> *" When a text is put to the vote at the request of a section of the electorate or an authority other than Parliament, Parliament must be able to give a non-binding opinion on the text put to the vote. ... "*

III. The Judge's decision

40. The Judge stated (at [59]) that the question for the court is "what are the minimum legislative requirements necessary to ensure that the procedure for triggering a section 70 referendum, the rules governing eligibility to vote as well as the conduct of the referendum process itself combined to guarantee a fair and effective vote in a direct democratic process which was plainly intended to increase the checks and balances on government".

41. He had earlier referred to the novelty of the issue before him and the absence of a decision on an equivalent provision in the Constitution of a British Overseas Territory: [24], [55] and [56]. He was also acutely aware of the tension resulting from the insertion of an element of direct democracy to increase the checks and balances on government into a system that is otherwise a representative democracy: [1] and [64]. He considered (at [60]) that the controversy and uncertainty about this referendum were the predictable consequences of the legislature's failure to enact any legislative provision in the decade between the enactment of section 70 and CPR Cayman's petition for a referendum about the cruise port terminal. But at [61] he asked whether

the sequence of events meant that a general framework law was a necessary implication of section 70 and thus a necessary precondition for the legality of the referendum, as opposed to a desirable implication.

42. On the approach to be taken when interpreting a Constitution, the Judge referred (at [56] – [58]) to a number of decisions, including the recent decision of this Court in *Deputy Registrar of the Cayman Islands & Attorney-General of the Cayman Islands v Day & Bush*, 7 November 2019. He stated (at [58]) that the statement in *Day & Bush* that it was not open to the court to put aside the language of constitutional provisions was made in a case in which the court had concluded that the language of the Bill of Rights about marriage was clear, but this case differed. There is, he stated at [59]) "a lack of clarity in the bare language of section 70" about the form in which the Legislative Assembly is required to enact legislation making provision for a people-initiated referendum. The court must "therefore give a generous and purposive interpretation to a unique constitutional provision which guarantees an important democratic right and decide if the [Port] Referendum Law is incompatible with it". That involved the court:

> ".. .*identifying how the requirements of legality, legal certainty, fairness and consistency are best guaranteed given the nature of the right in issue and the apparent purpose behind its enactment. Determining the requirements of legality, certainty and fairness is classically the function of a Court*".

He had stated earlier that there is a little scope for deference in determining the meaning of ***the Constitution***, and that these questions "are plainly matters for a Court to determine" and "not merely policy considerations for the Legislature": see [56] and [63].

43. It appears that the Judge was not assisted by the background material relied on by the Government. This included the apparent assumption by the Hon D Kurt Tibbetts JP MLA, Leader of Government Business at a meeting during the Second Round of Negotiations on ***the Constitution*** on 15 January 2009 in a discussion about the intended difference between a section 69 referendum initiated by the Legislative Assembly and a people-initiated one: see the judgment at [46]. Mr Tibbetts appeared to assume that an individual law would be enacted for each section 69 referendum. The Government submitted that since section 69, like section 70 referred to "a law" and "a referendum", both provisions are to be read in the same way. During the discussion Mr Tibbetts also said that "a people-initiated referendum would still have to be triggered by the action of the Legislative Assembly". The Judge noted (at [59]) that no paper or other aid to understanding the legislative intent behind section 70 was apparently presented to those negotiating, and concluded that he was not assisted by what, in the context of the discussion as a whole, he described as "some throwaway remarks by Mr D Kurt Tibbetts".

44. The Government also relied on an email sent to Mr Bulgin, the Attorney General, in November 2014 by Mr Ian Hendry who had chaired the United Kingdom's delegation and the Second Round of Negotiations and is an author of a textbook on British Overseas Territories Law. Mr Bulgin had consulted Mr Hendry about the views expressed by the Constitutional Commission in 2014. Mr Hendry's rejection of the Commission's point that it was unclear whether section 70 requires that a law be enacted which governs all people-initiated referendums (see [23] above) stated that "it is clear that section 70 deals with individual people-initiated referendums". He thus rejected the Commission's view that this was not clear. The Judge did not refer to this in the section of his judgment giving his analysis and conclusions. Since he had (at [17]) described Mr Hendry's comments as expressly stated to be personal comments it would appear that he did not regard them as of assistance to the Government's argument. It is also to be noted that Mr Hendry's email to the Attorney General also described his comments as "initial comments" and stated that, as he had "not consulted anyone else they must not be taken as considered views of the UK Government".

45. The Judge gave his answer to the question he posed about whether a general framework law was a necessary implication of the right accorded by section 70 or only a desirable implication at [62] – [63] of his judgment. He stated that a general framework law was the necessary implication and consequence of the enactment of section 70 because "absent such a law, the pre-Petition process lacked clarity or legal support". A law which "authorised and explained the pre-petition process and the subsequent collection of signatures as well as the process for verifying signatures and certifying the Petition was … necessary to ensure a sound, transparent, fair and above all legal basis for any people-initiated referendum". The law required "had to be a general or framework law because it had to cover the process of collecting and verifying a petition and any such law must necessarily be general in character". The rule of law required that a procedure to determine the validity of petition signatures and limitations on the right to petition "must be prescribed by law rather than left to the individual discretion of the Elections Officer" or "the common sense of a civil servant". He relied on *de Freitas v Ministry of Agriculture* [1999] 1 AC 69, a decision of the Privy Council in which Lord Clyde stated at 78H that "where the line is to be drawn is a matter which cannot in fairness be left to the hazard of individual decision".

46. The Judge considered (at [64]) that "another powerful factor in favour of the need for a framework law governing people-initiated referendums is the clear policy which underpins the enactment of s.70, namely the promotion of the exercise of effective, direct democratic rights with a view to increasing the checks and balances on Executive action". The fact that the

Government would be likely to have a strong view on the issue of national importance which led to the petition to trigger a referendum was a powerful reason in favour of a general law setting out the ground rules for the conduct of all referendums rather than proceeding by way of specific, *ad hoc* enactment of a new law each time a s. 70 referendum is triggered.

47. As stated at [7] above, the Judge made it clear at [65] that he was not ruling on whether the absence of a general law had in fact resulted in substantive unfairness in the campaign about the cruise berthing facility. But he stated at [64] that the evidence before the court on the substantive matters relied on by the Respondent (see [52] and [90ff] below) provided considerable support for the argument that "an unequal playing field which was heavily stacked in favour of the Government side" had been created "to an extent which endangered the right to a fair and effective vote". He concluded that allowing the Government to change the ground rules every time risked the rules being changed to promote the Government's policy choice and this would undermine "the people's direct democratic right to question that policy choice via a fair and effective vote in a people-initiated referendum". He recognised that enacting a general law setting out the ground rules would not necessarily eliminate "the risk that the odds may be stacked against" those who are opposed to the Government's policy and are seeking to veto it, but considered that it was bound to reduce that risk.

IV. Summaries of the Appellant's and the Respondent's cases

48. There follows a broad summary which seeks to encapsulate the case of each party. The analysis in Part V of this judgment addresses a number of the points relied on in more detail and deals with the Government's submissions in reply to the Respondent's Notice.

The Government's case:

49. Mr Maclean's submissions on the Government's four grounds of appeal can be summarized as follows:

a) The Judge misconstrued section 70 by implying into it a requirement that the legislature must enact a general law providing for the holding of people-initiated referendums when there is neither any textual support nor any purposive justification for that implication. As to the text, the key words of section 70(1) are that "a law enacted by the Legislature shall make provision to hold a referendum ..." (emphasis added) and the use of the singular "suggests that a referendum-specific, rather than a general, law is contemplated (or, at the very least, is permitted)".

b) The Judge was correct to adopt a purposive approach to the construction of section 70 and the constitutional right in issue; namely what a fair and effective right to vote, required. But he erred in his application of that approach in concluding from his assessment that a general law would "best guarantee" or "best ensure" the constitutional right in issue -- a fair and effective right to vote under section 70 - and that a general law was required, as opposed to merely being desirable. The correct approach was to ask whether the requirement of generality was necessary to give effect to the constitutional right in issue and whether a "bespoke" referendum specific law could in principle give effect to it.

c) The Judge also derived the requirement of generality, a requirement about the form of the legislation from a concern about whether the substance of the legislation would give effect to the constitutional right. His concern was to reduce the risk of the Government seeking to "stack the odds" against a petition which seeks a referendum in order to overturn the policy of the Government. This was erroneous because substantive regulatory provisions might fail to give effect to the constitutional right, whether they are in a general law or a referendum specific law. The provisions in a general law might be exactly the same as those in a referendum specific law. Generality is in itself not a safeguard against an unconstitutional denial of a fair and effective right to vote under section 70.

d) It does not follow, as the Judge considered it did, from the fact that a general law may be required to regulate the petition and verification process under section 70(2) that, once a petition has been verified, as the petition in this case was, a section 70 referendum may not be regulated by a "bespoke" law. Even if a general law regulating these processes is legally required, in this case, where the petition has now been verified and the validation decision has not been challenged as unlawful or set aside, that does not establish a basis for the Respondent to succeed in this judicial review because issues surrounding what Mr Maclean described as historical elements are moot.

50. Mr Maclean also submitted on behalf of the Government that, even if a general rather than a referendum-specific law is required for a section 70 referendum, the Judge erred in granting a quashing order. It was argued that declaratory relief would have been adequate for every practical purpose and would have better respected the principles of comity and the separation of powers. The analogy with section 23 of ***the Constitution*** that, in the case of legislation incompatible with the Bill of Rights, the remedy must be a declaration of this and of the nature of the incompatibility which it is then for the legislature to resolve, a number of United Kingdom and Hong Kong decisions, and the decision of Acting Judge Nova Hall in the Grand Court in *Bennett v The Honourable Speaker of the Legislative Assembly,* 28 December 2018 were relied on.

The cases of the Respondent and the Intervening Party

51. Mr Buttler, supported by Mr Lowe QC, adopted most of the Judge's analysis and submitted that his conclusion that section 70 required a general law was correct. Alternatively, they submitted by way of Respondent's Notice that, even if the Judge erred and a general law is not constitutionally required, the ***Port Referendum Law*** is substantively unconstitutional.

The Judge was correct to conclude that section 70 of the Constitution required a general law

(1) The wording and structure of section 70 made it clear that a general law was required, and the Judge was correct to state that the legislature's interpretation of the constitution should not be afforded a margin of deference by the court. The Judge had not erred in asking which of the competing interpretations best guaranteed or best ensured the constitutional right of the people under section 70 to determine issues of national importance.

(2) The same meaning should be given to the words "a law" and "a referendum" in sections 69 and 70, the two provisions of ***the Constitution*** on referendums on matters of national importance and both contemplated a standing law. The Judge was correct in rejecting the Government's submission (based on what Mr Tibbetts had said in the negotiations (see [43] above) that section 69 required a different specific law for each Legislative Assembly initiated advisory referendum and thus so did section 70.

(3) The Judge was correct to focus on the problems for the petition and verification process absent a general law. It is clear from section 70(1) that the duty to enact "a law" crystallised and was triggered when ***the Constitution*** came into force and is not contingent on the presentation of a petition that has been verified. It is only the duty to hold the referendum itself that is triggered by the presentation of a petition and meeting the other requirements in section 70(2). The fact that in this case the petition has now been verified and that the validation decision was not challenged as unlawful or set aside does not mean, as the Government argued, that this point is moot.

(4) The Judge's interpretation of section 70 promotes its purpose of ensuring the constitutional right under it to a fair and effective vote because, for the reasons identified by the Judge (summarised at [45] – [46] above), a general law leaves less scope for conflict of interest between the legislature and the people who are given "sovereign power" by section 70 to bind the legislature and the executive.

a. Contrary to the Government's submission that it was wrong to derive a requirement as to the form of the required law from a concern about its substance, there is a relation between form and substance and the Government now agrees that a general law is better as a matter of policy. It is true that one could end up with the same rules in a specific law as those in a general law, but, for the reasons given by the Judge, rules in a general law provide a structural safeguard and are likely to be more neutral than ones formulated in the context of a particular battle.

b. It might be difficult to detect manipulation of the rules by reference to the law on a single referendum until there have been a number of people-initiated referendums.

c. At the time of the negotiations for and the enactment of the new constitution the United Kingdom had in place a stable general referendum law in the Political Parties, Elections and Referendums Act 2000. It was therefore not surprising that the framers of the Cayman Islands constitution had that in mind when formulating section 70.

d. The Judge's interpretation is also consistent with international good practice, especially that reflected in the Venice Commission's Code of Practice and with the recommendations of the Constitutional Commission

e. It is odd, if a bespoke referendum-specific law is permitted, that section 70 (2) (b) and (c) give the function of settling the referendum question and its date to the cabinet. While those provisions, on their own, do not mean that there has to be a general law, they are a clue that the drafters of ***the Constitution*** had in mind a standing law followed by an implementing law. The Constitutional Commission's 2011 paper and the guidance in the Venice Commission illustrate the logic of first having a general law and then a law for the particular referendum.

The Respondent's Notice: substantive constitutional flaws in the Port Referendum Law

52. The Respondent relied on the following five matters which it was submitted are substantive flaws in the ***Port Referendum Law*** rendering it unconstitutional. The first is the failure to set out the process by which persons may register as electors for people-initiated referendums. The second is that the matter of national interest and the referendum question are formulated in a substantially different way to the formulation in the petition because they mix the issue of a cruise berthing facility on which the petitioners sought a referendum with the question of an

"enhanced" or "enlarged and refurbished port facility" on which they did not. The other three matters are the absence of rules governing campaign finance, access to publicly owned broadcast media, and the provision of objective information. This is because the Schedule to the ***Port Referendum Law*** (see [32] above) excludes Part V of the ***Elections Law (2017 Revision)*** on election expenses and because the ***Port Referendum Law*** says nothing about access to broadcast media and the provision of objective information. In his oral submissions, without abandoning any of them, Mr Buttler emphasised the first two as impeding the effectiveness of the right to vote and making the law unconstitutional.

Relief: a quashing order or a declaration?

53. If the ***Port Referendum Law*** is contrary to section 70 and unconstitutional either because there is no general framework law or because it is substantively flawed, Mr Buttler, supported by Mr Lowe, argued that the submission that only declaratory relief should have been given should be rejected. The Judge had jurisdiction to make a quashing order and the Government had not identified an error of law in his approach. As to the matters the Government relied on, they argued that section 23 of ***the Constitution*** does not apply to Part VI, the United Kingdom cases are distinguishable because the United Kingdom Parliament is sovereign whereas the Legislative Assembly is not, *Bennett v The Honourable Speaker of the Legislative Assembly* is not of assistance because it appears to assume that a law can be of no effect and yet remain valid, and the Hong Kong cases record the uncontroversial proposition that unconstitutional laws are invalid.

V. Analysis

54. The high-level principle governing the interpretation of constitutional provisions is not at issue in this case. It is common ground that, as recently held by this court in *Day & Bush* after a review of the authorities, such provisions should be interpreted in a broad and purposive manner, not narrowly and technically. The dispute is about the application of the component parts of that principle to determining how section 70 of ***the Constitution*** is to be interpreted. Is it to be interpreted as requiring the law that makes provision for a people-initiated referendum to be a general framework law or will a specific law enacted for the referendum triggered by a particular petition suffice? If a specific law does suffice, is the ***Port Referendum Law*** constitutionally flawed for other reasons?

55. The clearest indication of the starting point is to be found in *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235, an appeal to the Privy Council from the Court of Appeal of Belize and

one of the decisions cited in *Day & Bush.* Lord Bingham of Cornhill stated at [26] that "[a]s in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution". To similar effect, is the statement of Justice Aharon Barak:

> "*It has been said that "constitutions are characterized by a high frequency of vague terms and phrases that can mean a number of things, acting as air valves that can open in different directions. Language, however, continues to restrict constitutional texts. Open ended language is not infinitely malleable. Even vague phrases have semantic boundaries.*": ***Purposive Interpretation in Law*** (Princeton 2005) 20.

The further guidance from *Day & Bush* is (see [39]) that when interpreting provisions in a broad and purposive way "it is not open to the court simply to ignore or put on one side what the provisions clearly say", and (see [40]) that "[w]hen constructing a provision, in a constitution, that provision must not only be considered individually, but in the context of the constitution as a whole".

The language used in the Constitution

56. Section 70 makes no express provision about the form of a law that must be enacted to provide for the holding of a people initiated referendum on a matter or matters of national importance. Mr Maclean submitted that there are textual factors clearly suggesting that section 70 does not require a general framework law. The first are the references to "a law" and "a referendum". He argued that as a matter of ordinary language the use of the singular indefinite article in section 70 suggests that, where a valid petition is presented, the law the Legislative Assembly is required to pass may be a specific law providing for that referendum to be held. Mr Buttler's answer that, without more, the use of the singular is no indication that the law may relate to a particular referendum because words in the singular are usually taken to include the plural must be rejected. Section 4(b) of the ***Interpretation Law (1995 Revision)*** provides that absent express provision or something in the subject or the context that is inconsistent "words in the singular include the plural, and words in the plural include the singular". It does not provide that the inclusion of the plural is to be to the exclusion of the singular.

57. The second textual factor relied on by the Government is the fact that in relation to holding a referendum on a matter or matters of national importance, sections 69 and 70 both use the terms "a law" and "a referendum". Section 69 empowers "a law" making provision for "a referendum" when so resolved by a majority of the elected members of the Legislative Assembly. Section 70 requires one following a petition signed by 25% of registered electors.

Both parties argue that the words "a law" and "a referendum" should have the same meaning in the two provisions. But whereas the Government submitted that neither require a general framework law, Mr Buttler submitted that both do. He relied on section 69's provision that "a law may make provision to hold a referendum… when so resolved by the majority of the elected members of the Assembly" (emphasis added). He submitted that although it was not absolutely clear from the emphasised words whether the "law" has to precede the resolution, those words are an indication that it does.

58. There were two limbs to the Government's submissions based on section 69. The first, emphasised in its written submissions, concerned the guidance as to legislative intention to be derived from what Mr Tibbetts had said during the negotiations, as to which see [43] above. The Judge was correct in rejecting this for the reasons he gave. For the reasons given at [44] above, the Government can also obtain no or little assistance from the initial and personal comments of Mr Hendry. But the second limb of Mr Maclean's submission has force. The clear indication from section 69's provision that "a law may make provision to hold a referendum… when so resolved by the majority of the elected members of the Assembly" (emphasis added) is that a general framework law is not required. Mr Buttler accepted that it was not clear from the words "when so resolved" whether the "law" has to precede the resolution but submitted that the words are an indication that it does have to. But, as Mr Maclean asked, emphasising the word "may", why, if it is necessary to have a general law, does section 69 not require this? The carve out in section 77(3)(b) of ***the Constitution*** of motions proposing a resolution under section 69 from the restrictions on the introduction of Bills and motions in section 77 is also an indication that a general law is not required. Even if, contrary to what has been stated at [56] above, looked at in isolation the wording of section 70 might be interpreted so as to require a general law, when considered with the use in section 69 of the identical words "a law" and "a referendum" in a context giving a clear indication that a general law is not required, the choice to use the same words in section 70 must be regarded as deliberate.

59. Mr Buttler's case is that the structure of section 70 gives a clear indication that the intention of the drafters of ***the Constitution*** was to require a general law. At the forefront of this was his submission that the duty under section 70 to make a law was not contingent on the making of a petition but crystallised when section 70 came into effect. He argued that, as a matter of logic, the law governing people-initiated referendums must include the rules governing petitions by which such referendums may be initiated. It was necessary for there to be legal regulation of the petition and verification process and decisions should not be left to the discretion of the Elections Officer. If the duty to enact a law under section 70(1) crystallised before the petition,

the words in section 70(1) must refer to a general law and not to a law about a particular referendum.

60. The Government did not dispute that the rule of law favours the enactment of regulations governing the petition verification process which pre-dates any people-initiated referendum and that such regulations must necessarily be general. Because citizens and officials need to know where they stand, the Government is open to criticism for not providing such regulations once the constitutional provision for people-initiated referendums came into force. It is, however, not the case that, as the Judge stated at [62], absent such rules those parts of the process lacked legal support.

61. Although section 70 contains nothing about the petition verification process, section 70(2)(a) does provide that only registered voters are eligible to sign it, and that to trigger the holding of a referendum 25% of them must sign the petition. The provision that section 90 of ***the Constitution*** governs qualification to sign the petition and vote in the referendum to that extent makes a link with the rules and administrative arrangements governing elections to the Legislative Assembly. It is not suggested that it is contrary to ***the Constitution*** for the verification to be done by the Elections Officer. The Elections Officer is a public officer and, as such, has to carry out the task of verification in accordance with well-known public law principles or face a challenge by way of judicial review. Decisions must not be affected by what are, in the context of the constitutional right at issue, improper purposes. Relevant considerations must be taken into account, irrelevant considerations ignored, and the limits of *Wednesbury* unreasonableness and proportionality apply. There is, as illustrated by the proceedings CPR Cayman informed the elections Officer in August 2019 that it intended to bring, thus a means of legally impugning the petition and verification process. The line is therefore not simply left to what the Judge at [63] characterised as the common sense of the Elections Officer, a civil servant, "to devise, in effect, on the hoof" and, quoting from Lord Clyde's judgment in *de Freitas v Ministry of Agriculture* [1999] 1 AC 69, at 78H, as "the hazard of individual discretion".

62. In the *de Freitas* case, a civil servant was suspended from office pending disciplinary proceedings because he had taken part in a peaceful demonstration against corruption. The issue was whether a statutory provision prohibiting civil servants from expressing opinions on politically controversial matters was consistent with the right under the constitution of Antigua and Barbuda to freedom of expression and freedom of assembly. The Privy Council held that it was not. This was so even if the prohibition was interpreted, as the Eastern Caribbean Court

of Appeal had held, only to apply where such prohibition was reasonably required for proper performance of the civil servant's official functions. The statute was insufficiently precise to comply with the principle of legal certainty: see [1999] 1 AC 69, at 77G and 78D. The need for certainty was particularly important in that context because of the serious consequences of breach. Lord Clyde stated at 78F-G that leaving it to individuals to decide whether they are or are not complying with the rule without guidance as to when the prohibition was reasonably required for the proper performance of their official functions was insufficiently precise to secure the validity of the statutory prohibition.

63. There is always a balance between what must be done by a rule and the need for flexibility; that is what may be left to the exercise of a discretion within a legal framework, here ***the Constitution*** and any relevant statutes. Context is important in determining where the balance lies. Here the context is whether the absence of statutory rules governing the petitioning and verification process meant that there was a real risk of an infringement of the right to petition. We address the question whether the legal framework provided by sections 70 and 90 provides sufficient legal support for the Elections Officer to exercise the task of verification flexibly but within that legal framework below.

64. Here the process of verification by the Elections Officer proved controversial in parts. In particular the legality of giving signatories the opportunity of removing their names from the petition is open to question because this might appear to be a form of pressure to do so and thus to interfere with the right to petition. But the process was completed, the petition was verified, and there has been no legal challenge to the process. We return below to the Government's submission that even if a general law regulating these processes is legally required, that does not establish a basis for the Respondent to succeed in this judicial review because the issue is moot.

65. The clear indication from the references to "a law" and "a referendum" in both section 70 and section 69 is that a general law is not required, a point not referred to by the Judge. But the submissions on the implications of a need for regulation of the petition and verification process to some extent point the other way. For that reason, in this case a textual analysis of section 70 in the context of the constitution as a whole does not in itself provide a clear answer one way or another as to whether a general law is required. The paragraphs below therefore focus on the purpose of section 70 in its constitutional context and the implications of that for its interpretation before reaching a conclusion on the significance of what the Judge described as the pre-petition and verification processes.

A broad and purposive construction

66. It was common ground that the starting point in interpreting section 70 in a broad and purposive way is the direct democratic rights which it conferred on Caymanians. In the widely-cited words of Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, at 328 an appeal to the Privy Council from the Court of Appeal in Bermuda, what is called for is a "generous interpretation ... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to". In *Reyes v The Queen* Lord Bingham stated at [26] that the court must do so by considering "the substance of the fundamental right at issue".

67. The Government submitted that the purpose of section 70 is to give Caymanians a constitutional right to a referendum that is fair and effective. It is thus very similar to Smellie CJ's formulation of the fundamental right when making a protective costs order in favour of the Respondent: see [85] below. The Respondent, supported by the National Trust, submits (skeleton argument para 24), that its purpose is "to establish and give effect to the people's sovereign right to determine matters of national importance" and that the court's task is to interpret it so as to secure full expression of that sovereignty. This is broadly similar to the statement of the Judge, in a passage set out at [46] above, that the clear policy underpinning the enactment of section 70 was the "promotion of the exercise of effective, direct democratic rights with a view to increasing the checks and balances on Executive action". Accordingly, Mr Buttler submitted that the Judge did not err in asking which interpretation of section 70 "best guaranteed" or "best ensured" its purpose.

68. Mr Buttler also argued (skeleton argument para 29) that section 70 "requires the legislature to make a self-denying law which cedes power to the people, allowing them to veto its policy choices". He relied on *Pollen Estate Trustee Company v Revenue and Customs Commissioners* [2013] EWCA Civ. 753, [2013] 1 WLR 3785 and *Hewitt v Rivers & the Attorney General for the Cayman Islands,* Grand Court 9 August 2013. In the *Pollen Estate* case Lewison LJ stated at [24] that the modern approach to statutory construction is to "have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose" (emphasis added). It should be noted, however, that in that case the effect was to extend the ambit of the statutory words (see [45] – [48]) rather than, as in this case, to restrict them. In *Hewitt v Rivers & the Attorney General for the Cayman Islands* Smellie CJ stated at [37] that constitutional provisions (in that case concerning eligibility for public office) must be regarded as reflecting the freedom of Caymanians to participate in the fullest expression of the political life of the Islands ...". That, submitted Mr Buttler, supported

interpreting the words "a law" and "a referendum" in section 70 so as to secure the "full expression" that a general law would provide.

69. The different formulations by the parties to these proceedings of what a purposive approach to constitutional interpretation requires can be summarised as a difference between the interpretation which "best" gives effect to the purpose and an interpretation which "can" give effect to it. The Judge and the Respondent concluded that it was the former which was needed and for that reason, and also because the law had to address the petition and verification process, that the law providing for a referendum must be a general law.

70. Undoubtedly section 70 provides a direct democratic right which may result in the policy of the Government and the legislature, the representative institutions of ***the Constitution***, being rejected. The substance of the constitutional right where the requirements of section 70 have been met, however, is to trigger a referendum that is fair and effective. The right to a fair and effective referendum could be described as absolute. But the submission that section 70 must be interpreted to require a general law in order to ensure what Mr Buttler described as full expression of the people's sovereignty may put the matter too highly.

71. First, the phrase "the full expression of the people's sovereignty" does not appear to recognise (as the variations in international practice illustrate) that there may be different ways of achieving a fair and effective referendum and, ultimately, as the Judge recognised (at [65]), it is for the Legislative Assembly to decide, subject to the constitution, what the law making provision for a referendum should contain. In *Brown v Stott* [2003] 1 AC 681, 702, in an appeal from the High Court of Justiciary, the Privy Council recognised that while the right to a fair trial is absolute, the constituent rights within ECHR Article 6 are not themselves absolute and different states may give, and have given, effect to the fundamental right in different ways.

72. Mr Buttler's description may also have put the matter too highly in that, notwithstanding the express constitutional provision in section 70(2)(b) that the Cabinet should settle the wording of the referendum question, he submitted (skeleton argument para 43) that this concerned only matters of "drafting detail" and not the issue of national importance. In his written submissions before the Judge he submitted that, notwithstanding the express provision in section 70(1) that the Legislative Assembly should enact a law, the Assembly and the Executive "are no more than parties to the debate". At the hearing, he also submitted that while the content of a framework law is "up for grabs", there must be an irreducible minimum of ground rules which

he suggested could be modelled on guidelines such as those in the Venice Commission's Code of Good Practice.

73. As to the first two points, in a constitutional framework which remains primarily a representative democracy, what section 70 requires, fairly and effectively to give effect to the direct rights of Caymanians, must be seen in the context of the constitutional roles assigned to other institutions and individuals and, having regard to the need to balance giving the fullest expression of constitutional rights, with those roles. See by analogy, Smellie CJ in *Hewitt v Rivers and Attorney General of the Cayman Islands* at [37]. Mr Buttler accepted (skeleton argument para 43) that the constitutional right to a people-initiated referendum is limited by the need to ensure that the issue is in fact one of national importance and that it is formulated in a way that can be put to an effective vote. It follows that, while the views of the petitioners that a matter is one of national importance would carry considerable weight, they are not conclusive. In relation to that question, the roles of the Executive and Legislative branches of government are not restricted in the way submitted by Mr Buttler. In the case of the settling of the referendum question, the words of section 70(2)(b) mean that the role of the Cabinet cannot be regarded as purely clerical and concerned only with drafting detail. We return to this below when discussing the point raised in the Respondent's notice

74. As to the Venice Commission, although its Code of Practice commands considerable respect, it has to be remembered that it is not an international instrument incorporating fundamental standards to which the state in question has subscribed which need to be taken into account in interpreting a constitution. It falls within the category of what Lord Bingham in *Reyes v The Queen* at [28] described "non-binding recommendations or opinions made or given by foreign courts or human rights bodies". Effect need not be given to such recommendations in interpreting the Constitution of the Cayman Islands because, as Lord Bingham stated, "it is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies".

75. The President observed during the hearing that, since section 70 does not expressly address the form of the law required, to say that it has to be a general framework law must be because that is a necessary implication of the constitutional right. That sets a high threshold. It is, however, a threshold consistent with the statement of Lord Bingham in *Brown v Stott*, albeit in the context of the ECHR, an international convention rather than a constitution which is similar to what he said in *Reyes*: see [74] above about the interpretation of a constitution. In *Brown v Stott,*

describing the ECHR as an important constitutional instrument, Lord Bingham stated at 703F-G that:

> *"the process of implication is one to be carried out with caution if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not of been willing to accept".*

76. There is no basis for deferring to the legislature on the construction of the constitution and statements such as that by Baroness Hale in *Suratt v Attorney-General of Trinidad and Tobago* [2007] UKPC 55, [2007] 71 WIR 391 at [45] that a party seeking to prove the unconstitutionality of and thus the invalidity of legislation has a heavy burden were made about the interpretation of legislation rather than of the Constitution itself. But this threshold is also consistent with taking account of the nature of the implication to be made. The Government argued that it is not possible to spell out a need for a general law on people-initiated referendums because of the different approaches taken by the legislatures in different jurisdictions as to what the rules in such a law should be. The fact that there is, as the Judge at [65] acknowledged, no obvious consensus as to the measures needed to ensure a fair and effective right to vote is not, however, in itself a knockout blow against interpreting section 70 to require a general law. The judge was careful to say that "ultimately it must be for the legislature to decide what a general Cayman referendums law should contain to guarantee a fair and effective right to vote". The absence of consensus is, however, an indication pointing away from interpreting section 70 to require a general law.

77. This is because just as a court should not imply limits to a statutory provision to give it what the court considers to be a sensible or desirable result, so it should not imply limits into a constitutional provision for that purpose. To do so risks trespassing on the territory of the legislature. As Lord Bingham stated *Reyes v The Queen* at [26], giving a generous and purposive interpretation to a constitution does not give a court "license to read in its own predilections…".

78. To similar effect, although in the context of a statutory rather than a constitutional provision, Lord Nicholls stated in *Inco Europe Ltd. v First Choice Distribution* [2000] 1 WLR 586, 592, that the courts "must abstain from any course which might have the appearance of judicial legislation" and should "exercise considerable caution before adding or omitting or substituting words". Before doing so:

> "...[T]*he court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."*

79. Leaving aside the petition verification point discussed above and which is returned to below, there are strong textual indications that a referendum-specific law is authorised by section 70. It was not argued that a referendum-specific law could not provide as fair a process as a general law and thus fully protect the constitutional right to participate in a fair and effective people-initiated referendum. The problem identified was a risk of a partisan Executive or Legislative Assembly stacking the odds in favour of its own position in a referendum-specific law. For instance, tight finance limits might be applied where the proponents of a referendum are well funded but not where they are not. But it was also accepted that a general law could contain substantive flaws that are very similar to those in a referendum-specific law. See also see the comments in the Report of the Independent Commission on Referendums, §§13.1, 13.11 and 13.13 about the quality of information in the United Kingdom's 2016 referendum on EU membership notwithstanding the the Political Parties, Elections and Referendums Act 2000.

80. If a general law is required, the effect would be a more restrictive interpretation of section 70 than an interpretation which gives the Legislative Assembly a choice between a general or a specific law. That effect might be considered counter-intuitive where what is required is an interpretation which is broad and generous in an instrument which (see *Hunter v Southam* [1984] 2 SCR 145, 155) provides a continuing framework capable of growth. So, in circumstances such as those in this case, where there is no general law but a petition is launched and signed by the required number of registered electors, the right of every Cayman Islands voter to participate in a people-initiated referendum would be stultified or at least significantly delayed. Mr Buttler submitted that this is the position in this case as a result of the absence of a general law on the process for verification of signatures even though no one has challenged the verification decision and even though the required percentage of registered electors have signed the petition. In a case such as this where the petition has been verified, whether or not the point is strictly moot, this is an unattractive argument. If correct, the result would be that the rights of both the petitioners, who are opposed to the cruise terminal berth plan, and of those who endorsed the plan in their vote in the 2017 election are, as Mr Maclean observed, compromised.

81. Another facet of such restriction is that the existence of a general law may make it difficult to make provision for the details of a particular referendum according to its subject matter. If, for instance guideline II.2(b) of the Venice Commission's Code of Practice is enacted in a Cayman Islands general referendum law, the fundamental aspects of the general referendum law will not be open to amendment for 12 months before a referendum. The differences in the rules including the length of the regulated period, finance, and qualification to vote in the various United Kingdom referendums before and after the enactment of the Political Parties, Elections and Referendums Act 2000 show that there may be advantages in being able to tailor the rules to the needs of a particular referendum: see for example Tables 3.1, 12.1 and 12.2 in the Report of the Independent Commission on Referendums (Constitution Unit, UCL, 2018).

82. As well as flexibility according to the subject matter of the referendum, a general law might make it more difficult to reflect the circumstances of and background to the particular petition. In this case, the plan for the cruise berthing facility and refurbished cargo dock was a manifesto commitment of the party which was elected in 2013 and which was part of the coalition government formed after the 2017 election. A general law requiring a neutral attitude by government or prohibiting one-sided campaigning by the authorities (see Venice Commission, Code of Good Practice, I.2.2(a) & (d) and 1.3.1(b)) might in such circumstances be thought to be unrealistic.

83. The substance of the fundamental right of every Caymanian voter guaranteed by section 70 is to participate in a fair and effective people-initiated referendum. Because that right can be fully protected by a referendum-specific law, and because of the clear textual indication from the use of the terms "a law" and "a referendum", setting aside, as has been done so far, the question of the impact of the petition verification process, we have concluded that it is clear that section 70 does not require a general framework law. Does the impact of the petition verification process make a vital difference?

84. We have referred at [63] and [73] above to the need to balance what must be done by rule and what can be done by the exercise of discretion within a legal framework because of the need for flexibility. The high degree of certainty required in *de Freitas* reflected the particular context, a statute which expressly either prohibited or, even if read down, significantly restricted the exercise of a constitutional right of freedom of expression. The argument rejected was that it sufficed to leave it to individual civil servants to decide without guidance whether the prohibition was reasonably required for the proper performance of their official functions.

85. In this case, when making a protective costs order in favour of the Respondent, Smellie CJ described the fundamental right guaranteed by section 70 as "the right of every Caymanian voter to participate in a fair and effective people-initiated referendum". But the absence of a general law does not in itself prevent or inhibit the right of every Caymanian voter to participate in such a referendum. In our judgment, the Judge's reliance on what Lord Clyde said wrongly equated the position of a statutory provision which directly and expressly infringed a constitutional right with the absence of legislation which resulted in a situation in which a constitutional right might be infringed if a public official exercised his public functions unlawfully.

86. The judge's reason for finding that a general law was required was an analogy to the precautionary principle, rather than it being necessary to avoid substantive infringement of the constitutional right of Caymanians to participate in a fair and effective people-initiated referendum. In the case of petition verification, it was the Elections Officer who it was said was not to be permitted to exercise his discretion in accordance with the constitutional framework and public law principles alone. The implication of the submissions that the Cabinet's role in settling the wording of the referendum question was limited to "drafting detail" and that the Assembly is no more than a party to the debate is similar. They give insufficient recognition to the constitutional roles of the Cabinet and the Assembly in relation to section 70. The power given to the Cabinet by section 70(2)(b) and the responsibility given to the Assembly in section 70(1) to enact a law show that the form of direct democracy created by section 70 does not oust the representative elements of democracy in the Cayman Islands.

87. One possible way of testing the position on the petition and verification process would be to ask whether, if legislation on that is required, a law which gives the task to the Elections Officer and provides that, where necessary that officer is entitled to apply the rules and administrative processes for elections by analogy would be lawful. Given the common ground that the words "a law" and "a referendum" have the same meaning in sections 69 and 70, another way of testing it is to ask whether, in relation to the resolution of the elected members which triggers a referendum under section 69, the law that "may make provision to hold a referendum" must regulate the resolution as well as the referendum itself and thus be a general rather than a referendum-specific law. For the reasons in the next paragraph, we have concluded that the answer to the first question is "yes" and the answer to the second is "no".

88. As to the first question, the legal framework provided by section 70 and 90 provides sufficient legal support for the Elections Officer to exercise the task of verification flexibly but within that legal framework, and subject to the supervisory jurisdiction by judicial review, and the more intense scrutiny that is appropriate where the question is whether the exercise of power has infringed a constitutional right. As in *Pollen Estate Trustee Company v Revenue and Customs Commissioners* [2013] EWCA Civ. 753, [2013] 1 WLR 3785 at [48] – [49], albeit in the context of interpreting the United Kingdom's Finance Act 2003 rather than a constitution, the absence of machinery (in this case rules for the petition and verification process) "is not an insuperable objection" and "some uncertainty at the edges cannot be decisive". As to the second question, as far as the resolution itself is concerned, the legal framework provided by section 69 together with section 75 on voting in the Assembly and the carve out in section 77(3)(b) referred to at [58] above provides a sufficient legal framework, also subject to the supervisory jurisdiction. Although Mr Buttler submitted that section 69 also required a general law, he did not state that the reason included the need to regulate the resolution by the elected members of the Assembly.

89. For these reasons, we have concluded that a broad and generous interpretation of section 70, suitable, in the words of Lord Wilberforce set out at [66] above "to give to individuals the full measure of the fundamental rights and freedoms referred to" does not require a general law on people-initiated referendums. A referendum-specific law which is not substantively flawed suffices. Accordingly, subject to the Respondent's Notice, the Government's appeal succeeds. It remains to consider whether, for the reasons in the Respondent's Notice the ***Port Referendum Law*** is substantively flawed and prevents or inhibits the right of every Caymanian who is a registered voter to participate in a fair and people-initiated referendum.

The Respondent's Notice

(a) Voter Registration

90. Mr Buttler accepted that there is nothing in itself objectionable about using the voter registration mechanism for general elections for the purposes of referendums but argued that in this case a problem of timing meant that the ***Port Referendum Law*** enacted on 31st October 2019 failed to secure an effective right to vote. This is because section 3(2) of the ***Port Referendum Law*** enabled the referendum to be 30 days after publication of the notice of the day, a shorter time than the total seven week lead time after the writ for elections under sections 28 and 29 of the ***Elections Law (2017 Revision).*** Accordingly, by the time it was clear to those entitled to vote but not yet registered what they had to do the earliest date they would be able to vote would

(see [25] above) be 1 April 2020. The result was that all those eligible under section 90 of ***the Constitution*** would not have been enabled to exercise their constitutional right to vote in a people-initiated referendum.

91. This does not in our judgment render the ***Port Referendum Law*** unconstitutional on the ground that the right to a fair and effective vote in a people-initiated, binding referendum has been impaired. First, in relation to those who have not registered as electors, despite the difference in total lead times, there is no material difference between the position for elections and referendums. This is because (see [25] above) for both section 11 of the ***Elections Law (2017 Revision)*** provides that an application to be registered takes effect from the beginning of the following quarter. So, if on 31 October 2019, instead of calling a referendum, a writ for an election had been issued, the seven-week period would expire on 19 December 2019. If therefore either a referendum or an election was called for that date on 31 October 2019 a person who was not registered as an elector on that date could not be registered until 1 January 2020. As Mr Maclean observed, there will always be some people qualified to be registered as an elector who, if they are not registered when an election or referendum is called, cannot get onto the register.

92. Secondly, the submission that it was not clear what people had to do must be rejected. It is clear from ***the Constitution*** itself that the referendum regime under section 70 is tied to a person being a registered elector (as is the regime under section 69). Section 70(1) expressly provides that only persons "registered as electors in accordance with section 90" are eligible to vote in a people-initiated referendum, and section 70(2)(a) that only those persons are eligible to sign the petition.

(b) Formulating the matter of national importance

93. Section 4 of the ***Port Referendum Law***, which is set out at [29] above, deals with this. Section 4(1) formulates the matter of national importance as "whether the Islands should continue to move forward with the building of the cruise berthing and enhanced cargo port facility". Section 4(2) provides that the Cabinet shall in accordance with section 70(2)(b) settle the wording of the referendum question for determining the matter of national importance under subsection (1) within thirty days of the coming into force of this Law. Section 4(3) provides that in "settling the wording of the referendum question the Cabinet shall, as far as possible, ensure that" the question is (a) clear and simple; (b) directed at the core matter of national importance under subsection (1); (c) unambiguous; and (d) neutral.

94. Mr Buttler submitted that formulating the matter of national importance as the Government has done in section 4(1) of the ***Port Referendum Law*** is unconstitutional. This, he argued, is because it allows the Government to control the scope of the right section 70 gave to Caymanians to determine issues of national importance and leaves it to the body whose policy is challenged to formulate the question. In this case the petition which secured the required signatures did not refer to the refurbishment of the cargo facility. Adding it to the matter in the petition and linking the two in the way that has been done redefined and thus changed the issue. Although the written submissions on behalf of the Respondent concerned only the matter of national importance, the oral submissions made a similar point in relation to the referendum question. It was argued that the desirability of a cruise berthing facility as a means of financing improvements to the cargo port was a matter to be deployed as an argument in favour of the cruise berthing facility in the debate but not, given the terms of the petition, part of the referendum question.

95. It is submitted on behalf of the Government that it is not now open to the Respondent to take this point because it was raised in her letter before claim but following further pre-action correspondence, as is evident from paragraphs 53 – 56 of both her statement of grounds and her amended statement of grounds, she chose not to pursue it in her pleaded grounds for judicial review. There is indeed no reference to the "redefinition" point in the relevant paragraphs of the grounds and the Respondent's skeleton argument only raises it as one of the arguments in favour of interpreting section 70 as requiring a general rather than a specific law. But we address the substance of the point below and, for the reasons given, reject it.

96. We referred at [73] above to Mr Buttler's acceptance that the constitutional right to a people-initiated referendum is limited by the need to ensure that the issue is one of national importance and that it is formulated in a way that can be put to an effective vote. We stated that it follows from this that although the views of the petitioners that a matter is one of national importance would carry considerable weight, they are not conclusive. The fact that section 70 does not give Caymanians the right to determine what issues are of national importance, only the right to vote in a fair and effective referendum on such issues if 25% of registered voters sign a petition, is important in assessing the submissions about formulating the matter of national importance and the referendum question. If the issue raised in a petition is not in fact a matter of national importance, the right to a referendum on it would not be triggered where it is signed by 25% of registered voters. If it is a matter of national importance and the petition is signed by the required percentage of registered voters, the right to a referendum on it would be triggered and it would not be constitutional for the Government to formulate the matter or to settle a

referendum question in ways that are unrelated or only very loosely related to the petition. But, in this case, it is not disputed that the plan for a cruise berthing facility has always been part of a single development proposal which includes the cargo port. The evidence of Stran Bodden, Chief Officer of the Ministry of District Administration, Tourism and Transport is that the two are inextricably linked: see 1st Affidavit §5 and 2nd Affidavit §§ 5-7. This is because the cruise disembarkation area would encroach heavily on the cargo port so that without enlargement cargo operations would be considerably constrained, and because of the financial benefit of undertaking the two projects together with the profit generated by the cruise lines cross-subsidising the planned refurbishment of the cargo terminal.

97. Although it is argued that it is the Government which is redefining the question, in the light of the history in which a proposed plan for a cruise berthing facility has always been linked to enlarging and improving the cargo port, it might be said that the matter of national importance is the package rather than a proposal which no one has made and is in that sense hypothetical or academic. For example, although there had been extensive financial modelling of the overall package, there was no disaggregated financial model of its components. A referendum question about the cruise berthing facility which left out any reference to the means of financing that facility is similarly artificial and hypothetical.

98. This submission on behalf of the Respondent is linked to her argument that the role of the Cabinet in the formulation of the referendum question is confined to drafting detail. For the reasons given at [72] – [73] and [86] above, that argument must be rejected. ***The Constitution*** expressly gives this function to the Cabinet, the Executive Branch of Government. The fact that section 70 introduces an element of direct democracy into what remains primarily a representative democracy does not mean that the Cabinet is in effect reduced to a clerical role and the Legislative Assembly to being in substance a rubber stamp. This is seen from the fact that, as the Respondent accepted, it is not left to the petitioners to determine what matters are issues of national importance.

(c) – (e) The absence of rules governing campaign financing, political broadcasting and providing objective information

99. As to the absence of rules governing campaign financing, political broadcasting and providing objective information, it was accepted by the Respondent that there are variations in international practice and no clear guidelines. It was, however, submitted that the omissions from the ***Port Referendum Law*** meant that there were no structural safeguards in place on these

matters to prevent the free choice of voters being undermined, or the democratic process distorted.

100. For instance, in relation to the absence of campaign finance rules, the evidence in support of the Respondent's case was that in terms of disclosed expenditure the Government spent six times more than CPR Cayman and its supporters on its campaign, and that there was further undisclosed expenditure in support of the project by a private Pro-Port lobby and Verdant Isle Port Partners, the consortium which has been selected as the preferred bidder to fund and undertake the development project.

101. It was also submitted that seriously misleading statements were made in leaflets and in the media on the environmental issues at the centre of the debate and the economic impact of proceeding or not proceeding. Mr Buttler relied on a Government brochure stating that if the berthing facility was not built the loss to the economy would be $200 million a year whereas a 2013 report by PWC for the Government gave the base case figure as 2 million. The base case figure stated is in fact about 2.3 million but, as Mr Maclean observed, that related to cruise passenger volumes not money. It was also submitted, in particular by Mr Lowe on behalf of the National Trust, that there were false statements made about how the plan would avoid damaging the coral environment (one saying that "less than 1% of coral habitats will be impacted"), the percentage of coral that would be relocated and the acreage of coral that would be lost. He also relied on the fact that the documentation did not mention or underplayed the damage by dredging and the number of critically endangered corals, sponges and fish that would be affected. There had been, he argued, a wholly unbalanced and misleading campaign by the Government which he characterized as little short of propaganda.

102. In the case of broadcasting, the emphasis of the complaint was the absence of rules governing access to publicly owned media which meant that the state-owned Radio Cayman provided the Government with 4,000 free advertisements described as "public service announcements" whereas CPR Cayman were asked to pay. This was said to be an example of skewing the rules to enable the Government and the legislature to bolster its campaigning power in a particular referendum.

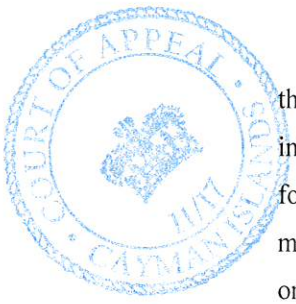
103. The provision in the Schedule to the ***Port Referendum Law*** (see [32] above) that the provisions of the ***Elections Law*** on Political Broadcasts shall, "with the necessary changes being made", apply to a referendum as they apply to an election was criticized for not identifying what those necessary changes are, but, if this is a submission that the provisions are too uncertain to be

constitutional, it must be rejected for substantially the same reason given at [84] - [85] above in relation to the *de Freitas* point. It was also submitted that the failure of the advertisements to identify the political party responsible for them was a breach of section 75 of the ***Elections Law (2017)***. The latter submission is an example of non-compliance with the rules governing the referendum but does not go to the constitutionality of the ***Port Referendum Law***.

104. It is not surprising that in the 10 months that signatures on a petition for a referendum were being gathered by those opposed to a plan which was a manifesto commitment in two elections that the Government sought to defend the plan and to rebut the environmental and financial arguments advanced by the opponents. It is unfortunate but also not surprising given the strength of feeling on both sides that terms such as "aggressive" and "vitriolic" were used to describe both sides and that there have been complaints of unfairness. But the suggestion that section 70 of ***the Constitution*** should be interpreted as requiring rules for referendums on these questions must be rejected. It is possible that a referendum law containing rules to govern these matters would have lowered the temperature. It is, however, to be observed that a general referendum law or provision in a referendum-specific law is not a panacea: see for example the Independent Commission on Referendums' comments noted at [79] above.

105. The substantial international variation on whether there should be rules governing campaign financing, political broadcasting and providing objective information, and the fact that many democratic states do not have such rules for referendums shows that these are not matters of constitutional imperative but substantive questions of policy for determination by national legislatures. The judge correctly said (at [65]) that on the materials before him there was a range of measures which may be considered for inclusion in a law to ensure a fair and effective right to vote but that there was no obvious consensus on what these must be. Many democratic legislatures do not impose rules of the sort for which the Respondent argues. For instance, in Denmark, France and Ireland there are no spending limits for referendums: Report of the Independent Commission on Referendums, Constitution Unit, UCL, 2018, §12.22. The Commission also stated (at §13.8) that questions of objective information and the quality of discourse have "long been primarily the responsibility of broadcasters" rather than legislation, and (at §13.11) that United Kingdom government information leaflets "have been widely criticized for lacking neutrality, and for using the government's advantageous position to interfere unduly in the campaign".

106. Mr Buttler was prudent in not emphasizing these three matters as impeding the effectiveness of the right to vote and making the law unconstitutional. We accept the Government's submission



that it cannot be said that the regulation of campaign financing or the provision of objective information is inherent in the concept of a fair and effective people-initiated referendum. It is for the Cayman Islands Legislative Assembly to decide whether, and if so, what provision to make on these matters in its law. For the reasons given the judgment below cannot be upheld on the grounds relied on in the Respondent's Notice.

VI. Conclusion

107. We have concluded that section 70 of ***the Constitution*** does not require a general referendum law and that the ***Port Referendum Law*** is not constitutionally flawed for the reasons in the Respondent's Notice. It is therefore not necessary to decide whether the Judge erred in granting a quashing order. Since there was full argument on the point, it suffices to observe that an unconstitutional law is invalid, that the court had jurisdiction to make an order quashing such a law, and that in *Ng Ka Ling v Director of Immigration* (1999) 6 BHRC 447, 479-480, one of the cases relied on by the Government, although the relief was a declaration, it was one that the parts of the Immigration Ordinance which were null and void "are excised therefrom". Even a provision in an Order in Council making a constitution can be quashed: see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453 at [71] and [106]. That a quashing order may be appropriate even in a highly sensitive situation involving the role of the court with the other two branches of the state is also seen from *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 where at [69] the Supreme Court of the United Kingdom stated that the Order in Council proroguing Parliament in September 2019 "should be quashed" and so ordered.

108. In the circumstances of this case we can understand why the Judge reached the decision that he did. These included what were from a legal point of view false starts by the Government in relation to settling the referendum question and date before enacting the ***Port Referendum Law,*** and evidence on the substantive matters relied on by the Respondent which the Judge considered (see [47] above) provided considerable support for the argument that "an unequal playing field which was heavily stacked in favour of the Government side" had been created. They also included an apparent failure to consult the Constitutional Commission before deciding how to respond to this the first people-initiated referendum and a background of very surprising non-responsiveness to two significant and highly relevant documents prepared by the Commission. However, for the reasons set out in Part V, we have been driven to conclude that this appeal must be allowed. We set aside the orders made by the Judge.